

## CHAPTER 1

# The Fundamentals of Criminal Law

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## 1.1 Introduction

Criminal law encompasses both a substantive and procedural component. Broadly speaking, the substantive component consists of defining and understanding the constituent elements of the various common law and statutory crimes and the defences that are available thereto. In contrast, the procedural component denotes the enforcement mechanism or, if you will, the process through which criminal defendants are brought to court and prosecuted for their alleged transgressions. The laws relating to arrest, search and seizure, illegally obtained evidence, pleadings, double jeopardy, arraignment, jury selection, and sentencing, for example, represent only a portion of the procedural component of the criminal law. It should be apparent, therefore, that to do justice to such a vast and complex subject would literally entail the writing of a separate and lengthy treatise. Accordingly, this book is concerned only with the substantive component of the criminal law.

It is important to emphasise that because the various state, territorial, and Commonwealth governments have their own separate crime legislation, there are literally thousands of criminal offences that are currently on the books throughout Australia, not to mention the common law offences that still exist in the three common law jurisdictions, namely New South Wales, South Australia, and Victoria. In our view, it would be neither practical nor helpful to undertake the task of familiarising the readers with all of these statutory and common law offences. In the chapters that follow, therefore, we shall limit our focus to the constituent elements of the most common crimes (and the defences thereto) against persons and property such as, for example, murder, manslaughter, sexual and non-sexual assaults, theft, burglary, robbery, and attempts in the common law jurisdictions of New South Wales, Victoria and South Australia.

In this chapter, however, our primary objective is to provide a framework that will facilitate an understanding of the basic principles and underlying rationales of the substantive criminal law. In particular, we shall examine such questions as: What is a crime and how does it differ from non-criminal prohibitions giving rise to civil liability such as torts and other civil wrongs? What purpose(s) are sought to be achieved by imposing criminal liability on persons or corporations? What, if any, elements do all crimes have in common? When is a crime considered to be one of *mens rea*? How many different types of *mens reas* are recognised? What is meant by the requirement of ‘temporal coincidence’, and what is the legal rationale for this requirement? What is meant by the term ‘strict liability’ and how does it differ from the term ‘absolute liability’? What is the difference between ‘primary’ or ‘denial’ defences and those which are classified as ‘secondary’ or ‘affirmative’ defences? Which defences are generally available to an accused? What is the difference between the ‘evidential’ and ‘legal’ burdens of proof, and which party bears the onus of discharging these burdens? How does one differentiate among principals in the first degree, principals in the second degree, accessories before the fact and accessories after the fact—and why are these distinctions important?

Throughout the book, readers are provided with a number of questions that will assist in reviewing the law discussed in the respective chapters. In particular, these questions will require readers to critically assess the reasoning in the cases as well as the courts’ overall approach to the relevant principles involved.

## 1.2 The definition and justification of the criminal law

### 1.2.1 The definition of a crime

There is no universally accepted definition of what constitutes a crime as distinguished from other types of legal wrongs such as torts, breaches of contract, and the like. 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. According to this definition, the primary distinction between crimes and other legal wrongs is that the former are prosecuted through criminal as opposed to non-criminal proceedings. Since each of the jurisdictions within Australia retains the power to designate which legal wrongs are to be prosecuted through this medium, the reality is that a crime is any conduct which the courts or legislatures choose to describe as such.

Louis Waller and CR Williams argue, however, that the distinction between criminal and non-criminal misdeeds is based upon more than merely an arbitrary designation: L Waller and CR Williams, *Criminal Law* (9th edn, 2001) 2, 3. Specifically, they espouse the view that with the exception of crimes of ‘strict’ or ‘absolute’ liability (see discussion below), a decision to designate conduct as criminal is generally based upon the existence or non-existence of two factors that inhere in all crimes; namely, that the conduct in question must be injurious to the public at large as opposed to merely being injurious to one or more individual persons; and the conduct at issue must involve an element of moral blameworthiness.

This view is problematic for several reasons. First, practically all torts and other civil wrongs could just as easily be classified as conduct that is ‘injurious to the public at large’. This is

exemplified in the fact that many crimes, if proven, would *necessarily* give rise to civil liability for the *same conduct*. The crimes of rape and indecent assault, for example, would constitute the tort of battery; the crime of theft (or larceny) would constitute the tort of conversion; and the crime of obtaining property by false pretences would constitute the tort of deceit. In these and numerous other examples, the elements of the crimes and their civil counterparts are very similar and, in some instances (for example, the crime of common assault and the torts of battery and assault), even identical. Should a decision as to whether to categorise the very *same conduct and its consequences* as ‘injurious to the public at large’ turn on whether it is being prosecuted criminally or civilly?

Second, the notion that an element of moral blameworthiness inheres in all non-strict liability crimes is open to question. The existence or non-existence of moral culpability is, and always will be, largely in the eyes of the beholder. With respect to non-*mens rea* crimes that prohibit the infliction of various types of harm through criminal negligence (such as involuntary manslaughter by criminal negligence), it is arguable whether the accused’s conduct, although deserving of the ‘fault’ epithet in strict legal parlance, involves an element of moral wrongdoing.

Finally, as discussed below, there are many forms of conduct (such as smoking, for example) that are not criminalised despite the fact that many view them as involving an element of moral culpability. Thus, notwithstanding such attempts to distinguish crimes from other legal wrongs, it is probably most accurate to state that what amounts to a crime is any conduct that the courts or legislatures choose to designate as such, irrespective of whether it is deemed as injurious to the public at large or morally blameworthy.

Although it is possible to identify some unique aspects of the criminal law, these are all procedural in nature. In a vein similar to that espoused in the above quotation from Glanville Williams, Lord Atkin wrote:

The criminal quality of an act cannot be discovered by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?:  
*Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC 310, 314.

Thus, a unique feature of criminal offences is that criminal sanctions may be imposed for their breaches. A related distinction is that in the case of the criminal law, the relevant conduct is taken from the control of private individuals and regulated by the state. It is important to note, however, that these are not substantive distinctions. They do not tell us which type of conduct should be prosecuted or met with harsh sanctions; rather, they simply reflect the different procedures and consequences that may follow after the decision has been made.

Thus, while we can distinguish between criminal and civil wrongs in a procedural sense, there is no principled basis upon which to draw such a distinction in a substantive sense. That aside, there is an enormous difference between criminal and civil wrongs in terms of their legal consequences. This is unsatisfactory because the stakes are far too high to be determined on the basis of such a tenuous distinction. The prosecution of criminal offences often results in the stigmatisation of the offenders and subjects them to a range of coercive measures. In contrast, civil wrongs are directed primarily at compensating the aggrieved parties and do not generally involve censure. The inability to substantively distinguish between criminal and non-criminal misconduct also impacts on the search for a justification of the criminal law.

## 1.2.2 The justification of the criminal law

The stigmatisation and punishment that are consequent upon a finding of guilt for a criminal offence require a moral justification. Not all practices or types of behaviour call for a moral justification. We do not need to justify playing sport, visiting friends, or dancing. However, as Andrew Ashworth correctly notes, the criminal law is ‘society’s strongest form of official punishment and censure’: A Ashworth, *Principles of Criminal Law* (2nd edn, 1995) 16. It is the precursor to sentencing that is the area of law where the state acts in its most coercive and intrusive manner. Whereas all other areas of law (such as contract and tort) are concerned with ‘simply’ regulating the transfer and adjustment of monetary sums, sentencing involves the intentional infliction of some type of harm, and hence infringes upon an important concern or interest such as one’s liberty or reputation. As such, it is not dissimilar to activities such as slavery, abortion, and euthanasia. It is a ‘fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification’: JV Barry, ‘Morality and the Coercive Process’ (1962–4) 4 *Sydney Law Review* 28, 29.

Thus, in order for an act to be deserving of blame and the deliberate infliction of punishment, it must breach some type of norm or standard. The strongest type of prohibition in our community is embodied in moral norms. By definition, morality is the ultimate set of principles by which we should live and consists of the principles that dictate how serious conflict should be resolved: M Bagaric, ‘A Utilitarian Argument: laying the s foundation for a coherent system of law’ (2002) 10 *Otago Law Review* 163. Lord Atkin’s observation in *Proprietary Articles Associations v Attorney-General (Canada)* [1931] AC 310 at 324, that morality and criminality are not co-extensive, is correct. Equally accurate, however, is Lord Coleridge’s view that ‘the absolute divorce of law from morality would be of fatal consequence’: *R v Dudley & Stephens* (1884) 14 QBD 287.

In order to explain and justify the criminal law on the basis of morality, it is not necessary that every criminal law seeks to enforce a moral norm. During the course of propounding his Soundest Theory of Law, Ronald Dworkin noted that in order for moral principles to explain and justify the settled rules of law, only a significant portion of the rules need to be consistent with the background moral theory: R Dworkin, *Law’s Empire* (1986). There are two ways in which it could be argued that morality underpins the criminal law. First, most of the criminal offences might fit within (or be consistent with) a particular moral virtue. Alternatively, it could be argued that rules of the criminal law are explicable by reference to a general moral theory.

### 1.2.2.1 The principle of liberty

The only discrete moral principle that is potentially broad enough to account for many criminal offences is liberty. Still the most famous statement concerning the paramountcy of liberty is by John Stuart Mill:

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. 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. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will

be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right: JS Mill, 'Utilitarianism' in M Warnock (ed), *Utilitarianism* (1986) 135.

The courts too have heavily endorsed the central role of personal liberty. As Mason CJ and Brennan J wrote:

The right to personal liberty is ... the most elementary and fundamental of all common law rights. Personal liberty was held by Blackstone to be an absolute right vested in the individual ... he warned 'of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any ... magistrate to imprison arbitrarily ... there would soon be an end of all other rights and immunities': *Williams v The Queen* (1986) 161 CLR 278, 292.

Despite the ostensible attractiveness of the view that the criminal law should prohibit only conduct that encroaches on the interests of others, the criminal law as we know it is so paternalistic and regulates so many victimless offences that an explanation of the institution on such a basis is indefensible. Offences such as drunkenness, failing to register one's pet, euthanasia, drug-taking, and not wearing seatbelts are evidence of this.

### 1.2.2.2 Morality and the criminal law

Rather than focusing on a discrete moral virtue, a more promising approach is to urge that a general moral theory underpins the criminal law. Lord Devlin is the most famous advocate of this view: P Devlin, *The Enforcement of Morals* (1965). He claimed that the purpose of the criminal law was to maintain and enforce public morality. For him there was a common morality that bonded society together. Lord Devlin's view has been fairly criticised on the basis that there is in fact no such thing as a *common* morality and, if there were, a large degree of convergence in the moral ideals of a society does not necessarily justify enforcement of such moral standards. For example, the existence of societies where it is widely believed that it is immoral for white and coloured persons to associate with each other does not mean that it is appropriate to enforce such a norm: HLA Hart, *Law, Liberty and Morality* (1963). However, such objections can be met if one adopts not the notion of some supposed common morality as being the foundation of the criminal law, but rather a coherent normative theory of morality.

Broadly, there are two types of normative moral theories. Consequential moral theories claim that an act is right or wrong depending on its capacity to maximise a particular virtue such as happiness. Non-consequential (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act. It is for this reason that the notion of (absolute or near absolute) rights is generally thought to sit most comfortably in a non-consequentialist ethic.

The leading contemporary non-consequentialist theories are those which are framed in the language of rights. Since the Second World War, there has been an immense increase in 'rights talk', both in sheer volume and the number of supposed rights. The rights doctrine has progressed a long way since its original modest aim of providing 'a legitimization of ... claims against tyrannical or exploiting regimes': SI Benn, 'Human Rights—For Whom and

For What?’ in E Kamenka & AE Tay (eds), *Human Rights* (1978) 59, 61. As Tom Campbell points out:

The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their activities, the need to subordinate the particular interests of individuals to the general good: T Campbell, ‘Realizing Human Rights’, in T Campbell (ed), *Human Rights: From Rhetoric to Reality* (1986) 1, 13.

There is now, perhaps more than ever, a strong tendency to advance moral claims and arguments in terms of rights. Assertion of rights has become the customary means to express our moral sentiments: ‘there is virtually no area of public controversy in which rights are not to be found on at least one side of the question—and generally on both’: LW Sumner, *The Moral Foundation of Rights* (1987) 1. There is no question that ‘the doctrine of human rights has at least temporarily replaced the doctrine of maximising utilitarianism as the prime philosophical inspiration of political and social reform’: H LA Hart, *Essays in Jurisprudence and Philosophy* (1983) 196–7.

Despite the prominence of rights talk in conventional moral discourse, even a cursory glance over the criminal law statute books shows that only a very small portion of criminal offences seek to protect individual rights. Certainly many traditional common law criminal offences protect important recognisable rights and interests: namely, the right to physical (including sexual) integrity and the right to own property. The criminal law, however, has grown almost exponentially in the past few decades, and offences aimed at securing the rights of others constitute an ever-decreasing portion of the criminal law.

For example, in Victoria each year only about 5000 offences are dealt with in the Higher Courts—County Court and the Supreme Courts: M Bagaric, ‘The ‘Civilisation’ of the Criminal Law’ (2001) 25 *Criminal Law Journal* 197. These are the most serious offences and relate to matters such as armed robbery and sexual offences. Further, an approximate 300,000 offences are dealt with in the Magistrates’ Courts. The offences dealt with at this level relate to a hotchpotch of behaviour. They range from burglary and assault to travelling on a train without a ticket and playing games to the annoyance of another. It is difficult to generalise about the nature of the offences dealt with at this level. For example, in terms of the twenty most common offences about half relate to behaviour which infringes the rights of another (for example, theft, burglary, and unlawful assault); the other half are comprised of victimless offences such as, the use of a drug of dependence, the refusal to furnish a return, intoxication in a public place, and unlicensed driving.

However, these offences only scratch the surface in terms of the number of total criminal offences charged each year. In fact, about 85 per cent of criminal offences never reach court. Instead, they are dealt with on the spot by means of an infringement notice. The ratio of matters dealt with on the spot to that determined by the courts exceeds 7 to 1: M Bagaric, ‘Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot’ (1998) 24 *Monash University Law Review* 231. Most of these offences are simply regulatory in nature, and aimed at controlling and deterring certain behaviour. They are typically victimless, strict liability offences. In 1990–91, for example, the ten most common infringement notices

which were sent to court for enforcement were exceeding the speed limit over 15 km/h and less than 30 km/h, leaving a vehicle in a no standing area, speeding less than 15 km/h over the limit, leaving a vehicle longer than the period fixed, leaving a vehicle at an expired meter, not wearing a seatbelt, leaving a vehicle in a carriageway, parking within nine metres of an intersection, travelling without a ticket, and leaving a vehicle in a no parking area: R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (1995).

All of these offences constitute paradigm instances of regulatory offences that do not seek to protect any recognisable right. It is therefore untenable to suggest that there is connection between the criminal law and contemporary moral discourse; the weight of numbers is simply crushing. Thus, the only apparent rationale for criminalising such conduct is that it is presumed to be an effective practical means of controlling and regulating the relevant conduct. The criminal law is a relatively cheap, convenient, and swift means of reinforcing a system of regulation. Economic considerations and reasons of expediency are treated as outweighing any argument that the criminal law should be reserved for the most antisocial form of behaviour: A Ashworth, *Principles of Criminal Law* (2nd edn, 1995) 50.

The other main moral theory is consequentialism. Many consequentialist moral theories have been advanced such as egoism and utilitarianism. The most influential in moral and political discourse is hedonistic act utilitarianism. This theory provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.

From a utilitarian perspective, the criminal law should seek to protect and enforce important human interests that are necessary for humanity to flourish. This approach appears to justify a far wider range of criminal offences than rights-based moral theories. A tenable utilitarian argument can be made in favour of criminalising much of the conduct that is prohibited by even the most trivial of regulatory offences. For example, it could be argued that it is morally permissible to forbid the riding of a bicycle without a helmet because it reduces the risk that cyclists will become a burden to the community by utilising scarce public health dollars. Similarly, it could be asserted that parking offences are justifiable because parking in a no parking zone may inconvenience others more than it benefits the offender.

However, an argument along such lines would be weak. Every legal prohibition to some degree encroaches upon personal liberty. Personal liberty weighs very heavily on the utilitarian scales because the capacity for people to lead their lives in accordance with their own ideas is an important ingredient for happiness. Further, in so far as regulatory offences are concerned, the other side of the scales appears to be lightened for two reasons. First, the interests sought to be protected by regulatory offences are generally not very important. Second, the risk of harm inherent in the conduct is normally remote. Ultimately, the scales appear to militate in favour of foregoing the use of the criminal law to regulate such conduct. As noted by Feinberg, the interference by the criminal law with trivia is likely to cause more harm than it prevents: J Feinberg, *The Moral Limits of the Criminal Law, Offense to Others* (1986). Similarly, Bentham argued that one of the circumstances in which criminal punishment should not be inflicted is where it is unprofitable or too expensive because the harm inflicted by the punishment is greater than the harm it prevents: J Bentham, *Introduction to the Principles of Morals and Legislation* (1789).

However, even if it is possible to provide a utilitarian and, therefore, a moral explanation for the bulk of our criminal laws, this is not a basis for *distinguishing* between the criminal and civil wrongs. At its highest, the utilitarian theory of morality provides a necessary, but *not a sufficient* criterion for criminalising certain behaviour. This is because the harm that is caused by breaches of the civil law is certainly no less than that occasioned by breaches of the criminal law.

The purchaser who fails to honour a contract for the sale of land, the solicitor who gives incorrect legal advice, the builder who is six months late completing a home, the doctor who fails to diagnose an illness, the plumber who arrives an hour late to fix the broken pipe, the storeowner who fails to mop up a spill in his or her shop, the taxi-driver who, as a result of a wrong turn gets his or her passenger late to the airport, the telecommunications company that disconnects the wrong telephone line, and the energy company that fails to prevent a power blackout—are all guilty of conduct which actually or in all likelihood causes a far greater amount of unhappiness than occurs as a result of a failure to register one's dog, driving at 70 km/h in a 60 km/h zone, flying a kite which annoys another, or parking too long at a parking meter.

Thus, even if it could be asserted that there is a general overlap between the criminal law and morality on the basis that most criminal offences relate to conduct which has at least the potential to cause unhappiness to either the agent or another, this does not form the basis for a coherent distinction between civil and criminal wrongs. Civil wrongs are generally no less harmful than the great majority of criminal offences.

Accordingly, it seems that the decision to make an activity a criminal offence is devoid of a moral justification.

### 1.2.3 Possible reform suggestions

To remedy this situation, there are at least two possible approaches that the legislature can undertake. The first is to narrow the range of conduct proscribed by the criminal law by limiting the criminal law to breaches of important moral principles. This would likely result in the decriminalisation of a large volume of conduct. Conduct such as littering and illegal parking could still be deterred (though perhaps not as effectively) through civil sanctions.

An alternative and more radical approach would be to do away with the distinction between the criminal and civil law. One could merely treat a breach of the law as just that—a violation of *the law* where the law is treated as a unified institution devoid of any demarcation between civil and criminal liability. Such a unification would provide the state with the option of being the party that enforces *all* breaches of the law. The relative seriousness of the breaches could be reflected by the different orders that are available for the respective types of conduct. Thus, murderers would still be imprisoned and contract breachers would still be forced to compensate the other party for the breach; however, the label (criminal or civil) ascribed to the body of law to which a particular legal dispute relates would be irrelevant to the determination of the dispute and the legal ramifications stemming from it.

Both approaches are doctrinally consistent and arguably represent an improvement over the present situation. The viability of the first approach will turn primarily on the possibility of fashioning a moral theory that provides a justification for the criminal law. In our view, this is not insurmountable. The main obstacle to the second approach is the pragmatic difficulties involved in expanding the role of the state to enforcing breaches of all laws.



## QUESTIONS

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- 1.1 After you have completed reading this book, re-read the above discussion. Do you agree with the discussion? Are there other possible definitions or justifications of crime?
  - 1.2 Which of the two reform options discussed above is the most persuasive? Why?
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## 1.3 The purposes of criminal laws: The connection between crime and punishment

### 1.3.1 Theories of punishment

As noted in the above section, there is close connection between crime and punishment. In a sense, punishment constitutes the ‘sharp end’ of the criminal law. It involves the deliberate infliction of pain on an offender by the community.

Punishment is the study of the connection between wrongdoing and state-imposed sanctions. The main issue raised by the concept of punishment is the basis upon which the evils administered by the state to offenders can be justified. Sentencing is the system of law through which offenders are punished. The main issues that must be addressed by any sentencing system are the types of sanctions that are appropriate and the factors that are relevant in fitting the sanction to the crime. Thus, sentencing and punishment are inextricably linked, with punishment being the logically prior inquiry. In order to properly decide how and how much to punish, it must first be decided on what basis punishment is justified and why we are punishing. For example, the *lex talionis*, an eye-for-an-eye theory of punishment, requires us to select a sanction that, as far as possible, equates with the nature of the crime. This stands in contrast to the communicative theory of punishment, which favours sanctions that will best inform offenders of the wrongfulness of their crimes.

Philosophical discussion in the area of punishment has been largely confined to the justification of punishment. On the other hand, legal analysis has primarily focused on sentencing issues. Oceans of ink have been spilt on each issue, and despite the logical dependence of sentencing on punishment, the spills have rarely merged; as a result, punishment and sentencing have generally evolved with only a cursory consideration of one another. However, there is logically a need for greater integration between the justification for punishment and sentencing law. In order to decide how offenders should be punished, we must first ascertain why we are justified in punishing offenders. Only then can the means (sentencing) be tailored to suit the ends.

There are two main theories of punishment that have been advanced. Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer, but is ultimately justified because this is outweighed by the good consequences stemming from it. These are traditionally thought to come in the form of incapacitation, deterrence, and rehabilitation. The competing theory, and the one which enjoys the most contemporary

support, is retributivism. All Australian jurisdictions examined in this book incorporate a mix of utilitarian and retributive sentencing objectives: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 1995* (WA) s 6. Retributive theories of punishment are not clearly delineated and it is difficult to isolate a common thread running through theories carrying the tag. All retributive theories assert that offenders deserve to suffer and that the institution of punishment should inflict the suffering they deserve. However, they provide vastly divergent accounts of why criminals deserve to suffer. Despite this, there are broadly three similarities shared by retributive theories. The first is that only those who are blameworthy deserve punishment and that this is the sole justification for punishment. Thus punishment is only justified, broadly speaking, in cases of deliberate wrongdoing. The second is that the punishment must be equivalent to the level of wrongdoing. Finally, punishing criminals is just itself: it cannot be inflicted as a means of pursuing some other aim. Accordingly, the justification for punishment does not turn on the likely achievement of consequentialist goals; it is justified even when ‘we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail’: RA Duff, *Trials and Punishments* (1986) 7. Thus, it is often said that retributive theories are backward-looking, merely focusing on past events in order to determine whether punishment is justified in contrast to utilitarianism, which is concerned only with the likely future consequences of imposing punishment.

It has been argued that retributivism cannot justify punishment: see M Bagaric, *Punishment and Sentencing: A Rationale Approach* (2001). The most pervasive flaw with retributive theories is that they cannot justify the need for punitive measures without resort to consequential considerations. This expedient reliance on consequences undercuts the stability of many retributive theories. Retributive theories that do not incorporate consequentialist considerations are flawed because they lead to the unacceptable view that we should punish even if no good comes from it. It has been suggested that utilitarianism is the most persuasive justificatory theory of punishment.

### 1.3.2 The goals of sentencing

As noted above, it has been suggested that there are three good consequences that flow from punishment: deterrence, incapacitation, and rehabilitation. However, recent empirical evidence casts doubt on the efficacy of a state-imposed system of punishment to achieve some of these objectives.

#### 1.3.2.1 Deterrence

There are two broad forms of deterrence. Specific deterrence aims to discourage crime by punishing actual offenders for their transgressions, thereby convincing them that ‘crime does not pay’. General deterrence seeks to dissuade potential offenders from engaging in unlawful conduct by illustrating the unsavoury consequences of offending. Available empirical evidence suggests that deterrence is achievable through criminal punishment, but only in a very narrow form.

It is inordinately difficult to obtain information regarding the effectiveness of sanctions in deterring offenders from committing offences at the expiry of a sanction. Offenders may not re-offend for numerous reasons, apart from the fear of being subject to additional punishment. The offending may have been a 'one-off' event, a suitable opportunity may not again present itself, rehabilitation may have occurred, or the offender may get a job.

However, the available evidence supports the view that severe punishment (namely imprisonment) does not deter offenders; the recidivism rate of offenders does not vary significantly, regardless of the form of punishment or treatment to which they are subjected: M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals' (2000) 24 *Criminal Law Journal* 19, 34–5. Thus, there is no empirical evidence to suggest that offenders who are dealt with by way of one of the new sanctions, as opposed to being sentenced to imprisonment, are more likely to offend.

When analysing the evidence concerning the efficacy of punishment to achieve general deterrence, there are broadly two different levels of inquiry. 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 question of whether there is any connection between criminal sanctions and criminal conduct.

There is no firm evidence to suggest that increasing penalty levels results in a reduction in crime. Following a comprehensive review of the evidence regarding marginal deterrence, Zimring and Hawkins stated that:

Studies of different areas with different penalties, and studies focusing on the same jurisdiction before and after a change in punishment levels takes place, show rather clearly that the level of punishment is not the major reason why crime rates vary. In regard to particular penalties, such as capital punishment as a marginal deterrent to homicide, the studies go further and suggest no discernible relationship between the presence of the death penalty and homicide rates: FE Zimring & GJ Hawkins, *Deterrence: The Legal Threat in Crime Control* (1973) 29.

Nearly three decades have elapsed since this review. The most recent extensive literary review on the topic has also failed to identify a link between heavier penalties and the crime rate: A von Hirsch, *Criminal Deterrence and Sentence Severity* (1999) 47–8. See further, SD Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) 18 *Journal of Economic Perspectives* 163.

The evidence relating to absolute deterrence, however, is much more positive. There have been several natural social experiments, which have shown a drastic reduction in the likelihood (perceived or real) that people would be punished for criminal behaviour. The key factor in these events is that the change occurred abruptly—and the decreased likelihood of the imposition of criminal sanctions was apparently the only changed social condition.

Perhaps the clearest instance of this is the police strike in Melbourne in 1923, which led to over one third of the entire state police being sacked: KL Milte & TA Weber, *Police in Australia* (1977) 287–92. Once news of the strike spread, thousands of people poured into the city centre and engaged in widespread property damage, looting of shops, and other acts of civil disobedience such as assaulting government officials and setting fire to a tram. This civil disobedience lasted for two days and was only quelled when the government enlisted

thousands of citizens, including many ex-servicemen, to act as 'special' law enforcement officers. This riotous behaviour was in stark contrast to the normally law-abiding conduct of the citizens of Melbourne. Similar civil disobedience occurred following the police strike in Liverpool in 1919 and the internment of the Danish police force in 1944.

Thus, although deterrence is effective, the evidence suggests that this is only true in the limited sense, specifically that there is a direct connection between crime rates and *some* penalty; a correlation between higher penalties and a reduction in the crime rate has not yet been found. This means that while general deterrence justifies punishing offenders, it is of little relevance in fixing the amount or type of punishment. This must be done by reference to other ideals. To this end, as discussed below, the principle of proportionality, which provides that the punishment should fit the crime, is the guiding determinant.

### 1.3.2.2 Incapacitation

Incapacitation involves rendering an offender incapable of committing further offences. Apart from capital punishment, no sanction can ever hope to totally prevent offenders from re-offending. All sanctions involve some degree of supervision or interference with the freedom of the offender; for example, probation, license cancellation orders and community work orders, somewhat limit (if merely by reducing the hours left in the day) the opportunity for further offending. Prison is the sentencing option that most effectively prevents re-offending.

Incapacitation is a means of protecting the community rather than an ends of punishment and sentencing. Its efficacy cannot be judged by the height of the prison wall. In order for incapacitative sentences to actually protect the community, it must be the case that the offenders who are subject to such sanctions would have offended if they had not been restrained.

To this end, the existing evidence suggests that we cannot distinguish with any meaningful degree of confidence between offenders who will re-offend and those who will not. Studies have shown that in predicting dangerousness, psychiatrists are wrong most of the time: J Monahan, 'The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy' (1984) 141(1) *American Journal of Psychiatry* 10. Another study revealed a false positive rate of about 65 per cent: see K Kozol, 'Dangerousness in Society and Law' (1982) 13 *University of Toledo Law Review* 241. For an overview of the literature in this area, see R Edney & M Bagaric, *Australian Sentencing* (2007), ch 3; Kirby J in *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519, [124]–[126]. Despite some initial optimism, there is also a low success rate using predictive techniques that draw upon more concrete supposed risk factors such as employment history and the age at which a person first started offending: A von Hirsch, 'Selective Incapacitation: Some Doubts' in A von Hirsch & A Ashworth (eds), *Principled Sentencing* (1998) 121–3.

The fact that a person has previously committed a serious offence is a particularly poor guide to identifying future serious offenders. A recent study tracking the behaviour of 613 offenders released from prison in New Zealand over a two-and-a-half-year period revealed that those who would be classified as 'serious offenders' were no more likely to re-offend within two-and-a-half years after release than ordinary offenders. Moreover, the study showed that they were in fact less likely to re-offend within that time. It was also found that of all the serious offences committed by the entire sample group, the vast majority were committed by offenders who were imprisoned for non-serious (or ordinary) offences. In total, only thirty of the sample

of 613 offenders committed a serious offence within the follow-up period: see M Brown, 'Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies' [1998] *Criminal Law Review* 710.

The most recent extensive review of incapacitation research notes that current predictive techniques 'tend to invite overestimation of the amount of incapacitation to be expected from marginal increments of imprisonment': FE Zimring & G. Hawkins, *Incapacitation* (1995) 86. Our ability to predict which offenders are likely to re-offend is so poor that it has been estimated that the increase in crime rate if prison use was reduced or abolished could be as low as five per cent: J Cohen, 'The Incapacitative Effect of Imprisonment: A Critical Review of the Literature' in A Blumstein, J Cohen & J Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978) 209. See further, SD Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) 18 *Journal of Economic Perspectives* 163.

### 1.3.2.3 Rehabilitation

Rehabilitation, like specific deterrence, aims to discourage the commission of future offences by the offender. The difference between the two lies in the means used to encourage desistance from crime. Rehabilitation seeks to alter the values of the offender so that s/he no longer desires to commit criminal acts. It involves the renunciation of wrongdoing by the offender and his or her re-establishment as an honourable law-abiding citizen, and is achieved by reducing or eliminating the factors that contributed to the conduct for which the offender is sentenced. Thus, it works through a process of internal attitudinal reform, whereas specific deterrence seeks to dissuade crime simply by making the offender afraid of again being apprehended and punished.

There are numerous types of treatments that have been used in a bid to reform offenders. Some attempt to deal with the perceived underlying cause of criminality by providing drug and alcohol programs, or anger management courses. Newly developed cognitive-behavioural programs encourage offenders to think before acting and also consider the consequences of their actions. Other methods attempt to better equip offenders for life in the community via educational or skills courses.

In a very influential paper based on extensive research conducted between 1960 and 1974, Martinson concluded that empirical studies had not established that any rehabilitative programs had been effective in reducing recidivism: RM Martinson, 'What Works? Questions and Answers About Prison Reform' (1974) 35 *Public Interest* 22, 25. Recent evidence is more promising. A recent wide-ranging review of the published studies in rehabilitation—which compared the recidivism rate of offenders who were subject to rehabilitative treatment to those who were not—led Howells and Day to conclude that there has been a significant degree of success with cognitive-behavioural programs: K Howells & A Day, 'The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems' (1999) 112 *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* 1. These programs target factors that are presumably changeable, and are directed at the 'criminogenic needs' of offenders; that is, they are directed at those factors which are directly related to the offending, such as antisocial attitudes, self-control, and problem-solving skills.

Promising programs have been developed in the areas of anger management, sexual offending, and drug and alcohol use. These appear to be more successful than programs based on confrontation or direct deterrence, physical challenge, or vocational training.

Despite such developments, the most that can be confidently said at this point regarding the capacity of criminal punishment to reform is that there is some evidence that it will work for a small portion of offenders and that there is no firm evidence that it cannot work for the majority of offenders. However, ‘treatments do not ... exist ... that can be relied upon to decide sentences routinely—that can inform the judge, when confronted with the run-of-the-mill robbery, burglary, or drug offence, what the appropriate sanction should be, and provide even a modicum of assurance that the sanction will contribute to the offender’s desistance from crime’: A von Hirsch & L Maher, ‘Should Penal Rehabilitation be Revived?’ in A von Hirsch & A Ashworth (eds), *Principled Sentencing* (1998) 26–7. See further, J Wilkinson, ‘Evaluating Evidence for the Effectiveness of the Reasoning and Rehabilitation Programme’ 44 (2005) *The Howard Journal of Criminal Justice* 70, 81.

The more fundamental problem with invoking rehabilitation as an objective of punishment is that rehabilitation (at least of the type which appears to be having some success) and punishment may be inconsistent. Punishment by its very nature must cause pain. There seems to be an inherent contradiction between deliberately subjecting one to pain and, at the same time, attempting to get the offender to see things your way. The more tolerant, understanding, and educative we are in trying to facilitate attitudinal change in others, the closer we come to providing them with a social service. For example, cognitive-behavioural programs focus on the *needs* of offenders and attempt to meet these needs by education and counselling aimed to reshape offenders’ beliefs, attitudes, and values, thereby improving their problem-solving capacity in order that they no longer engage in criminal behaviour. Such programs seem to work better in community settings than in institutions. There is very little difference between such programs and educational courses within the community (which are enthusiastically undertaken by many law-abiding members of the community). This argument is emboldened by the fact that many rehabilitative ‘sanctions’ cannot be ‘imposed’ without the consent of the offender. By making the interests of the offender paramount, modern rehabilitative programs are more akin to welfare services than punitive sanctions. In order for the goal of rehabilitation to justify punishment, at the minimum, it must be shown that reform is attainable in a setting that is primarily directed at imposing unpleasantness on the offender. There is no evidence in support of this. Whether this tension between rehabilitation and punishment is irreconcilable remains to be seen, but one suspects that it will be. This being the case, the aim of rehabilitation is arguably misguided as an objective of sentencing.

It follows that the only objective of punishment which empirical evidence has shown is attainable through a system of state-imposed sanctions is (absolute) general deterrence. Although this justifies punishment, it does not set the amount of punishment. In terms of fixing the amount of punishment, the cardinal determinant is the principle of proportionality, which prescribes that the punishment should fit the crime. That the severity of the punishment should be roughly commensurate with the gravity of the offence is one of the few principles of the debate in punishment and sentencing that has garnered widespread acceptance by philosophers, legislatures, and the courts. Despite this, sentences for similar offences vary widely from jurisdiction to jurisdiction and from court to court. The main reason for this is

that legislatures and the courts have not developed a workable way to match the two limbs of the principle.

At this point we focus our attention on how legislatures can match the two limbs of the proportionality principle. This, admittedly, is not an easy task. How many years of imprisonment correlate to the pain endured by a rape victim? The main difficulty here is that the two currencies are different. The interests typically violated by criminal offences are physical integrity and property rights. At the upper end of criminal sanctions, the currency is deprivation of freedom. The only conceivable way to give content to the proportionality principle is to adopt a uniform standard for measuring the offence gravity and punishment severity. To this end, the only tenable uniform currency appears to be unhappiness or pain. Thus, it has been suggested that the amount of unhappiness caused by the punishment should be commensurate with the seriousness of the offence: M Bagaric & R Edney, 'What's Instinct Got to Do With it? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) *Criminal Law Journal* 1.

## QUESTIONS

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- 1.3 What is punishment?
  - 1.4 What is sentencing?
  - 1.5 What is the connection between punishment and sentencing?
  - 1.6 What are the main theories of punishment?
  - 1.7 What theory do you think is the most persuasive?
  - 1.8 What are the main aims of sentencing?
  - 1.9 Which aims of sentencing are achievable through a system of state-imposed sanctions?
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## 1.4 Sources of criminal law

The law of Australia is derived from the law of England. English law was, and to a large extent remains, in the form of the common law. It was the judiciary, therefore, that was largely responsible for the construction of the basic principles and doctrines, including the enunciation of many crimes. By the nineteenth century, most of the fundamental doctrines of law had been established. Thus, when the English came to Australia and annexed it to the British empire, they brought with them the common law of England. In short, the common law of England governed Australia, although the particular details were varied as appropriate to the then infant penal colony.

Since then two developments need to be noted. First, throughout and since the nineteenth century, the various Parliaments in England and Australia have taken an increasingly interventionist role in the creation of law. This created an extensive body of statutory law. Second, in the context of criminal law, the statutory law took two forms: the statutes were either restatements of the law in line with the basic structures of common law doctrines of criminal responsibility; or they were codifying statutes that displaced the common law of crime.

The combined result of the distinctions between common law and statutory law, and between statutory restatements and statutory codifications, is as follows. In Victoria, New South

Wales and South Australia the primary source of criminal law is the common law and, as a general rule, any legislation must be interpreted in the light of common law precepts—unless Parliament has expressly, or by necessary implication, evinced a clear intention to displace the common law. In other words, in resolving any statutory ambiguities, the courts are obliged to apply common law principles in the absence of a clear legislative intention to do otherwise. These jurisdictions are referred to as the common law jurisdictions. The main criminal law statutory provisions in these jurisdictions are the *Crimes Act 1900* (NSW); *Criminal Law Consolidation Act 1935* (SA); and the *Crimes Act 1958* (Vic).

On the other hand, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory are referred to as the Code jurisdictions. In the Code jurisdictions, all crimes now exist in statutory form as defined by the various Codes which have specifically supplanted the substantive common law crimes. In Queensland, the *Criminal Code Act* was passed in 1899 and came into operation in 1901. The *Criminal Code Act* is not the Code. The Code is found in a schedule to the Act. It is prescribed that the Code is to be cited as the ‘Criminal Code’. In Western Australia, a similar *Criminal Code* was incorporated into the *Criminal Code Compilation Act 1913* (WA). In Tasmania, the *Criminal Code* was adopted in 1924 (see *Criminal Code Act 1924* (Tas)), and in the Northern Territory the year was 1983 (see *Criminal Code Act 1983* (NT)).

Australia has a federal system of government and, due to the various Constitutions in that system, criminal law is primarily a matter for the states. However, there is also a federal criminal jurisdiction created by the Commonwealth Parliament. In recent years, the Commonwealth government, in consultation with state governments, has been developing a National Criminal Code. As noted above, this was developed by the MCCOC. It is currently in force, applying to all Commonwealth offences from 15 December 2001: *Criminal Code Act 1995* (Cth). The origin of the Code dates to the mid 1990s, when the Standing Committee of Attorneys-General (SCAG) established a committee known as the Criminal Law Officers Committee (CLOC) consisting of ministerial advisers in crime from the Attorneys-General departments from each Australian jurisdiction. The main purpose of CLOC was to develop a national Model Criminal Code, though its organisation and function was different from that of a law reform agency. CLOC first met in May 1991, though its name was changed in November 1993 to the Model Criminal Code Officers Committee (MCCOC). CLOC, and more recently MCCOC, has published around thirty publications, mainly in the form of discussion papers (DP) followed by a final report (FR), though there have been a few stand-alone publications (SAP) on model provisions. These publications cover quite varied subjects within criminal law and their recommendations are often implemented on a voluntary basis in Australian state, territorial, and federal criminal law Acts or Codes. However, there is little momentum for a nationwide uniform Criminal Code. The only jurisdiction to adopt the proposed National Criminal Code is the Australian Capital Territory, which recently became a Code jurisdiction following the phased commencement and application of the *Criminal Code 2002* (ACT).

Examples of MCCOC publications and their implementation include general principles of criminal responsibility (DP & FR 1992—implemented in the Commonwealth jurisdiction in 1995, the ACT in 2002, and South Australia (with self defence legislation) in 1997); theft, fraud, and related offences (DP 1993 & FR 1995—implemented in the Commonwealth and South Australia); conspiracy to defraud (DP 1996 & FR 1997—implemented in the Commonwealth in 2001); criminal damage and computer offences (DP 2000 &



FR 2001—inserted in the Commonwealth & New South Wales Bills in 2001); non-fatal offences against the person (DP 1996 & FR 1998—implemented in genital mutilation legislation in Australian jurisdictions except Tasmania, Queensland in *Criminal Code Amendment (United Nations and Associated Personnel) Act 2000* (Cth)); sexual offences against the person (DP 1996 & FR 1999—implemented in evidence-related legislation in New South Wales, South Australia, and Victoria in 1998–99); fatal offences against the person (DP 1998 but no legislative implementation); serious drug offences (DP 1997 & FR 1998—implemented in New South Wales and Victorian legislation on supplying drugs to children in 1998); offences against administration of justice (DP 1997 & FR 1998—no implementation); contamination of goods (DP 1997 & FR 1998—implemented in all jurisdictions except ACT, the Northern Territory, and Western Australia); offences against humanity and slavery (DP & FR in 1998—implemented in the Northern Territory, South Australia, and the Commonwealth); mentally impaired accused (SAP 1995–96—implemented in the ACT, South Australia, and Victoria in 1999, 1995, & 1997); forensic procedures (SAP 1995–96—implemented in all jurisdictions except the Northern Territory and Queensland); DNA databases (SAP 1999–2000—implemented in all jurisdictions except Northern Territory, Queensland, and Victoria); abolition of the year and a day rule (SAP 1992—implemented in all Australian jurisdictions except the Commonwealth jurisdiction and the Northern Territory); double jeopardy (DP November 2003—no implementation): see MR Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (2002) 26 *Criminal Law Journal* 152, 155–7, 164–5, 170–4.

In addition to the differences noted above, Code jurisdictions also differ from common law jurisdictions in that the courts are not obliged to construe legislation in accordance with common law principles in the absence of a clear legislative intention to the contrary. In fact, the courts in these jurisdictions have stated that common law principles have no relevance in the absence of contrary legislative indications. However, as will emerge in later chapters, the courts in these jurisdictions understandably look to the common law for guidance in cases where the legislation is unclear or the relevant terminology had a particular meaning at common law. In *R v Barlow* (1997) 188 CLR 1, at 32, Kirby J stated:

At least in matters of basic principle, where there is ambiguity and where alternative constructions of a code appear arguable, this Court has said that it will ordinarily favour the meaning which achieves consistency in the interpretation of the language in the codes of other Australian jurisdictions. It will also tend to favour the interpretation which achieves consistency as between such jurisdictions and the expression of general principle in the common law obtaining elsewhere.

Over the last decade or so, the members of the High Court have displayed a tendency to (i) sever the connection between the common law *of* England and the common law *in* Australia, and (ii) develop a *national* criminal law. The latter tendency is marked in their various attempts to discover underlying harmonies among the criminal laws of the code jurisdictions and the common law jurisdictions: see *R v Barlow* (1997) 188 CLR 1 above.

The general method of handling jurisdictional diversity in this book is (i) to analyse the relevant common law principles for each topic and then (ii) discuss statutory developments in the common law jurisdictions of the New South Wales, South Australia, and Victoria.

We discuss the position in Code jurisdictions only where judgments in these jurisdictions illuminate the common law position. Relatively speaking, few people are prosecuted at the federal level for the range of offences considered in this book. Thus, we do not closely examine the Commonwealth *Criminal Code*.

## 1.5 Criminal capacity

For purposes of the criminal law, who or what has the capacity to incur criminal liability? The assumption is that everyone is capable of committing crimes and being held criminally responsible for those crimes. This assumption is, however, subject to a number of exceptions that warrant brief discussion. These exceptions run throughout the entire criminal law process, and therefore constitute *general* exceptions rather than *particular* exceptions to specific crimes. An example of a particular exception is that, until recently, a husband could not be convicted as a principle in the first degree of the rape of his wife. It was considered axiomatic that a husband did not have the capacity to rape his wife.

### 1.5.1 Children

The common law doctrine of *doli incapax* stated that a person under the age of seven years is incapable of committing a criminal offence. By virtue of legislation this doctrine has been altered and the minimum age at which a person is deemed capable of committing a crime is now ten: *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Young Offenders Act 1993* (SA) s 5; and *Children, Youth and Families Act 2005* (Vic) s 344.

Legal issues of capacity arise, however, where the person is over the age of ten and under the age of fourteen at the time of the alleged crime. There is a rebuttable presumption that children who are age ten and under the age of fourteen are incapable of committing a crime. In these instances, therefore, the prosecutor must not only prove the elements of the crime(s) in question and the child's complicity therein beyond a reasonable doubt, but also prove by the same standard of proof that at the time of the alleged criminal act or omission, the child knew that his or her conduct was wrong in the sense that it was in contravention of the standards which govern the behaviour of ordinary persons: *R v M* (1977) 16 SASR 589; *R v Whitly* (1993) 66 A Crim R 462; *C v DPP* [1996] 1 AC 1. This requirement has not been rigorously enforced in prosecutions other than homicides. In prosecutions for other types of crimes, the prosecution typically satisfies its burden by adducing testimony from the police that the child admitted to knowing that what he or she did was wrong in the relevant sense.

The most recent discussion of this doctrine was by the Victorian Court of Criminal Appeal in *R v ALH* (2003) 6 VR 276; [2003] VSCA 129 (4 September 2003). The court noted that at common law there exists a rebuttable presumption that a child under fourteen years of age is incapable of committing a crime and that the presumption may be rebutted by evidence that the child knew the acts were seriously wrong. The noted anomaly that has developed in relation to the doctrine was the prohibition upon use of the mere facts of the offence as evidence capable of proving the requisite knowledge in the child that the act or acts were

seriously wrong. The court disapproved of this principle. Eames JA (with whom Batt JA and Callaway J agreed) opined, at [74]:

I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

In this regard the court refused to follow the decision in *C v Director of Public Prosecutions* [1996] AC 1.

Supplementing this doctrine of capacity in all Australian states is the process of juvenile justice, which establishes separate and distinct procedures for children. In Victoria, for example, the Children's Court has exclusive jurisdiction over most crimes committed by persons who are over the age of ten and under the age of eighteen at the time of the commission of an offence: *Children, Youth and Families Act 2005* (Vic) s 516. There are, however, some exceptions to this general rule. The first is that the Children's Court lacks jurisdiction to adjudicate all homicide offences (save for infanticide under s 6 of the *Crimes Act 1958* (Vic)) as well as the offence of attempted murder. The second exception is that in 'exceptional circumstances', the court may exercise discretion to decline jurisdiction and order that the matter be transferred to the Magistrates' Court. In this context, exceptional circumstances may include instances in which the defendant was under the age of eighteen at the time the offence was allegedly committed, but has reached the age of nineteen or above by the time proceedings were actually commenced in the Children's Court; exceptional circumstances may also include situations where, due to the seriousness of the alleged crime(s) and/or the advanced age of the accused, the court is of the view that it would be more appropriate to try the defendant as an adult in the Magistrates' Court. The 'exceptional circumstances' that may be taken into account are enumerated in sub-ss 516(5)(a)–(h) of the *Children, Youth and Families Act 2005* (Vic). Finally, if the defendant is charged with one or more indictable offences, he or she (or his or her parent) may opt to have the charges adjudicated by a jury in the County or Supreme Court: ss 3(1), 356 and 516 of the *Children, Youth and Families Act 2005* (Vic). The jurisdiction of the Children's Court is further enhanced by s 20C of the *Crimes Act 1914* (Cth) which provides that all Commonwealth offences committed by children are to be treated as though they were offences against the state or territory in question. For purposes of this section, a 'child' is a person under the age of eighteen: *Crimes Act 1914* (Cth) Part 1AD, s 15YA.

A similar framework exists in South Australia. The presumption of *doli incapax* has been affirmed in *R v M* (1977) 16 SASR 589. The Youth Court of South Australia is established by the *Youth Court Act 1993* (SA). This court has power to deal with children of or above the age of 10 years and under the age of 18 years at the date of the alleged offence (*Youth Court Act 1993*

(SA) s 10). The Youth Court deals with all charges, except for those referred to in the *Young Offenders Act 1993* (SA) sub-s 17(3), which lists the following exceptions:

If—

- (a) the offence with which the youth is charged is a homicide, or an offence consisting of an attempt to commit, or assault with intent to commit homicide; or
- (b) the offence with which the youth is charged is an indictable offence and the youth, after obtaining independent legal advice, asks to be dealt with in the same way as an adult; or
- (c) the Court or Supreme Court determines, on the application of the Director of Public Prosecutions or a police prosecutor, that the youth should be dealt with in the same way as an adult because of the gravity of the offence, or because the offence is part of a pattern of repeated offending,

the Court will conduct a preliminary examination of the charge, and may commit the youth for trial or sentence (as the case requires) to the Supreme Court or the District Court.

With regard to New South Wales, see the *Children (Criminal Proceedings) Act 1987* (NSW) which deals with the conduct of criminal proceedings against children and other young persons.

## 1.5.2 Corporations

Corporations are responsible for a significant amount of harm. As noted by the New South Wales Law Reform Commission in *Issue Paper 20* (2001) at para 1.8:

Corporate crime poses a significant threat to the welfare of the community. Given the pervasive presence of corporations in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are affected by individual action, the potential for both economic and physical harm caused by a corporation is great. There is a substantial body of literature that considers corporate crime to be a serious social problem, despite what some may argue to be relatively less media coverage than crimes committed by individuals, at least in the tabloid newspapers, and despite the lack of comprehensive empirical research into the costs and incidence of corporate misconduct. In the area of workplace safety, for example, statistics from WorkCover NSW reveal that there was a total of 163 reported employment fatalities in New South Wales in the financial year 1998/99, and 55,492 employment injuries for that same period, 25.8% of which were reported as permanent disability cases. The gross incurred cost of employment injuries for that year was \$854 million.

As noted above, every person is presumed capable of committing crime. But is a corporation considered a person in terms of having the legal capacity to incur criminal liability? The short answer is that 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 question then becomes one of determining which acts of a corporation's officers or employees may be attributed to the corporation. At common law there are two approaches, both of which are predicated on the notion that a corporation should only be liable for conduct on the part of its agents, which can fairly be regarded as the conduct of the corporation itself.

The first approach involves the doctrine of vicarious liability, in which the acts of the employee in the course of his or her employment are attributed to the corporate employer: *Morgan v Babcock Ltd* (1929) 43 CLR 163. According to this approach, the central legal issue is whether the employee was acting within the scope of his or her employment. The second approach involves the doctrine of *identification*. Under this doctrine, the law treats the acts and mentality of the superior officers of the company as the acts and mentality of the company itself: *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531. The now classic formulation of the doctrine states that '[a] company may in many ways be likened to a human body. It has a brain and a nerve centre that controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. ... In cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or managers will render the company itself guilty': *HL Bolton (Engineering Co) Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172. The primary legal issue on this approach will be identifying the superior officer who credibly represents the 'hands' and 'mind' of the company. Because a corporation's legal status as a person is purely fictional, a corporation itself cannot be subjected to imprisonment. It can, however, be sanctioned by various other means such as fines and/or revocation or suspension of its right to conduct business. See the *Criminal Code* (Cth) ss 12.1–12.6.

On either approach, the criminal law has acute difficulty in attributing responsibility to corporations for certain offences, such as homicide. This is due in part to the fact that homicide is typically envisioned as one human being killing another. As Chris Corns remarks, '[t]here is a cultural and linguistic resistance to construing artificial persons, such as corporations, as killers': C Corns, 'The Liability of Corporations for Homicide in Victoria' (1991) 15 *Criminal Law Journal* 351–2. This image flies in the face of reality. In a three-year period ending in 1990, there were some 203 workplace deaths in Victoria that were attributable to some level of corporate negligence. Given the reluctance to attribute responsibility to corporations for homicide, it is no surprise that the first conviction for corporate manslaughter in Victoria occurred as late as 1994, when Denbo Pty Ltd pleaded guilty and was fined \$120,000. Note, however, that Denbo was in liquidation at the time and was able to avoid paying the fine—although it did resume its activities under a new corporate name and personality.

However, more recent approaches to corporate criminal liability have greatly expanded the range of offences in relation to which corporations may be liable.

A corporation can generally be convicted of the same offences as a natural person, such as offences involving fraud or theft, some drug offences, offences that pervert the course of justice and contempt of court. Corporations can attract criminal liability as accessories to a crime as well

as principals, and as parties to a conspiracy. It is open to question whether a corporation can be convicted of murder (at least in New South Wales), or manslaughter. Some commentators have suggested that corporations should not be convicted of certain crimes, which would inherently require an act by a natural person, such as perjury or a sexual offence. Others have disputed this claim, arguing that, in this context corporate liability should arise where the criminal acts were committed by a manager or employee of the corporation, in accordance with general principles of corporate criminal liability: New South Wales Law Reform Commission, *Issue Paper 20* (2001) para 2.2. The ACT has become the first Australian jurisdiction to create the offence of industrial manslaughter: see *Crimes Act 1900* (ACT), ss 49A–49E, which came into operation in 2004.

## QUESTION

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- 1.10 In principle, is there any reason that a corporation cannot be convicted of murder or rape?
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## 1.6 Classification of crimes

Traditionally offences have been classified as either felonies or misdemeanours. The significance of this distinction is that felonies are typically more serious than misdemeanours in terms of the possible sanctions to be imposed upon conviction. The last jurisdiction to maintain the felony/misdemeanour distinction was New South Wales. However, this distinction has also now been abolished in this jurisdiction as well. A felony is taken to be a reference to a ‘serious indictable offence’, and a misdemeanour is now termed a ‘minor indictable offence’: *Crimes Act 1900* (NSW) s 580E. In Victoria, the traditional classification was abolished by the *Crimes (Classifications of Offences) Act 1981* (Vic). In Victoria, crimes are now classified as being either summary offences or indictable offences. A similar classification is adopted in South Australia: *Criminal Law Consolidation Act 1935* (SA) s 5D.

Summary offences, which are always in statutory form, are offences that are dealt with by a magistrate sitting without a jury. Although the rules of evidence and procedure that govern the disposition of summary offences are very similar to those that govern the disposition of indictable offences, the determination of summary offences is called a ‘hearing’ rather than a trial. Typically, summary offences are less serious (in the sense described above) than indictable offences, or indictable offences which are triable summarily. In contrast, indictable offences are those which are triable only before a judge and jury. Indictable offences that are triable summarily are offences that, upon the consent of the parties designated by Parliament, are triable summarily before a magistrate sitting without a jury. Unless all of the designated parties consent to summary disposition, the matter will be treated as an indictable offence and disposed of accordingly in the County or Supreme Court. Parliament alone decides whether an offence is designated as summary, indictable, or indictable triable summarily.

Another method of classifying crimes is to draw a distinction between ‘offences against the person’ and ‘offences against property’: see P Gillies, *Criminal Law* (4th edn, 1997) 399–550, 551–660; KL Whitney, MM Flynn & PD Moyle, *The Criminal Codes, Commentary and*

*Materials* (5th edn, 2000) 45–237, 238–302. Offences against the person include, for example, assaults and unlawful homicides. This category is sometimes subdivided into the categories of fatal and non-fatal offences against the person, and between non-fatal sexual and non-sexual offences against the person. Offences against property include such crimes as larceny or theft, obtaining property by false pretences, embezzlement, receiving stolen property, obtaining credit by fraud, blackmail, burglary, robbery, and many others. Supplementing these two categories are the derivative or inchoate offences of incitement, attempt, and conspiracy (discussed in section 1.7 below). This type of classification has no substantive significance. For example, it does not affect the manner in which the offences are prosecuted.

## 1.7 A doctrinal framework: General principles of criminal responsibility

In this section, we provide an overview of the general principles that constitute criminal law as a unified and determinate body of law. As general principles they will admit of exceptions, and it has been suggested that they admit of so many exceptions that, in reality, their generality has been hopelessly compromised. As a consequence, these so-called general principles may be viewed as justifications, the main effect of which is to create an *image* of criminal law as a rational, consistent, and certain system of legal rules. At the end of this book, you should return to these general principles and ask yourself whether, in light of your study of the legal definitions that ensue in the succeeding chapters, it is possible, or even desirable, to have such a set of general principles. That said, this segment outlines the putative general principles of criminal responsibility, which contribute to the criminal law's self-image as a rational system of formal legal rules.

It is a general principle of criminal law that criminal responsibility may not be attributed to a person unless s/he (i) has engaged in *conduct* that is forbidden by the criminal law (referred to as the *actus reus* of the crime) and (ii) possesses a *mental state* prohibited by the criminal law (referred to as the *mens rea* of the crime). In addition, it is required that the prohibited mentality exist *at the time* of the volitional act(s) or omission(s) giving rise to the prohibited conduct (referred to as the requirement of 'temporal coincidence'). These three principles are embodied in the common law maxim: *actus non facit reum nisi mens sit rea*. This has been judicially interpreted as meaning that the act itself does not constitute guilt unless done with a guilty mind.

The emphasis of the maxim is on the *unity* of the volitional act(s) or omission(s) component of the *actus reus* and the *mens rea*. Stated differently, one does not incur criminal liability for one's volitional criminal act(s) or omission(s) alone, nor for one's criminal mentality alone; rather, it is only where there is a *temporal coincidence* between one's criminal act(s) or omission(s) and one's criminal mentality that liability attaches. The nature of acts and omissions and their status as an essential component of the *actus reus* of a crime will be explained in greater depth below.

The following is an in-depth discussion of the constituent elements of a crime. Suffice it to say that this should be read with great care.

### 1.7.1 Elements of an offence

Each crime is comprised of certain elements, and each and every element must be present in order for the crime to have been committed. For example, burglary *at common law* is defined as: (a) breaking; (b) entering; (c) of a dwelling; (d) at night-time; (e) with intent to commit a felony therein. Unless all five of these requisites are present, there is no crime of burglary.

The elements which comprise any particular crime are sometimes referred to as the *corpus delicti*, a Latin term meaning ‘the body of the crime’. Thus, in the above example, elements (a) through (e) would constitute the *corpus delicti* of the crime of burglary at common law.

In order to convict for the commission of a crime, the Crown must prove each and every element which comprises the offence, *and the defendant’s complicity therein*, beyond a reasonable doubt.

### 1.7.2 *Mens rea*

Many crimes require, as an essential element, that 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. When this is so, that mental state is referred to as the *mens rea* component of that crime. *Mens rea* is a Latin expression that means ‘bad or guilty mind’. In Australia, the *mens rea* component can consist of one or more of the following mental states, depending upon the statutory or common law definition of the crime:

- *Intention*—meaning that the defendant acted (or omitted to act) with the actual subjective intention of bringing about one or more of the results forbidden by the definition of the crime; or, according to some authorities, that the defendant acted (or omitted to act) with the knowledge that one or more of the results forbidden by the definition of the crime were practically certain to result: *R v Hoskin* (1974) 9 SASR 531 at 540; *R v Hurley* [1967] VR 526 at 540; *R v Brown* (1975) 10 SASR 139 at 154.
- *Knowledge*—meaning that the defendant acted (or omitted to act) while holding certain facts to be true. The term knowledge is often used interchangeably with the terms awareness and foresight in this context.
- *Belief*—meaning that the defendant acted (or omitted to act) with the belief that certain facts were true, albeit with some doubt or doubts as to their existence.
- *Recklessness*—meaning that the defendant acted (or omitted to act) with knowledge (or an awareness or foresight) that there was a *possibility*, or depending on the type of crime, a *probability*, that some or all of the results forbidden by the definition of the crime would result from his or her conduct. (In New South Wales, s4A of the *Crimes Act 1900* provides additionally that for “the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge”).

For a clear and thorough discussion of the concept of *mens rea*, see P Gillies, *Criminal Law* (4th edn, 1997) 46–73.

Is negligence a *mens rea*? If the defendant’s conduct amounts only to *ordinary* negligence where the defendant *should* have been aware of the risk but did not actually *advert* to it, the prevailing view is that this does not constitute a *mens rea*. The reason is that ordinary negligence is not a mental state, but merely *conduct* which falls below an objective standard



of care required by law to protect others from *unreasonable risks of harm*. On the other hand, recklessness (as defined above) is in effect an aggravated form of negligence in which the defendant actually *advert*s to a known risk and elects to proceed despite that awareness. It is because of the express advertence factor that this particular form of negligence constitutes a *mens rea*: G Williams, *Criminal Law* (2nd edn 1961), 53; see also Gordon, 'Subjective and Objective Mens Rea' (1975) 17 *Crim Law Quarterly* 355, 372–81.

It must be emphasised that when viewed in isolation, recklessness or any other *mens rea* is merely a state of mind which neither amounts to any form of negligence nor gives rise to criminal liability. It is only when an accused's reckless state of mind temporally coincides with a voluntary act or omission that poses an *unreasonable risk of harm* to another or others that it rises to the level of aggravated negligence (see discussion below regarding voluntary acts/omissions and temporal coincidence). On the other hand, if an accused acts or omits to act while advertent to a risk that does not pose an *unreasonable risk of harm* to another or others, his or her conduct does not amount to any form of negligence. Thus, the term 'recklessness' has two separate and distinct usages in the criminal law. As a *mens rea*, it merely denotes a state of mind whereby an accused advert to the fact that his or her conduct *may* result in the consequences forbidden by the common law or statutory definition of the offence in question. As an aggravated form of negligence, it denotes a combination of a *mens rea* that temporally coincides with a volitional act or omission that poses an *unreasonable risk of harm* to another or others.

Not all crimes are defined in such a way as to require, as a constituent element, that the accused must have acted with one or more of the *mens reas* discussed above. When that is so, the crime is properly referred to as one of non-*mens rea*. Conversely, a crime is properly referred to as one of *mens rea* if it is defined in such a manner as to require that the accused must have acted with one or more of the aforementioned *mens reas*.

Although not all crimes are of the *mens rea* variety, *all* crimes have an *actus reus* component. All of the non-*mens rea* elements of a crime, as defined by its statutory or common law definition, are collectively referred to as the *actus reus*, a Latin expression which means 'bad act'. In the above example of burglary at common law, therefore, the *actus reus* would consist of elements (a) through (d), and the *mens rea* would consist of element (e).

### 1.7.3 *Actus reus*

The *actus reus* component of a crime consists of more than merely its external or non-*mens rea* elements as defined by its statutory or common law definition. As a matter of common law doctrine, *the actus reus* component of a crime requires that the non-*mens rea* elements must be the *result* of a voluntary act or omission to act *where the law imposes a duty to act*. In other words, there must be a *causal connection* between the act or omission and the non-*mens rea* elements of the crime. There are, however, rare instances in which Parliament defines an offence in such a way as to dispense with this requirement. These rare types of crimes are referred to as 'situational offences'. The nature of these offences is explained by Peter Gillies:

Some offences are of such a nature that their *actus reus* consists of nothing more than D's relationship with, or other implication in, a static situation. Such offences have been termed 'situational offences'. The classic example is the offence of being the licensee of prescribed

premises on which is found a person during prohibited hours, who is there for an unlawful purpose. Others include being the occupant of a place used for unlawful gaming, or for the purpose of prostitution.

These offences are generally of a minor nature, and have been created by statute. They do not require proof of conduct on the part of D, whether it be activity or inactivity. No doubt the typical 'situation' will have arisen because of D's activity or inactivity, but the *actus reus* does not extend to these acts and thus they will not need to be proven. In short, they are not part of the offence of this type.

It may be that situational offences represent an exception to the general rule that D must act (or fail to act) voluntarily, because their *actus reus* does not include conduct on D's part. For example, the licensee who is asleep while another person is on the premises during prohibited hours for an unlawful purpose is, notwithstanding the licensee's unconscious state, prima facie liable for the offence of this type: at 32–3 (footnotes omitted).

As will be seen in Chapter 13, an accessory liability is yet another instance in which it is not necessary to demonstrate a legal causal nexus between the accessory's encouragement and/or assistance of the principal offender(s) and the latter's criminal conduct.

For an act to be regarded as voluntary, it must consist of some *willed* muscular movement. A muscular movement is deemed as *willed* if it results from a *conscious decision* to move a portion of one's body. Acts done whilst sleepwalking, for instance, would not amount to voluntary acts in the relevant sense. Similarly, an omission to act (where the law imposes a legal duty to act) is regarded as voluntary if it results from a *conscious decision* to refrain from acting. Therefore, involuntary movements such as reflex actions cannot constitute voluntary acts or omissions.

In short, while the term *actus reus* generally denotes the non-*mens rea* elements of a crime, it does have a minimal mental component: the requirement of a willed muscular movement or a conscious decision to refrain from acting. It is important to note, however, that this minimal mental component of the *actus reus* requires nothing further such as any particular motive or *other* state of mind. If any further state of mind is required by the definition of the crime, it will constitute a *mens rea*.

The voluntary act or omission to act can consist of more than one act or omission in certain circumstances. With the common law crime of burglary, for example, the elements of breaking and entering may not occur at the same time. If the defendant does the breaking on Monday and the entering on Tuesday, it is obvious that both elements cannot be brought about by a single voluntary act. All that is necessary is that both elements are the result of voluntary acts rather than reflexive or other involuntary movements of the body. In the vast majority of cases, however, the non-*mens rea* elements will result from a single voluntary act or omission to act.

An omission can form the *actus reus* of an offence only where a person is under a *legal duty to act*. A duty to act will arise in the following circumstances: (a) where one is under a contractual duty to act (a hired body guard, for example); (b) where one is under a statutory duty to act (police officers, for instance, are typically under a statutory obligation to come to the aid of those in peril); (c) where one is deemed to have voluntarily assumed a duty to act by undertaking to rescue someone in peril: *R v Stone and Dobinson* [1977] QB 354; *R v Taktak* (1988) 34 A Crim R 334; and (d) where the defendant and victim have a special relationship. The last

situation raises the question of when the defendant and victim will be regarded as having a special relationship of the type that will require the defendant to come to the aid of the victim when s/he is in a position of peril. Although the courts have thus far declined to enunciate any clear answer, such a relationship is generally found when the victim is in fact relying on the defendant to protect him or her, the reliance is reasonable under the circumstances, and the defendant knows or has reason to know of the victim's reliance: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 508 (per Deane J); *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 at 235 (per Gibbs CJ); *Caltex Oil Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 555 (per Gibbs CJ). Although not an exhaustive list, these types of special relationships have been held to exist between parents and minor children, spouses, common carriers and passengers, innkeepers and guests, primary or secondary school teachers and pupils.

Thus, if a mother is a good swimmer and notices her four-year-old child drowning in the neighbour's pool, the law requires her to make a reasonable effort to rescue the child. If the mother makes a conscious decision to walk away and do nothing and the child drowns, her inaction will be considered a voluntary omission to act, which can give rise to criminal liability. It is important to remember that a conscious decision to refrain from acting in any of the four circumstances described above must also be a voluntary one if it is to serve as a predicate for criminal liability. It will not be regarded as voluntary unless the defendant is aware that the victim is in peril *and* the circumstances are such that the defendant can avert the danger without a significant risk of suffering grievous bodily harm to himself or herself.

In summary, it is sufficient to state that the *actus reus* of an offence consists of: (a) the non-*mens rea* elements of the offence as defined by its statutory or common law definition; and (b) the voluntary act or omission to act which brings about those non-*mens rea* elements. While there is a rebuttable presumption of sorts that the acts or omissions which bring about the non-*mens rea* elements are of a voluntary nature, the prosecution will be required to prove this beyond a reasonable doubt if evidence arises during the course of the trial which raises a genuine question as to their voluntariness. In *Ryan v The Queen* (1967) 121 CLR 205 at 217, Barwick CJ enunciated the test of whether a genuine issue of voluntariness has been raised. His Honour opined that the question to be determined by the trial judge is 'whether upon that material a jury would be entitled to entertain a reasonable doubt as to the voluntary quality of the act attributed to the accused'.

As noted above, not all crimes are of the *mens rea* genre; that is, not all crimes require, as a necessary element, that a person act *intentionally, knowingly, recklessly*, or with a certain *belief* in bringing about some or all of the proscribed consequences. With the exceptions of involuntary manslaughter and nuisance, all common law offences are of the *mens rea* type, and most have now been codified into statutory offences with minor variations. With new statutory offences that were not recognised at common law, it is not at all uncommon to find that a *mens rea* is not required. An example of a non-*mens rea* statutory offence would be a statute making it unlawful to operate a motor vehicle on a public highway that weighs in excess of a prescribed weight. Statutes of this type typically do not require the Crown to prove a *mens rea*. The question of whether such a statutory offence is one of *mens rea* is generally determined by the definition of the offence as prescribed by the legislature. This is discussed below at 1.7.6.

### 1.7.4 The doctrine of temporal coincidence

We noted earlier that 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 concur in time. This is known as the doctrine of temporal coincidence. This doctrine is often misstated as requiring instead that the *mens rea* and *actus reus* concur in time. To illustrate why this formulation is flawed, suppose that D accidentally runs V down on a dark road and, as a result, V dies several days later. If D decides hours after the accident that he wants V to die, it is apparent that D has formed the requisite *mens rea* for murder (an intention to kill), which coincides in time with the *actus reus* of murder (causing the death of another human being). Although the *actus reus* of murder is not complete until the time of V's death, there is no disputing the fact that the *actus reus* is in progress from the moment of the accident and, therefore, temporal coincidence exists between the *mens rea* and the *actus reus* of the crime. There is also little doubt that it would be wrong to hold D liable for murder under these circumstances. To do so would effectively amount to imposing liability on D for nothing more than his thoughts. If, on the other hand, D purposely runs V down with the intention of causing his death, it would be equally incorrect if D were not liable for murder. The critical distinction between these two scenarios is that in the latter, there is a concurrence in time between the *mens rea* and the volitional act or acts (such as stepping on the accelerator, turning the steering wheel to aim the vehicle in V's direction, or both), which bring about the non-*mens rea* elements of the crime. In the latter scenario, D's liability is predicated on more than merely his culpable state of mind; rather, D's liability is based on the concurrence in time of a culpable mental state and a willed act that is causally linked to the non-*mens rea* elements of the offence. This doctrine was recently reaffirmed in *Baker v The Queen* [2010] VSCA 226 (9 September 2010). Relying heavily on the High Court's decision in *Meyers v The Queen* (1997) 147 ALR 440 at 441–442; [1997] HCA 43, Maxwell P, with whom Buchanan and Bongiorno JJA concurred, opined at [12]–[13]:

The Court recited the following passage from the reasons of Brooking JA (with whom Teague J agreed) in the Court of Criminal Appeal:

‘The real question for the jury was that of the intention with which the applicant did the acts which caused the fatal head injury. But that injury was not to be considered in isolation from the other injuries. The whole altercation was one episode. The fatal head injury, and its infliction, were not to be considered in isolation from the other injuries sustained by [the victim] and indeed the whole course of events in the applicant's home that night, although the ultimate question for the jury was whether the Crown had proved beyond reasonable doubt that the acts causing death were accompanied by the necessary specific intent. The infliction of injuries other than the fatal injuries was to be taken into account by the jury in considering that ultimate question.’

Importantly for present purposes, the High Court expressly agreed that the whole of the circumstances could be looked at in order to determine whether the acts causing

death were accompanied by the necessary specific intent (that is, an intent to cause really serious injury). Their Honours went on:

‘But it would not be correct to assume that the act which caused death—there may have been only one such act—was accompanied by the intent which accompanied all the other acts that occurred in the course of the fighting. Although an intent to inflict really serious injury could reasonably be inferred from the totality of the injuries inflicted on [the victim], it does not follow that the appellant had that intent at the time when he did the particular act which resulted in her death.

An accused person who unlawfully kills another is not guilty of murder unless he does the particular act which causes the death with one of the specific intents that is an essential element of the crime of murder. *The particular act and the intent with which it is done must be proved by the prosecution beyond reasonable doubt. Act and intent must coincide.* If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that other acts were done with that intent, no conviction for murder can be returned unless there is evidence on which the jury can reasonably find that the act which caused the death was one of those done with the necessary intent.’ (footnotes omitted)

In subsequent chapters you will discover that the doctrine of temporal coincidence can be highly problematic in certain situations. When a strict application of the doctrine would operate to absolve a person of criminal liability under circumstances where it appears unjust to do so, the courts have displayed a willingness to relax this requirement in order to reach what they believe to be the just result.

## QUESTIONS

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- 1.11 Why is it incorrect to state that the doctrine of temporal coincidence requires that the *mens rea* and *actus reus* must concur in time?
  - 1.12 To which type of offence is the doctrine of temporal coincidence applicable?
  - 1.13 If an offence is of the non-*mens rea* genre, does the doctrine of temporal coincidence apply?
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### 1.7.5 Defences

There are two types of criminal defences. The first is often referred to as a primary or ‘denial’ defence. A primary or ‘denial’ defence is one that asserts, based on the evidence adduced, that 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. If, for example, an accused is claiming that the prosecution has failed to prove the requisite *mens rea*, one or more of the *actus reus* components, or perhaps both, this would constitute a primary or ‘denial’ defence.

The second category of criminal defence is often referred to as a secondary or ‘affirmative’ defence. With this type of defence, an accused is asserting that even if the prosecution has

proven each of the constituent elements of the offence and the accused's complicity therein, s/he is nonetheless entitled to an acquittal because of a defence that is recognised in law and supported by the evidence adduced at trial. A classical example of a secondary or 'affirmative' defence would be that of self-defence to a charge of assault or criminal homicide. As you will discover in subsequent chapters, there are a number of other defences that fall into this category, such as provocation, duress, necessity, insanity, and diminished responsibility.

### 1.7.6 Strict liability

You should now be familiar with the essential components of a crime and the nature of the two types of defences thereto; together they constitute the core of the general principles of criminal law. There are, however, a range of legal definitions and principles that depart from this core and, therefore, are grouped into separate categories. The law of strict liability represents one such categorical departure.

Strict liability crimes are those that, by way of express statutory statement or judicial interpretation, do not require proof of *fault*. Fault in this context denotes, at a minimum, that the accused acted negligently in bringing about the consequences proscribed by the statutory or common law definition of the crime(s) alleged. Fault in this context also includes any instance in which an accused is found to have committed a crime of *mens rea*. Therefore, a crime of strict liability is one which, by definition, does not require the prosecution to prove that the accused acted with ordinary negligence or any of the recognised *mens reas*. As none of the offences recognised at common law (with the exception of the crime of public nuisance) are of the strict liability type, it follows that nearly all strict liability offences exist in statutory form.

An important decision dealing with the issue of whether crimes *purporting* to dispense with a *mens rea* requirement should be strictly construed as such is *He Kaw Teh v The Queen* (1985) 157 CLR 523. The offences at issue in *He Kaw Teh* were under the *Customs Act 1901* (Cth), and dealt with the importation and possession of prohibited imports without reasonable excuse. For many years, the courts had interpreted these offences as ones of non-*mens rea*. Thus, in the typical case, it was necessary to prove only that the defendant engaged in the act of importing or possessing a prohibited import; that is, the prosecution was not required to prove that the accused had *knowledge* that what was imported or possessed was in fact a prohibited import. In *He Kaw Teh*, the High Court held that both offences (importing and possessing) required proof of a *mens rea*—in this instance, *knowledge* that what was imported or possessed was a prohibited import. The result is that the prosecution is now required to prove that the defendant had *knowledge* of the *existence and nature* of what s/he imported and possessed. In particular, the court held that consonant with the notion that criminal sanctions are primarily designed to further the interest of deterrence, all statutory offences are *rebuttably presumed* to be crimes of *mens rea*. The rationale employed by the High Court was that the interest of deterrence is not served by imposing criminal liability on those whose conduct is made criminal because of circumstances of which they were unaware—or consequences which they could not have reasonably foreseen (in other words, persons who do not act with a bad mind).

The court further held, however, that this presumption can be displaced (thereby making the offence one of non-*mens rea*) by necessary implication when it appears that an additional parliamentary intention in enacting the legislation was to aid in its enforcement, by coercing people into taking effective measures to prevent the *actus reus* from occurring. The court held

that such a parliamentary intention would only be found in instances where it is reasonable and practicable to take these types of effective preventive measures. Finding that it was not reasonable and practicable to take such precautions in regard to the crimes at issue, the court held that the presumption of *mens rea* had not been displaced by necessary implication; consequently, that there could be no conviction unless the prosecution proved that the accused had actual knowledge that what he had imported and possessed was a prohibited import.

It should be noted that the defences which are generally available to an accused may also be interposed in relation to strict liability offences. There are two additional defences, however, which are of specific application to strict liability crimes. The first consists of an honest *and* reasonable belief in the existence of facts that, if true, would have made the accused's conduct perfectly lawful (known as the *Proudman* defence): *Proudman v Dayman* (1941) 67 CLR 536 (for a more recent decision reaffirming the *Proudman* defence, see *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25 (11 June 2008)). If Parliament has expressly or by necessary implication abrogated this or some analogous statutory defence, the offence is then referred to as one of *absolute* liability: *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 533; *Schmid v Keith Quinn Motor Co Pty Ltd* (1987) 29 A Crim R 330 at 339. The second is the 'external intervention' defence, which requires the accused to show that: (i) his or her conduct occurred as the result of a stranger or non-human act; (ii) s/he had no control over that conduct; and (iii) s/he could not have been reasonably expected to guard against such external intervention: *Mayer v Marchant* (1973) 5 SASR 567 at 573. This defence has been enunciated primarily by the Supreme Court of South Australia. Its status in other jurisdictions is uncertain.

### 1.7.7 Inchoate crimes

This is another category of legal rules that departs from the legal image of the typical crime. Inchoate crimes, which include attempt, incitement and conspiracy, are those in which the mental element of the crime, although formed, is not fully expressed in the conduct of the accused. With these types of crimes, the criminal law comes the closest to holding people criminally responsible for their thoughts alone. The attribution of liability for inchoate crimes makes it possible for the law to intercede pre-emptively, rather than idly stand by until the contemplated crime reaches fruition. This represents a major extension of the range of conduct over which the criminal law has jurisdiction. In this respect, it is significant that the law of inchoate crimes took off in the late eighteenth and nineteenth centuries when the process of criminal justice oriented itself around the problem of public order.

Although the inchoate offences are dealt with in great detail in Chapter 12, the crimes of incitement and conspiracy are related to the law of participatory liability, which is considered below. It is therefore appropriate to provide a cursory description of these offences before proceeding to the next topic. Incitement consists of encouraging or attempting to induce or persuade (or other analogous terms) another person to commit a crime. Conspiracy, on the other hand, consists of an agreement between or among two or more persons to commit an illegal act.

### 1.7.8 Participation

In the contexts of the inchoate offences of incitement and conspiracy, the criminal law attributes responsibility to individuals on the basis of their *association with others* and, as such, permits the process of criminal justice to target groups. The laws of incitement and conspiracy are not,

however, the only areas of law in which the association with others (rather than the classic solitary accused and single or multiple victims) forms the basis of criminal liability. As noted earlier, the same is true regarding the doctrine of vicarious liability in the context of the capacity of corporations to incur criminal liability. In this segment we examine yet another such area: the law of participatory liability (sometimes termed as ‘complicity’).

At common law, the basic distinction of participatory liability is between principal parties and accessories. A principal in the first degree is a party who personally performs part or all of the *actus reus* of the crime. If two or more parties each perform a portion of the *actus reus*, then each is considered to be a joint principal in the first degree. Robbery, for example, is basically a theft that is accomplished by means of an assault. If D-1 and D-2 commit a robbery, whereby D-1 holds a gun to V’s head and demands that he hand his wallet over to D-2 (and V complies), it is apparent that D-1 and D-2 have each performed a portion of the *actus reus* of robbery; D-1 has performed the assault component and D-2 has performed the theft component.

The term principal in the first degree also encompasses those who are both present (meaning within eyesight and/or earshot or at least in close enough proximity to render assistance to the other joint principals) at the scene and ‘acting in concert’ as part of a pre-conceived agreement, express or implied, to commit a crime. In these instances, each of the parties ‘acting in concert’ is regarded as a joint principal in the first degree. In the above example, if D-1 and D-2 had agreed to commit the robbery together, but D-1 had actually performed all of the *actus reus* elements with D-2 standing at his side, D-1 and D-2 would have acted in concert and, therefore, would be regarded as joint principals in the first degree. Whenever parties act as joint principals in the first degree, the law attributes the act(s) of each joint principal to the other or others.

A principal in the second degree is one who is present at the scene of the crime and, though providing assistance and/or encouragement to the principal(s) in the first degree, does not significantly contribute to or actually perform any portion of the *actus reus* of the ulterior crime. In the above example, therefore, suppose that the plan included another accomplice, D-3, whose role was to wait in a nearby getaway car in order to assist D-1 and D-2 in escaping from the scene. In this scenario, D-3’s participation would *appear* to represent a classic example of a principal in the second degree. However, as D-3 was present at the scene and participated in the crime as part of the pre-conceived plan, s/he too would be regarded as a joint principal in the first degree. Thus, while it is theoretically possible to participate in a crime as a principal in the second degree, in practice it would be extremely rare to encounter a situation in which an accomplice to a crime, though present at the scene and lending his or her assistance or encouragement to the principal offender(s), was not acting in concert with them as part of a pre-conceived plan to commit the offence in question. If, for example, A were to unexpectedly arrive at the scene of an unprovoked assault by B on C and suddenly decided to encourage B to beat C to death, A’s participation would be properly characterized as that of a principal in the second degree—assuming there was no *agreement* between A and B, *express or implied*, to inflict death or grievous bodily harm on C.

An accessory before the fact is a party who provides the same type of assistance or encouragement as a principal in the second degree, except that s/he is not *present* at the scene where the ulterior crime takes place. What is crucial to understand is that it is of no consequence that only one or some of the parties may have actually performed the *actus reus* of the crime; that is, each party to the joint criminal enterprise is personally liable for the crime to the same extent as a principal in the first degree. It is also critical to understand that the liability of a principal



in the second degree or an accessory before the fact is derived solely from the liability of the principal or joint principals in the first degree. Consequently, there can be no liability for such secondary parties unless the prosecution is able to persuade the fact-finder of the guilt of at least one principal in the first degree by the requisite standard of proof beyond a reasonable doubt (see Chapter 13). Furthermore, the liability of the secondary party cannot be greater than that incurred by the principal in the first degree.

In contrast, the liability of each joint principal in the first degree is not derivative, but primary in the sense that the act(s) of one is regarded as the act(s) of the others. Thus, it is theoretically possible that the liability of one joint principal in the first degree can exceed that of another. In the example above involving A, B, and C, for example, suppose that unbeknownst to A, C had provoked B to such an extent as to reduce B's liability from murder to that of voluntary manslaughter. Assume further that despite the absence of a pre-conceived plan to kill or seriously injure C, an express or implied agreement to do so was formed between A and B during the course of the assault. The result could well be that A would be convicted of murder and B of voluntary manslaughter. Since the liability of joint principal offenders is primary in the sense that the act(s) of one are the act(s) of all, it is only the act(s) of B that are imputed to A and, therefore, *A does not reap the benefit of C's provocative acts of which he was unaware and which induced B to kill.*

Finally, there are accessories after the fact, which, though not providing assistance or encouragement in the actual commission of the ulterior crime, take affirmative steps *after* its commission to secrete one or more of the aforementioned participants, or otherwise assist them in avoiding apprehension or prosecution—while knowing or believing that they have committed the offence(s) in question. Under common law doctrine, an accessory after the fact is also liable to the same extent as a principal in the first degree. By virtue of statutes in most jurisdictions, however, an accessory after the fact is now subject to a far lesser punishment than a principal in the first degree. It is important to note that all participants to crime, other than principals in the first degree, are commonly referred to as 'secondary parties.' The *mens rea* and *actus reus* requirements for secondary parties are thoroughly discussed in Chapter 13.

There remains one final and extremely important aspect of secondary party liability to be addressed. At common law, under what is referred to as the *common purpose doctrine*, secondary parties are not only liable to the same extent as a principal(s) in the first degree for the offence(s) that were actually contemplated by the secondary parties and committed by the principal(s) 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 offence(s) actually contemplated. Thus, if D-1 and D-2 agree to commit an armed bank robbery and D-2 knows that D-1 is armed with a loaded handgun when he enters the bank, D-2 will not only be liable for the armed robbery committed by D-1 as planned, but also for any murders or assaults that D-2 contemplated might be committed by D-1 as part of the planned criminal enterprise (but not crimes committed by D-1 which D-2 did not contemplate as incidental to the armed robbery, such as a rape committed by D-1 on one of the tellers as part of a personal frolic on his part). Although there is scant authority on this point, the same principle seems to apply as between or among joint principal offenders; that is, although the act(s) of one are considered the acts of all and liability is therefore primary rather than derivative, this is only true with respect to acts which the principal offender actually contemplated might be committed by one or more of the other principal offenders as incidental to the pre-conceived criminal enterprise.

The *common purpose* doctrine denotes the situation (noted above) in which the parties to crime are acting in concert pursuant to an agreed upon or pre-conceived plan to commit one or more offences. The *common purpose doctrine* will be examined in greater depth in Chapter 13.

### 1.7.9 Transferred malice

With *mens rea* offences which require that an accused act intentionally or recklessly in bringing about a forbidden result, the common law doctrine of transferred malice (or transferred intent as it is sometimes referred to), can be an important factor. Suppose that without lawful excuse, D throws a punch intended for V, which misses and strikes V-1. Although D is clearly guilty of an attempted battery-type assault on V (the crime of attempt is discussed in Chapter 12), what, if any offence, has D committed against V-1? 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 s/he had carried out the crime as intended; that is, the law regards the *mens rea* as being transferred from the intended person or property to that which is actually harmed: *R v Newman* [1948] VLR 61 at 64; *R v Hunt* (1825) 1 Moo CC 93; 168 ER 1198; *R v Latimer* (1856) LR 17 QBD 359 at 361; *R v Bacash* [1981] VR 923 at 925, 933. In the above example, therefore, the *mens rea* for assault (an intention to make contact with V's person) would literally follow the punch that ends up hitting V-1. It is important to note, however, that the doctrine does not apply unless the accused ultimately achieves the *same* offence that s/he intended. Another way of expressing this limitation is that the doctrine is only applicable in instances where the *actus reus* of the intended offence is identical to that of the resulting offence. Thus, if the punch that missed V had instead broken a nearby window belonging to V, V-1, or any other person, the doctrine would not apply because the offence ultimately committed by D (malicious mischief) is different from the one that s/he intended (assault).

As noted above, the doctrine is also applicable where the intended offence is one that requires that an accused act recklessly in bringing about a forbidden result: P Gillies, *Criminal Law* (4th edn, 1997) 77–78. To illustrate, assume that it is a statutory offence to recklessly cause serious injury to another person without lawful excuse. Assume further that D sells his car to V with knowledge that V is unaware that the brakes are in imminent danger of failing. If V-1 then borrows the car from V and sustains serious injury when the brakes fail, D would be guilty of this statutory offence by operation of the doctrine of transferred malice. Although D contemplated that V might be injured in this manner, the *actus reus* of the same statutory offence occurred when V-1 was injured in a similar manner. For an incisive and thorough discussion of the doctrine of transferred malice, see RM Perkins and RN Boyce, *Criminal Law* (3rd edn, 1982) 921–6.

#### QUESTION

- 1.14 Should the terms 'transferred malice' and 'transferred intent' therefore be seen as misnomers in so far as they imply that the doctrine applies only in situations where the intended crime is one that requires that an accused act intentionally in bringing about a forbidden result? Why or why not?

## 1.8 Burdens of proof

In several of the case extracts contained in this book, reference is made to the distinction between the ‘legal’ and ‘evidential’ burdens of proof. The ‘legal’ burden of proof denotes 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 prosecutions, it is the Crown that carries the ‘legal’ burden with respect to each and every element of the offence(s) charged—and the identity of the accused as the perpetrator. The standard of proof by which the Crown must satisfy the judge or jury of these facts is the most stringently recognised in law: beyond reasonable doubt.

The ‘evidential’ burden of proof denotes 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 cases, the Crown bears the ‘evidential’ burden with respect to each and every element of the offence(s) charged—and the identity of the accused as the perpetrator. The test for determining whether the Crown has satisfied this burden is to ask whether the evidence, looked upon in the light most favourable to the Crown, is such that a jury (or judge) could reasonably find that these facts have been proven beyond a reasonable doubt. If the answer is ‘yes’, the burden has been discharged and the Crown’s case will be submitted to the jury (or judge in the event of a bench trial). If the answer is ‘no’, the charge(s) will be dismissed without the jury’s consideration.

When an accused is asserting a secondary defence (self-defence, for example), the situation is more complex. Since the accused is the one asserting the defence, it is s/he who bears the ‘evidential’ burden with respect to each of the constituent elements of the defence. In this particular context, the test for determining whether the accused has satisfied the burden is to ask whether the evidence, looked upon in the light most favourable to the accused, is such that a jury (or judge) could reasonably find that the Crown has failed to negate one or more of the elements of the defence beyond reasonable doubt. If the answer is ‘yes’, the burden has been met and the defence will be submitted to the jury (or judge in the event of a bench trial). If the answer is ‘no’, the defence will not be submitted to the fact-finder. If the accused meets the ‘evidential’ burden, the Crown then assumes an additional ‘legal’ burden of negating the defence beyond reasonable doubt. Because self-defence and the other secondary defences are comprised of more than one constituent element, the Crown can satisfy this burden by negating any one or more of these elements beyond reasonable doubt. Thus, while one should not underestimate the difficulty in proving or disproving any fact by such an onerous standard, the Crown’s ‘legal’ burden in this context is not as weighty as it might appear.

The foregoing discussion raises the question of whether an accused is ever saddled with a ‘legal’ burden. As a matter of common law doctrine, the answer is ‘no’, with one notable exception. When insanity and diminished responsibility defences are interposed, the accused bears both the ‘evidential’ and ‘legal’ burdens of proof. In addition, the standard of proof by which these burdens must be discharged differs significantly from the ones noted above. To satisfy the ‘evidential’ burden in this context, the accused must persuade the court that the evidence, looked upon in the light most favourable to the accused, is such that a fact-finder could reasonably find, *on the balance of probabilities*, that the constituent elements of the defence

have been proven. If the accused is able to meet this burden, s/he then bears the ‘legal’ burden of persuading the fact-finder, on the balance of probabilities, that the elements of these defences have been proven to its satisfaction.

It should be kept in mind that the allocation of ‘legal’ and ‘evidential’ burdens—as well as the applicable standards of proof—can be altered at any time and in any manner that Parliament wishes. As a general rule, however, the burdens and standards of proof set forth in this section will apply in the absence of a clear legislative intention to the contrary.

## REVIEW QUESTIONS

- 1 What is meant by the term *corpus delicti*?
- 2 How does the term *corpus delicti* differ, if at all, from what are termed as the constituent elements of a crime?
- 3 What is meant by the term *mens rea*?
- 4 How many types of types of *mens reas* are recognised in the criminal law?
- 5 Do some crimes have more than one *mens rea* requirement?
- 6 Do all crimes have a *mens rea* requirement?
- 7 If a crime is defined in such a manner that it requires proof of neither a *mens rea* nor criminal negligence, what term is used to describe such an offence?
- 8 What is the difference between a primary (denial) and secondary (affirmative) defence?
- 9 Are there any secondary (affirmative) defences available to crimes of strict liability? If so, what factors must be proved to successfully interpose such a defence or defences?
- 10 If a strict liability crime is defined in such a manner that no secondary defence is available, what term is used to describe such an offence?
- 11 What is meant by the *actus reus* of a crime?
- 12 Do all crimes have an *actus reus* component?
- 13 Can corporations incur criminal liability?
- 14 At common law, how old must a child be in order to incur criminal liability?
- 15 What is meant by the doctrine of temporal coincidence?
- 16 Is it necessary to prove temporal coincidence with every type of crime?
- 17 What is meant by the doctrine of transferred malice?
- 18 What is meant by the term principal in the first degree?
- 19 How does a principal in the first degree differ from a principal in the second degree or an accessory before the fact?
- 20 In practical terms, why is it rare for someone to act as a principal in the second degree?

- 21 Can principals in the second degree or accessories before the fact be held criminally liable for a crime that is more serious than the crime(s) committed by the principal in the first degree? Why, or why not?
- 22 Can one joint principal in the first degree be liable for a more serious offence than another joint principal in the first degree? If so, under what circumstances, and why?
- 23 What is the difference between the 'legal' and 'evidential' burdens of proof?
- 24 In criminal prosecutions, who bears the legal burden of proof on all matters with the exception of the defences of insanity or diminished capacity?
- 25 In criminal prosecutions, who bears the evidential burden, and on what issues?
- 26 If the defence satisfies the evidential burden on the elements of a secondary (affirmative) defence, who then bears the legal burden on these elements? What is the test for determining whether the defence has satisfied the evidential burden in raising a secondary (affirmative) defence, other than one of diminished capacity or insanity?
- 27 Assume that there is a statutory offence which provides: 'A person who operates a motor vehicle on a public highway in excess of the prescribed speed limit is guilty of a summary offence, punishable by ...' Your client, John, has been issued a summons and charge sheet alleging that he exceeded the speed limit by 10 km. John advises you that although he doesn't doubt the allegation, he did so inadvertently because he was engaged in a heated conversation with a passenger in his car at the time. John asks you whether a person can be convicted of this offence despite being unaware that s/he was driving in excess of the prescribed speed limit. How would you advise him?
- 28 Tom, Dick, and Harry are mates and heroin addicts. In order to support their habit, they devise a plan to rob a local ANZ bank. According to the plan, Tom will loan his car to Dick who will drive to a parking lot just outside the bank with Harry, who will be armed with a fully loaded .38 calibre handgun. Although the plan is for Dick to wait in the getaway car with the motor running while Harry enters the bank to procure over \$10,000 from a cashier at gunpoint, both Tom and Dick have implored Harry to refrain from harming anyone. Although Harry assents to their request, the cashier sets off a silent alarm during the robbery and Harry is forced to confront police in order to effect his exit from the bank. During an exchange of fire with two police officers, a shot fired by one of the officers goes astray and kills one of the bank's patrons. When several more police arrive on the scene, Harry decides to surrender.
- Dick hears the gunshots and decides to flee before he too is detected and confronted by police. While driving back to Tom's home for refuge, Dick is feeling a bit depressed about the ill-fated attempt to rob the bank. Dick decides that burning down a local primary school might lift his spirits. Because Dick has a child who attends the school, he knows that the school is on mid-semester break and, therefore, assumes it is uninhabited. Unbeknown to Dick, a security guard is on duty, but has fallen asleep on the job. Dick sets the school alight with petrol and a match and the security guard dies of smoke inhalation before he can be rescued by the fire brigade.
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