CHAPTER 2

Defining crime

Learning outcomes

- **LO 2.1** Explain the key complexities associated with definitions of crime.
- **LO 2.2** Describe the main categories of criminal law.
- **LO 2.3** Identify problems in implementing criminal law.

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What do we mean by 'crime'? Media reports often focus on murder, armed robbery and drug trafficking, which are all serious offences under criminal law. But what about tax evasion, genocide or the poisoning of waterways through pollution? These latter behaviours are not typically found in criminal laws, yet many people see them as at least as serious as traditional crimes, and some are punishable as criminal offences. So, crime can be defined in different ways. This chapter examines some of these different approaches, from narrow dictionary and legal definitions to broader understandings of how social and political processes construct both what is and is not crime. This chapter also considers how behaviours come to be **criminalised** and **decriminalised** at various times, and the relationship between crime, harm and fairness.

What is crime?

Dictionaries are an obvious starting point in the task of defining crime. *Butterworths Concise Australian Legal Dictionary* (Butt 2004) notes that a crime is 'a wrong punishable by the state', while the *Macquarie Dictionary* (2013) defines it as:

> an act committed or an omission of duty, injurious to the public welfare, for which punishment is prescribed by law, imposed in a judicial proceeding usually brought in the name of the state
> serious violation of human law: *steeped in crime*
> any offence, esp. one of grave character
> serious wrongdoing; sin
> (colloq.) a foolish or senseless act: '*it's a crime to have to work so hard*'.

These definitions have some common elements. Using them, we could define crimes as acts or omissions that:

- cause public harm
- are forbidden by law
- are punishable by law.

Do these **dictionary-based meanings** convey the full scope of crime? One limitation is that they exclude behaviours that are harmful but not forbidden by law. For example, an expectant mother who consumes large amounts of alcohol risks inflicting serious harm on her baby via foetal alcohol syndrome, but commits no crime punishable by law in Australia. On the other hand, some behaviours arguably cause no public harm yet are forbidden and punishable. For example, assisting a person with a terminal illness to end their own life is a breach of criminal law in many jurisdictions, yet many people see it as a matter of personal morality and choice, rather than as causing public harm. When does personal choice become a crime? To add more confusion, some harms may be partially unlawful, but not criminal. Smoking tobacco, for example, is extremely harmful, but not prohibited outright. Its availability is regulated so that it can only be sold under certain conditions. Even when the law does intervene, such as to ban advertising or sales to children, offences are not regarded as crimes in the same way as assault or theft would be.

As well as being limited in scope, dictionary meanings of crime do not always acknowledge that concepts of wrongfulness and harm vary across societies and cultures, and across time. For example, adultery is still considered by many people as a serious sin, but it is no longer a crime in Australia. Domestic violence has only recently come to be considered a serious crime. Female circumcision is a required cultural practice in some societies, but in Australia it is known as female genital mutilation and is a crime.

An alternative approach is to consider how law defines crime. A classic **legal definition** notes that crime is 'acts or omissions that are prohibited under appropriate penal provisions by authority of the State' (Lord Atkin in *Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC p. 310 at 324). This statement echoes Queensland's *Criminal Code 1899*, which defines an offence as 'an act or omission which renders the person … liable to

punishment' (section 2). That is, conduct is criminal when law-makers at a particular time make it punishable as a crime (Bronitt & McSherry 2017). However, not all punishments imposed by the state relate to crimes. Many laws impose civil or regulatory penalties, for example fines or a loss of licence points for traffic offences, or bans from holding company directorships for breaches of corporations laws.

Another problem with legal definitions of crime is that they tell us that acts become criminal when the law says they are criminal, but shed little light on why or how. Why does the law criminalise some harmful acts and not others? Why does it sometimes criminalise acts that cause no public harm at all? And how does it decide which offences merit being treated as crimes and which are merely civil or regulatory wrongs?

A further criticism of legal definitions of crime is that crimes defined by law have tended to focus on **crimes of the powerless**, such as burglary and robbery, while the **crimes of the powerful**, such as corruption and pollution, are often ignored (Croall 2001, p. 49). For example, Case study 2.1 reports on a recent controversy in Australia about the ethical and legal standing of politicians' expense claims where a personal or party benefit is apparent. Is there sometimes a double standard when we consider criminal prosecutions for theft or fraud involving small amounts of money while politicians are allowed to make questionable claims or simply repay claims that are false?

CASE STUDY **2.1**

Crime, error or public service? The 2013–17 federal government expenses scandals

From 2013, the federal coalition government became embroiled in a series of scandals involving questionable past and present expense payments (Prenzler, Horne & McKean 2018). Politicians were roundly condemned in the media for bending or breaking rules to avoid paying for personal or party-related travel, or for engaging in activities funded by private benefactors wishing to influence government. The media reports represented these activities as tantamount to theft and fraud, but occurring in a grey area of law. Some 'offenders' had to repay money and some lost their ministerial positions, while one was prosecuted and convicted in a criminal court but was acquitted on appeal. The following are some of the higher profile cases of questionable conduct in the rolling scandal (Burke 2017; Prenzler, Horne & McKean 2018):

- Former Agriculture Minister Barnaby Joyce attended three football games at a cost of $4615. He received free tickets to corporate boxes but billed taxpayers for flights, accommodation and government cars.
- Former Prime Minister Tony Abbott used allowances to attend a radio host's wedding and repaid $1705 for this wedding and those of two parliamentary colleagues.
- Joyce, Foreign Minister Julie Bishop and MP Teresa Gambaro claimed more than $12000 for 'overseas study' payments when attending a wedding in India.
- Abbott was criticised for $23000 worth of taxpayer-funded trips to sporting events when he was opposition leader, including the Melbourne Cup, Bathurst V8 Supercars, Coffs Coast Cycle Challenge and Birdsville Races.

CASE STUDY 2.1

continued

- Former Attorney-General George Brandis repaid $1683 for attending a radio host's wedding, but defended his $7000 bookcase stocked with $12808 worth of books and magazines paid for by taxpayers.
- MP Don Randall repaid $5259 for a trip to Cairns. While in Cairns, Randall bought an investment property, but he claimed the main reason for the trip was to talk to a Queensland politician. For unexplained reasons, the two could not talk on the phone.
- Labor Frontbencher Tony Burke claimed $8000 for his family to travel business class on a four day holiday to Uluru.
- Burke also had to repay expenses associated with taking a chauffeured government car to a Robbie Williams concert.
- Former Health Minister Sussan Ley resigned after it was revealed she bought a $795000 investment property on the Gold Coast while on government business.
- Former Speaker of the House of Representatives Peter Slipper used taxis to tour wineries in the Canberra area at a cost of $964 to taxpayers.
- Bronwyn Bishop was forced to step down as Speaker of the House of Representatives after she spent $5227 on a chartered return flight by helicopter between Melbourne and Geelong (a two-hour round trip by road) to attend a party fundraising event.

Some criminologists (e.g. Friedrichs 2009) argue that the definition of crime should be expanded to include wider forms of harm that may not traditionally be found in criminal law. Harm-based definitions of crime have the advantage of covering a much wider range of behaviours, including specific acts such as harassment and discrimination, misuse of taxpayer funds, clear-felling of land and failing companies not paying employee entitlements. Consider workplace injuries, for which very few criminal actions are taken against negligent employers. For example, a royal commission found that explosions at Esso's Longford gas plant in Victoria in 1998, which caused two deaths, eight serious injuries and state-wide economic damage, were caused by the company's failure to properly assess hazards and to train and supervise employees (Wheelwright 2002). The company was fined $2 million for breaches of safety laws, but no criminal action was taken. Another royal commission found that the botched rollout of a federal government scheme was a direct cause of the deaths of four men from electrocution while installing roof insulation from October 2009 to February 2010 (Shergold 2015). Their employers were dealt with under workplace safety regulations, and the minister at the time was demoted, but under a harm-based definition, corporate or government neglect could be seen as criminal.

Harm-based and human rights definitions of crime are helpful because they broaden our understanding of the concept. However, they have their own problems, to do with defining harm and human rights. Like crime, understandings of rights also vary over different times and places, and the relative importance of various rights is also contested. For example, is the right to freedom of speech more important than the right to safety from terrorism? Balancing these rights in the context of the criminal offence of sedition has been

a problematic task (Australian Law Reform Commission 2006). Is reducing organised crime allegedly committed by bikies more important than people's right to freely associate, as Queensland's former *Vicious Lawless Association Disestablishment Act 2013* assumed (Jabour 2014), particularly when the law's effectiveness is doubtful (Monterosso 2018)?

From the above discussion we can see that crime is not a 'natural' phenomenon, but a social and political construction. It occurs when law-makers decide to criminalise certain behaviours and not others. This decision is influenced by a range of factors that can change over time. In Queensland, for example, until 2004 it was an offence to wear felt slippers in public at night (under laws based on those existing in 12th century England) (Townsend 2004). Laws like this were designed to deter burglary, but they are now considered irrelevant and have been repealed. New laws have been created to deal with contemporary problems, such as engaging in sexual activity while knowingly infected with the AIDS virus. Similarly, until the 1980s it was not possible in most Australian states for a man to be charged with the rape of his wife. Changing social views of the rights of women, and lobbying activity by feminist groups, forced a change to the criminal law. We return to this social and political approach later in the chapter, but turn first to an examination of the content and organisation of laws about crime, and how they work in Australian society.

Criminal law in action

Laws that create offences and punish 'wrongs' can be divided in different ways, but a three-way hierarchy of offences is common, with **criminal law**, narrowly defined, at the top:

1. criminal offences (breaches of the criminal law)
2. regulatory offences (breaches of other forms of statutory regulation, such as traffic, tax and environmental laws)
3. private or 'civil' wrongs (committed by one person against another, such as breach of contract or accidents).

As a general rule, the further one moves up this hierarchy, the more likely it is that the state will be involved and that the offender will face serious penalties like imprisonment (or the death penalty in some jurisdictions)—as opposed to fines, financial damages or the loss of a licence at the lower end. To protect the rights of accused people, the further one moves up the hierarchy, the more likely it is that the standard of 'proof' will move from 'the balance of probabilities' to 'beyond reasonable doubt'. A two-part hierarchy of criminal law violations is also used: felonies and/or indictable offences are the most serious offences, usually adjudicated before a judge and jury; and misdemeanour and/or summary offences are usually adjudicated before a magistrate (see Chapter 16).

A key feature of the criminal law in action, therefore, is that the government-run criminal justice system initiates and prosecutes the case and the offender may be at risk of a jail term. **Regulatory offences** can sometimes also lead to imprisonment but are more likely to result in civil penalties like a fine or loss of licence. Breaches are often investigated by inspectors in government regulatory agencies. However, police also hand out on-the-spot fines for

a wide range of relatively minor regulatory offences such as jaywalking, numerous traffic offences and, in some states, the possession of small amounts of illegal drugs. In most cases, no criminal conviction is recorded for these offences. Unpaid debts and accidents where no breach of the criminal law is involved (e.g. not caused by dangerous driving) are treated as private disputes dealt with in civil rather than criminal courts. The state provides the forum but is not involved as a participant. Rather than imprisonment or fines, penalties involve the payment of damages to the plaintiff (the 'victim').

Within Australia, the criminal law has developed in two separate ways. Queensland, Western Australia, Tasmania and the Northern Territory enacted **criminal codes**, based on a draft written by Sir Samuel Griffith in the 1890s. The criminal law of the other states is based on **common law**, found in a large and diverse collection of statutes and previous case decisions. The 19th century criminal codes began as part of a reformist movement to unify and simplify all aspects of criminal law in one code. However, over time, the codes have become just as dependent on case law as other jurisdictions, and the criminal codes have become just as complex. Since 1995 the Commonwealth has also had a criminal code, which was developed originally with the idea of providing a model that all states could follow, so that for the first time there would be one criminal law system for all of Australia. This has not eventuated, although there is growing harmonisation of state laws on some topics (Bronitt & McSherry 2017). Despite these differences, criminal law in the different Australian jurisdictions has many similarities, including the traditional categories of crimes:

- against property (e.g. theft, robbery, fraud)
- against the person (e.g. assault, murder, manslaughter)
- against morality (e.g. prostitution, bestiality, drug offences)
- against the state (e.g. corruption, bribery)
- against public order (e.g. unlawful assemblies, public drunkenness).

Furthermore, the processes of investigation, prosecution and adjudication of crimes in different states also have many similarities, as discussed in Chapter 14.

Trends in criminalisation

As mentioned earlier, decisions about what behaviours should be criminalised change over time. This can occur because of:

- social change (e.g. recognition of the rights of women led to the crime of rape in marriage)
- technological change (e.g. new crimes to do with computers)
- evolving morality (e.g. the legalisation of homosexual acts)
- campaigns to update and reform criminal law (e.g. provisions to deal with new circumstances such as the spread of the AIDS virus, and terrorism).

Law-makers can be slow to respond to these social changes. While not enforcing the law in such cases may seem sensible—such as wearing slippers at night (above)—sometimes non-enforcement is more problematic. For example, Australian police were strongly criticised in the 1980s for not vigorously enforcing domestic violence laws (Hatty 1989). It is often

argued that leaving the discretion to enforce or not enforce laws with police, prosecutors or other regulators can lead to unfairness, discrimination and corruption.

Calls to criminalise certain behaviours are a common reaction to perceived social problems, and there have been trends to criminalise previously lawful behaviours. Recent examples include offences of using a mobile phone while driving, 'hooning' (street drag-racing), 'chroming' (sniffing inhalants), a range of terrorist-related and organised crime–related offences (e.g. belonging to proscribed organisations) and internet offences (e.g. possessing child abuse games and 'revenge porn' laws, introduced for example in NSW in 2017). The message here is that criminal law is not set in stone but is constantly evolving. At the same time, criminal law is usually characterised by the longevity of what could be called 'core crimes', such as murder, assault, sexual assault, robbery, extortion, blackmail, kidnapping and theft. Maintaining the criminalisation of these behaviours has strong support in public opinion (Braithwaite 1989, pp. 38–43). It is with these core crimes that there seems to be the strongest overlap between legal definitions of crime and those behaviours commonly regarded as morally wrong.

Social science surveys have been used to try to gauge public opinion about the relative **seriousness of different offences**. In the 1980s, for example, in a survey by the Australian Institute of Criminology (Wilson, Walker & Mukherjee 1986, p. 2) respondents ranked hypothetical crimes in the order below, with 1 being the most serious and 13 the least serious:

1. A person stabs a victim to death.
2. A person smuggles heroin into the country for resale.
3. A factory knowingly gets rid of poisonous waste in a way that pollutes the city water supply. As a result, one person dies.
4. A worker has his leg caught in an unguarded piece of machinery because the employer knowingly failed to provide safety measures. As a result the worker loses his leg.
5. A person armed with a gun robs a bank of $5 000 during business hours. No-one is physically hurt.
6. A parent beats his child with his fists. The child is hurt and spends a few days in hospital.
7. A man beats his wife with his fists. As a result she spends a few days in hospital.
8. A person illegally receives social security cheques worth $1000.
9. A person cheats on their Commonwealth income tax return and avoids paying $5 000 in taxes.
10. A doctor cheats on claims he makes to a Commonwealth health insurance plan for patient services for an amount of $5000.
11. Two adult males willingly engage in a homosexual act in private.
12. A person breaks into a home and steals $1000 worth of household goods.
13. A person steals $5 worth of goods from a shop.

It is interesting to note that at that time crimes of the powerful such as pollution and unsafe workplaces ranked quite highly. But note how social security fraud for $1000 was considered worse than tax evasion or medical fraud worth $5000!

Criminal law has enormous variability. It can be an instrument of great public good: to protect people's property and keep them safe from threats to their bodily integrity. But it can

also be a means by which groups control and exploit other groups or simply impose their own narrow morality on the whole community. The criminal law can be used to enforce slavery or racial segregation. It can be a means by which dictatorial regimes exercise control by making protests illegal and criminalising political activism as 'treason' or 'sedition'. This last point alerts us to the issue of the **legitimacy** of criminal law. That is, how are laws justified? Can law be legitimate without full democratic involvement in law-making? How much democracy is required for legitimacy? This issue is taken up in Chapter 14 when discussing the authority of the criminal justice system.

Controversies

There may be consensus about the core elements of criminal law, but conflict occurs around diverse aspects of criminalisation. The following section briefly examines some key issues to demonstrate types of disagreements and contradictions that occur.

Truth in sentencing

Criminal law goes hand-in-glove with the assignment of penalties. Chapter 1 referred to the way the media frequently portrays the criminal courts as being soft on crime. Courts usually have a range of **sentencing** options that can leave victims and the public dismayed at what appear to be 'punishments' that 'let criminals off with a slap on the wrist'. For example, a sentence of two years imprisonment may entail parole (conditional release) that sees real jail time reduced by half (in some states). Imprisonment can also be suspended, subject to the convicted person not reoffending (i.e. not caught and convicted). Judges may also impose several sentences for different crimes, then order that they be served concurrently. Case studies 2.2 to 2.5 provide examples of adverse media reporting of these types of sentences.

CASE STUDY 2.2

Concurrent sentences

In 1996, [an offender 'Jo'] took part in a riot in Canberra. He had a long criminal history, including a jail term for assaulting police. 'Jo' took a place at the front of a crowd of people that charged into a line of police outside Old Parliament House. He taunted police, 'inviting them to spar', and punched a male officer in the face while the officer's arms were locked into a police human chain. When Constable Rachel Benthien was pulled out of the police line, 'Jo' kicked her repeatedly in the head, stomach and chest. Constable Sue King went to Benthien's aid, but 'Jo' also kicked her in the stomach. Benthien was seriously injured with three fractured ribs, a bruised liver and bruised kidney. 'Jo' was convicted of assault and sentenced by Magistrate Peter Dingwell, who said he wanted the punishment to 'reflect the seriousness of the offence'. He gave 'Jo' 12 months for assaulting Benthien, six months for the assault on the male officer and four months for the assault on King–'to be served concurrently' (Whittington 1997, p. 13).

CASE STUDY 2.3

Suspended sentence

In 2012, in Queensland, a 17-year-old driver on a provisional licence knocked down and killed a Taiwanese fruit picker aged 25 and severely injured his 30-year-old female companion (Baskin 2013). At the time of the incident, the driver was reading Google Maps on her phone and drove with one wheel on the grass verge of the road for at least 20 metres. In 2013, she was convicted of dangerous driving causing death and grievous bodily harm. She was disqualified from driving for three years and sentenced to 30 months imprisonment, 'wholly suspended'. Her barrister told the court that the incident had changed his client's life. Nonetheless, prior to sentencing and five months after ploughing into the two pedestrians, she had been fined for again reading Google Maps while driving. She also had a previous offence for leaving the scene of a crash.

CASE STUDY 2.4

Parole, suspended sentences, no conviction recorded

A 2013 report by Queensland's *Sunday Mail* on alleged light sentences for assaults on police included the following cases (Kyriacou 2013):

- A man was given parole after pleading guilty to eight offences including seriously assaulting a police officer. The offender had been jailed on 11 previous occasions, including for rape.
- A female officer had been trying to assist a drunken man when he pushed her down a flight of stairs and urinated on her. The offender was given a $550 fine and a three-month jail sentence suspended for 12 months.
- A male officer was attempting to assist a drunken woman when she kneed him in the face, breaking his nose. She was ordered to pay $750 in compensation to the officer and given a four-month suspended sentence.
- A British engineer was given a $350 fine after punching a female police officer in the back. No conviction was recorded because of concerns that a conviction would prevent him obtaining Australia residency.

CASE STUDY 2.5

When a life sentence does not mean 'life'

In Western Australia an online petition was launched in 2018 opposing the release of Dante Arthurs, who was convicted of killing eight-year-old Sofia Rodriguez-Urrutia Shu in a shopping centre toilet in 2006 in extremely violent circumstances (Campbell 2018). Arthurs was given a life sentence in 2007 but with a non-parole period of 13 years. The online petition received 25 000 signatures within the first 48 hours. Sofia's family also expressed concern that the law provided for a review opportunity every three years following the non-parole period. This meant they might have to 'relive the ordeal every three years' (p. 1).

It is important to note that sentencing decisions are made by courts according to rules set out in legislation. Queensland's *Penalties and Sentences Act 1992*, for example, sets out (in section 9(1)) the purposes for which punishment may be imposed. In summary form these are:

- punishment
- rehabilitation
- deterrence
- denunciation of the conduct involved
- protection of the community
- a combination of these objectives.

These objectives are assessed in the light of the particular circumstances of the offence, the offender and victim, and sometimes one factor will outweigh the others. For example, with younger offenders, the prospects of rehabilitation may be seen as more important than punishment, whereas with the perpetrators of particularly vicious sexual or violent assaults, community protection may be a more important objective. The Act sets out a long list of factors to guide courts in this assessment, including the seriousness of the offence and the harm done, the age and intellectual capacity of the offender, their previous criminal history and their willingness to participate in counselling or other rehabilitation (section 9(2)). In several Australian states Sentencing Advisory Councils now provide data, reports and research on what kinds of sentences are actually being imposed by courts (see, for example, the Queensland Sentencing Advisory Council website listed at the end of this chapter).

Advocates of **discretionary sentencing**—where judges have some choice about the penalty—argue that sentencing needs to take account of individual circumstances and serve the various purposes described above. Conditional release (which is granted by corrections authorities and not by the sentencing court), for example, means serious offenders are supervised when returned to the community, and those on suspended sentences are deterred from reoffending by the threat of serving the original sentence plus the new penalty. However, critics argue it results in reduced deterrence, and increased victim and community dissatisfaction. In the 1990s, several states adopted 'truth in sentencing', which limited or removed early release options. Western Australia and the Northern Territory went further by introducing **mandatory sentencing**, where sentences were fixed for different offences. The Northern Territory has since removed this requirement, after cases where people had to be jailed for stealing a biscuit (Northern Territory Crime Prevention Office 2003).

Matching enforcement to harm

This chapter referred earlier to the harm perspective on criminal law and the rating of offences by seriousness. Harm is a key criterion in the application of the ultimate punishment of death. In 2005, for example, 25-year-old Australian citizen Tuong van Nguyen was executed in Singapore for attempting to smuggle just under 400 grams of heroin into Australia. His crime divided opinion in Australia, where the penalty may have been in the order of a minimum of four years in prison (Lasry 2005). One view was that van Nguyen was 'an

educated, industrious young man, with no criminal record [who] foolishly agreed to act as a "mule" for a drug syndicate, in a misguided attempt to drag his brother free of debt' (Editorial 2005). Journalist Andrew Bolt (2005) expressed the opposing view:

> Nguyen was caught carrying enough heroin for 26 000 hits. Spot the true barbarians. Is it really Singapore, about to hang an Australian? Or is it Australia, which keeps producing such gallows fodder for Asia's executioners—criminals so greedy or stupid as to traffic in drugs?... [Singapore's] leaders say heroin kills so any of those who smuggle it deserve their own death.

Another Australian convicted overseas received a more sympathetic response from journalists. In 2004, 28-year-old Schapelle Corby was arrested at Bali's international airport at the end of a flight from Brisbane via Sydney. She was later sentenced by an Indonesian court to 20 years in jail for attempting to import 4 kilograms of marijuana. The defence argued that the prosecution was unable to prove the drugs were placed by Corby where they were found in her boogie-board bag. The bag was out of her possession for 12 hours and the case led to revelations of lax security, and drug smuggling involving baggage handlers, at Sydney Airport (*Canberra Times* 2005). Critics of the judgement also pointed to perceptions of entrenched corruption in the Indonesian legal system and wide inconsistencies in sentencing. Corby's 20 years was compared, for example, with a 15-year sentence given to the son of former President Suharto for organising a contract killing (Powell 2005).

How much harm is caused by drugs such as heroin and marijuana? The types of harm are highly variable. A major Australian study addressed this question by comparing the financial costs of 'illicit drugs' with those of tobacco and alcohol for the year 2004–05. The costs included lost productivity, hospitalisation, crime, accidents, and pain and suffering. The results are summarised in Table 2.1, showing that illicit drugs (including heroin and marijuana) made up 22.4% of costs at approximately $7 billion, with tobacco accounting for 39.0% at $12 billion. The study also looked at deaths: 15 050 persons died from tobacco compared with 3494 from alcohol and 872 from illicit drugs (Collins & Lapsley 2008, pp. 52, 56).

TABLE 2.1 **Social costs of drug abuse, 2004–05**

ALCOHOL	TOBACCO	ILLICIT DRUGS	TOTAL
$10 829m	$12 026m	$6 915m	$30 828m
35.1%	39.0%	22.4%	

Note: The total includes interaction effects.
Source: Collins, D. & Lapsley, H. 2008, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society*, Department of Health and Ageing, Canberra, p. 63.

TABLE 2.2

Estimated harms post-9/11, 2002–03 to 2012–13, Australia

	FATALITIES	INJURIES	FINANCIAL COSTS	LAW ENFORCEMENT
Terrorism	0	0	$6.3 billion	Heavy
Traffic crashes	16 348	432 695*	$196.3 billion	Light
Drugs				
Alcohol	38 434	NA	$168.5 billion	Light
Tobacco	165 550	NA	$346.3 billion	Light
Illicit drugs	9 592	NA	$90.1 billion	Heavy
Workplace 'accidents'	28 600	903 800**	$666.6 billion	Light

*Hospitalised. **Partial and full incapacity. NA: not available.
Source: Adapted from Prenzler, Manning & Bates (2015), p. 95.

Table 2.2 shows the results of a related study using Australian government reports on different measures of harm from different substances and activities. The research was prompted by the enlarged criminalisation of terror-related activities, and the enormous investment in counter-terrorism policing and intelligences services after the 9/11 War on Terror. The results show a clear inverse relationship between harm and enforcement. The researchers cautioned that the data can be read in different ways in terms of policy implications, but that they certainly support the case for a better alignment between harms, law and enforcement.

Tokenism

Criminalising behaviour is designed to stop the behaviour—in theory. A 'black letter' approach to the law operates on the assumption that this is the case, so that fighting to get a behaviour criminalised or decriminalised will be extremely important for activists with a cause. But simply prohibiting behaviour doesn't 'make it so'. An important aspect, therefore, of a criminological approach to the law will be to examine what is called 'the behaviour of law' (Black 1976). This approach questions how effective the law is in changing human behaviour, and what strategies are used—successfully or unsuccessfully—to try to enforce it. Chapter 14 shows that the very large majority of criminal offenders in Australia are never brought to justice. In fact the gap between offences and convictions is so wide that one could hardly say that the criminal law is effective. Part of the reason is that offenders are very hard to catch and their culpability is difficult to prove. In other cases, 'non-enforcement' or 'under-enforcement' may be the result of police receiving bribes (e.g. to turn a blind eye to prostitution). Other cases

may result from political compromises. The law 'on the books' may be used to appease the group that wants the activity prohibited, while the lack of enforcement may mean 'the law in action' appeases the group that wants the activity to continue. Two examples of this are euthanasia and abortion.

Voluntary euthanasia has been illegal in Australia for many decades. This is despite the fact that there is a substantial demand for euthanasia from people suffering incurable illnesses, and surveys show high levels of public support, averaging around 75%, for the right of terminally ill people in great suffering to receive assistance to die peacefully (Cartwright 2017). The Victorian government responded to public demand and introduced enabling legislation in 2017, due to come into force in 2019 (Towell 2017). In 1996, the Northern Territory government also legalised euthanasia. However, in 1997 members of a group of conservative Christian politicians (the Lyons Forum) initiated a Bill in federal parliament that led to the Northern Territory legislation being over-ruled, ensuring that euthanasia remained illegal throughout Australia until the Victorian decision. A private member's Bill introduced to the Australian Senate in 2018 sought to restore the right to legalise euthanasia to the Northern Territory and Australian Capital Territory governments (O'Toole & Smith 2018), but it was defeated in a close vote (Karp 2018). Despite its current illegality, there are indicators that doctors at times engage in interventions to hasten death that could technically be considered illegal and place them at risk of prosecution (Douglas et al. 2001; Komesaroff & Charles 2015; Neil et al. 2007). Case study 2.6 discusses some issues surrounding a high-profile euthanasia case in Queensland that led to a change in the law.

CASE STUDY
2.6

Law, life and death

In March 2002, Queensland resident Nancy Crick announced she intended ending her own life. She had been suffering from chronic illnesses for some time. She invited supporters of euthanasia to be present as witnesses, and to protest against the criminalisation of euthanasia. Twenty-one people were present when she took an overdose of barbiturates. Her death was investigated by police to ascertain whether anyone present had actively assisted her suicide, rather than simply being there out of companionship and support. Such assistance could have been prosecuted under section 311 of the *Criminal Code 1899* (Qld). After nearly two years, police announced that no charges would be brought. A year after Nancy Crick's death, a law was passed in Queensland enshrining the 'double effect' of administering drugs to seriously ill patients (*Criminal Code (Palliative Care) Amendment Act 2003* (Qld)). While it is illegal to give a person drugs with the intention of hastening their death, the same drugs can be given to the same person for palliative care (to relieve pain and distress) even if it is known that their likely outcome will be the person's death. So it is a crime to give a dying person drugs to hasten their death, but not to give them the same drugs for pain relief even while knowing they will also cause death (Horrigan 2003).

Extract from *Adventures in Law and Justice* by Bryan Horrigan with permission of UNSW Press.

The topic of abortion law enforcement followed a similar pattern of criminalisation and covert practice as occurred with euthanasia. The common legal issues around abortion are summarised below using Queensland law as an example.

1. Up until late 2018, sections 224–226 of the *Criminal Code 1899* prohibited abortion, with a penalty of up to 14 years imprisonment.
2. Section 282 of the *Criminal Code 1899* provided a defence where the procedure was performed to preserve the life of the mother.
3. The long-term criminalisation of abortion was largely the result of conservative religious and moral influences on the ruling political parties.
4. More than 80% of Queenslanders believe abortion should be a decision between a woman and her doctor (Carr 2017; Public Health Association of Australia 2005).
5. Estimates put the number of abortions each year in Queensland between 10000 and 14000 (Children by Choice 2018).
6. These abortions occurred because courts liberally interpreted section 282 as allowing abortion to protect either the physical or mental wellbeing of the mother (Drabsch 2005).
7. Abortion by choice was therefore technically illegal but very common.

In 2010 a young Queensland couple faced trial, with the woman charged with procuring her own abortion (the first time a woman had ever been charged under the 111-year-old section 225 of the *Criminal Code*) and the male with supplying her with the means to do so (drugs he imported via the Internet). Both were acquitted by a jury, despite admitting the facts of the offences (Carlisle 2010). In 2018, the Queensland Premier released a report from the Queensland Law Reform Commission (2018) reviewing abortion laws and recommending reforms. Subsequently, the state parliament supported a change to remove abortion from the *Criminal Code*, after 119 years, and allow abortion through a consultative process between a woman and medical practitioner, up to the twenty-second week of pregnancy (Smee 2018). The vote was 50 in favour, 41 against.

Prosecuting war crimes

War crimes present another ongoing issue for the law in action. The first systematic application of war crimes laws occurred after World War II, when many Nazis were convicted of horrific crimes. More recently, the world has seen major efforts undertaken to capture and try those accused of genocide and related crimes against humanity, particularly in the wars in the former Yugoslavia, Kosovo and Sierra Leone (see Chapter 9). The prosecution of Nazis and their accomplices was carried out at the Nuremberg Trials by a special International Military Tribunal. The Tribunal was authorised to apply three categories of crimes: 'crimes against peace, war crimes and crimes against humanity'. War crimes were defined as:

> violations of the laws or customs of war. Such violations shall include, but not be limited to … murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. (*Charter of the International Military Tribunal* 1945)

The application of these laws was focused on the instigators of atrocities and was limited to those on the losing side of the war. However, a number of actions by the victors have also been labelled as war crimes, although no prosecutions ensued. The firebombing of the German city of Dresden near the end of the war is one example. Case study 2.7 summarises this event.

CASE STUDY
2.7

Was winston churchill a war criminal?

In 1945, near the end of World War II, British and US air forces launched a two-day bombing attack on the German city of Dresden. Large residential areas and historic cultural precincts were destroyed in the inferno. The attack is estimated to have killed more than 25 000 people; most of them were non-combatants, including many refugees. The reasons given for the attack were to destroy factories producing weapons components and destroy the rail system used for troop deployments to the Russian front. But the destruction went far beyond these targets as a result of the blanket deployment of incendiary devices. Evidence suggests that revenge and demonstrations of power were major motivations behind the planning. British Prime Minister Winston Churchill authorised the attacks, but wrote soon after: 'I feel the need for more precise concentration upon military objectives such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction.' A number of commentators later described the attack as 'a war crime'. (Addison & Crang 2006, <www.nationalarchives.gov.uk/education/heroesvillains/g1/cs3/g1cs3s3a.htm>)

Conclusion

This chapter has not provided a single definition of crime but argued in favour of a broad and flexible usage of the term. Criminology is interested in all aspects of law-making and law enforcement. What counts as 'criminal' inevitably involves political and social processes, disagreement and conflict. This was illustrated in case studies that highlighted contradictions and issues in the formation and application of criminal law. A questioning attitude towards the law is always appropriate.

Key terms

common law
crimes of the powerless/powerful
criminal codes
criminalised
criminal law
decriminalised
dictionary-based meanings of crime
discretionary sentencing
harm-based and human rights definitions of crime
legal definition of crime
legitimacy
mandatory sentencing
regulatory offences
sentencing
seriousness of different offences

Questions

1 What are the differences and similarities between criminal, regulatory and civil law?

2 Why are 'the law in the books' and 'the law in practice' often different?

3 What are your views on discretionary and mandatory sentencing? Make reference in your answer to Case studies 2.2 to 2.5.

4 Are people who engage in disruptive forms of environmental protest criminals or heroes?

5 Should there be clear offences and penalties associated with the types of questionable expense claims made by politicians in Case study 2.1?

6 Imagine Schapelle Corby was clearly guilty of attempting to smuggle 4 kilograms of cannabis into Indonesia. What do you think would have been an appropriate penalty? Why?

7 Should the manufacture, supply and use of tobacco be criminalised?

8 Should giving a person drugs to hasten their death be a crime, when giving the same drugs for pain relief, knowing they will hasten death, is not? Why/why not? Refer to Case study 2.6 in your answer.

9 Should those responsible for ordering the firebombing of Dresden have been charged with war crimes (see Case study 2.7)? Can you think of any modern parallels with this issue?

Recommended readings

Findlay, Odgers & Yeo's (2014) *Australian Criminal Justice* is a good analysis of criminal law in theory and practice.

Bronitt & McSherry's (2017) *Principles of Criminal Law* is one of the most comprehensive Australian sources for criminal law.

Websites

These sites contain links to reports, research and data on sentencing laws and practices:

Queensland Sentencing Advisory Council <www.sentencingcouncil.qld.gov.au>

Sentencing Advisory Council, Victoria <www.sentencingcouncil.vic.gov.au>

References

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Baskin, B. 2013, 'Driver off the hook', *Courier Mail*, 19 November, p. 2.

Black, D. 1976, *The Behavior of Law*, Academic Press, New York.