CHAPTER 1

WHAT IS CRIME AND CRIMINAL LAW?

COVERED IN THIS CHAPTER

In this chapter, you will learn about:

- the nature of criminal law
- different perspectives on the meaning of 'crime'
- the main sources of Australian criminal law
- 'code' and 'common law' criminal jurisdictions in Australia
- the parties to a criminal case
- geographical nexus—what criminal laws apply and where they apply
- criminal law's two branches—substantive and procedural
- the Model Criminal Code.

STATUTES TO REMEMBER

Crimes Act 1900 (NSW)
Crimes Act 1958 (Vic)
Criminal Law Consolidation Act 1935 (SA)
Criminal Code Act 1995 (Cth)

INTRODUCTION

Welcome to the study of criminal law! It is, at times, confronting, but ultimately enlightening and fascinating in its relevance to everyday human activity.

But, first, what is 'criminal law'? The answer is inextricably linked to an understanding of the nature of 'crime' and why certain conduct is prohibited in different communities. At the outset, though, it is important for you to distinguish criminal law from criminology.

Criminology involves the study of the causes, nature and prevalence of criminal behaviour. There is an overlap of a number of disciplines in criminology, including sociology, law, psychology, history and economics, which have all contributed to the development and application of theories to explain the phenomenon of crime.

Criminal law is more difficult to define. Essentially, the criminal law involves state regulation of wrongs, proved through the criminal law process and resulting in punishment for individuals and groups who commit those wrongs. It is important to highlight the role of the state in criminal law. The state is a mixture of various

institutions—the legislature, judiciary and executive as well as police and penal institutions—comprising both elected representatives and appointed individuals capable of generating and enforcing laws, rules and regulations affecting diverse areas of human life. This definition of criminal law, although useful in a general sense, is inadequate because it does not give a clear account of the specific content of the criminal law or of the types of activities that amount to punishable wrongs. But who said answering the first question you asked would be easy?

WHAT IS CRIMINAL LAW?

Consider the following quote from novelist Henry Miller:

> The study of crime begins with the knowledge of oneself.[1]

Each one of us has intimate knowledge of ourselves as a human being and that knowledge is based on our individual lifestyle, interests, beliefs and world view. Therefore, one interpretation of Miller's claim is simply that our knowledge about our own behaviour and standards (perhaps involving a moral dimension) is where it is useful to begin the study of crime and criminal law. In a sense we impose our own standards, gained from knowledge of ourselves, on conduct to assess whether or not we consider it wrongful, and thus possibly falling into the category of 'criminal'. We have knowledge of our own character and can make some estimate of the dangers and temptations that life is likely to present to us—in this way we may begin to identify 'criminal' behaviour. That does not mean that all behaviour we individually identify as 'criminal' will be labelled that way in a legal sense, but this self-reflection does give us an initial framework for the study of criminal law and an awareness of our own preconceptions.

There are also a number of other value sources, such as religious, cultural, family, social, economic and political sources, which operate upon individuals and the community in delineating 'criminal' behaviour. These sources contribute to the framework for informed consideration of the content and application of the criminal law.

The reality is, however, that this self-generated framework based on individual and collective values is of limited utility, as certain standards of behaviour and a general sense of 'right' and 'wrong' are imposed upon us from powerful external sources. Most notably, the actions of the state in creating legislation and the decisions of courts represent the overarching sources of the criminal law. Ultimately, 'criminal' conduct is prescribed through the democratic parliamentary process and passed into laws, or emerges from the common law. These laws are enforced by executive institutions such as the police, who arrest alleged law-breakers. What follows is

a court process presided over by the judiciary where it is determined whether an individual is guilty of criminal conduct. If guilt is established, that individual will be sentenced by a judicial officer and the punishment will be administered by an executive institution, such as corrective services. This process will take place regardless of the value system of the individual and their particular view of what is criminal.

A classic legal dictionary definition of 'criminal law' is:

> The rules of statute and common law which direct that certain actions are punishable by the state.[2]

This definition may satisfy those seeking a basic understanding of criminal law, but as law students it is important for you to think more deeply and consider the central principles or values of the criminal law. Thinking deeply is challenging and underlines the difficulties of definition. Your efforts to better define and understand the criminal law will be assisted by the insightful contribution of Andrew Ashworth, Emeritus Vinerian Professor of English Law at the University of Oxford, who refers to a 'principled core of criminal law'.[3] Ashworth asserts that 'any attempt to define the criminal law in terms of its content is destined to fail … [as criminal law 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'.[4] That is, the content of the criminal law is constantly changing and no principles can be discerned to direct or limit these changes; its content is increasingly determined by political expediency. Ashworth then, in a valiant attempt to save the criminal law from becoming a lost cause because of this uncertainty in definition and lack of boundaries, advocates a principled use of the criminal law by prescribing limits for the intervention of its coercive functions, particularly punishment of those persons who break the criminal law. This is the 'principled core of the criminal law', which contains four interlinked principles:

(1) the principle that the criminal law should be used, and only used, to censure persons for substantial wrongdoing
(2) the principle that criminal laws should be enforced with respect for equal treatment and proportionality
(3) the principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences
(4) the principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.[5]

Ashworth emphasises that the core idea is that 'if a particular wrong is thought serious enough to justify the possibility of a custodial sentence, that wrong should

be treated as a crime, with fault required and proper procedural protections for defendants'.[6] In relation to minor wrongs that have been made criminal offences 'simply because the criminal courts offer themselves as a quick and cheap means of dealing with them', Ashworth puts forward the solution of creating 'a new category of "civil violation" or "administrative offence", which would certainly be non-imprisonable and would normally attract a financial penalty; procedures would be simplified but would preserve minimum rights for defendants, such as access to a criminal court'.[7] Although somewhat idealistic in a time when we have seen an increasing number of 'criminal' offences created by governments without regard to the principled core of the criminal law, it is still important to keep Ashworth's principles in mind in considering the framework of the criminal law, its changing content, the processes used to investigate alleged criminal behaviour and the sentencing of those who have been found to have committed criminal offences.

Overall, while acknowledging the difficulties of definition, it is apparent that the contemporary criminal law can be described as a collection of state-enforced prohibitions and procedures that are informed and shaped by politically and socially constructed ideas of right and wrong that are concerned with human behaviour.

BRIEF PERSPECTIVES ON THE MEANING OF 'CRIME'

Criminal law deals with wrongs labelled as crimes. In seeking to give meaning and substance to the word 'crime', consider the following six scenarios. From your present knowledge and life experience, has a crime been committed in each scenario? Why or why not?

(1) While having lunch in a restaurant, a person (A) takes a gun out of their bag and shoots a person (B) quietly eating their meal at the next table. B is killed.

(2) What if the facts in scenario 1 were changed so that A only took out the gun and shot and killed B after B had got up from his table and begun to walk towards A with a large carving knife in his raised hand?

(3) An employee (C) of a uranium processing plant dies as a result of overexposure to radiation in their working environment.

(4) A person (D) yells from the street in a loud voice directly at another person (E) sitting on the front deck of a house. In yelling at E, D repeatedly uses the expletives 'fuck' and 'cunt'.

(5) What if the facts in scenario 4 are changed so that E is inside the house? After being invited in, D enters the house and begins talking to E. During this conversation an argument develops between D and E. D then yells abuse at E, repeatedly using the expletives 'fuck' and 'cunt'.

(6) A person (F) is driving their car on a major national highway and after driving for an hour F falls asleep at the wheel. The car crosses to the incorrect side of the road and collides head-on with a car travelling in the opposite direction. F is not injured, but all occupants of the other car apart from its driver (G) are killed. G is seriously injured.

The above scenarios are a few examples designed to illustrate some of the difficulties we will encounter in seeking an absolute, or even adequate, answer to the question, 'What is crime?' during our study of the criminal law. They should prompt you to consider and reflect upon your own understanding of what amounts to a crime and the various factors that may influence the construction of crime. This includes the 'knowledge of oneself' and common sense, as well as external sources of influence that shape the criminal law. These scenarios should have prompted you to think about what actually happened—that is, what was said and/or done; how it happened; and the context in which it happened. In thinking about what was said and done it is important to consider the concepts of harm, morality and offensiveness. In considering how an incident happened, it is important to take account of the general social conscience and whether there are any justifications or excuses for the conduct involved in the incident or event. The 'public' or 'private' location of the happening is also an important factor in determining whether there has been a crime.

Keeping this in mind and turning to particular perspectives on the meaning of crime, it is initially useful to consider strictly legal perspectives. Leading British criminal law scholar Professor Glanville Williams has stated that a crime is 'a legal wrong that can be followed by criminal proceedings and which may result in punishment'.[8] In a similar vein, 'crime' is defined as 'an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers in the service of the Crown'.[9] These definitions of 'crime' focus on the legal process, and the liability of the individual to punishment, to distinguish crimes and the criminal law from torts and the civil law. They are legalistic definitions that give you a foundation for understanding what 'crime' is. However, they are not entirely adequate and it is arguable that a universally satisfactory definition is elusive. Other perspectives on crime may, however, promote deeper thought as to a more comprehensive definition.

There are many other perspectives on the meaning of crime, including historical, social, moral and human rights. It is clear that history has gradually shaped our conceptions of crime. These conceptions can become entrenched and may be difficult to change even though social conditions have changed. The influences of history in the Australian context are particularly apparent in the legacies of being a

colony of Britain. The colony received English law and imposed it on all Australians, including Indigenous peoples, ignoring the Indigenous laws preceding and coexisting alongside it. History and cultural influences provide some explanations for the content and construction of contemporary 'crime', but they cannot account for all of its features. For example, although murder, rape and theft have a long history of criminalisation, conduct amounting to adultery, homosexual acts between consenting adults and vagrancy have been decriminalised. Also, the prohibitions on the sale and use of certain drugs, and the misuse of electronic communications and computer data, are comparatively recent additions to the criminal law that cannot be explained by historical influences, particularly in relation to the use of drugs.

Another perspective taken by legal commentators has been to focus on the characteristics of crime rather than historical influences on it. The concepts of harm and offensiveness, together with the 'public/private distinction', have been identified as providing a moral dimension to efforts to explain the criminalisation of certain behaviours. There is a significant amount of harmful conduct characterised as 'crime' whether it be to the person or to property. Crimes such as assault, arson, kidnapping and robbery are clearly harmful. 'Harm', however, is also a word that is difficult to define and it cannot be categorically applied to all conduct that is labelled as a crime. It is certainly arguable that there are 'many events and incidents which cause serious harm [and which] are either not part of the criminal law or, if they could be dealt with by it, are either ignored or handled without resort to it'.[10] Similarly, immorality and offensiveness underpin the criminalisation of certain forms of conduct, particularly sexual assaults, acts of indecency and public order offences; however, neither could be described as essential conditions for criminality.[11]

A human rights approach to the meaning of 'crime' is offered by Rob White, Fiona Haines and Nicole Asquith. They argue that 'a crime occurs whenever a human right has been violated, regardless of the legality or otherwise of the action … [allowing for the inclusion of] … oppressive practices such as racism, sexism and class-based exploitation'.[12] The human rights approach also acknowledges international dimensions of crime, and draws 'attention [to] the concept of state crime … which is a substantial departure from conventional definitions of crime that focus on individual wrongdoing'.[13] Although such a meaning broadens our conception of crime, it does not reflect the contemporary reality of the criminal law. While some human rights can be protected through legal mechanisms, 'human rights are not enforceable in the same way as criminal law'.[14] Further, the creation and adaptation of laws is clearly linked to 'the political process of the legislature … the decision of the police to enforce [criminal laws] … and the reactions of members of the community—and in particular strong economic groups. In short, what we call crime is part of a larger process of social control'.[15]

Perceptions are also shaped by the portrayal of crime through the media. This is increasingly so in a technological age where the electronic media provides instantaneous news and comment on events:

> The media are important not only in shaping our definitions of crime and crime control, but also in producing legal changes and reinforcing particular types of policing strategies … they make unusual events usual events in our lives.[16]

Accordingly, there is a complex range of forces operating in society that influences the labelling of conduct as a crime. In the study of criminal law, however, it is important to keep uppermost in our minds that no matter how harmful, morally reprehensible or dangerous certain conduct is, it is not a crime in any formal legal sense unless the relevant authorities of the state have made it one.

SOURCES OF AUSTRALIAN CRIMINAL LAW

The original source of Australian criminal law arrived with the First Fleet in 1788 and was transplanted through the subsequent British settlement of the colony of New South Wales. The existing English criminal law was 'received' into the colony. William Blackstone's *Commentaries on the Laws of England*[17] stated the common law of England. The primary source of his statements of law was judicial interpretation of the law from case to case. This common law formed the basis of the criminal law in the colony and, at that time, there was limited parliamentary intervention. Indigenous Australians were regarded by the English settlers as 'nomadic', with no recognisable system of laws and society. Accordingly, there was no recognition of Aboriginal customary laws alongside English common law.

As Murray Gleeson, former Chief Justice of the High Court of Australia, observed:

> The common law of Australia was based upon the common law of England. We inherited it at the time of European settlement. The word 'common' was a reference to the rules that applied to all citizens, the laws all people had in common, as distinct from special rules and customs that applied to particular classes, such as members of the clergy, or in particular places. The rules of the common law are judge made. They were developed and refined by English, and, later, Australian courts, originally at a time when parliaments were less active in the area of law making than they are today.[18]

Since colonisation, the advent of responsible self-government and the later federation of the Australian colonies into a nation, legislation has become an important source of criminal law in the various Australian jurisdictions. Some states, namely Queensland, Western Australia and Tasmania, plus the Northern Territory, have codified the criminal law following the Criminal Code drafted in the 1890s by Sir Samuel Griffith,

the first Chief Justice of the High Court of Australia. A code is legislation that seeks to thoroughly cover the law in a particular area—that is, both the common law and statutes in that field of law. More recently, the criminal law in the Australian Capital Territory has been largely codified in the *Criminal Code 2002* (ACT), which corresponds to the Commonwealth *Criminal Code Act 1995*.[19] The criminal law in these five jurisdictions and the Commonwealth are not specifically considered in this book although reference may, at times, be made to cases where code provisions have been interpreted by the courts, including the High Court, and the decisions have direct application to what are known as the 'common law' jurisdictions.[20]

The focus of the book is on the 'common law' jurisdictions of New South Wales, Victoria and South Australia. These jurisdictions derived their criminal law from English common law and retain the common law as an important contemporary source of criminal law. The legislation pertaining to criminal law in these jurisdictions has expanded over time and there is a principal consolidated statute in each jurisdiction, namely:

- *Crimes Act 1900* (NSW)
- *Crimes Act 1958* (Vic)
- *Criminal Law Consolidation Act 1935* (SA).

Although some aspects of the British influence are still apparent today, the criminal law in the Australian common law jurisdictions largely revolves around a working knowledge of the principal criminal law statutes and common law principles, which supplement and inform the various legislative provisions. Some parts of the common law have been completely replaced by statutory provisions. Where there is a conflict between the sources of law, the statute prevails. There are also other statutes in each jurisdiction that deal with certain aspects of the criminal law, criminal procedure and sentencing; and, where necessary, these statutes are identified and discussed.

When you are thinking about the criminal law in each of the common law jurisdictions, you must consider the relevant key statutes and common law principles. For example, in New South Wales the *Crimes Act 1900* (NSW) is a principal source of criminal offences and defences; the *Criminal Procedure Act 1986* (NSW) contains comprehensive provisions as to the procedures to be followed in criminal cases in all New South Wales courts; *R v Williams* (1990) 50 A Crim R 213 and *R v Blackwell* (2011) 81 NSWLR 119 are leading cases on the meaning of 'recklessness' in criminal offences; and *Wilson v The Queen* (1992) 174 CLR 313 is the seminal case authority on the legal test for the offence of 'manslaughter by an unlawful and dangerous act'—namely, the unlawful act that causes the victim's death must be dangerous in the sense that it carries with it 'an appreciable risk of serious injury' to a person (at 333).

THE PARTIES TO A CRIMINAL CASE

In considering the common law as a principal source of the criminal law it is also important to understand the nomenclature, or system of names, for the parties to a case. The fundamental dichotomy of prosecution and defence reflects the adversarial system operating in all Australian jurisdictions. In this system the parties to an allegation of the commission of a criminal offence present their cases to an impartial arbiter who has the authority to make a decision and impose a punishment when required. Depending on the particular level of a court before which the proceedings are conducted within a jurisdiction, the prosecution and defence will be differently described, as set out in Table 1.1.

TABLE 1.1 Key terms for parties to a criminal case

TYPE OF CASE	PROSECUTION	DEFENCE
Proceedings before a magistrate	Police informant Director of Public Prosecutions (DPP)	Defendant Offender (if convicted and sentenced)
Proceedings before a judge or judge and jury	Director of Public Prosecutions (DPP) The Queen, The Crown (R)	Defendant or accused Prisoner (if convicted) Offender (if convicted and sentenced)

In criminal appeal cases, the party appealing a particular decision or outcome is known as the 'appellant' and the other party as the 'respondent'. Where an appeal is not available as of right, but an application for leave to appeal must first be determined by the court (as in applications for special leave to appeal to the High Court), the parties are the 'applicant' and the 'respondent', as illustrated in Table 1.2. A single case may progress through several different courts and it is important to be able to align the terminology used in each court with the relevant party to the case.

TABLE 1.2 Key terms for parties to a criminal appeal

PARTY LODGING APPEAL	OTHER PARTY
Appellant (right of appeal)	Respondent
Applicant (where leave of court required)	Respondent

CRIMINAL JURISDICTION AND GEOGRAPHICAL NEXUS

When you are considering the application of criminal law in Australia, you need to be aware of some important jurisdictional considerations of each state and territory—by this we mean what particular laws apply and where they apply. This is complicated by the existence of a Commonwealth criminal law, which has national coverage but is limited to certain categories of crime in accordance with the relevant constitutional heads of power. There is no power in the Commonwealth Constitution relating specifically to the criminal law so the Commonwealth parliament has created criminal laws by using its 'external affairs', 'taxation', 'import/export', and 'trade and commerce' powers under s 51 of the Constitution. Particular examples of Commonwealth criminal offences are importation of prohibited drugs, terrorism, people smuggling and various fraud offences related to taxation and social security payments. These crimes relate to particular areas of national and international regulation.

On the other hand, the criminal law of each state and territory is directed to offences against the person, including murder, non-fatal assaults and sexual assaults; property offences including stealing and frauds; drugs offences, including supply, manufacture and use of prohibited drugs; and public order offences, including offensive behaviour, property damage and prostitution. These offences must be committed with a territorial or geographical nexus with a particular state or territory.

Regarding this nexus requirement for a particular state criminal jurisdiction to apply, there are useful examples of geographical provisions in the *Crimes Act 1900* (NSW) ss 10A–10F and the *Criminal Law Consolidation Act 1935* (SA) ss 5E–5I. In New South Wales, a 'geographical nexus' must be established between the state and the offence before the courts have jurisdiction to try the offence. A 'geographical nexus' exists where 'the offence is committed wholly or partly in the State' or 'the offence is committed wholly outside the State, but the offence has an effect in the State'.[21] The South Australian legislation is similar. However, it is more elaborate and uses the phrase a 'territorial nexus', which exists if:

> **(2)** **(a)** a relevant act occurred wholly or partly in this State; or
>
> **(b)** it is not possible to establish whether any relevant acts giving rise to the alleged offence occurred within or outside this State but the alleged offence caused harm or a threat of harm in this State; or
>
> **(c)** although no relevant act occurred in this State—
>
> (i) the alleged offence caused harm or a threat of harm in this State and the relevant acts that gave rise to the alleged offence also gave rise to an offence against the law of a jurisdiction in which the relevant acts, or at least one of them, occurred; or

(ii) the alleged offence caused harm or a threat of harm in this State and the harm, or the threat, is sufficiently serious to justify the imposition of a criminal penalty under the law of this State; or

(iii) the relevant acts that gave rise to the alleged offence also gave rise to an offence against the law of a jurisdiction in which the relevant acts, or at least one of them, occurred and the alleged offender was in this State when the relevant acts, or at least one of them, occurred; or

(d) the alleged offence is a conspiracy to commit, an attempt to commit, or in some other way preparatory to the commission of another offence for which the necessary territorial nexus would exist under one or more of the above paragraphs if it (the other offence) were committed as contemplated.[22]

The effect of such territorial provisions is essentially the same across the various jurisdictions. The provisions make clear which state judicature has the authority to hear a particular case. This is important now because movement across borders has become commonplace and crimes can be carried out in a variety of forms, including by electronic and other instantaneous means.

THE TWO BRANCHES OF THE CRIMINAL LAW

The criminal law is divisible into two branches but these branches interlink and overlap, so they cannot be studied in isolation. These branches are the substantive criminal law and the procedural criminal law.

Despite the fact that, traditionally, most doctrinal analysis of criminal law has been presented by separating substantive law from criminal procedure, David Brown and his co-authors observe that:

> Law-makers must be conscious of the relationship which exists between the requirements of the substantive law and the practices used by enforcement agencies to collect and extract evidence to meet those requirements … to take substantive criminal law out of the context of the criminal process may be convenient, but it leads to a fundamentally distorted picture of the way in which criminal law operates in society.[23]

This important correlation between the substantive and procedural criminal law will be illustrated in this book, with pre-trial and trial procedures covered in Chapter 3 and the various substantive criminal offence categories examined in the following chapters. As students of the criminal law, you must be able to distinguish between substantive and procedural criminal law. But at the same time you must recognise that the evidence gathered during the police investigation of a complaint about an alleged offence will ultimately be used as the basis to establish the elements of any offence charged against a defendant. The way in which this evidence has been gathered, and whether the requirements of the procedural criminal law have been complied with, will have a direct impact on whether the prosecution can prove the elements of the offence charged, beyond reasonable doubt in a court hearing.

TABLE 1.3 The two branches of criminal law

SUBSTANTIVE	PROCEDURAL
Concerned with—legal rules and principles which identify behaviour as legally criminal *Comprises*—elements of particular criminal offences (conduct and mental) and the requirements of defences *Illustration*—the offence of murder is made up of the following elements: (1) an act or omission by a person which causes the death of another person, and (2) the act or omission causing death was done, or omitted to be done, with the intention to kill or to cause grievous bodily harm to that other person or with reckless indifference to human life.	*Concerned with*—legal rules and regulations that determine the structure and function of, and regulate the operation of, the criminal justice system *Comprises*—police powers of investigation and detention of suspects, process of bringing an alleged offender before the court, the conduct of the trial of a criminal offence, sentencing and the administration of punishment *Illustration*—a person may be arrested where there are reasonable grounds to suspect they have committed an offence. That person may be searched and anything found may be seized. The person may then be detained for a reasonable time while the police investigate the alleged crime, and the person may consent to being electronically interviewed. If a decision is made to charge the person, a Court Attendance Notice or equivalent documentation will be issued and the person may be released to bail.

THE MODEL CRIMINAL CODE

As previously noted, there is no single, uniform body of criminal law in Australia. Each state and territory has its own set of criminal laws. In addition, the Commonwealth criminal law regulates those matters within the domain of its constitutional powers. A major attempt to reform and harmonise the criminal law in Australia has been under way for some time with the development of a Model Criminal Code, designed to be adopted uniformly across all nine Australian jurisdictions. Since 1991, this project has been the ongoing work of the Model Criminal Code Officers Committee (MCCOC) established by the Standing Committee of Attorneys-General (SCAG).[24] Over time the MCCOC produced a series of reports dealing with the proposed content of the Model Criminal Code. The *Criminal Code Act 1995* (Cth) enacted part of the Model Criminal Code in the Commonwealth jurisdiction; the Commonwealth *Criminal Code* commenced operation on 1 January 1997.[25] A range of offences has subsequently been added to the Commonwealth *Criminal Code*, many of which reflect the work of the MCCOC. The Model Criminal Code has also influenced the development of the

criminal law in the Australian Capital Territory. Since 1 July 2009 all criminal offences in the Australian Capital Territory have been interpreted by reference to the *Criminal Code 2002* (ACT), which is almost exactly the same as the Model Criminal Code developed by the MCCOC.

There is little evidence to suggest that implementation of the Model Criminal Code (or any other attempt to codify the criminal law) is likely in the common law jurisdictions. In South Australia and Victoria, some parts of the criminal law have been codified, including through the adoption of some chapters of the Model Criminal Code in their respective legislation, the *Crimes Act 1958* (Vic) and the *Criminal Law Consolidation Act 1935* (SA), but there is no uniformity. In New South Wales, some provisions from the Model Criminal Code have been implemented and included in the *Crimes Act 1900* (NSW), but there have been no signs that a wholesale codification of the criminal law in New South Wales, Victoria or South Australia is being considered.[26] Nevertheless, the range of subject matter now covered by uniform or Commonwealth laws means that legal practitioners are increasingly likely to encounter the Commonwealth *Criminal Code* in advising clients charged with criminal offences.[27]

Overall, criminal law statutes in New South Wales, Victoria and South Australia remain incomplete and presuppose the continued existence of the common law. It seems that uniform Australian criminal laws are still an ideal that will not be reached in the foreseeable future because state jurisdictions cling to their power to create criminal laws to suit what are seen as their own local and specific conditions.

Important references

For more extensive coverage of the issues relating to what is crime and criminal law, the sources of Australian criminal law and the Model Criminal Code addressed in this chapter, you should consult the following textbooks.

Kenneth Arenson, Mirko Bagaric and, Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions* (4th edn, 2014) Chapter 1 'The Fundamentals of Criminal Law' 2–18.

Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (3rd edn, 2010) Chapter 1 'Theory and the Criminal Law' 3–76 and Chapter 2 'General Principles' 77–86.

David Brown, David Farrier, Luke McNamara, Alex Steel, Michael Grewcock, Julia Quilter and Melanie Schwartz, *Criminal Laws* (6th edn, 2015) Chapter 2 'Criminalisation and Penality' 46–143 and Chapter 3 'Components of Criminal Offences' 145–46.

David Caruso, Rhain Buth, Mary Heath, Ian Leader-Elliott, Patrick Leader-Elliott, Ngaire Naffine, David Plater and Kellie Toole, *South Australian Criminal Law: Review and Critique* (2014) Chapter 1 'Criminal Responsibility' 1–27.

Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (2015).

Michael Eburn, Roderick Howie and Paul Sattler, *Hayes & Eburn* Criminal *Law and Procedure in New South Wales* (4th edn, 2014) Chapter 1 'General Principles' 1–15.

Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (4th edn, 2012) Chapter 1 'What is Crime and who is the Criminal?' 3–24 and Chapter 4 'Individual Explanations for Crime' 69–95.

Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws—Critical Perspectives* (2004) Chapter 1 'Defining Criminal Laws' 3–48.

Rob White, Fiona Haines and Nicole Asquith, *Crime and Criminology* (5th edn, 2012) Chapter 1 'The Study of Crime' 1–22.

Rob White and Santina Perrone, *Crime, Criminality and Criminal Justice* (2nd edn, 2015) Introduction 'Understanding Criminal Justice' 2–10 and Chapter 1 'Doing Criminology: Measuring Crime as an Example of Criminological Research' 28–33.

ASSESSMENT PREPARATION

Active learning questions

1 Is there an absolute definition of crime?
2 How do we distinguish between criminal behaviour and behaviour that is simply socially unacceptable?
3 Is it likely that the Model Criminal Code will ever be uniformly adopted as the criminal law for all Australian jurisdictions? Why or why not?
4 What are the advantages and disadvantages of a uniform national criminal law?
5 Imagine that you are a newly admitted legal practitioner preparing an advice about a criminal matter.
   a What sources of law must you consult?
   b In what order must these sources be applied?
   c How can case law be used in formulating your advice?
   d Are interstate or international sources of law relevant?
6 Identify a criminal offence that was recently enacted in your jurisdiction.
   a What rationale or justification was offered to support the creation of this criminal offence?
   b What influences were operating, including by any specific individuals or groups, leading to the enactment of this offence?
   c What harm does this criminal offence purport to address?
   d Do you think that this criminal offence might achieve its purpose? Why/why not?
   e Do you foresee any difficulties associated with the enforcement of this criminal offence?
   f What (if anything) does the enactment of this criminal offence tell us about the development of the criminal law more broadly?

Discussion question

> A Crime, or misdemeanour, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it … The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individual; wrongs, or crime[s], are breach and violation of public rights and duties, due to the whole community … In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.[28]

Can the essence of crime be distilled in terms of injury to the wider community or is Blackstone's conception of crime in the above extract historically contingent and thus too narrowly drawn in the contemporary context? Can you imagine a society without criminal law?

There are a number of things for you to think about when answering this question relating to the nature of crime and the reach of the criminal law, which have been considered in this chapter. It is a useful platform to use for writing an essay.

Notes

1 Henry Miller, *The Air-Conditioned Nightmare* (1945) 87.
2 Peter Butt (ed), *LexisNexis Concise Australian Legal Dictionary* (4th edn, 2011) 147.
3 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' in Andrew Ashworth, *Positive Obligations in Criminal Law* (2013) 1–30.
4 Ibid 2.
5 Ibid 28–9.
6 Ibid 29.
7 Ibid 30.
8 Glanville Williams, *Textbook of Criminal Law* (2nd edn, 1983) 27.
9 Mick Woodley (ed), *Osborn's Concise Law Dictionary* (11th edn, 2009) 125.
10 Paddy Hillyard and Steve Tombs, 'Beyond Criminology?' in Paddy Hillyard, Christina Pantazis, Steve Tombs and Dave Gordon (eds), *Beyond Criminology: Taking Harm Seriously* (2004) 13.
11 See David Brown, David Farrier, Luke McNamara, Alex Steel, Michael Grewcock, Julia Quilter and Melanie Schwartz, *Criminal Laws* (6th edn, 2015) 103–10.
12 Rob White, Fiona Haines and Nicole Asquith, *Crime and Criminology* (5th edn, 2012) 5–6.
13 Ian Warren, 'What is Crime and who is the Criminal?' in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (4th edn, 2012) 13. The international dimension of criminal law is beyond the scope of this book; see generally Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (3rd edn, 2010) Chapter 15 'International and Transnational Crimes' 941–1041.
14 Warren, ibid 12. For example, anti-discrimination laws allow for some protection of human rights, but are not typically regarded as criminal laws.
15 Mark Israel, 'What is Crime?' in Andrew Goldsmith, Mark Israel and Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (3rd edn, 2006) 11.
16 White, Haines and Asquith, above n 12, 8–9.
17 See Gregory D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (2002) 7–8.
18 Murray Gleeson AC, *The Rule of Law and the Constitution* (Boyer Lectures, 2000) 6.
19 This is also known as the Model Criminal Code. See further discussion in the section headed 'The Model Criminal Code'.
20 For an overview of codification of criminal laws in Australia and critical analysis of approaches to interpretation in 'code' and 'common law' jurisdictions, see Stella Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law' (2013) 39(3) *Monash University Law Review* 838.
21 *Crimes Act 1900* (NSW) ss 10C(1) and (2). See also s 10B(3) as to interpretation of 'the place in which an offence has an effect'.
22 See *Thai v Director of Public Prosecutions (South Australia) (No 2)* (2009) 196 A Crim R 449 for a useful example of the application of the territorial nexus provisions in a case involving various counts of 'falsifying documents with intent to deceive'.
23 Brown et al., above n 11, 27.
24 The MCCOC was later renamed the Model Criminal Law Officers Committee (MCLOC), and in 2011 was replaced by the National Criminal Law Reform Committee. Also, the Standing Council on Law and Justice (SCLJ) replaced SCAG in 2011; the SCLJ was

then itself replaced by the Law, Crime and Community Safety Council in July 2014. A Model Criminal Code was released by the Parliamentary Counsel's Committee in May 2009, and is available online at <www.pcc.gov.au/uniform/crime%20(composite-2007)-website.pdf>.

25 The 'General Principles of Criminal Responsibility' set out in Chapter 2 of the Commonwealth *Criminal Code* (based on the Model Criminal Code) have applied to all Commonwealth criminal offences since 15 December 2001: see *Criminal Code* (Cth) s 2.2(2), (3).

26 For a discussion of the implementation of MCCOC reports, which to date has been piecemeal, see Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152.

27 See, for example, *Road Rules 2014* (NSW) r 10-1 regarding the application of Commonwealth *Criminal Code* Chapter 2 to offences against the *Road Rules 2014* (NSW). For a case example of the potential significance of this development, see *Police v Rankin; Police v Roberts* [2013] NSWLC 25.

28 William Blackstone, *Commentaries on the Laws of England* (1st edn, 1769) Book IV, Chapter 1, 5.