CHAPTER 4

FAULT ELEMENTS

4.1 This Chapter reviews the general scheme of fault elements of offences in the Penal Code and examines some of the key concepts through which this scheme is expressed. The specific fault elements of particular offences will be examined in subsequent chapters.

Principles of fault

4.2 In some instances, fault elements are specified in the provisions establishing particular offences. For example, intentional homicide requires one person to cause the death of another 'intentionally': Code s 106. In addition, certain general provisions of the Code supplement the specific fault elements. They lay down principles from which fault elements can be derived in the absence of specific provisions for particular offences. They also provide guides to the interpretation of the terms used in specific fault elements.

4.3 The pivotal concepts in the law of fault elements are intention, recklessness and inadvertent negligence (commonly abbreviated to simply 'negligence'). These are the states of mind that are most commonly in issue. The relationship between them is governed by the Code s 6:

- Section 6(1) provides: 'No person shall be guilty of a criminal offence unless he intentionally does an act which is prohibited by the criminal law and for which a specific penalty is prescribed.'
- Section 6(2) reinforces the general requirement for intention: 'No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits.' It also deems recklessness to be the equivalent of intention.
- Section 6(3) defines recklessness.
- Section 6(4) provides: 'A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission.' It also defines negligence.
- Section 6(5) specifies the conditions under which offences can be construed as not requiring intention: 'No provision of law constituting a criminal offence shall be construed as dispensing with the necessity to prove the criminal intention of the accused, unless such construction is expressly stated or arises by necessary and distinct implication.' This provision effectively abolishes the

common law categories of strict and absolute liability, in which intention is not required for minor offences because of their subject matter or low penalties.

4.4 Intention is the most serious or 'worst' state of mind. It involves choosing to commit the offence whereas recklessness merely involves choosing to run an unjustifiable risk of committing it. Inadvertent negligence, the least culpable state of mind, involves a failure to foresee that harm will or could be caused when a reasonable person would have foreseen this and taken action to avert the outcome. Section 6 establishes intention or recklessness as general requirements for criminal responsibility, and rejects negligence except where it has been adopted in legislation expressly or by necessary implication. This is in line with modern formulations of the common law principles of criminal responsibility for serious offences. There is strong modern authority in support of a common law principle of subjective awareness for *mens rea*, that is, a principle that the accused must have appreciated the nature of what was done, including any circumstances, consequences or risks forming part of the definition of the offence. As it was put in a leading Canadian case, *mens rea* consists of 'some positive state of mind such as intent, knowledge or recklessness': *R v City of Sault Ste. Marie* [1978] 2 SCR 1299, 1325 (Dickson J). See also *DPP v Morgan* [1976] AC 182 (HL); *He Kaw Teh v R* (1985) 157 CLR 523, [1985] HCA 43.

4.5 It is commonly said that intention and recklessness are subjective forms of fault whereas negligence is objective. Describing a test of criminal responsibility as 'subjective' means that liability is determined by reference to the blameworthiness of a person's own state of mind. The alternative, 'objective' approach to assessing criminal responsibility involves measuring the state of mind and conduct of an accused against that of some hypothetical person, such as an 'ordinary' or 'reasonable' person, placed in a similar situation. This approach to assessing criminal responsibility is 'objective' because it does not depend on any finding that the accused's state of mind was blameworthy in itself. For example, the conduct elements of the offence might have been committed inadvertently. Nevertheless, the accused can be blamed because of a failure to direct attention to the risk of harm and choose a different course of action. Negligence was the base-line for criminal responsibility under the model code developed by the British Colonial Office which was briefly in force in Vanuatu, 1973-1980: see **1.4**. That code is still in force in Solomon Islands, Kiribati and Tuvalu. However, its objectivist principles were rejected for the Vanuatu Code in 1981 and have also now been rejected in new codes for Fiji and Nauru.

4.6 The major departure from the scheme of the Code s 6 is found in s 12, which establishes a defence of reasonable mistake of fact:

> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

As was discussed in Chapter 2, the original version of s 12 permitted a mistake of fact to operate as a defence whether or not it was reasonable: see. The current requirement for a mistake to be reasonable was adopted in 1989. It was argued in Chapter 2 that s 12 should be read narrowly, so that it applies only to offences where there is no express fault element and also where culpability turns on beliefs about facts or circumstances but not results: see **2.10-2.11**. For example, it does not apply to a claim that a homicide or injury was unintentional, even if based on an underlying mistake of fact: ss 106; 107. It does, however, apply to offences such as rape or indecent assault when a claim is made to a belief that there was consent to the interaction: ss 90; 98(2).

Intention

4.7 There are different ways in which intention can play a role in fault elements of offences:

- It can be specified as a required fault element of an offence. For example, intention is expressly required for the offences of intentional homicide and intentional assault under the Code ss 107-107; theft under the Code s 122 requires that property be appropriated with *the intention of* permanently depriving the other person of the property.
- It can be interpreted to be a fault element when another term is used. For example, arson or damaging property has to be done 'wilfully': Code ss 133-134. The term 'wilfully' has been interpreted to mean either intentionally or recklessly: *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209.

4.8 It is well-established that intention does not require premeditation. Thus, an intention may be formed and executed within a moment. Moreover, intention is not the same as motive (ultimate objective). The prosecution does not have to prove any particular motive for an offence, though the existence of a motive is a fact that might be used as evidence of the intention of some action.

4.9 Two different types of intention have been recognized in the case-law of the common law world.

- First, a person is said to intend something if the purpose is to make it occur. The prospect of making it occur provides the *reason* for acting. In *Peters v R* [1998] HCA 7; (1998) 192 CLR 493, at [68], McHugh J said: 'No doubt, when a

person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing.' For example, someone who shoots at another person in order to kill that person may be said to intend to cause death. This is sometimes called 'purpose' intention or 'direct' intention.

- A person is also said to intend something when it is known or foreseen that it will be a certain or virtually certain consequence of some action, even though the action may have another purpose. In *Peters* at [68], McHugh J said: 'If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur.' For example, a person who sets fire to a house in order to collect insurance money, knowing that people are inside and will inevitably be killed, may be said to intend to cause death. This is sometimes called 'knowledge' intention or 'oblique' intention.

The link between the two types of intention is that the person chooses to commit the physical elements of an offence rather than merely chooses to risk committing them.

4.10 In *Zaburoni v R* (2016) 256 CLR 482; 330 ALR 49, a majority of the High Court of Australia adopted a curiously narrow view of the meaning of 'intention' in the Queensland Criminal Code, effectively confining it to intention in the form of purpose. Kiefel, Bell and Keane JJ said at [14]:

> Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct … knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code. In the last-mentioned respect, the Code is distinguished from its Commonwealth counterpart, which allows that a person has intention with respect to a result if the person is aware that the result will occur in the ordinary course of events.

It was said at [15] that, where an accused has foresight that conduct is virtually certain to produce a particular result, this is of evidential significance. However, it does not, in and of itself, amount to intent.

4.11 *Zaburoni* was a case concerning the offence of 'transmitting a serious disease with intent' under the Criminal Code s 317(b) (Qld). However, the judges' remarks were clearly meant to apply generally to the concept of intention in the Queensland Code. They cited with approval a comment of Connolly J in the murder case of *Willmot (No 2)* [1985] 2 Qd 413 at 418: 'Relevant definitions in the *Shorter Oxford English Dictionary* [of intent] show that what is involved is the directing of the mind, having a purpose or design.' However, the High Court provided no justification in principle or policy for this interpretation, and no explanation of why 'intention' should carry a

different meaning in the Queensland Code from elsewhere in the common law world. The High Court simply treated the matter as settled by previous Queensland authority. Yet, that previous Queensland authority was also devoid of any justification in principle or policy.

4.12 Excluding the knowledge form of intention could have unfortunate consequences for some offences. In particular, it would drastically reduce the scope of the offence of theft. Theft requires an intention to deprive the owner of the property, but in almost all cases this can be proved only in the form of knowledge intention: see **Chapter 8**. It is rare for one person to steal the property of another in order to deprive the other person of it. A person who steals the property of another will usually do so simply in order to gain the benefit of the property, but with the incidental knowledge that the other person will thereby be deprived of it. It is, therefore, difficult to see how the restrictive interpretation of intention could withstand serious challenge in that, if any, context.

4.13 Therefore, the better view is that the interpretation of 'intention' favoured by the High Court of Australia in *Zaburoni* is wrong. It should not be followed in Vanuatu. 'Intention' in the Penal Code should be interpreted to encompass both purpose intention and knowledge intention.

4.14 Intention can be conditional: a person can intend an outcome that is dependent on certain conditions being met. This is obviously true for intention in the form of purpose, where the person acts with the aim of achieving an outcome which may be dependent on the interaction of a variety of factors. It has also been held to apply to intention in the form of knowledge. In *Smith, Afford v R* (2017) 259 CLR 29; [2017] HCA 19, the defendant was convicted of importing drugs into Australia, an offence which required proof of intent to import. The defendant had claimed that he was carrying luggage for someone else and that, although he was suspicious, he had hoped the luggage did not contain drugs. He appealed the conviction on the ground that his state of mind could have amounted to recklessness but not intention. The High Court dismissed the appeal on the ground that he would intend to import drugs in the event that he was prepared to bring the luggage into Australia even if it contained drugs. The concept of conditional intent has also been acknowledged by the United Kingdom Supreme Court. In *R v Jogee* [2016] UKSC 8 at [92], it was said:

> In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending

> that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

4.15 Intention can be proved through a confession or some other admission by the accused. It can also be proved by circumstantial evidence, through inferences from what happened. For example, the circumstances of a killing may be such that it is reasonable to conclude the accused's purpose must have been to kill, or alternatively that the accused must have known that death would result. This is acknowledged in the Code s 11(3), a curious provision which lies submerged in a section dealing with ignorance of law or fact. Section 11(3) addresses cases where knowledge of certain facts is necessary in order to form a criminal intention. It provides: 'In the absence of direct evidence thereof, such knowledge may be proved by inference from other facts or circumstances.'

4.16 In drawing inferences, the chain of reasoning is first to analyse objectively what would have been in the mind of an ordinary person who did what the accused did and then ask whether there is any reason why the accused's state of mind might have been different. An objective test is used to explore the accused's state of mind. However, the ultimate issue is always the accused's own state of mind and this may not be the same as that suggested by the objective test. Factors such as anger or intoxication may make it unsafe to draw that inference.

4.17 Intention in the form of purpose will usually be easier to prove for premeditated action than for impulsive action. Knowledge is the form of intention which may be easier to prove where action has been impulsive.

Knowledge

4.18 The elements of certain offences require that a person act 'knowing' some matter or matters. Thus, for receiving under the Code s 131, stolen property must be received 'knowing' it to have been dishonestly obtained. Similarly, for offences relating to false or misleading representations under the Code s 124 and s 130C, the person must act 'knowing' that a representation is false or not believing it to be true.

4.19 To make a representation knowing that it is false is to intend to make a false representation, in the broad sense of intention: see **4.9**. In contrast, not believing a representation to be true is a form of recklessness: see below.

Recklessness

4.20 The term 'reckless' is used in two senses in criminal law.

- For serious crimes where recklessness is commonly treated an as alternative fault element to intention, recklessness is viewed as the unjustifiable taking of a *known* risk. The concept is therefore used in a special sense, referring to a subjective state of mind. The actor must be aware of the risk. It is not sufficient that the conduct is objectively dangerous. Recklessness is defined in these terms in the Code s 6(3).
- In some legislation, the term 'reckless' is used in a sense closer to its meaning in ordinary language, as signifying a high degree of negligence, amounting to dangerousness. Thus, offences of reckless driving have been created in the Road Traffic (Control) Act ss 12-13. In this context, reckless driving appears to be synonymous with dangerous driving. Both concepts refer to breach of objective standards of behavior rather than to subjective states of mind. This may also be the meaning of recklessness in the offence of 'unintentional harm' in the Penal Code, which provides that 'No person shall unintentionally cause damage to the body of another person through recklessness or negligence, or failure to observe any law': s 108. The offence of intentional assault under s 107 already covers subjective recklessness in causing damage to the body of another person, so that it makes some sense to treat the reference to recklessness in s 108 as meaning 'dangerous'. See *Morrison v Public Prosecutor* [2020] VUCA 29 at [21], where it was said: 's.108…covers a wide variety of acts, from recklessness, *which could include extremely dangerous driving*, to negligence which could extend to just momentary carelessness.' [emphasis added] for further discussion of the interpretation of s 108, see **6.? – 6.?**

The present concern is with recklessness in the former, subjective sense.

4.21 Subjective recklessness can be in issue for a range of offences under the Code:

- Some Code offences expressly mention recklessness as a form of fault element. See, for example, the use of the term in ss 130B(2) and 130C(b), in offences relating to obtaining money by deception or false or misleading statements, and in the offence of arson under s 134(2).
- There are also offences which, although they do not expressly use the term 'reckless', specify states of mind that are effectively forms of recklessness. For example, the offence of obtaining property by false pretences requires that a person act knowing that a representation is false or *not believing it to be true*. To make a representation not believing it to be true involves taking the risk that it is false and is a form of recklessness.
- Many Code offences require the conduct to be committed 'with intent' or

‘intentionally’. However, s 6(2) deems recklessness to be the equivalent of intention: ‘recklessness in doing that act shall be equivalent to intention’. The Court of Appeal has held that this applies to the offence of intentional homicide under the Code s 106: *Kal v Public Prosecutor* [2018] VUCA 56 at [48]. Presumably it applies to all other offences that specify intention as the fault element including intentional assault under the Code s 107.

4.22 The Code s 6(3) defines recklessness in this way:

> A person shall be considered to be reckless if –
> (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and
> (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.

Awareness of a risk is a subjective state of mind but unreasonableness is an objective matter: it is immaterial that the person may have thought that taking the risk was reasonable.

4.23 Some definitions of recklessness refer to the risk-taking being ‘unjustifiable’ rather than ‘unreasonable’. However, the relevant considerations will be the same whichever term is used. Whether or not it was reasonable or justifiable to take a risk will depend on the interaction of several variables:

- the degree of risk;
- the magnitude of the harm if the risk materialises;
- the social value of the end for which the risk is taken; and
- the costs of avoiding or minimising the risk.

4.24 Unreasonableness or unjustifiability is part of the definition of recklessness because an element of risk-taking is necessary for the conduct of everyday life and indeed may sometimes be valued. Thus, in *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464 at 470, where the role of the concept of recklessness in the common law of murder was under analysis, the High Court of Australia observed: ‘A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable.’ Conversely, in *Leary v R* (1977) 74 DLR (3d) 103 at 116–17 (SCC), Dickson J noted that justifiability is not a practical issue in relation to reckless rape because: ‘The harm to be anticipated from acting upon the mistaken belief that the woman is consenting is very great whereas that which may be lost in failing to act is slight.’

Wilfulness

4.25 The term 'wilfully' is found in offences including arson, damaging property, and maltreatment if animals, birds or fish: Code ss 133-134(1), 136. 'Wilfully' has been interpreted to mean either intentionally or recklessly: *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209. It has also sometimes been treated as referring just to intention. This appears to be the meaning in s 134(2), where the 'recklessly' is expressly included as an alternative to 'wilfully'.

Negligence and criminal negligence

4.26 Negligent conduct is conduct that fails to comply with the standards of the reasonable person for avoiding the commission of harm to others. It is defined in this way in the Code s 6(4):

> A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.

The term 'negligent' is sometimes also used as a shorthand for 'inadvertent negligence', to describe the state of mind of an actor who does not advert to the consequences or risks of negligent conduct. Inadvertent negligence is a state of mind involving a culpable failure to anticipate harms that the reasonable person would have anticipated and taken action to avoid. Disregarding a risk that is foreseen constitutes recklessness in the subjective sense of the term: see **4.20**.

4.27 The Vanuatu Code s 6(4) provides: 'A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission'. In the history of the common law, *mens rea* has often been said to include only subjective states of mind such as intention and recklessness. The common law offence of manslaughter, however, has always been a notable exception, with a 'gross' or 'criminal' degree of negligence being sufficient for the fault element. In addition, the phraseology of s 6(4) might suggest a misleading degree of aversion to liability for negligence. The provision refers to 'unless the crime consists of an omission'. Its message might have been more clearly conveyed by saying, 'A person who is merely negligent shall be guilty of a criminal offence only if they have omitted to observe a legal duty to act.' It is a general principle of common law that there can be criminal liability to prevent harm occurring when this involves breach of a legal duty to act: see **3.2-3.9**.

4.28 In the Vanuatu Penal Code, negligence is the basic fault element for the offence

of unintentional harm under s 108:

> No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.

Recklessness is included as an alternative in s 108 but the context may suggest that this means conduct that is dangerous: see **4.20**; and see *Morrison v Public Prosecutor* [2020] VUCA 29 at [21]. In effect, all cases under s 108 will be cases of negligence, although there may be particular forms of negligence which amount to recklessness or involve failure to observe a law.

4.29 An unreasonable mistake is a negligent mistake. Thus, offences for which fault is addressed through the defence of reasonable mistake of fact under s 12 can be committed negligently. Examples include rape and indecent assault with respect to claims for a mistaken belief in consent: see the discussion at **2.10-2.11**.

4.30 To establish criminal liability in most common law jurisdictions, there must generally be negligence to the degree called 'criminal negligence'. Negligence sufficient for civil liability in the law of torts may not be sufficient for criminal liability. It is said that the departure from the standard of care of the reasonable person must be great enough to justify the kind of sanctions and stigma that follow on a criminal conviction. The negligence must therefore be 'gross'; there must be a wide departure from the standard of care that would be exercised by the reasonable person. The distinction between civil and criminal degrees of negligence has a long history. It was emphasised by Lord Atkin in *Andrews v D.P.P.* [1937] AC 576 at 583, [1937] 2 All ER 552 (HL):

> Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.

4.31 Various expressions have been used to convey the idea of criminal negligence. A common direction to jurors is taken from *R v Bateman* (1925) 19 Cr App Rep 8 at 13, where it was said that a jury must be satisfied that the negligence 'went beyond a mere matter of compensation and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. Other expressions that have been used include 'a marked departure', 'a substantial departure' and 'a serious deviation' from the standard of conduct of the reasonable person. See also the definition of negligence in the Australian Criminal Code (Cth) s 5.5, which refers to 'a great falling short' of the standard of care of a reasonable person.

4.32 It is not yet settled whether and how far the standard of criminal negligence will be imported into the Vanuatu Penal Code. The standard of criminal negligence is not expressly adopted in the Code. It has, however, been read into some criminal statutes by the courts: see, for example, the decision of the High Court of Australia in *Callaghan v R* (1952) 87 CLR 115; [1952] HCA 55. On the other hand, the New Zealand courts historically declined to read it into their Crimes Act: see *The King v Storey* [1931] NZLR 417 at 432 (CA); *R v Yogasakaran* [1989] NZCA 362, [1990] 1 NZLR 399 (CA). It required a legislative amendment in 1997 before the standard of criminal negligence became part of the law of New Zealand. In the decision of the Vanuatu Court of Appeal in *Morrison v Public Prosecutor* [2020] VUCA 29, it was apparently assumed that the standard of criminal negligence was not to be read into the offence of unintentional harm under s 108 of the Penal Code. It was observed at [21]: 's.108…covers a wide variety of acts, from recklessness, which could include extremely dangerous driving, *to negligence which could extend to just momentary carelessness*.' [emphasis added] Unfortunately, there was no discussion of the issues.

Transferred fault

4.33 It sometimes happens that an assailant intends to attack one person but misses and strikes and perhaps injures or kills another person. The contact that actually results is different from the contact that was intended. There is a general principle of common law to the same effect that the intention to attack one person is transferred to the contact with or injury to another. This is called the principle of 'transferred intent' or 'transferred *mens rea'*. It applies generally to offences against the person. It is not express in the Vanuatu Penal Code but is likely to be imported by the courts.

Mistake or Ignorance of Fact

4.34 In the history of the common law of crime, there has been some debate about whether mistake of fact should be treated simply as an aspect of the general law of fault elements or whether it should constitute a separate defence, perhaps with a condition that the mistake should have been a reasonable one. Under the Penal Code, mistake of fact can be treated in either of these ways depending on the offence in issue.

4.35 If the offence is one requiring some subjective mental state such as intention, knowledge or recklessness, mistake or ignorance of fact can negate that element. A mistake of fact may be inconsistent with these specific states of mind. A person who

believes that a suitcase is empty does not ‘possess’ drugs which are found within it. A person who pulls the trigger of a gun, mistakenly believing it to be unloaded, does not have an intention to kill or cause bodily harm. A person who picks up a mobile telephone belonging to someone else, mistakenly believing that it is their own, does not have an intention to deprive the owner of it. In these instances, it makes no difference whether the mistake is reasonable or unreasonable. In either case, the mistake is inconsistent with the state of mind which is required to be proved to establish the offence. In deciding whether there was a mistake or ignorance, a court may consider its reasonableness. However, reasonableness is not a condition for the negation of responsibility. A foolish mistake or ignorance may still provide a good defence.

4.36 An objectively reasonable mistake of fact may also be inconsistent with the assertion that an injury was caused by negligence. For example, if there was a reasonable belief that a gun was unloaded, it would not be foreseeable that pulling the trigger would cause injury to anyone. Moreover, pulling the trigger might not be a negligent act.

4.37 Where a mistake of fact cannot be addressed in any other way, a defence may be provided by the Penal Code s 12:

> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

First, the accused must positively hold a genuine belief in a fact or circumstance Secondly that belief must be objectively reasonable. This provision establishes the test for excusing criminal responsibility in relation to several serious offences: see, for example, **Chapter 7** respecting mistaken beliefs in consent to sexual interaction and **Chapter 9** respecting mistaken beliefs about substances that happen to be prohibited drugs. Section 12 also establishes the test for criminal responsibility in relation to a host of minor offences in governmental regulatory schemes.

4.38 If the evidential burden to raise a defence under s 12 is discharged, the prosecution will carry a persuasive burden to disprove the defence beyond reasonable doubt. The prosecution can do so in either of two ways: (1) by disproving the existence of the belief or (2) proving that it was unreasonable.

4.39 A successful claim for a reasonable mistake may not always result in an acquittal. Section 12 only grants a defence for a belief which, had it been true, would have made the conduct ‘innocent’: in other words, the conduct elements of the offence would not have been not committed. A person who makes a mistake, however reasonable, may sometimes still commit an offence. For example, a person may possess a substance prohibited under the Dangerous Drugs Act (Van) thinking that it is

something else. There will be no defence if the substance that it is thought to be is also prohibited under the Act.

4.40 As discussed in **4.29**, an unreasonable mistake is a negligent mistake, so that offences to which s 12 might apply can be committed negligently. The restrictive wording of s 12, however, also allows some persons to be convicted who were not negligent. Unless a mistake is made, it is immaterial that reasonable care or due diligence may have been exercised to prevent the offence occurring: see *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183. This is unfortunate. Contrast the law of Canada, which recognises a general defence of due diligence to observe the law: *R v City of Sault Ste. Marie* [1978] 2 SCR 1299.

4.41 In *G J Coles & Coy Ltd v Goldsworthy*, the Queensland equivalent of the Penal Code s 12 was held to require a genuine belief in the sense of a 'positive' belief. This seems to exclude any state of mere inadvertence or ignorance no matter how reasonable the state of mind might be. If this view is correct then s 12 would be available to a person who possesses a prohibited drug honestly and reasonably believing that it is aspirin, but not to a person who possesses a prohibited drug having no idea what the substance is but, quite reasonably, never contemplating the possibility that it might be a prohibited drug. It is difficult to see why such a sharp distinction should be made between mistake and ignorance.

4.42 The phrase 'belief in any fact or circumstance' in s 12 might be interpreted to cover only matters of present fact or circumstance and to exclude any belief about the consequences or potential consequences of acts. In *Gould & Barnes* [1960] Qd R 283 at 291–2, it was said that an equivalent defence under the Queensland Criminal Code would be available for a mistaken belief about the contents of a bottle, or about the chemical properties of the contents, but not for a mistaken belief that a particular usage of the contents would be safe: see also *Gould & Barnes* at 297–8. Nevertheless, the question should be regarded as still open.

4.43 The defence of reasonable mistake can be excluded by the provisions of particular offences. An example is s 97, concerning unlawful sexual intercourse with a child. The provision actually creates two offences: s 97(1) makes it an offence to have sexual intercourse with a child under the age of 13; s 97(2) makes it an offence to have sexual intercourse with a child under 15 but of or over the age of 13. Both offences exclude any defence of belief that the child was of or over the age in question: s 97(3).

Mistake or Ignorance of Law

4.44 Ignorance or mistake of law will not provide a defence. Section 11(1) of the Penal Code provides:

> Ignorance of the law shall be no defence to any criminal charge.

A similar principle is also recognised at common law, where the Latin expression *ignorantia juris non excusat* is sometimes used. The principle is often expressed in terms of 'ignorance' of the law rather than 'mistake' though it is well established that the principle applies to positively mistaken beliefs as well as to states of ignorance.

4.45 The rule that ignorance or mistake of law is no defence applies in two somewhat different kinds of cases:

- A person may commit the conduct elements of an offence, fully aware of what he or she is doing, but without appreciating that the conduct is legally prohibited. For example, someone may not appreciate that a permit is required in order to run a commercial operation or to make alterations to a building. In such cases, the principle that mistake or ignorance of the law is no defence operates to deny any special exculpatory defence: see **Chapter 10** on defences which justify or excuse commission of the conduct elements of an offence.
- A person may commit the conduct elements of an offence, not being aware of what he or she is doing because of ignorance or mistake about some matter of law which is part of the offence description. For example, a person may possess a substance, knowing what it is but without realising that possession of it is prohibited under the Dangerous Drugs Act. The classification of the substance is a matter of law but is part of the definitional elements for the offence of possession of a dangerous drug. In this second category of cases, the rule that ignorance of the law is no excuse does not exclude a special exculpatory defence for having committed the elements of the offence. Instead, it prevents an accused claiming lack of responsibility with respect to one of the definitional elements.

4.46 Various rationales have been offered to explain why ignorance of the law should not operate as a defence. A justification is easiest to find for offences that are moral or social wrongs (*mala in se*). In such cases, a person should already know that they ought not to do the act or make the omission, quite independently of its specific legal prohibition. Ignorance of the legal prohibition is considered immaterial to an assessment of the person's culpability. The principle is, however, more difficult to justify for those offences that are essentially contraventions of schemes of governmental social and economic regulation (*mala prohibita*). However, the purpose of denying a defence for such offences is presumably to encourage people to check the legal status of their conduct before they engage in it.

4.47 Traditionally, little allowance has been made for the difficulties that even a careful person may encounter in trying to ascertain what is actually required by the law. In *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493, the defendant was convicted of fishing for rock lobster in a prohibited area. He had made enquiries of the Fisheries authorities and had been given information which did not identify the area proposed

to be fished as one where fishing for rock lobster was prohibited. The High Court of Australia nonetheless affirmed the conviction because the defendant had made a mistake of law rather than a mistake of fact. Officially-induced error of law has been accepted as a defence in some jurisdictions, but not yet in Australia. There is no provision for such a defence in the Vanuatu Penal Code.

4.48 The Penal Code, like the common law, accepts that mistake or ignorance of the law can negative criminal responsibility for theft where it gives rise to a 'claim of right' to property. The definition of theft in s 122 requires that property be taken or converted 'without a claim of right made in good faith'. This exception to the general principle that ignorance of the law is no defence operates to negative criminal responsibility where a person acts under a mistaken belief in having a legal entitlement to the property. It has been held in Australia that such a claim need not have any foundation in accepted legal doctrine: see *Walden v Hensler* (1987) 163 CLR 561; 75 ALR 173. However, it must be a claim of a legal right, not just a moral right.

4.49 It is not ignorance of the criminal law that founds a claim of right, but ignorance of the law of property rights. In the legislation of many jurisdictions, the defence extends to any property offences, not just theft. Moreover, it has sometimes been suggested that, at common law, the exception for claims of right may extend beyond property offences and cover any claim made as a matter of private or civil law. Under the Penal Code, however, the exception is limited to theft.