

REASSESSING ACTUS REUS

*Andrew Ashworth KC**

This article focuses on Tony Smith's criticisms of criminal lawyers' use of the concept of actus reus. It explores how those criticisms relate to the proliferation of types of actus reus in the last five decades, especially in connection with the spread of offences of omission.

Tony Smith's research and writing on the criminal law of both New Zealand and England and Wales has both admirable depth and enormous breadth, taking in areas including property offences, public order offences and contempt of court. Tony has also established an international reputation for exploring the general part of the criminal law, including his pioneering work on codification and on constitutional aspects of criminal justice. One of his earliest and finest works on the general part of the criminal law is his contribution to the festschrift for his mentor and Cambridge colleague Glanville Williams, "On Actus Reus and Mens Rea".¹ That short paper packs a strong punch. To reassess all of its ideas some 55 years later would be a Herculean task – should defences be regarded as independent of the actus reus and mens rea? Should the absence of justification be regarded as an element of the actus reus? Is mens rea an indispensable ingredient of criminal liability? Perhaps the overarching argument of the paper is this:²

This division of crime into its constituent parts is an exercise of analytical convenience: the concepts of *actus reus* and *mens rea* are simply tools, useful in the exposition of the criminal law. Great care should, therefore, be taken to avoid determining questions of policy by reference to definition and terminology. Such observations as that the maxim *actus non facit reum nisi mens sit rea* serves the "important purpose of stressing two basic requirements of criminal liability," make *actus reus* and *mens rea* seem rather more than analytical tools. They have been converted from the descriptive to the normative: to propositions that criminal liability *should* be based on harmful conduct, and *should* require a mental element.

Tony Smith follows this argument through, interrogating key aspects of actus reus and mens rea, and commenting that, by comparison with the number of writings on mens rea and culpability, "the

* Vinerian Professor of English Law Emeritus, University of Oxford.

1 ATH Smith "On Actus Reus and Mens Rea" in PR Glazebrook (ed) *Reshaping the Criminal Law* (Stevens & Sons, London, 1978) 95.

2 At 96–97 (footnotes omitted).

volume of literature dealing with actus reus is minute".³ What I hope to do here is to shine a light on some different varieties of actus reus that have achieved prominence in the last half-century, and to apply Tony's arguments and methodology to them. In particular, he argues against those writers who refer reverentially to the actus reus of an offence, thereby tending:⁴

... to obscure the principles (such as, that liability for a consummated crime should be based on some outward mischief, and that the law should justify conduct that involves the doing of the lesser of two harms) on which criminal liability should be based.

In Tony's view, normative propositions of this kind should be brought into the foreground and subjected to scrutiny in terms of their rationales, rather than left to general statements about mens rea and actus reus.

This task becomes all the more important when the frontiers of criminalisation are continually pushed further, and new forms of actus reus find their way into the criminal law. My own expertise does not extend to New Zealand law, but I would expect many of the following seven types of English criminal legislation to be mirrored in New Zealand:

- (1) Endangerment offences (particularly road traffic offences, the most recent addition in English law being an offence of causing serious injury by careless driving, taking its place alongside causing death by careless driving and other result-oriented offences of negligence).
- (2) Offences in the inchoate mode (such as the principal offences under the Fraud Act 2006 (UK), which penalise the dishonest making of a false representation with intent to make a gain or cause a loss, not the actual causing of a gain or loss).
- (3) Pre-inchoate offences (the most far-reaching of which is probably s 5 of the Terrorism Act 2006 (UK), which criminalises engaging in conduct in preparation for giving effect to an intent to commit terrorism, and thus goes far wider than the "more than merely preparatory act" required by the English law of attempts).⁵
- (4) Risk-based possession offences (such as possession of a firearm or of a knife in a public place, which may be cast as "non-constitutive crimes" in that the ultimate harm used to justify such crimes lies remote from the crime of mere possession).⁶

3 At 97.

4 At 102.

5 For analysis, see Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at ch 5.

6 See further AP Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011); and Andrew Ashworth *Positive Obligations in Criminal Law* (Hart Publishing, Oxford, 2013) at ch 6.

- (5) Membership offences (for example, being a member of an organisation classed as a terrorist organisation).
- (6) Failure to comply with the requirements of a behaviour order (English law contains over 20 types of behaviour order, which courts may make with or without conviction, and which typically prohibit certain conduct by an individual and reinforce this with a criminal offence of non-compliance).⁷
- (7) Failure to comply with the requirements of a regulatory regime that imposes duties on individuals or corporations (such as duties to report, to prevent or to protect, discussed further below).

Not all of these seven varieties of actus reus are new creations of the 21st century, but the increasing frequency of legislative resort to criminalisation of these kinds is surely beyond doubt. The issues of principle they raise are manifold and deep. For example, there has been longstanding debate about the most appropriate threshold for liability for a criminal attempt. Should the actus reus of an attempt be a more than merely preparatory act, or a substantial step, or the last act before commission of the offence itself? The further along the way the test for an attempt is located, the greater the opportunity for defendants to change their mind; the earlier the test for an attempt is located, the greater the opportunity for law enforcement officers to intervene and prevent harm from occurring. But surely these arguments apply doubly to offences drafted in the inchoate mode (type 2 above), which have the effect of pushing the actus reus of attempting such offences even further back. Thus it is a crime under the Fraud Act 2006 to attempt to make a false representation with intent to cause loss or gain, thereby penalising a rather remote act. And, more obviously, do similar arguments not apply to pre-inchoate offences (type 3 above), which explicitly impose liability at a stage before the actus reus of an attempt?

These are just some of the questions of principle that lie behind the seven types of criminal legislation described above. One particular question of principle, closely tied to the concept of actus reus, concerns the place of omissions. A leading English textbook takes a strong line on omissions. Simester and Sullivan's text states that:⁸

It is a guiding principle of the law that defendants are liable according to what they do, and not what others do and they fail to prevent.

7 Behaviour orders are discussed in Andrew Ashworth and Rory Kelly *Sentencing and Criminal Justice* (7th ed, Hart Publishing, Oxford, 2021) at ch 11. For a current English example, see ss 20 and 21 of the Public Order Act 2023 (UK).

8 AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing, Oxford, 2019) at 15.

And again:⁹

Standard legal doctrine stipulates that the behaviour requirement [in the actus reus of a crime] is a requirement of positive action by the defendant. Except occasionally, an omission will not do.

What should we make of these trenchant assertions? The final proposition, as it stands, confuses the normative with the descriptive. It presents a descriptive proposition – that omissions will only occasionally suffice (how occasional? Five or 10 per cent?) – when it should be engaged on the task of advancing reasons why the law should not criminalise omissions. However, Simester and Sullivan do go on to advance two such reasons, and we should examine them closely.

Their first reason is that omissions intrude on individual autonomy to a greater degree than the negative prohibitions typical of the criminal law. Is this true? We may share the high value placed by the authors on individual autonomy without conceding that this is a strong argument against omissions liability. What individual autonomy means here is the opportunity to make and follow one's life plans, without being obliged to deviate from or abandon them for another's convenience, as in the "failure to rescue" offences in other European countries. When Simester and Sullivan refer to citizens being forced "constantly to interrupt our own actions and plans in order to prevent outcomes that are brought about by others",¹⁰ they are surely exaggerating the frequency with which such incidents occur. And when the lead author criticises omissions liability on the ground that it saddles individuals with "[u]ntrammelled responsibility for harms the occurrence of which one is prima facie unconnected with",¹¹ there is further exaggeration residing in the word "untrammelled" – a well-drafted law would set the limits of liability. Moreover, the autonomy of all individuals should be valued, and this may supply a justification for requiring one individual to do a not-too-demanding positive act if another person's vital interests are at stake (such as alerting the emergency services to a life-threatening situation). Developments in social media may not only render it easier to summon help, but also change attitudes on whether to intervene, particularly if the whole incident can be filmed.

The second reason advanced in Simester and Sullivan's treatise is related to the first, and it is that individuals should be entitled to give priority to their own interests over those of others. This reason is open to the same rebuttal as the first, but there is also a further difficulty with it. Where a person undertakes a particular occupation or trade, it may be justifiable to attach duties to that role and to reinforce those duties with criminal offences of failing to comply with those obligations. Thus offences of type 7 above are now increasingly to be found. One example of this would be offences of failure to report – for example, failure by professionals in the banking sector to report suspected

9 At 74.

10 At 76.

11 AP Simester "Why Omissions are Special" (1995) 1 LEG 311 at 333.

money-laundering transactions.¹² These professionals are best placed to observe and report such transactions, they are engaged in a profitable business, and it is surely fair to impose a reporting duty on them, while leaving government officials to follow them up.

Another set of examples would be offences of failure to prevent – for example, failure by an organisation to prevent bribery by an employee or agent that was intended to benefit the organisation, subject to a due diligence defence.¹³ Again, the officers of the company are best placed to observe such behaviour, and also to put in place procedures designed to prevent it. These "failure to prevent" offences have a number of significant features. One is that they may criminalise corporations, raising the question whether the arguments from individual autonomy apply to bodies corporate. Another feature is that such offences typically require no mens rea, but do incorporate a due diligence defence: that the corporation "had in place adequate procedures designed to prevent [employees, agents and the like] from undertaking" conduct intended to obtain or retain corporate business. A further feature is that such offences may require only a short interruption of the individual's ordinary life plans, rather than the "untrammelled" responsibility sometimes alleged.¹⁴

The argument put forward by Simester and Sullivan is that liability for omissions should be exceptional,¹⁵ but it is still unclear what exactly that means. It is not simply a numerical matter: the gist is surely that there must be a strong case for the imposition of a duty on a citizen or corporation, and also for criminalising failure to carry out that duty. Thus, if we are to construct a convincing case for criminal offences of omission, there are several normative hurdles to be surmounted.

First, it must be clear that dealing with the particular breach of duty through regulatory sanctions (such as enforcement notices reinforced by fines) is neither commensurate with the moral significance of the wrong done, nor sufficiently effective in reducing the frequency of breaches. Such considerations arise, for example, when the question is whether there should be an offence of failure by a professional to report child abuse,¹⁶ or failure by an Internet provider to remove content harmful to children.¹⁷ The safety of children is one of the most important values that the criminal law should protect, and this may indicate that a purely regulatory response is less appropriate than criminalisation.

12 Various offences in the Proceeds of Crime Act 2002 (UK), ss 330–331, discussed in Ashworth, above n 6, at 58–60.

13 Bribery Act 2010 (UK), s 7, discussed in Andrew Ashworth "A New Generation of Omissions Offences?" [2018] Crim LR 354 at 358–361.

14 See for example Simester, above n 11.

15 Simester and others, above n 8, at 76.

16 For discussion, see Ashworth, above n 6, at 60–65.

17 Currently before the United Kingdom Parliament in the Online Safety Bill 2022 (HL Bill 87), cls 62 and 93–95. The imposition of such duties on Internet providers remains controversial, and the fate of the Bill's provisions remains uncertain.

Failure by a childcare professional to report child abuse is surely serious enough to be a crime, since not only is child protection an important value but it is also the reason for employing professionals. As for the duties of Internet providers, it can be argued that they should take responsibility for supervising and overseeing the activities of those who post items on the Internet,¹⁸ particularly in respect of the protection of children. Most Internet providers are corporations, and it is recognised that the identification principle is an inadequate basis for corporate criminal liability. On the other hand, the failure-to-prevent model is more effective, and no less fair, if it incorporates a due diligence offence.¹⁹

A second strong argument in favour of an omissions offence applies if what the law mandates is a rather small sacrifice by one individual in order to protect a fundamental right of another. For example, the right to life lies at the core of human rights law.²⁰ It is the state's responsibility to have in place services to respond to life-threatening emergencies (eg police, fire, ambulance), but it is arguable that it should be the citizen's duty to alert the emergency services if a person is in peril. If the citizen has a mobile phone, it should take little time to alert the emergency services: this is a small sacrifice of time, with a potentially life-saving result. There remain questions of what further steps (if any) a citizen should be expected to take, and whether any further duties should be reinforced by the criminal law rather than left to morality or social conscience. Some of those considerations will be mentioned in the paragraphs that follow.

Thirdly, a person should only be liable to conviction of an omissions offence if they were present, or if they were not present but had a duty to be present. In principle, a duty should only be cast on a person who has the opportunity to discharge it, being at the scene or "on the spot". The exception to this arises where the person has a duty to safeguard another (most clearly, a parent's responsibility for the safety of their child), or where the person is employed or designated to undertake surveillance of potentially dangerous activities (for example, a lifeguard at a swimming pool).

Fourthly, there is the question of capacity. The law should not require citizens to put themselves in personal danger when responding to a life-threatening emergency: this is one reason why the strongest case for criminalisation is where the citizen has a duty to use their mobile phone to alert the emergency services. There may also be an argument in favour of criminal liability where life-saving equipment is readily at hand (eg a lifebelt, if a person is thought to be in danger of drowning) but the

18 On the supervisory principle, see Jeremy Horder and Gabriele Watts "The Scope of Liability for Failure to Prevent Economic Crime" [2021] Crim LR 851.

19 Ashworth, above n 13; Horder and Watts, above n 18; and Sam C Brown and Bastian Hertstein "Failure to Prevent Money Laundering and the Supervisory Principle" [2022] Crim LR 648.

20 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 6; and European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 2.

citizen makes no effort to deploy that equipment.²¹ The question of capacity also merges with the question of presence: a lifeguard who sees someone in danger of drowning, in the pool for which they have responsibility, should have a duty to take steps to rescue that person. Contacting the emergency services is, in principle, not sufficient if the danger is urgent and the lifeguard has the training and the opportunity to attempt a rescue.

Fifthly, omissions offences must conform to "rule of law" principles. In particular, the offences must be clear in what they require of the citizen, and "must avoid taking people by surprise, ambushing them, putting them into conflict with [the law's] requirements in such a way as to defeat their expectations and frustrate their plans".²² This requirement is no more problematic in failure-to-prevent offences than in the general run of (negative) prohibitions in the criminal law, but it does cause concern in so-called "failure of easy rescue" offences. The discussion of presence and capacity in the foregoing paragraphs has shown the opacity of what the law requires of a citizen in a given situation.²³ One way of reducing the uncertainty is to phrase the law in a minimalist fashion, as by confining the criminal sanction to citizens who fail to alert the emergency services. If, however, it is thought fair to extend the criminal sanction to citizens who fail to use readily available life-saving equipment (such as throwing a lifebelt to a person in danger of drowning), elements of uncertainty creep in; the same applies when discussing what is expected of a lifeguard when someone gets into difficulty in the pool for which they have responsibility.

This relatively detailed discussion of the features of omissions offences in contemporary criminal law demonstrates the wide range of issues of principle that lies beneath the statement that the actus reus must be a positive act and not an omission. As Tony Smith put it in his essay of 1978, "the terminology of actus reus tends to conceal the important principles that are at stake" when deciding whether to criminalise certain conduct.²⁴ However, more interest has been shown in actus reus in

21 Compare Simester and others, above n 8, at 15, n 50: "if a swimmer drowns, the law cannot afford to prosecute every person on the beach". This is advanced as a pragmatic argument against omissions offences, but it applies only to a minority of omissions offences, and does not apply when there is only one person on the beach or by the river.

22 John Gardner "Introduction" in HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed, Oxford University Press, Oxford, 2008) at xxxvi.

23 Compare this passage from Simester and others, above n 8, at 15, recognising that there may be a good argument for criminalising an adult who fails to rescue a child from a shallow pool, but adding that this would depend "upon such factors as the seriousness of the impending harm and the degrees of risk and inconvenience involved in averting it".

24 Smith, above n 1, at 95.

recent years, especially in omissions, so that the volume of literature dealing with it can no longer be described as "minute".²⁵ To return to the first quotation above from Tony's 1978 essay:²⁶

Such observations as that the maxim *actus non facit reum nisi mens sit rea* serves the "important purpose of stressing two basic requirements of criminal liability," make *actus reus* and *mens rea* seem rather more than analytical tools.

What Tony describes as the "positive approach" focuses on "what are, and what ought to be, the prerequisites of criminal responsibility",²⁷ and thus on the issues of principle raised by debate about those prerequisites. The aim of this short article has been to follow Tony's lead, and to demonstrate the breadth and depth of those issues, by reference to the developing forms of criminalisation and, in particular, to the increase in offences of omission.

25 At 97.

26 At 96. The internal quotation, criticised in this passage, was taken from Rupert Cross and Philip Asterley Jones *Introduction to Criminal Law* (8th ed, Sweet & Maxwell, London, 1976) at 25.

27 Smith, above n 1, at 107.