Chapter 24 Creating criminal offences

One purpose of the law is, by creating offences, to punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful. Criminal offences carrying conviction can have a serious impact on individuals, and new criminal offences can have a significant resource impact on the criminal justice system. They should be included in legislation only if they are necessary to achieve a significant policy objective (which is likely to be the avoidance of harm to society generally or to particular classes of people).

Offences are one of a variety of alternative mechanisms for achieving compliance with legislation and should not be seen as the default response to breaches of legislation. Before settling on enforcement by criminal offence, officials must conduct an analysis as to whether the policy objective can be achieved effectively:

- without state intervention, for example, where it can be achieved by self-regulation by the applicable industry, or through civil claims or civil complaints investigation processes;
- by non-criminal state measures, such as education campaigns, informal warnings, or other methods of persuasion, such as codes of practice or national standards; or
- by other forms of State enforcement, such as civil remedies (including pecuniary penalties or taking action under a licensing regime).

Chapters 22, 23, 25, and 26 provide more detailed guidance on alternatives.

In addition to determining that a criminal offence is necessary, a number of other matters should be thoroughly assessed before a criminal offence is included in legislation:

- What conduct should be prohibited? (the “physical element”, or actus reus).
- When should the person be held responsible? What is the required culpability? (the “mental element”).
- What defences, if any, should be available?
- On whom should the burden of proof lie?
- Who should be punished (for example, an individual or a company)?
- What maximum penalty should apply?

Legal advisers should be consulted early in the policy development process if new criminal offences are proposed. The Ministry of Justice should also be consulted whenever a new criminal offence is created or an existing criminal offence is altered in some way (including an increase in the penalty).

If an offence is the preferred approach, thought needs to be given to the type of offence. Offences generally fall into one of three categories:[48]

- **Offences requiring mens rea**—Mens rea (the mental element) is an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the actus reus, of the offence).[49] It requires the prosecution to prove that not only did a defendant engage in a prohibited act, but that the defendant did so with the specified intent: the defendant's state of mind is important in assessing culpability. Offences requiring mens rea are still the most common offences, and the mental element is particularly important for serious offences.

- **Offences of strict liability**—The prosecution is not required to prove mens rea, but the defendant can escape liability if he or she can show the existence of a defence or an absence of fault. Strict liability offences are used to enforce requirements of regulatory regimes, such as regulating an occupation or commercial activity.

- **Offences of absolute liability**—Liability is established once the prosecution proves the act beyond reasonable doubt because the option of proving a defence or absence of fault is not open to the defendant. These offences are almost never used: it is rarely justifiable to create an offence for which there is no defence. The starting point is always to consider what defences should be open to the defendant.

Guidelines

24.1 Should the conduct be subject to the criminal law?

Compelling reasons must exist to justify applying the criminal law to conduct.

The authors of *Principles of Criminal Law* make the following point:[50]

> […] even though a prima facie case can be made in favour of criminalising an activity, for example because it is harmful to others, it does not follow that criminal legislation is the best response. Other forms of intervention need to be considered; sometimes, it may be best not to legislate at all. The criminal law is a powerful, expensive, and invasive tool. It should not be used lightly.

Imposing criminal sanctions is a serious matter that has significant consequences. For example, making an action subject to the criminal law may authorise the Police or other enforcement agencies to search and arrest an individual and to search and seize their property for the purpose of investigating or preventing the commission of a crime. Depending on the seriousness of the misconduct, a person subject to a criminal conviction may experience a loss of liberty (imprisonment or home detention), a loss of property (confiscation, fines, or reparation), or both. A person who is convicted acquires the stigma of a criminal conviction,

[48] Simon France (ed) *Adams on Criminal Law—Offences and Defences* (online looseleaf ed, Thomson Reuters) at CA 20.12.

[49] Mens rea is the latin phrase used in the criminal law to refer to the element of an offence that encapsulates the fault or moral blameworthiness of the defendant, typically that the defendant intended to do the prohibited act or had knowledge of it.

[50] AP Simester, WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, 2012) at 21.7.2.

which may affect future employment or overseas travel.

Because of the possible consequences, criminal offences should be created with care, and with convictions being possible only if imposed by a court where the offence is proved by the prosecution to the standard of "beyond reasonable doubt" following a fair process (including the minimum standards of criminal procedure set out in the New Zealand Bill of Rights Act 1990).

The following factors, not all of which must be present, may be relevant in determining whether conduct should be criminalised:

- the conduct involves physical or emotional harm;
- the conduct involves serious harm to the environment, threats to law and order, fraud, bribery or corruption, or substantial damage to property rights or the economy;
- the conduct, if continued unchecked, would cause significant harm to individual or public interests such that public opinion would support the use of the criminal law;
- the conduct is morally blameworthy, having regard to the required intent and the harm that may result; or
- the harm to public or private interests that would result from the conduct is foreseeable and avoidable by the offender (for example, it involves an element of intent, premeditation, dishonesty, or recklessness in the knowledge that the harms above may eventuate).

It is undesirable to further criminalise conduct that is already addressed by the criminal or civil law unless doing so would serve a goal that is not currently served by the law.

24.2 What conduct is to be prohibited?

Legislation must precisely define the prohibited conduct.

Criminal law marks the legal boundary of individual liberty. Offences must be defined clearly so that people know what is and what is not prohibited. Therefore, it is necessary to consider exactly what conduct (called the *actus reus*) is prohibited by a criminal offence.[51] The description of the conduct should be precise and rationally connected with the harm targeted by the policy objective.

An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or failure to preclude conduct that it was intended to prohibit.

General provisions (such as "every breach of this Act is an offence") are not acceptable as they

[51] Actus reus is the latin phrase used in the criminal law to refer generally to the conduct that is prohibited by an offence (and which may encompass behaviour, consequences, or circumstances).

may capture a range of conduct that is too wide and not intended to be subject to the criminal law.

Any proposal to apply the criminal law to conduct occurring outside New Zealand (extraterritorial conduct) should be discussed with the Ministry of Justice early in the policy development process because this is relatively unusual and subject to unique considerations.

24.3 When should the person be held responsible?

Legislation should state the mental element (mens rea) required for an offence to be committed.

It important to consider why, and in what circumstances, a person who has committed the physical act should be considered culpable and deserving of punishment for having committed that act. As a general rule, a person should be liable for a criminal offence only if he or she is at fault for the prohibited conduct. This concept of moral responsibility for the conduct is reflected in the mental element of the offence (the mens rea). That mental element can be framed in many different ways (for example, the defendant "intentionally", "recklessly", or "knowingly" performed the prohibited conduct). Each of these formulations has subtle differences as explained in judicial decisions.

A criminal offence should include a mental element unless there are compelling policy reasons to relieve the prosecution from the burden of proving a mental element and require the defendant to prove some essential element to avoid liability. In such a case, an offence may be framed as a strict liability offence, meaning the prosecution must prove only the physical element of the offence.

Policy reasons for strict liability offences may exist in the regulatory context if:

- the offence involves the protection of the public, or a group such as employees, from those who voluntarily undertake risk-creating activities;
- there is a need to provide an incentive for people who undertake those activities to adopt appropriate precautions to prevent breaches; or
- the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.

In those cases, officials should be able to provide reasons why strict liability offences are justified in the particular regulatory context. They should also consider what defences would be appropriate.

If legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know *before* engaging in conduct whether it is prohibited and, if so, in what circumstances.

24.4 What defences, if any, should be available?

Legislation should identify any specific defences that are available.

It is important to consider whether any factors that exonerate the defendant from criminal liability should be specified in legislation. Certain general defences, such as self-defence, will exist without needing to be specified or cross-referenced.

However, particularly when strict liability offences are justified, it is necessary to specify any defences that a defendant is entitled to raise in the relevant statutory context that, if accepted, would result in acquittal.

24.5 On whom should the burden of proof lie?

The burden of proving both the actus reus and the mens rea should remain on the prosecution.

The default position is that the prosecution must prove beyond reasonable doubt both the existence of the prohibited conduct (actus reus) and the requisite mental element (mens rea). This is described as a *legal burden* of proof. There is no obligation on the defendant to negate those elements of the offence.

If the legislation specifies a justification or excuse (for example, lawful authority or reasonable excuse) for certain conduct, but does not require the defendant to prove its existence, the defendant must raise credible evidence to bring the matter into issue before the court. This is described as an *evidential burden*—it is not a burden of proof. If the defence satisfies the evidential burden, the prosecution must then disprove the existence of the defence beyond reasonable doubt (the legal burden).

There may sometimes be good policy reasons for placing a legal burden of proof on the defendant. An example is where a strict liability offence is justified (as described in 24.3). In that case, the prosecution must prove only the physical element of the offence and, to avoid liability, the defendant must prove the existence of a statutory defence or total absence of fault on the lesser standard of the balance of probabilities. However, shifting the burden in this way will constitute a limitation on the presumption of innocence (*see* section 25(c) of the New Zealand Bill of Rights Act 1990) so there must be compelling justification for departing from the default position and consideration must be given to what defences should be available to the defendant.

Legislation must be very clear if it is intended to place a legal burden of proof on the defendant. If the legislation is not clear, the court may interpret the provision as placing only an evidential burden on the defendant.

24.6 Who should be punished?

Legislation must identify who will be liable to criminal conviction and in what circumstances they will be liable.

Legislation should be very clear about which people are potentially liable for the criminal

offence—that is, whether "any person" is potentially liable or only a particular subset of people.

Criminal liability may be imposed on an individual or a body corporate. The meaning of "person" includes, by default, a corporation sole, a body corporate, and an unincorporated body, unless specific case law or legislation states differently.[52]

In relation to corporate liability, unless the legislation specifies otherwise, the general rule is that a director or member of a corporation (for example, a shareholder of a company) is not vicariously liable for the acts of the corporation (but could be liable as a secondary party if he or she knew of the offending and encouraged or assisted it). However, a corporation may be vicariously liable for the acts of its employees or agents. A corporation can also be directly liable if the acts of an employee or agent can be attributed to it.

24.7 What is maximum penalty that will apply?

Legislation must state the maximum fine and/or term of imprisonment.

Once legislation comes into force, the decision as to precisely what penalty will be imposed in a particular case rests solely with the courts. When imposing a sentence, the courts have regard to the maximum penalty available, the particular facts of the case, and the guidance and principles set out in the Sentencing Act 2002. The courts also have regard to any additional sentencing guidance provided by the legislation and higher courts.

The maximum penalty should not be disproportionately severe, but should reflect the worst case of possible offending. Legislation that sets minimum penalties is undesirable because it limits the courts' ability to impose a sentence appropriate to the particular case. It may also be seen as contrary to the principle of the separation of power and judicial independence.

The maximum penalty affects the procedure that the courts adopt, including whether the High Court can hear the case and whether the defendant has the right to elect trial by jury. Section 6 of the Criminal Procedure Act 2011 provides more detail as to how the maximum penalty will affect the procedure that is adopted.

If offending is in a commercial context, it may be appropriate to provide for a variable fine, such as a fine linked to the commercial benefit derived from the offending. Proposals for such penalties should be discussed with the Ministry of Justice and the Ministry of Business, Innovation and Employment (MBIE) at an early stage. Since those types of fines can result in very large, indeterminate penalties being imposed in a criminal context, there should be compelling justification for a commercial gain penalty.

References to precedents and similar offences must be made with care. Subtle differences may exist as to the elements of the offence, such as the required mental element, justifying a higher penalty in one context but not in another. This can be the case even if the same general subject is covered by both the existing offence and the proposed offence, or the harm to be addressed is similar. However, penalties for some offences may be unduly low simply because

[52] Interpretation Act 1999, section 29.

of the age of the Act.

Basing proposed offences on overseas legislation can be particularly problematic. The whole statutory context, common law (particular legal terms may be interpreted differently in different countries), and sentencing framework need to be considered before taking an offence from another jurisdiction and proposing it for inclusion in New Zealand law.