1. FUNDAMENTALS OF CRIMINAL LAW:

1. Introduction

We will examine:

- What is a crime
  - Purpose sought to be achieved by imposing criminal liability on persons or corporations- Ch1, p11 read on own: Deterrance, Retribution (or Incapacitation) and Rehabilitation.
- What elements do crimes have in common
- What is mens rea and actus rea of a crime
- What is strict and absolute liability
- What defences are available to an accused
- What is the difference between the evidential and legal burdens of proof and which party bears the onus of discharging these burdens.
- Note Subjective vs Objective

Definition of a Crime

- A crime is generally defined as conduct that is forbidden by law and which can be followed by criminal prosecution.

2. Sources of Criminal Law

Victoria –Common Law jurisdiction.

- In Vic- main criminal law statutory provisions are contained in the Crimes Act 1958(Vic). These provisions are largely interpreted by referring to common law principles.
- Constitutionally, Criminal Law is a generally matter for the states but there is federal criminal jurisdiction created by the Commonwealth Parliament

3. Criminal Capacity

- Assumption is that everyone is capable of committing crimes and being held criminally responsible for those crimes with a number of exceptions.

  1. Children

Under 127 prosecutors must not only prove all the elements of a crime, but must also prove that at the time of committing the offence the accused knew that the action was wrong.

Corporations can incur criminal liability.

4. Classification of Crimes

Summary Offences Or Indictable Offences.

Summary Offence- Less serious than indictable offences.
  - Example- traffic infringements, offensive behaviour, property damage
  - Determined by a hearing not a trial.

Indictable Offence- more serious offence.
  - Example: Murder, Rape, Drug Trafficking, Offences and Burglary
  - Can be tried summarily depending on the offence classification.

Offences i) Against The Person and ii) Offences Against Property

1) Offences Against the Person: Eg: Unlawful homicide, CL and Statutory Assaults and Rape

ii) Offences Against Property: Theft, Obtaining Property or a Financial Advantage by deception, Burglary, Robbery

  - Overriding these offences will be the inchoate (or incomplete) offence where an offence has not quite been completed but criminal liability will attach all the same.

5. General Principles of Criminal Responsibility
• Most important general principles studied of this course are contained here in Chapter 1.7 of the text.

> Criminal Responsibility

To attribute criminal responsibility and find a person guilty of any criminal or property offence, we need to establish:

1. The Actus Reus of the offence - non mens rea element – engage in conduct forbidden by the criminal law
2. The Mens Rea of the Offence - mental state of the Defendant – a mental state prohibited by the criminal law
3. Establish there is Temporal Coincidence (ie the mens rea is present at the time of the Actus Reus). – Mental state must occur at the time of committing the offence.

Elements of an Offence

Each crime is composed of elements are called the CORPUS DELECTI. (Body of a crime)

• Each element comprising the corpus delecti of the offence will fall into the category of the Actus Reus of Mens Rea of the offence.
• Different Mens rea for each offence

Mens Rea

Many crimes require that the defendant must have acted with a particular state of mind.

• This mental element is referred to as the MENS REA of the crime.
  
In criminal law, mens rea consists of one or more of the following mental states, depending upon the statutory or common law definition of the crime:

1. INTENTION - the defendant acts with actual subjective intention, the knowledge that the particular result is forbidden, practically certain to result intention: ‘connotes a decision to bring about a situation so far as it is possible to do so - to bring about an act of a particular kind or a particular result

See, He Kaw Teh v The Queen (1985) 157 CLR 523, 569 per Brennan J.

2. KNOWLEDGE- defendant acts while holding certain facts to be true, awareness and foresight

3. BELIEF

4. RECKLESSNESS- D acts with knowledge, that there was a probability that all the results possible from a definition of the crime were likely to occur.

5. NEGLIGENCE - Is Negligence a mens rea?

Objective test- what would a reasonable person have thought? Conduct where there is a falling short in which a reasonable person would recognise.

Not a mental state as is an objective not subjective test. D did not act to the extent that a reasonable person would have. Here to protect others from the risk of harm.

Intent is not the same as Motive only interested in Intent until sentencing

To find Mens Rea

1. Determine what mens rea standard is required in respect of each separate element of the actus reus (the particular offense)

2. Interpret the criteria of those element(s) what is the test for that offense

3. The factual question: Did the D in fact act with the mens rea required? do they satisfy that test
**Actus Reus of the Offence**
- Although not all crimes require a mens rea component, they all have an actus Reus component.

**Actus Reus** (a latin term meaning bad act) consists of:
1. **All of the non mens rea elements of a crime**: Intent
2. The voluntary act or omission to act which brings about those non mens rea elements.
   - **Omissions**
     - Can also form the AR of an offence where D has a legal duty to act.
     - Must consist of a conscious decision of D’s mind
     - To be voluntary, act must consist of a conscious decision of the D’s mind and be the result of an exercise of the free will of the D.
     - Crimes of strict and absolute liability the offence is proved without having to prove a mens rea component only the criminal act.

**Doctrine of Temporal Coincidence**
- Where an offence is one of mens rea, there can be no crime unless the MR and the AR concur in time.

**Defences**
- Two types:
  1. **Primary or Denial Defence**- failure to establish an AR or MR element.
  2. **Secondary or Affirmative Defence**- EG Duress, Necessity, Insanity, Self Defence.

**Strict Liability Offences**
- May be committed without a MR. Mainly exist in statutory form.

**Incohaete Crimes**
- Crimes that are incomplete, unfinished or imperfectly expressed or realised.
- We will only look at Attempts in Chapter 12.

**Transferred Malice**
- Where D acts with a requisite MR to commit an offence against a particular person or property and succeeds in causing the same type of harm to another or other property, the law treats D in the same manner as if he or she carried out the crime as intended.

**6. Burdens Of Proof**
- **Legal Burden of Proof**- On Crown -beyond a reasonable doubt.
- **Evidential Burden of Proof**- Crown (Criminal Cases) Ask a judge or jury whether the offence can be proven beyond a reasonable doubt.
  - In cases of secondary defences (eg self defence) D has the evidential burden.

**7. Subjective vs. Objective Considerations**
- Subjective looks into mind of D
- Objective looks at a reasonable person in D’s position
2. HOMICIDE AND ACTUS REUS

1. Introduction
Homicide- is a term used to describe the lawful or unlawful killing of a human being.
- It’s also described as a volitional act (or omission to act) that causes the death of another
  human being sooner than it would have otherwise occurred.

2. Legal Reality Of Homicide
- Homicide offences are uncommon in Australia.
- Most cases arise in the context of interpersonal disputes and usually involves someone the
  defendant knows.

3. Categories Of Unlawful Homicide
- Unlawful Homicide encompasses various offences, the basic distinction being between
  murder and manslaughter.
- The distinction between murder and manslaughter depends upon one or both of two legal
  factors, namely the mens rea required and the operation of some defences that reduce
  murder to manslaughter.

The old distinction based on malice aforethought for murder is outdated and misleading relic of
the common law as you can commit murder without malice.

Murder:
At Common law there are 4 categories of murder in Australia.
1. INTENTIONAL MURDER-Causing death of another with the intention to kill or cause
   grievous bodily harm.
   s.3 Crimes Act (vic) but is defined under Common law.

2. RECKLESS MURDER-Causing death of another while being reckless as to killing or
   while being reckless as to causing grievous bodily harm

3. STATUTORY CONSTRUCTIVE MURDER-Unintentionally causing the death of
   another by an act of violence done in the course of committing a crime of which violence is
   an essential component.
   Sec 3A Crimes Act

4. COMMON LAW CONSTRUCTIVE MURDER- Causing the death of another by
   violently resisting, preventing or escaping from lawful arrest. s3A Crimes Act, resisting
   arrest/escaping from custody

Manslaughter
1. Voluntary Manslaughter
Where an incidence amounts to murder, but is reduced due to manslaughter due to mitigating
circumstances. Mitigating circumstances may arise where a defendant is provoked to kill.

2. Involuntary Manslaughter
This occurs where you cause the death of another while not intending or being reckless (of the
probability type) as to causing death or grievous bodily harm.
- Two types: involuntary manslaughter by unlawful and dangerous act and
  involuntary manslaughter by criminal negligence.
In this course we focus on Involuntary Manslaughter only.
Defining Homicide SEE OVERVIEW PAGE 6

To establish the offence of unlawful homicide, we need to establish that there is an AR and MR.

- All categories of unlawful homicide share the SAME AR.
- For AR must show there is:
  1. A voluntary act (or omission to act where the law imposes a duty to act); and
  2. A causal nexus between that act/omission and the non mens rea elements of the offence.
  3. Victim must be a reasonable human being
  4. Victim must have died

Meaning of life and death:

Who can be a victim of Unlawful Homicide?

- Victim must be a HUMAN BEING

Foetus and Child

- R v Hutty [1953] VLR 338 at 339 per Barry J). – Only when it has a separate existence to mother will foetus be a human ‘in being’. A baby is born when it is completely delivered from its mother; it does not derive it power of living from its mother, but by virtue of its own functioning organs.

The point at which a child becomes a human being has been defined in statutes except for Vic and SA. In Vic we rely on a common law definition.

R v West - At common law, injuring a foetus inside the mother can still amount to charges of murder or manslaughter if the child dies upon birth.

Death

- Medical advancements can make this unclear as to when the precise moment of death occurs. Death is defined under statute - The life of a human being is deemed to end at the irreversible cessation of brain function or blood circulation.
- s41 Definition of death
- For the purposes of the law of Victoria, a person has died when there has occurred-
  - (a) irreversible cessation of circulation of blood in the body of the person; or
  - (b) irreversible cessation of all functions of the brain of the person.
4. Actus Reus: Overview

- As the Non MR or AR element is the same for all unlawful homicides; we’ll begin with AR component of Unlawful Homicide.

Two main elements of the actus reus:

1. **Voluntariness**;

2. **Causation** - There is no one test of legal causation. We must establish both factual and legal causation for unlawful homicide.

**FIRST ISSUE IN AR IS TO IDENTIFY THE RELEVANT ACT OR OMISSION GIVING RISE TO LIABILITY**

Then we consider:

1. **Voluntariness**
   Conduct must have been willed by D or directed by a conscious decision of D.

Where there is series of acts, the courts will also look at that series of acts to see if it is regarded as one transaction that was voluntary. 

*(R v Butcher)*

Which act caused the death of the victim? Neither the movement of the victim onto the knife, nor the holding the knife could be isolated as the cause of death. Both are deemed to be the legal cause of death. The court will look at a series of acts to determine whether it is part of one transaction that is voluntary.

The act must be conscious and willed.

2. **Causation – Novus actus Intervenus**
   The AR of any crime requires a causal connection between the D’s voluntary act/omission and the Non MR components of the crime.
   - Objective test to determine whether the conduct that caused the death of V occurred in a continuing manner without an intervening event. *(R v Blaue)*
   - Not necessary for prosecution to identify precise act causing death for murder and manslaughter *(R V PL)*

We are not looking at the mind of the defendant at this stage.

For causation to be established, two elements must exist:

1. **Factual Causation** - D’s conduct must be the factual cause of death (the ‘but for’ principle); Death would not have occurred but for the defendants conduct. *(R v White)*

2. **Legal Causation** - The legal cause of death

   1. **D’s conduct must be an operating and substantial cause of V’s death** *(R v Hallet).*
      *(Note Eggshell Skull Rule in Blaue’s case); First causal test p.56 text*
      The q to be asked is whether an act or series of act or omissions that are consciously performed by the accused is or are so connected with the event that they must be regarded as having a substantial cause of effect of the death, without being spend in the eyes of the law being sufficiently interrupted in the chain of causation. An act or omission will be an operating and substantial cause of death where it is conducted as part of an ordinary series or chain of events that flow from that act or omission. Only where it is shown that there is an interruption to this act or omission by an extraordinary event will break the chain of causation.
2. **The immediate cause of death must not have been an intervening act or event (novus actus interveniens) to break the chain of causation.**

Two types of recognised Intervening events that may break the chain of causation:

1. **Medical Treatment** (R v Jordan; R v Smith; R v Evans & Gardiner) Reconcile 3 cases on a policy basis. *(NOT REALLY)*
2. **Fright and Self Preservation** (Royall v R). Apply 3 criteria in Royall but note the Doctrine of Intended Consequences.

*1 induced feeling of physical arm*
*2 That it was reasonable for v to wish to escape*
*3 That v selected a reasonable mode of escape*

3. Police action R v Pagett (1983) 76 Cr App R 279
4. Gunfire exchanged accused used a human shield so police shot her appeal court found he caused the death of victim with his actions of using the victim as a shield and then firing on police were the “substantive and operative cause”

Causation can exist when defendant bring about death indirectly

*If you break the chain of causation, the defendant is no longer liable.*

It's long being policy of the law that those who use violence on other people must take their victims as they find them. Where the victim has an unknown frailty, physical, mental or religious, and as a result of any of these factors the victim dies in circumstance where an ordinary person wouldn’t have died, they must take their victim as they find him. *(R v Blaue)*

1. Where the immediate cause of death is the medical treatment received by a victim as a result of injuries inflicted by the d, d is still legally responsible for the victims death where the treatment is given without negligence by a competent medical practitioner. Competent medical treatment will not break the chain of causation.
2. Medical treatment that palpably wrong will break the chain.(R v Jordan) However despite being good law its not safe to rely on Jordan’s case if its been distinguished by crown and smith. However courts are reluctant to blame medical intervention full vicotrian supreme court disagreed with R v Jordan in R v Evans and Gardiner court found in this case the act of the accused must be “substantive and operative cause of the death of the victim”DOES NOT HAVE TO BE ONLY CAUSE

3. Medical treatment that’s inept or incomplete or unreasonable or thoroughly bad in affecting the chances of recovery are p
4. Only where it can be said that the original act or conduct of the defendant is merely the setting in which non of cause operates, in the cases of medical treatment only here can the chain of cause be broken R v Smith [1959]888 Second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound. *(pp42-43)*
5. Since the case of Jordan, courts are reluctant to use medical treatment to break the chain of causation.

In exam must discuss all 3 cases and explain the policy of the courts.

You must apply the three criteria to determine whether the victim’s action was proportionate. The chain of causation will be broken if the victims reaction was unreasonable due to physiological frailty, e.g. a phobia. This will only apply however, if the accused had no prior knowledge of this phobia.
Legal Causation Extra Notes
Tests of Eggshell Skull Rule and Fright/Self Preservation

Eggshell Skull Rule: those who use violence on another take their victim as they find him (even if normal person would not die in these circumstances). Applies to V’s physical, mental condition and religious beliefs (R v Blaue). Frailties will not break the chain of causation and D’s act is still operating and substantial cause of V’s death.

Frigh and Self Preservation
Reaction of V severs causal chain if reaction is unreasonable/disproportionate to the threat posed by D. Apply 3 criteria:
1. Was there a well-founded apprehension of physical harm in V?
2. A reasonable wish by V to escape?
3. Attempt to escape made by V was reasonable?
Reasonable is what V would do in a situation of emergency, objective considerations to determine reasonable mode of escape.

Exception to Eggshell skull rule-
If V reacts unreasonably/disproportionately to the threat posed due to a psychological frailty, don’t take victim as you find him. D not culpable as chain of causation broken.
Royall’s case
Here chain of causation is broken where V reacts unreasonably/disproportionately to the threat posed and causes own death as a result of a psychological frailty in V unknown to D.

But Doctrine of Intended Consequences: D intends conduct that causes V to react in a way that results in the death of V and D is aware that there will be an unreasonable/disproportionate reaction by the victim, chain of causation is not broken and D’s conduct is still the legal cause of V’s death. ie D knows of V’s reaction (due to a psychological frailty in V) that will cause V to react disproportionately. Royall’s case.

Authority for just one are of causation only when issue is did victim bring about there own death by escaping etc

- Natural consequence test: (Mason CJ, Dean & Dawson) Majority was the 1 victims fear well founded or reasonable in all the circumstance and the conduct 2 must have been a natural consequence of the defendants conduct.
- Moved away from take your victim as u find them requirement that the victim acts reasonably
- If V does something ‘irrational or unexpected’ èmore difficult to establish causation (and easier to argue V performed voluntary act)
- In cases of fright or self-preservation cases, where V over-reacts to the threatening acts or words of the accused, this may be sufficient to break the chain of causation.
- If the victim’s reaction to the acts of the D was quite disproportionate or unreasonable, the chain of causation is broken: Toohey & Gaudron, Royall [at 21]; also Brennan J
- BUT
- Mason CJ and McHugh J concluded that if V’s acts of self-preservation were unreasonable this did not necessarily break the chain of causation….
Mitigating acts by offender Will only break causation when they effectively undo what they did to make sure they don't die. (R v Taber & Styman)

EXAMPLE:
D and V are at a nightclub in Hawthorn. V is making advances on D’s girlfriend and D is unhappy. D sees V exit the Club alone and follows him. D is fuming and wants to teach him a lesson he won’t forget. D catches V and king hits him from behind. V falls to the ground unconscious, hits his head on the concrete and starts to bleed. After D hits V, he runs off, leaving V on the ground and V bleeds to death. V is a haemophiliac. What is D’s criminal liability here?

For legal causation consider the following issues:

Eggshell skull rule- D takes his victim as he finds him (Blaue). This relates to V’s physical condition, mental condition and religious beliefs. These types of frailty in V will not break the chain of causation and D’s conduct will still be the legal cause of V’s death even if a normal person would not ordinarily die in these types of circumstances. Here as V is a haemophiliac and he bleeds to death quickly, eggshell skull rule applies so V’s physical condition will not break the chain of causation.

5. Omissions
An omission can also form the actus reus of an offence only where a person is under a legal duty to act.

See Page 29 of the text.

• The range of relevant duties is not fixed or certain.
• We will consider:

A) Where there is a special relationship between the D and V (R v Shepherd; R v Russell) father/son mother/daughter

B) Where D voluntarily assumes responsibility of V and undertakes to take care of a helpless person (R v Stone v Dobinson; R v Taktak). Duty applies if D puts V in a position to prevent others from helping.

Under b) this may create a duty to take steps to preserve that person’s life. D had assumed a duty of care for the health of the victim and had been grossly negligent in the performance of that duty.

The D will owe a duty of care in law to help a stranger if D has voluntarily assumed care of a stranger in such a way to, to prevent others from helping them.

In the case of an Omission, when answering an exam question:
1. First establish there is a duty of care owed by D to V.
2. Then establish the AR and MR elements of the offence.

Establish AR:
1. Voluntariness (will be satisfied where you make a conscious decision not to act).
2. Causation (both factual and legal),

Establish MR:
Ensure there is temporal coincidence 3.
Discuss applicable Defences (if any)

6. If murder must establish mens rea see below
3. MURDER AND MENS REA

1. Introduction
It is the MR component which will determine whether the Unlawful homicide of a human being will amount to murder or manslaughter (we look at invol manslaughter

Overview:
- We have a number of categories of unlawful homicide in Victoria as follows:

1. Intentional Murder-
   - Cause death of V with intention to kill or cause GBH
   - S.3 Crimes Act
2. Reckless Murder
   - Cause death of V while acting with recklessness as to killing or causing GBH
   - S.3 Crimes Act.
3. Constructive Murder-Death is unintended.
   This will arise in 2 circumstances.
   - Under statute, S.3A CA-Death of V is unintended but committed by an act of violence in the course or furtherance of the commission of a crime the necessary elements of which include violence for which a person can be sentenced to imprisonment for 10 years or more.
   - At Common Law-Death of V is unintended but was caused while D was attempting to escape or assist another to escape a lawful arrest.
4. Defensive Homicide
   - s.9AD Crimes Act
5. Child Homicide
   - Child under 6 years s.5A Crimes Act
6. Manslaughter
   - We now have Involuntary Manslaughter in Victoria and there are 2 types we consider:
     1. Invol Manslaughter by Unlawful and Dangerous Act
     2. Invol Manslaughter by Criminal Negligence.

We will focus on the following 4 categories of Unlawful Homicide under MR component:
Murder:
1 Intentional Murder
2. Reckless Murder
3. Constructive Murder
If D’s conduct does not fall easily into any of these categories of MR for murder, then we look at liability for unlawful homicide under:
4. Involuntary Manslaughter (NOTE: this is not a true MR for Unlawful homicide as it’s assessed by an objective standard). Just looked at here for ease of reference after analysing MR categories for murder.

Motive
- Motive is different to intention.

Transferred Malice
- What is prohibited in murder is the killing of another human being, not a particular human being, simply a human being (other than yourself).
2. Three Different Categories Of Murder under MR

- The MR element for Unlawful Homicide will determine whether D will be charged with Murder or Involuntary Manslaughter.
- **3 categories** of MR amounting to **MURDER**:
  1. Intentional Murder
  2. Reckless Murder
  3. Constructive Murder.

1. **INTENTIONAL MURDER**—Intention to cause death or GBH

   Where D Causes the death of another human being with the intention to kill or cause GBH- this will be Intentional Murder and will fall under s.3 Crimes Act.

   **Intention Must be Subjective**
   - For MR the intention required is that of D and is always SUBJECTIVE.
   - The accused must have the requisite intention, not that of a hypothetical reasonable or ordinary person.
   - Intention is a question of fact for the jury to determine having regard to all the circumstances.
   - Intention to cause GBH is sufficient MR for Intentional murder under s.3 of CA.
   - Really serious bodily harm = GBH.
   - Intention to cause unconsciousness is intention to cause GBH.

   **Actual Intention**
   - Question of fact for the jury to determine, having regard to all the circumstances.
   - Intention not been comprehensively defined in Australia R v Wilmott; He Kaw Teh v R

   **Intention and Foresight of Death**
   - Practical certainty

   **Intention to Cause GBHarm**

   An intention to cause GBH is sufficient MR for Intentional Murder under s.3 of the Crimes Act.
   - **Grievous Bodily Harm defined**: really serious bodily harm: R v Miller.
   - **What amounts to GBH?** R v Rhodes, R v Ross
   - **GBH is Assessed By an Objective Standard by the Jury**

2. **RECKLESS MURDER**: Recklessness regarding Death or GBH

   - Murder if D causes death of another while acting with recklessness as to causing the death or GBH to V.
   - D will be charged under s.3 Crimes Act for Murder.

   **Test for Recklessness**
   - Under the common law in it is murder for D to kill V by engaging in conduct that he/she foresees will PROBABLY cause the death or grievous bodily harm of V, even if D does not intend that result.

   The test is a subjective one- look at D’s knowledge that death or GBH will probably result from his act/omission.