

21. Creating criminal offences

Criminal offences are the most serious form of sanction that can be imposed under law. They are one of a variety of alternative mechanisms for achieving compliance with legislation (see Chapters 19, 20, 22 and 23) and should not be seen as the default response to breaches of legislation. There must be a clear need for a new or increased criminal penalty.

Before deciding whether or not to create a criminal offence, four matters should be thoroughly assessed. These matters will allow officials to establish whether or not a criminal penalty is necessary, or whether the conduct can be addressed by alternative mechanisms, such as the civil law, infringement penalties or pecuniary penalties.

- What conduct is to be prohibited? (the “physical element”).
- When should the person be held responsible? What is their culpability? (the “mental element”).
- What defences, if any should be available?
- Who should be punished? (for example, a company, or its directors, management, or offending individual employees).

Penalty regimes from other New Zealand or overseas statutes should not be duplicated without first considering whether or not they are appropriate having regard to the particular context of the new legislation.

Legal advisers should be consulted early in the policy development process. The Ministry of Justice should 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).

Guidelines

21.1. What conduct is to be prohibited?

Legislation must precisely define the prohibited conduct.

People must be able to act in certain ways, or decide not to act in certain ways, and have a clear understanding of the legal consequences that might follow. It is therefore necessary to first consider exactly what conduct is being prohibited (called the *actus reus*) and how the conduct is connected with the harm caused.

In criminal proceedings, the prosecution must prove beyond reasonable doubt that the defendant committed the physical act. 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 an acquittal.

It is undesirable to further penalise conduct where that conduct is already addressed in such a way (by criminal law or otherwise) that provides an appropriate level of punishment, denunciation, prevention, or deterrence.

21.2. When should the person be held responsible?

Legislation must state what mental element must be present for an offence to be committed.

Why and in what circumstances a person should be found guilty of a criminal offence should be considered. This “mental element” (called the “*mens rea*” or “*guilty mind*”) 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 and is supplemented by the common law.

The default position is that the prosecution must prove the mental element of an offence beyond reasonable doubt. However, in some cases the defendant may be best placed to provide evidence of the mental element. Other strong policy reasons might also exist that justify requiring them to do so. In these cases it may be appropriate to “shift the burden” of proving the mental element from the prosecution to the defence. A common example is strict liability offences in which the prosecution must prove the physical element, but not the mental element, of an offence. The defendant must prove an absence of fault on the lesser standard of the balance of probabilities.

Other formulations exist, such as requiring the prosecution to prove that the defendant “knew or ought to have known” so that a defendant cannot escape conviction just by showing they did not actually know something was happening, or the consequences of an act.

Legislation that imposes a burden on a defendant to prove or establish any element of a defence in criminal proceedings will constitute a limitation on the presumption of innocence (NZBORA 25(c))¹³⁵. Cogent reasons will therefore be required to justify shifting the burden.

Strict liability offences are commonly used in the regulatory context and may be appropriate where:

- 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 incentivise people who undertake those activities to adopt appropriate precautions to prevent breaches;
- the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.

Legislation that imposes any burden of proof on a defendant in criminal proceedings should explicitly address:

- who the burden rests with;
- what matters they are required to prove;

¹³⁵ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

- the standard of proof that applies to those matters (usually “the balance of probabilities”).

21.3. What defences, if any, are available?

Legislation must identify any specific defences that are available.

When the prosecution is required to prove the mental and physical element of an offence, or disprove the mental element in strict liability offences, the defendant will be entitled to argue in defence that the prosecution has not proven (or disproven) the necessary elements to the requisite standard of proof.

Where particular factors exist that a person should be entitled to rely on in defence to the new criminal offence (other than the general defence above), it may be appropriate to provide specific defences.

These defences might require the defendant to point to enough evidence to raise the defence (such as for the defence against assault in s 48 of the Crimes Act 1961¹³⁶), or they might require the defendant to prove a certain state of affairs. In both cases, the burden will remain on the prosecution to prove beyond reasonable doubt that the defence is not available to the defendant.

21.4. Who should be punished?

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

Criminal liability may be imposed on an individual or body corporate. Where a body corporate is liable, officials must consider whether directors or employees of that body may also be subject to criminal liability and in what circumstances. Where an individual is liable, a question is whether other individuals, who may have participated in the offending in some way, should be subject to liability.

A range of statutory mechanisms exist to achieve this. The PCO can provide advice on the most suitable option.

Sometimes the liability is imposed on parties as a matter of convenience, usually at the low level of infringement offences (for example, parking offences are committed by the owner of the vehicle, not the driver, irrespective of who parked the vehicle). However convenience alone is insufficient; there must be other reasons to justify the imposition of liability on a person who did not commit the prohibited act.

¹³⁶ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

21.5. Should the conduct be subject to the criminal law?

Compelling reasons must exist to justify applying the criminal law to any conduct. The criminal law should be reserved only for conduct that society considers is sufficiently blameworthy to attract the consequences of a criminal conviction.

Having identified the physical and mental elements, who should be punished, and what defences might be available, the question of whether the conduct should be regulated by a criminal offence can be considered.

The criminal law is used to punish, deter and publicly denounce conduct that society considers is blameworthy, harmful and should be prohibited. The criminal law brings the full weight of the State's power to bear on those within its jurisdiction and will involve interfering with a number of fundamental rights. 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 will acquire the stigma of a criminal conviction and may suffer public denouncement of their conduct and, in some cases, impacts on future employment or overseas travel. Further, 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.

It is because of these extraordinary consequences that criminal offences should be created with great care, and criminal convictions should only be imposed by an independent court where a defendant's guilt is proved by the prosecution to the standard of "beyond reasonable doubt" following a rigorously fair procedure.

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

- the conduct involves threats of emotional or physical harm, and the risk of, or actual, physical violence or sexual violence 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 substantial harm to individual or public interests such that public opinion would support the use of the criminal law;
- the conduct is morally blameworthy;
- the harm to public or private interests that would result from the conduct is foreseeable and avoidable by the offender (for instance, it involves an element of intent, premeditation, dishonesty or recklessness in the knowledge that the harms above might eventuate).

General provisions, ("Every breach of this Act is an offence"), are not acceptable as they may capture too wide a range of conduct, not intended to be subject to the criminal law.

21.6. What range of penalties 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 will have regard to the range of penalties available, the particular facts of the case, and the guidance and principles set out in the Sentencing Act 2002¹³⁷. The court will 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 offending. Legislation that sets minimum penalties is undesirable, as it limits the courts' ability to impose a sentence appropriate to the particular case and is contrary to the principle of judicial independence.

The maximum penalty will impact upon the procedure that the courts will 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 2011¹³⁸ provides more detail as to how the maximum penalty will affect the procedure that is adopted.

Where offending is in a commercial context, it may be appropriate to provide for a variable fine such as "three times the commercial gain 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.

Reference to precedents and similar offences must be done with care. While there will be a hierarchy of penalties in a particular area (such as driving offences causing injury or death), New Zealand has not adopted the inflation-adjusted "penalty unit" system found in many other jurisdictions. Therefore, when comparing offences in different statutes, the penalties may be unduly low simply because of the age of the statute, and not provide an accurate guide.

¹³⁷ <http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html>

¹³⁸ <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html>