Criminal law:

- Substantive component: consists of defining and understanding the constitute elements of the various common law and statutory crimes and the defences that are available thereto.
- Procedural component: denotes the enforcement mechanism or, if you will, the process through which criminal defendants are brought to court and prosecuted for the alleged transgressions.

The fundamentals of criminal law -

Definition and justification of the criminal law:

Definition –

- No universally accepted definition of what constitutes a crimes
- Professor Glanville Williams defines a crime as *'a legal wrong that can be followed by criminal proceedings and which may result in punishment'*: G Williams, *Textbook of Criminal Law* (2nd edn, 1983) 27.
- According to this definition, the primary distinction between crimes and other legal wrongs is that the former are prosecuted through criminal as opposed to non-criminal proceedings.
- The reality is that a crime is any conduct, which the courts of legislatures choose to describe as such.
- A unique feature of criminal offences is that criminal sanctions may be imposed for their breaches.
- The prosecution of criminal offences often results in the stigmatization of the offenders and subjects them to a range of coercive measures. In contrast, civil wrongs are directed primarily at compensating the aggrieved parties and do not generally involve censure.

Justification –

- The stigmatization and punishment that are consequent upon a finding of guilt for a criminal offence require a moral justification.
- A Ashworth, *Principles of Criminal Law* (2nd edn, 1995) 16. – Notes that the criminal law is *'society's strongest form of official punishment and censure.'*
- Whereas all other areas of law are concerned with 'simply' regulating the transfer and adjustment of monetary sums, sentencing involves the intentional infliction of some type of harm, and hence infringes upon an important concern or interest such as one's liberty or reputation.
- It is a *'fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification'*: JV Barry, 'Morality and the Coercive Process' (1962 – 4) 4 Sydney Law Review 28, 29.
- In order for an act to be deserving of blame and the deliberate infliction of punishment, it must breach some type of norm or standard. – The strongest type of prohibition in our community is embodied in moral norms.
- Morality is the ultimate set of principles by which we should live and consists of the principles that dictate how serious conflict should be resolved. (M Bagaric, 'A Utilitarian Argument: laying down the foundation for a coherent system of law' (2002) 10 Otago Law Review 163.)
- Lord Coleridge's view that *'the absolute divorce of law from morality would be of fatal consequence'*: R v Dudley & Stephens (1884) 14 QBD 287.
- There are two ways that morality underpins the criminal law. First, most of the criminal offences might fit within (or be consistent with) a particular moral virtue. Alternatively, it could be argued that rules of the criminal law are explicable by reference to a general moral theory.

The principle of liberty –

- The only discrete moral principle that is potentially broad enough to account for many criminal offences is liberty.
- The right to personal liberty

Morality and the criminal law –

- Rather than focusing on a discrete moral virtue, a more promising approach is to urge that a general moral theory underpins the criminal law.
- Lord Devlin: (P Devlin, *The Enforcement of Morals* (1965).) – claimed that the purpose of the criminal law was to maintain and enforce public morality. For him there was a common morality that bonded society together, Lord Devlin's view has been fairly criticized on the basis that there is

no such thing as a common morality and, If there were, a large degree of convergence in the moral ideals of a society does not necessarily justify enforcement of such moral standards.
- Broadly, there are two types of normative moral theories.
- Consequential moral theories claim that an act is right or wrong depending on its capacity to maximise a particular virtue such as happiness.
- Non-consequential theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act.
- Assertion of rights has become the customary means to express our moral sentiments: '*there is virtually no area of public controversy in which rights are not to be found on at least one side of the question – and generally on both.'*: LW Sumner, The Moral Foundation of Rights (1987) 1.
- Only a very small portion of criminal offences seek to protect individual rights.
- Offences dealt with in the Higher Courts – County Court and the Supreme Courts – most serious offences and relate to matters such as armed robbery and sexual offences
- Magistrate's Courts – offences dealt with at this level relate to a hotchpotch of behaviour. Range from burglary and assault to travelling on a train without a ticket.
- About 85% of criminal offences never reach court.
- Consequentialism – Many consequentialist moral theories have been advanced such as egoism and utilitarianism. The most influential in moral and political discourse is hedonistic act utilitarianism. This theory provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.
- From a utilitarian perspective, the criminal law should seek to protect and enforce important human interests that are necessary for humanity to flourish.
- Every legal prohibition to some degree encroaches upon personal liberty. Personal liberty weighs very heavily on the utilitarian scales because the capacity for people to lead their lives in accordance with their own ideas is an important ingredient for happiness.
- Even if it is possible to provide a utilitarian and, therefore, a moral explanation for the bulk of our criminal laws, this is not a basis for distinguishing between the criminal and civil wrongs. At its highest, the utilitarian theory of morality provides a necessary, but not sufficient criterion for criminalizing certain behaviour. This is because the harm that is caused by breaches of the civil law is certainly no less than that occasioned by breaches of the criminal law.
- Even if it could be asserted that there is a general overlap between the criminal law and morality on the basis that most criminal offences relate to conduct which has at least the potential to cause unhappiness to either the agent or another, this does not form the basis for a coherent distinction between civil and criminal wrongs.
- Civil wrongs are generally no less harmful than the great majority of criminal offences.

<u>The purposes of criminal laws: The connection between crime and punishment –</u>

Theories of punishment:
- Punishment constitutes the 'sharp end' of the criminal law. It involves the deliberate infliction of pain on an offender by the community.
- Punishment is the study of the connection between wrongdoing and state-imposed sanctions.
- The main issue raised by the concept of punishment is the basis upon which the evils administered by the state to offenders can be justified.
- Sentencing is the system of law through which offenders are punished.
- In order to properly decide how and how much to punish, it must first be decided on what basis punishment is justified and why we are punishing.
- There are two main theories of punishment that have been advanced.
- Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer, but is ultimately justifies because this is outweighed by the good consequences stemming from it. These are traditionally thought to come in the form of incapacitation, deterrence, and rehabilitation.
- The competing theory, and the one which enjoys the most contemporary support, it retributivism.
- Retributive theories of punishment are not clearly delineated and it is difficult to isolate a common thread running through theories carrying the tag.
- All retributive theories assert that offenders deserve to suffer and that the institution of punishment should inflict the suffering they deserve.
- However, they provide vastly divergent accounts of why criminals deserve to suffer.
- Despite this, there are broadly three similarities shared by retributive theories.

• The first is that only those who are blameworthy deserve punishment and that this is the sole justification for punishment. Thus, punishment is only justified, broadly speaking, in cases of deliberate wrongdoing.
• The second is that the punishment must be equivalent to the level of the wrongdoing.
• Finally, punishing criminals is just itself: it cannot be inflicted as a means of pursuing some other aim.
- Retributive theories that do not incorporate consequentialist considerations are flawed because they lead to the unacceptable view that we should punish even if no good comes from it.

The goals of sentencing:
- There are three good consequences that flow from punishment: deterrence, incapacitation, and rehabilitation.

Deterrence:
- There are two broad forms of deterrence:
• Specific deterrence aims to discourage crime by punishing actual offenders for their transgression, thereby convincing them that 'crime does not pay'.
• General deterrence seeks to dissuade potential offenders from engaging in unlawful conduct by illustrating the unsavoury consequences of offending.
- Available empirical evidence suggests that deterrence is achievable through criminal punishment, but only in a very narrow form.
- Offenders may not re-offend for numerous reasons, apart from the fear of being subject to additional punishment. The offending may have been a 'one off' event, a suitable opportunity may not again present itself, rehabilitation may have occurred, or the offender may get a job.
- The available evidence supports the view that severe punishment (namely imprisonment) does not deter offenders; the recidivism rate of offenders does not vary significantly regardless of the form of punishment or treatment to which they are subjected.
- When analysing the evidence concerning the efficacy of punishment to achieve general deterrence, there are broadly two different levels of inquiry:
• Marginal deterrence concerns whether there is a direct correlation between the severity of the sanction and the prevalence of an offence.
• Absolute deterrence relates to the threshold question of whether there is any connection between criminal sanctions and criminal conduct.
- There is no firm evidence to suggest that increasing penalty levels results in a reduction in the crime.
- The evidence relating to absolute deterrence, however, is much more positive. There have been several natural social experiments, which have shown a drastic reduction in the likelihood (perceived or real) that people would be punished for criminal behaviour.
- Although deterrence is effective, the evidence suggests that this is not only true in the limited sense, specifically that there is a direct connection between crime rates and some penalty; a correlation between high penalties and a reduction in the crime rate has not yet been found.
- This means that while general deterrence justifies punishing offenders, it is of little relevance in fixing the amount or type of punishment.

Incapacitation:
- Incapacitation involves rendering an offender incapable of committing further offences.
- Apart from capital punishment, no sanction can ever hope to totally prevent offenders from re-offending
- All sanctions involve some degree of supervision or interference with the freedom of the offender; for example, probation, license cancellation orders, and community work orders, somewhat limit the opportunity for further offending.
- Prison is the sentencing option that most effectively prevents re-offending.
- Incapacitation is a means of protecting the community rather than an ends of punishment and sentencing.
- In order for incapacitative sentences to actually protect the community, it must be the case that the offenders who are subject to such sanctions would have offended if they had not been restrained.
- The existing evidence suggests that we cannot distinguish with any meaningful degree of confidence between offenders who will re-offend and those who will not.

- Studies have shown that in predicting dangerousness, psychiatrists are wrong most of the time.
- The fact that a person has previously committed a serious offence is a particularly poor guide to identifying future serious offenders.
- Our ability to predict which offenders are likely to re-offend is so poor that it has been estimated that the increase in crime rate if prison use was reduced or abolished could be as low as five per cent.

Rehabilitation:
- Rehabilitation, like specific deterrence, aims to discourage the commission of future offences by the offender. The difference between the two lies in the means used to encourage desistence from crime.
- Rehabilitation seeks to alter the values of the offender so that s/he no longer desires to commit criminal acts.
- It involves the renunciation of wrongdoing by the offender and his or her re-establishment as an honourable law abiding citizen, and is achieved by reducing or eliminating the factors that contributed to the conduct for which the offender is sentenced.
- Thus, it works through a process of internal attitudinal reform, whereas specific deterrence seeks to dissuade crime simply by making the offender afraid of again being apprehended and punished.
- Some attempt to deal with the perceived underlying cause of criminality by providing drug and alcohol programs, or anger management courses.
- Newly developed cognitive-behavioural programs encourage offenders to think before acting and also consider the consequences of their actions.
- These programs target factors that are presumably changeable, and are directed at the 'crimineogenic needs' of offenders; that is, they are directed at those factors which are directly related to the offending, such as antisocial attitudes, self control, and problem-solving skills.
- There is some evidence that it will work for a small portion of offenders and that there is no firm evidence that it cannot work for the majority of offenders.
- The more fundamental problem with invoking rehabilitation as an objective of punishment is that rehabilitation and punishment may be inconsistent.
- Punishment by its very nature must cause pain. There seems to be an inherent contradiction between deliberately subjecting one to pain an, at the same time, attempting to get the offender to see things your way.
- The more tolerant, understanding and educative we are in trying to facilitate attitudinal change in others, the closer we come to provide them with a social service.
- Many rehabilitative 'sanctions' cannot be 'imposed' without the consent of the offender.
- In order for the goal of rehabilitation to justify punishment, at the minimum, it must be shown that reform is attainable in a setting that is primarily directed at imposing unpleasantness on the offender. There is no evidence in support of this.
- It follows that the only objective punishment which empirical evidence has shown is attainable through a system of state-imposed sanctions is (absolute) general deterrence.
- How many years of imprisonment correlate to the pain endured by a rape victim? The main difficulty here is that the two currencies are different.
- It has been suggested that the amount of unhappiness caused by the punishment should be commensurate with the seriousness of the offence.

Sources of criminal law:
- The law of Australia is derived from the law of England.
- English law was, and to a large extent remains, in the form of the common law.
- It was the judiciary, therefore, that was largely responsible for the construction of the basic principles and doctrines, including the enunciation of many crimes.
- When the English came to Australia and annexed it to the British empire, they brought with them the common law of England.
- The common law of England governed Australia, although the particular details were varied as appropriate to the then infant penal colony.
- Throughout and since the nineteenth century, the various Parliaments of England and Australia have taken an increasingly interventionist role in the creation of the law, the statutory law took two forms: the statutes were either restatements of the law in line with the basic structures of common