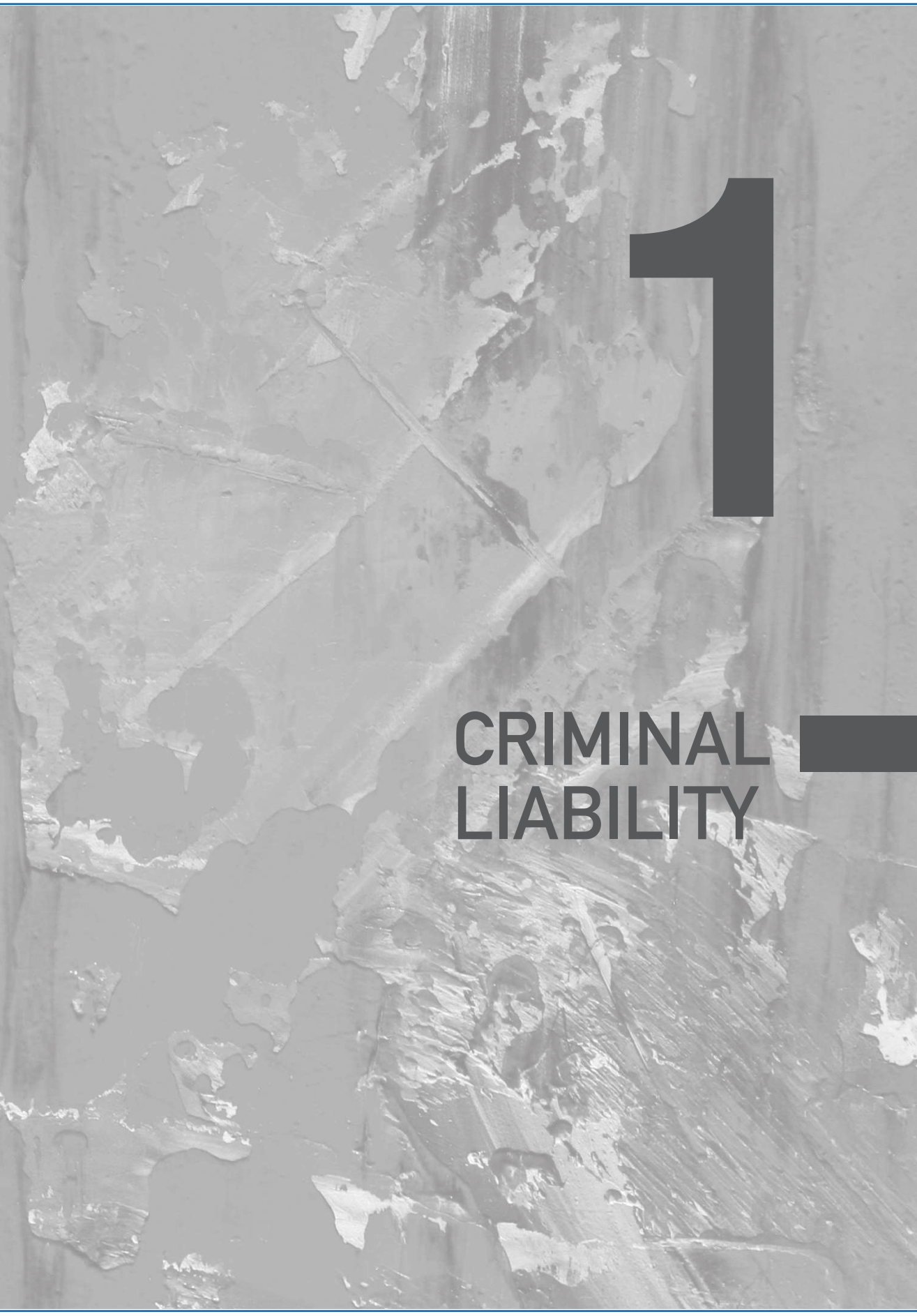

1 CRIMINAL LIABILITY

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1.1 Introduction

The criminal law comprises a state response to wrongdoing on the part of the population, proscribing conduct that lies outside of the normal expected conduct of citizens. As such, the criminal law seeks to regulate socially transgressive or unacceptable (criminal) behaviour.

The criminal law spans a wide range of deviant behaviours, from violent and sexual offences against the person (such as murder, assault and rape), to property offences (criminal damage, and offences of dishonesty such as theft and fraud), to those which cause minor disruption to society (public order offences and minor drug and driving offences) or threaten national security (treason, sedition and terrorism offences). In addition, an attempt to commit a criminal act may be an offence in itself, as may assisting others to commit offences or associating with known criminals or proscribed organisations.

In providing a framework of rules to address these behaviours, the criminal law actually comprises two discrete branches: *substantive criminal law* and *procedural criminal law*. The substantive criminal law is the body of rules that determine whether a person has done something that amounts to a crime. It provides definitions of criminal offences and a maximum penalty that might be applied to a person who is found guilty of that offence. Procedural criminal law regulates the means by which these laws are enforced. The majority of this book is concerned primarily with the substantive criminal law, but it is often impossible to gain a worthwhile or realistic understanding of this without consideration of some aspects of criminal procedure. Despite being conceptually discrete, substantive law and procedural law overlap and are bound together. They are in many ways mutually inextricable.

This chapter is divided into two main sections. Section 1.2 looks at the nature of the criminal law; its purposes, limits and sources. This part examines a number of important issues, such as the purposes of the criminal law, the legitimate limits on its scope and its sources. Section 1.3 examines the notion of criminal responsibility, looking at who may be held liable for a criminal offence and the principles that underlie the state's obligations in proving an offence.

1.2 Criminalisation

1.2.1 The purposes of the criminal law

The purpose of the criminal law is simultaneously straightforward and difficult to state with any degree of precision. At a basic level, it exists to describe a range of conduct that is so beyond the pale as to warrant proscription by the state, and to facilitate the identification of those who have engaged in such conduct in order that they can be punished and the incidence of that conduct lessened.

An insight into the aims of the criminal law can be gained from examining the rationales for the imposition of punishment, whether this be a term of imprisonment, a fine, community punishment (eg, community service) or some other form of sanction. Sentencing is discussed in more depth in Chapter 2, but a brief consideration of its purposes is illustrative when it comes to contemplating the reasons for the existence of the criminal law. By way of example, the 'purposes of sentencing' in New South Wales are set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW):

> **(a)** to ensure that the offender is adequately punished for the offence,
> **(b)** to prevent crime by deterring the offender and other persons from committing similar offences,
> **(c)** to protect the community from the offender,
> **(d)** to promote the rehabilitation of the offender,
> **(e)** to make the offender accountable for his or her actions,
> **(f)** to denounce the conduct of the offender,
> **(g)** to recognise the harm done to the victim of the crime and the community.

Although the provisions of other jurisdictions may not set them out in precisely the same way, the purposes listed above are a reasonable summation of the aims of punishment and sentencing. This is itself a good indicator of what the criminal law aims to achieve: retribution; deterrence; incapacitation; rehabilitation; accountability and denunciation as well as recognition of harm.

1.2.1.1 Retribution

Retribution (ensuring that the offender is adequately punished for the offence) is perhaps the most readily accepted justification for the imposition of criminal sanctions. The central idea of retribution is that people receive their 'just deserts' for engaging in criminal conduct. In other words, and in keeping with the tenet of 'an eye for an eye', the punishment should be proportionate to the crime committed. This urges that a person should be punished sufficiently for their wrongdoing, but importantly also places a limit on the punishment, in

that it should not be so harsh as to be wholly disproportionate, even where this might be said to achieve other aims (such as deterring others from committing that same offence).

1.2.1.2 Deterrence

Under this idea, a person is deterred from carrying out an action by the fact of its criminalisation and/or the fact of penalty, because of the inconvenience, unpleasant consequences of, and social stigma attached to the label of 'criminal'. Deterrence can be targeted at the offender being sentenced in order to deter that offender from reoffending (known as 'specific deterrence') or it can be aimed at the wider population (known as 'general deterrence').

1.2.1.3 Incapacitation

More serious offences are likely to bring the possibility of a sentence of imprisonment. Some offences are so serious that the offender will be sentenced to a long term of imprisonment, during which time their incarceration means that they cannot pose a threat to society. In the past, practices such as the death penalty or transportation to a penal colony sought to achieve the same ends.

1.2.1.4 Rehabilitation

The sentencing process brings with it the possibility of facilitating or coercing the offender into engaging with rehabilitative programs designed to promote the desistance from crime. This might be carried out while imprisoned or in another setting.

1.2.1.5 Accountability and denunciation

In addition to the tangible effects of a guilty verdict and the imposition of punishment, the criminal law also serves a communicative function, making the offender accountable and denouncing the criminal conduct.

1.2.1.6 Recognition of harm

Unlike the civil law (contract and tort, for example), the criminal law does not generally seek to compensate those who have been the victim of wrongdoing. Similarly, since criminal proceedings are generally brought by the state, victims are often considered to be an unvoiced party. The victim's role is likely to be formally limited to that of witness for the prosecution.[1] However, conviction and punishment for the perpetrator of a criminal offence serves to recognise the harm caused to the victim and to the wider community. The level of harm will be a relevant consideration when considering the offence that should be charged and when setting the sentence.

1.2.2 The limits of the criminal law

In setting out the range of behaviours that are prohibited, the criminal law sets negative limits to a person's liberty, but it also restrains the state, insofar as it sets out the conditions under which the state may hold its citizens criminally responsible. In principle, this means that a person

1 Both of these statements are qualified by the fact that there is the possibility of victim compensation and also the possibility of a victim of crime presenting a 'victim impact statement' to the court at the sentencing stage.

cannot be convicted of a criminal offence unless the prosecution can prove beyond reasonable doubt that the defendant has fulfilled all of the formal requirements of an offence. These are often referred to as the 'elements' of the offence (see Section 1.3.3 for a discussion of these elements). The nature and extent of criminalisation has been a topic of interest to scholars in the United Kingdom and United States for some decades, and of a more recent focus in Australia.[2]

1.2.2.1 The harm principle

One of the means used in order to delimit the legitimate scope of the criminal law is by reference to the 'harm principle'. This liberal philosophical position was most famously and influentially stated by the 19th century political philosopher, John Stuart Mill:[3]

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized 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 opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

As a guiding principle, the harm principle therefore serves as both a justification for, and limitation on, the use of the criminal law by the state when it comes to the criminalisation of harmful behaviour. The use of the state power that is the criminal law is justified in order to prevent harm to others, but it is not to be used in other situations or for other ends, and the criminal law should therefore only be used to prevent harm to others. Adherents to the harm principle are also likely to agree that the criminal law should only be used where there is no other, less coercive means by the relevant ends can be achieved (the 'parsimony principle'; see Section 1.2.2.4).

The harm principle is useful, but there are limits to its utility. One such limitation is that the level of harm caused does not tell us everything we might want to know about the culpability of the person who has caused the harm. As a general rule, it might seem justifiable to declare the killing of a person to be a harm worthy of criminal proscription. However, it is also clear that, in the context of causing another person's death, the circumstances in which this could arise can vary markedly, and this variation necessarily helps to shape the criminal law's response.

In some circumstances, the killing of another human being may amount to murder, but there are other circumstances under which it may also not amount to a criminal offence at all. For example, if a surgeon is carrying out a potentially life-saving operation to the best of their abilities and the patient suffers an adverse reaction that results in the patient's

2 Thomas Crofts & Arlie Loughnan, *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015).
3 John Stuart Mill, *On Liberty* (Longman, Green & Co, 1865), 6.

death, the surgeon is unlikely to be criminally liable for the death. Even where death is inflicted deliberately, there may be circumstances that vitiate criminal liability. For example, it is lawful to kill where it is reasonably necessary in self-defence (see also Section 1.3.4 on the place of defences in the criminal law; Chapter 7 for more on defences). Even if causing another person's death does comprise a criminal offence, the type of offence, and severity, differs widely. For instance, contrast the intentional killing of a person committed during the course of a vicious and hate-filled racist beating with that of the killing of a person by a young, inexperienced driver, momentarily distracted and therefore driving carelessly at the time when the car collided with a pedestrian. Each of these fictional incidents is likely to comprise a criminal offence, but the first is undeniably more serious than the latter. In each of the situations set out above, the result – the death of a person as a result of the actions of another – is arguably the same in each case, and yet the level of culpability is markedly different on the part of the persons who have caused the respective deaths.

Even though it may not tell us everything we need to know about the culpability of the individual defendant, offences that involve causing physical injury to others are relatively easy to justify according to the harm principle, which often maps the contours of current criminal prohibitions. For instance, homicide offences (eg, murder and manslaughter) and serious assaults clearly cause harm to another. By way of contrast, suicide and attempted suicide, which were formerly criminal offences but were decriminalised across Australia in the middle of the 20th century, do not, since they are not 'calculated to produce evil to someone else'. However, many other widely accepted offences do not satisfy the harm principle. On a strict interpretation, it is difficult to see how offences of drug possession or those relating to prostitution or incest (between consenting adults) cause harm, or indeed assisting another to commit suicide.

For instance, s 81C of the *Crimes Act 1900* (NSW) defines the offence of 'misconduct with regard to corpses' as follows:

> Any person who:
> **(a)** indecently interferes with any dead human body, or
> **(b)** improperly interferes with, or offers any indignity to, any dead human body or human remains (whether buried or not),
> shall be liable to imprisonment for two years.

Although the commission of this offence could understandably cause distress to the family and friends of the deceased should they become aware of it, it is otherwise arguably difficult to frame this offence according to harm. Bringing such an offence within the scope of the harm principle involves construing harm more broadly in order to accommodate the notion of a shared morality and the integrity of the social fabric. Almost any act can be argued to have an effect on society and thus to cause harm or not, according to one's moral and political view of the world. At this point, the harm principle becomes less useful in guiding judgments as to what should be criminalised, as it depends upon individual moral views.

1.2.2.2 Criminal law as regulator of public morality

An alternative basis on which to decide upon the appropriateness of criminal sanction focuses on whether the relevant conduct violates a shared social morality. This approach was

famously advocated by the English judge Lord Devlin,[4] and later honed by Ronald Dworkin.[5] As with the harm principle, it is easy to see that many behaviours comprising criminal offences are in violation of widely held moral values, but there are two immediately apparent problems with the idea that criminal law should be shaped by notions of wrongfulness that correlate with the moral values of society.

The first problem with equating moral and criminal wrongdoing is that the idea of a shared morality is itself a problematic notion. Although most, if not all, members of society might agree with the existence of many crimes (murder, rape, assault, theft, fraud), the consensus is unlikely to be complete. On this, it is worth noting that views on morality, even when limited to Australian society, will and do change over time; and so do criminal laws. Until relatively recently, suicide and attempted suicide remained criminal offences, and consensual male homosexual sex comprised a criminal offence in all Australian jurisdictions until 1972; it remained a criminal offence in Tasmania until 1995.

A prominent example of recent criminal law reform is in relation to euthanasia, which is treated as murder under the substantive criminal law of most jurisdictions (although often prosecuted as manslaughter or assisted suicide, or indeed left unprosecuted). Despite its legal classification as murder, many argue that euthanasia should have a place as a lawful option for people exercising their own right to self-determination, and in order to ensure that people are afforded a dignified death. Limited steps to allow this to happen lawfully have recently come into effect in Victoria, with the advent of the *Voluntary Assisted Dying Act 2017* (Vic).

A second problem with using the criminal law to regulate social morality concerns the appropriateness of criminalisation. Even insofar as a social morality can be discerned, it is clear that not all behaviours that offend against this consensus are, or should be, criminalised. Prominent examples of behaviours that are immoral but do not attract criminal liability include lying and adultery. Although there may be a broad consensus agreeing that these behaviours contravene social morality, few would argue that they should be criminalised.

1.2.2.3 The political nature of criminal law

The intimate link between the creation of criminal law via the political bodies of the state and the nature of the criminal law affects its structure, as the courts have acknowledged:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality – unless the moral code necessarily disapproves all acts prohibited by the state, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence;' for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the state to be crimes, and the only common nature they will be found to possess is that they are prohibited by the state and that those who commit them are punished.[6]

4 Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1968).
5 See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011).
6 *Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC 310, 324 (Lord Atkin).

As Lord Atkin notes, the classification of conduct as criminal depends upon a circular definition rooted in the means and purposes of its creation. Given this critique, it is unsurprising that the search for principles in the criminal law can be frustrating.

In the year 2000, the prominent criminal law academic Andrew Ashworth wrote an article in the English legal journal *Law Quarterly Review*, titled: 'Is the Criminal Law a Lost Cause?'. As the title suggests, the account is somewhat critical. Ashworth's diagnosis is almost 20 years old and applied to England and Wales, but its critique is an apposite reflection on the current state of the criminal law in the jurisdictions covered by this book. Ashworth begins his analysis by noting the exponential growth of criminal law and attributing this to politicians, pressure groups, journalists and others who 'often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern'.[7] Ashworth continues:

> Any attempt to define the criminal law in terms of its contents is destined to fail … [since it is] … not the product of any principled enquiry or consistent application of certain criteria, but largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups and so forth.[8]

Despite this, Ashworth suggests the following four key determinants of the 'principled core of the criminal law':

(1) the criminal law should be used, and only used, to censure persons for substantial wrongdoing;

(2) the criminal law should be enforced with respect for equal treatment and proportionality;

(3) persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences; and

(4) maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.[9]

1.2.2.4 Parsimony principle

In common with other, similar jurisdictions, Australian commentators have argued that there are too many criminal offences, and that the range of conduct they cover is too broad. It is suggested that, under political pressure, politicians at both state and federal level are too quick to turn to the criminal law when attempting to address a social problem.

The 'parsimony principle' dictates that the extent and use of the criminal law should not exceed that which is necessary to achieve its objectives. It is most commonly referred to in relation to sentencing decisions, where adherence to it means that a sentence passed should not exceed that which is required to meet the relevant sentencing objectives: five years' imprisonment should not be imposed where two years is sufficient; imprisonment should not be used at all where a community punishment is sufficient. The parsimony principle is also applicable to the scope of criminalisation, where adherence to it means minimum

7 Andrew Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 225.
8 Ibid, 226.
9 Ibid, 253–5.

interference by the criminal law and suggests the use of the criminal law is not necessarily advisable even where conduct causes harm and/or transgresses standards of social morality. On this, liberal moral philosopher Joel Feinberg has said:

> It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and that there is probably no other means that is equally effective at no greater cost to other values.[10]

The plurality of alternative forms of social control forms part of the backdrop to the parsimony principle. Since a basic function of the criminal law is to regulate harmful or wrongful behaviour in society, it is worth noting that there are many other structures and institutions that also seek to achieve this. For example, sporting associations, religious institutions, schools and even family and friendship groups have standards and types of sanctions that might be applied in the event of transgression of what is considered to be an acceptable form of behaviour. There are therefore numerous situations in which errant behaviour might fall under a plurality of responses. For instance, where a soccer player is engaged in serious foul play that transgresses the rules of the sport, and injures a fellow participant, it is possible that the player has committed a criminal offence, and might even find themselves arrested and prosecuted for an offence against the person (see Section 4.4.1). In addition to this, or instead, there is the possibility of in-game sanctions (receiving a red card and being 'sent off'). The player might also be subject to sanctions on the part of the club that employs the player and by the governing body (in the form of a suspension from playing and/or a monetary fine), and might be sued and have to pay damages to the injured party (under the torts of negligence or trespass to the person). The existence of these alternatives to the use of the criminal law are likely to have an effect on decisions made as to whether to prosecute.

1.2.2.5 Constructing criminal offences

The passages above have addressed the purposes and limits of the criminal law, and some of the issues that have informed this discussion will also affect the way in which particular offences are constructed, since the way criminal laws are framed depends upon the offending behaviour they seek to address and the harms they seek to ameliorate. Some offences depend upon an identifiable 'result'. For example, homicide offences such as murder and manslaughter require that the accused's conduct has caused the death of the victim. Without this result, the offence cannot be established. By contrast, the commission of other offences does not depend upon establishing the causation of harm and can be committed simply by engaging in a form of proscribed conduct. For example, the offence of rape (known as 'sexual assault' in NSW) is committed where a person engages in non-consensual sexual intercourse with another person (see Chapter 5 for coverage of sexual offences). Although there is clearly the potential for causing great harm to the victim's physical and mental health in these circumstances, the commission of the offence does not depend in the same way upon proving that harm. Because of this, these are sometimes referred to as 'conduct' rather than 'result' crimes. Many offences comprise both a conduct and a result element: the recently legislated NSW offence of assault causing death requires both an assault (conduct) and the death of the victim (result).[11]

10 Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1984), xix.
11 *Crimes Act 1900* (NSW), s 25A.

The criminal law comprises a form of rule system and, like any rules, laws can be framed in general or specific terms. The criminal law can catch a wide range of behaviours within the net of criminalisation by drafting broadly defined offences. Alternatively, offences can be defined narrowly, in order to catch highly specific forms of conduct.

Some offences, such as assault and theft (known as 'larceny' in NSW), are construed quite broadly and may form base offences for other, narrower offences, characterised by specific aggravating factors. For example, an assault may be aggravated (in other words, it may comprise a more serious offence) where the person causes harm, or uses a weapon, or where the offence is committed in company.

Other areas of the criminal law comprise standalone offences that criminalise very specific behaviour. For instance, under reg 213 of the *Road Rules 2014* (NSW), it is an offence for the driver of a vehicle to be a distance of more than three metres away from the unoccupied vehicle: while it is unlocked; while the windows are open more than two centimetres; or while the key is in the ignition. The maximum penalty for each of these offences is a fine of $2200.

One criticism of broadly drafted offence provisions is that they depend heavily on the discretionary judgment of police and other enforcement agencies. This is particularly evident when it comes to the policing of low-level public order offences. For instance, under s 9 of the *Summary Offences Act 1988* (NSW):

> **(1)** A person who:
>
> **(a)** is given a move on direction for being intoxicated and disorderly in a public place, and
>
> **(b)** at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,
>
> is guilty of an offence.
>
> Maximum penalty: 15 penalty units
>
> **(2)** For the purposes of this section, a move on direction is a direction given to a person by a police officer, under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, to leave a public place and not return for a specified period.

The maximum penalty of 15 penalty units currently amounts to a fine of $1650. Enforcement of the offence, and concomitant liability to pay the fine, clearly depends upon a high degree of discretion both in terms of making the original order and then choosing to enforce the offence. It is also liable to cause disproportionate harm to the homeless, for example.[12] These particular powers have drawn criticism;[13] others point to 'over-policing' as a significant cause of the overrepresentation of Indigenous peoples in the criminal justice system, and as a proportion of the prison population.[14]

12 In a similar vein, under s 49 of the *Summary Offences Act 1966* (Vic), begging carries a maximum penalty of 12 months' imprisonment.

13 Elyse Methven, '"A Very Expensive Lesson": Counting the Costs of Penalty Notices for Anti-social Behaviour' (2014) 26(2) *Current Issues in Criminal Justice* 249.

14 See, eg, Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).