

CRIMINAL LAW

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Abbreviations Key

Abbreviation	Meaning
A / D	The accused / defendant
V / C	The victim / complainant
AR / MR	<i>Actus reus</i> (physical elements) / <i>mens rea</i> (fault elements)
BRD	Beyond reasonable doubt
CA	<i>Crimes Act 1958</i> (Vic) (all section references are to this Act unless stated)
CMIA	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic)
JDA	<i>Jury Directions Act 2015</i> (Vic)
SOA	<i>Summary Offences Act 1966</i> (Vic)
A / D	The accused / defendant
V / C	The victim / complainant
AR / MR	<i>Actus reus</i> (physical elements) / <i>mens rea</i> (fault elements)
BRD	Beyond reasonable doubt
SA	<i>Sentencing Act 1991</i> (Vic)
YJA	<i>Youth Justice Act 2024</i> (Vic)
RSI	Really serious injury (the Victorian term for grievous bodily harm in murder)
UDA	Unlawful and dangerous act (manslaughter)
NAI	<i>Novus actus interveniens</i> (a new intervening act that breaks the chain of causation)
Charge Book	Judicial College of Victoria, <i>Victorian Criminal Charge Book</i> (free online, and the best statement of the elements of each Victorian offence)
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Onus, Standard and Structure

The prosecution must prove every element of an offence beyond reasonable doubt (*Woolmington v DPP* [1935] AC 462; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1)). For most defences the accused bears only an **evidential burden** (there must be evidence raising the defence as a reasonable possibility), after which the prosecution must **disprove** the defence beyond reasonable doubt (CA s 322I for the Part IC defences). The main exception is mental impairment, which must be proved on the **balance of probabilities** by the party raising it (CMIA s 21). For every problem question: identify the offence, state its source, work through each element applying the facts, then consider any defences, then conclude.

Part A: Foundations of Criminal Liability

The Nature, Purposes and Sources of Criminal Law

What is a crime?

A crime is conduct that the law prohibits and that the State may punish. There is no conduct that is criminal by its nature; conduct is criminal because Parliament or the common law says so. What marks criminal law out from civil law is the procedure and the consequences:

Feature	Criminal Law	Civil law
Parties	The State (the Crown, through the DPP or police) prosecutes the accused	Plaintiff sues defendant
Purpose	Punishment, censure and protection of the community	Compensation or other remedy for the plaintiff
Standard of proof	Beyond reasonable doubt	Balance of probabilities
Outcome	Conviction and sentence (imprisonment, fines, orders)	Damages, injunctions, declarations
Stigma	Formal public condemnation	Generally none

Theories about what should be Criminalised

- **Legal moralism** (Lord Devlin, *The Enforcement of Morals* (1965)): the criminal law may enforce a society's shared morality because immorality threatens social cohesion. Criticised (notably by HLA Hart) as vague, since it asks whose morality and how strongly felt, and because it risks enforcing prejudice.
- **The harm principle** (JS Mill, *On Liberty* (1859)): the only legitimate purpose of criminal law is to prevent harm to others. Conduct that harms only the actor should be left alone.
- **Individual autonomy (liberal) approach**: people are rational agents who should be punished only for conduct they freely chose. This supports **minimal criminalisation**, the requirement of a **voluntary act**, and **subjective** fault (what the accused actually intended, knew or foresaw).
- **Community welfare (social protection) approach**: the criminal law exists to protect the community, so the interests of the collective may justify **objective** standards of liability. This supports negligence-based offences, strict and absolute liability, and constructive liability (for example, statutory constructive murder under s 3A).
- **Legal paternalism**: the criminal law may protect people from themselves, particularly vulnerable people (for example, laws about children, seatbelts, drugs).

Purposes of Punishment

Theories of punishment divide into **retributive** theories (punishment is deserved because of the wrong done: "just deserts", proportionality) and **utilitarian** theories (punishment is justified by its future benefits: deterrence, incapacitation and rehabilitation). **Restorative justice** focuses on repairing harm between offender, victim and community.

In Victoria, the only purposes for which a sentence may be imposed are listed in the *Sentencing Act 1991* (Vic) s 5(1):

1. **Just punishment:** to punish the offender to an extent and in a manner that is just in all the circumstances.
2. **Deterrence:** to deter the offender (specific deterrence) or others (general deterrence) from committing similar offences.
3. **Rehabilitation:** to establish conditions under which rehabilitation may be promoted.
4. **Denunciation:** to manifest the court's and the community's denunciation of the conduct.
5. **Community protection:** to protect the community from the offender.

Sources of Victorian Criminal Law

- **Common law:** murder, manslaughter and common law assault are defined by the common law (although their penalties are statutory). Many rules of causation, fault and complicity also developed at common law.
- **Statute:** principally the *Crimes Act 1958* (Vic), the *Summary Offences Act 1966* (Vic), the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), the *Road Safety Act 1986* (Vic), the *Control of Weapons Act 1990* (Vic) and the *Family Violence Protection Act 2008* (Vic).
- **Commonwealth law:** the *Criminal Code Act 1995* (Cth) applies to federal offences (for example, drug importation, terrorism, fraud on the Commonwealth).
- **Victoria is a common law (non-Code) jurisdiction.** Queensland, Western Australia, Tasmania, the Northern Territory and the ACT have criminal codes, as does the Commonwealth. Do not apply Code provisions or NSW cases without flagging that the law may differ.
- **Interpreting penal statutes:** where genuine ambiguity remains after ordinary interpretation, it is resolved in favour of the accused (*Beckwith v The Queen* (1976) 135 CLR 569). The principle of legality presumes that Parliament does not intend to abrogate fundamental rights without clear words.

Classifying Offences

- **Indictable offences:** serious offences, tried before a judge and jury in the County Court or Supreme Court.
- **Summary offences:** less serious offences heard in the Magistrates' Court (for example, common assault under SOA s 23).
- **Indictable offences triable summarily:** indictable offences that may be heard in the Magistrates' Court if the accused consents and the court considers it appropriate (*Criminal Procedure Act 2009* (Vic) s 28 and Sch 2).

Maximum penalties in the Crimes Act are expressed as "levels" (SA s 109):

Level	Maximum imprisonment	Level	Maximum imprisonment
1	Life	6	5 years
2	25 years	7	2 years
3	20 years	8	1 year
4	15 years	9	6 months
5	10 years		

Burden and Standard of Proof

- The prosecution bears the **legal burden** of proving every element of the offence **beyond reasonable doubt** (*Woolmington v DPP* [1935] AC 462, the "golden thread"). The presumption of innocence is also protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).
- For most defences, the accused bears only an **evidential burden**: there must be evidence (from either side) that raises the defence as a reasonable possibility. Once raised, the prosecution must **disprove** the defence beyond reasonable doubt (CA s 322I for self-defence, duress, sudden or extraordinary emergency).
- **Exceptions** where the accused bears a legal burden on the balance of probabilities: mental impairment (if raised by the defence, CMIA s 21), and some statutory defences (for example, the cognitive impairment exception to the affirmative consent rule in s 36A(3) and (4)).
- The *Jury Directions Act 2015* (Vic) governs how judges direct juries, including on the meaning of proof beyond reasonable doubt.

The Elements of Criminal Liability

For a person to be convicted, the following must be established:

1. The court has **jurisdiction** over the offence.
2. The accused had **capacity** to commit an offence (age, and in some cases corporate status).
3. The accused performed the **physical elements** (*actus reus*): conduct, in the required circumstances, causing any required result.
4. The accused had the **fault elements** (*mens rea*) required by the offence.
5. The physical and fault elements **coincided in time** (temporal coincidence).
6. There is **no defence** (justification or excuse) that negates liability.

Actus Reus (physical element)

The physical elements can include **conduct** (an act or omission), **circumstances** (for example, that the victim did not consent, or that property belonged to another) and **results** (for example, death or serious injury). "Result crimes" such as murder require the conduct to cause a prohibited result; "conduct crimes" such as perjury do not.

Voluntariness

- Every offence requires that the accused's conduct was **voluntary**: a willed, conscious and deliberate act (*Ryan v The Queen* (1967) 121 CLR 205).
- Voluntariness is distinct from intention. An act can be voluntary even if its consequence was unintended. In *Ryan*, the accused pointed a loaded, cocked rifle at a service station attendant; the gun discharged when the attendant moved. The High Court held the jury could look at the whole series of voluntary acts (loading, cocking, pointing), not only the final "reflex" pressure on the trigger. See also *R v Butcher* [1986] VR 43.
- Examples of **involuntary** conduct: reflex actions and spasms, acts done while asleep or unconscious, acts during an epileptic seizure or concussion, acts physically forced by another, and conduct during automatism (see Part G).
- **Presumption of voluntariness**: the law presumes conduct is voluntary. If there is evidence raising the possibility that it was not, the prosecution must prove voluntariness beyond reasonable doubt (*R v Falconer* (1990) 171 CLR 30).

- Where an involuntary state results from earlier voluntary conduct, look for the earlier act. In *Jiminez v The Queen* (1992) 173 CLR 572, a driver fell asleep at the wheel; the question was whether driving while tired (a voluntary act) was dangerous.

Omissions

The general rule is that there is **no liability for failing to act**. An omission is only criminal where the accused was under a **legal duty to act** (a moral duty is not enough). Duties arise from:

- **Statute** (for example, the duty of a driver involved in an accident to stop and render assistance: *Road Safety Act 1986* (Vic) s 61).
- **Special or status relationships**: parent and child (*R v Russell* [1933] VLR 59; *R v Gibbins and Proctor* (1918) 13 Cr App R 134).
- **Contract**: a duty assumed under a contract (*R v Pittwood* (1902) 19 TLR 37, railway gatekeeper who left a crossing gate open).
- **Voluntary assumption of care** of a helpless person, particularly where the accused secludes them so others cannot help (*R v Instan* [1893] 1 QB 450; *R v Stone and Dobinson* [1977] QB 354; *R v Taktak* (1988) 14 NSWLR 226).
- **Creating a dangerous situation**: a person who creates a danger comes under a duty to take reasonable steps to avert it (*R v Miller* [1983] 2 AC 161, accused started a fire with a cigarette and walked away).

Mens Rea (fault element)

- There is a **presumption that Parliament intends mens rea to be an element** of a statutory offence unless it is excluded expressly or by necessary implication (*He Kaw Teh v The Queen* (1985) 157 CLR 523).
- Fault is generally **subjective**: what this accused actually intended, knew, believed or foresaw, not what a reasonable person would have done.

Fault Element	Meaning + Key Authority
Intention	Acting with the purpose or meaning to bring about a result, or meaning to do the act. Intention is not the same as foresight. Foresight that a result is certain or virtually certain may be evidence from which intention is inferred, but it is not itself intention (<i>Zaburoni v The Queen</i> (2016) 256 CLR 482).
Knowledge	Awareness that a circumstance exists or will exist. "Wilful blindness" (deliberately refraining from inquiry) can support an inference of knowledge (<i>Pereira v DPP</i> (1988) 63 ALJR 1).
Belief	Less than knowledge; the accused thinks the circumstance exists but may have some doubt.
Recklessness	In Victoria: the accused foresaw that the harmful consequence would probably result from their conduct and proceeded regardless (<i>R v Crabbe</i> (1985) 156 CLR 464 for murder; <i>R v Campbell</i> [1997] 2 VR 585 for offences against the person). "Probable" means likely, a substantial or real chance, not a mathematical figure (<i>Boughey v The Queen</i> (1986) 161 CLR 10).
Negligence	Objective. Conduct that is such a great falling short of the standard of care a reasonable person would have exercised, involving such a high risk of the relevant harm, that it merits criminal punishment (<i>Nydam v R</i> [1977] VR 430). Negligence is not a state of mind, which is why some writers say it is not truly <i>mens rea</i> .

Motive is not intention!

Motive is the reason why a person acts; intention is what they mean to do. Motive is generally irrelevant to liability (a "good" motive is no defence), but evidence of motive can help prove intention or identity, and motive is relevant to sentencing (*De Gruchy v The Queen* (2002) 211 CLR 85).

Temporal Coincidence

The physical and fault elements must coincide in time. Courts have avoided unjust results in two main ways:

- **Continuing act:** where conduct continues over time, the fault element can be formed during it. In *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, the accused accidentally drove onto a police officer's foot and then deliberately left the car there; the assault was a continuing act.
- **Series of acts as one transaction:** in *Thabo Meli v The Queen* [1954] 1 WLR 228, the accused beat the victim intending to kill him, believed he was dead and rolled him off a cliff; he actually died of exposure. The acts were one transaction, so the murder conviction stood. The approach has been extended where there was no pre-conceived plan (*R v Church* [1966] 1 QB 59) and is recognised in Australia (*Meyers v The Queen* (1997) 147 ALR 440).

Transferred Malice

If A intends to harm B but instead harms C, A's fault is "transferred" to the harm actually caused to C (*R v Saunders and Archer* (1573) 2 Plowd 473). For murder, it is enough that the accused intended to kill or cause really serious injury to **some person**, not necessarily the victim (*La Fontaine v The Queen* (1976) 136 CLR 62). Malice does **not** transfer between different kinds of harm: an intention to hit a person does not supply the fault for damaging property (*R v Pembliton* (1874) LR 2 CCR 119).

Strict and Absolute Liability

Category	Fault required?	Honest and reasonable mistake of fact available?	Examples
<i>Mens rea</i> offence	Yes: intention, knowledge or recklessness	Not needed: an honest (even unreasonable) mistake can negate the fault element	Murder, theft, most Crimes Act offences
Strict liability	No	Yes	Many regulatory offences
Absolute liability	No	No	Some minor traffic and regulatory offences

Deciding which category applies

Start from the presumption that fault is required (*He Kaw Teh v The Queen* (1985) 157 CLR 523; *Sweet v Parsley* [1970] AC 132). Gibbs CJ in *He Kaw Teh* identified factors that may displace it:

1. The **words of the statute** (for example, "knowingly" or "wilfully" signal fault; their absence in one section but presence in another may signal the opposite).
2. The **subject matter**: "truly criminal" offences are more likely to require fault than regulatory or public welfare offences.
3. Whether imposing strict liability would **assist enforcement**: would it make people take more care, or is there nothing the accused could have done?

A **severe penalty** (especially imprisonment) points strongly towards fault being required.

Honest and reasonable mistake of fact

For strict liability offences, the accused is not guilty if they acted under an honest and reasonable, but mistaken, belief in facts which, if true, would have made the conduct innocent (*Proudman v Dayman*

(1941) 67 CLR 536; *He Kaw Teh*). The accused bears an evidential burden; once raised, the prosecution must disprove it beyond reasonable doubt (*CTM v The Queen* (2008) 236 CLR 440).

Even strict and absolute liability offences require a **voluntary** act. A person is not liable where the prohibited situation arose from circumstances entirely outside their control (*Kilbride v Lake* [1962] NZLR 590, where a warrant of fitness was removed from a car while the driver was away).

Mistakes of Fact and of Law

- **Mistake of fact, mens rea offences:** an honest mistake, even if unreasonable, may mean the accused lacked the required intention or knowledge (*DPP v Morgan* [1976] AC 182). The more unreasonable the claimed belief, the less likely a jury is to accept it was honestly held. Statute may require reasonableness instead: for sexual offences the question is whether the accused **reasonably** believed in consent (s 36A).
- **Mistake of fact, strict liability offences:** the mistake must be honest **and** reasonable (*Proudman v Dayman*).
- **Mistake of law:** ignorance of the law is no excuse, even if the accused relied on official advice (*Ostrowski v Palmer* (2004) 218 CLR 493).
- **Claim of right exception:** for property offences, an honest belief in a legal right to the property can negate dishonesty even if the belief is mistaken in law (s 73(2)(a); *Walden v Hensler* (1987) 163 CLR 561).

Criminal Capacity

Children

Age at time of conduct	Position in Victoria
Under 12	Conclusively presumed incapable of committing an offence (YJA s 10). No prosecution is possible.
12 or 13	Rebuttable presumption of doli incapax ("incapable of wrong"), now codified in YJA s 11. The prosecution must prove beyond reasonable doubt that, at the time, the child knew the conduct was seriously wrong in a moral sense , as distinct from merely naughty or mischievous.
14 and over	Full criminal capacity.

Rebutting doli incapax: *RP v The Queen* (2016) 259 CLR 641

- The prosecution bears the onus and must prove, beyond reasonable doubt, that the child understood the conduct was seriously wrong **by the standards of ordinary reasonable people**, not merely that it was legally wrong or naughty.
- The inquiry is into **this child's** intellectual and moral development: their upbringing, education, home environment and any evidence from teachers, family or experts.
- Knowledge of wrongness **cannot be inferred merely from the acts themselves**, however obviously wrong they appear.
- Capacity must be proved for **each** offence; proof in relation to one charge does not automatically carry over to another.
- The older authority suggesting less evidence is needed the closer the child is to 14 was criticised in *RP* because it assumes children mature at a uniform rate.

Corporations

A corporation is a legal "person" and can be criminally liable (*Interpretation of Legislation Act 1984* (Vic) s 38). Because a corporation can only act through people, the law attributes conduct and fault in two main ways:

- **Vicarious liability:** the conduct (and sometimes the fault) of an employee acting within the scope of employment is attributed to the corporation. This is largely confined to statutory and regulatory offences (*Mousell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836).
- **Identification (directing mind and will):** the acts and state of mind of senior officers who embody the company (such as directors and senior managers) are treated as the company's own (*Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *Hamilton v Whitehead* (1988) 166 CLR 121).

Limits: a corporation cannot be imprisoned, so it cannot be convicted of an offence punishable only by imprisonment (such as murder), and it cannot personally commit offences that require a natural person's bodily conduct.

Workplace manslaughter: since 1 July 2020, the *Occupational Health and Safety Act 2004* (Vic) Part 5A creates an offence of workplace manslaughter where a body corporate or an officer negligently breaches a duty owed under that Act and the conduct causes death. The maximum penalty is 100,000 penalty units for a body corporate and 25 years' imprisonment for an individual. This responds to the difficulty of convicting corporations of common law manslaughter.

Mental impairment and unfitness

Adults may lack criminal responsibility because of mental impairment at the time of the offence, or may be unfit to stand trial. These are dealt with in Part G.

How to Answer a Criminal Law Problem Question

The method

1. **Read the facts twice.** Mark every person, every act, dates, ages, relationships (family member?), states of mind, injuries and property.
2. **Identify each potential accused and each potential charge.** Start with the most serious offence the facts support, then work down to alternatives (for example, murder, then manslaughter).
3. **For each charge,** state the source of law (for example, "Murder is a common law offence; the penalty is in CA s 3").
4. **List the elements** the prosecution must prove beyond reasonable doubt.
5. **Deal with each element in turn:** state the rule, cite authority, apply the facts, reach a mini-conclusion. Spend your time on elements that are genuinely in issue; deal briefly with the obvious ones.
6. **Consider defences** only where the facts raise them. State the evidential burden and that the prosecution must then disprove the defence.
7. **Consider extended liability:** were others involved (complicity)? Was the offence completed (if not, attempt)?
8. **Conclude** on each charge: likely outcome and any alternative verdicts.

Part B: Homicide

Overview of Unlawful Homicide

Homicide is the killing of a human being by another human being. A homicide is **lawful** if it is justified or excused (for example, by self-defence). All other homicides are **unlawful**, and fall into the categories below.

Category	Definition	Source and Maximum Penalty
Intentional murder	Causing death with intention to kill or cause really serious injury	Common law; life (s 3(1))
Reckless murder	Causing death knowing that death or really serious injury was the probable result	Common law; life (s 3(1))
Statutory constructive murder	Unintentionally causing death by an act of violence done in the course or furtherance of a violent crime punishable by 10 years or more	s 3A; life
Common law constructive murder	Causing death by a violent act while resisting or escaping lawful arrest	Common law (<i>R v Ryan and Walker</i> [1966] VR 553); life
Manslaughter by unlawful and dangerous act	Death caused by a voluntary act that is a criminal offence and is objectively dangerous	Common law; 20 years (s 5)
Manslaughter by criminal negligence	Death caused by a grossly negligent act or omission	Common law; 20 years (s 5)
Child homicide	Conduct that would be manslaughter, where the victim is a child under 6	s 5A; 20 years
Infanticide	A woman kills her child under 2 while the balance of her mind is disturbed as a result of giving birth	s 6; 5 years
Culpable driving causing death	Death caused by driving recklessly, with gross negligence, or while incapable of proper control through alcohol or drugs	s 318; 20 years
Dangerous driving causing death	Death caused by driving at a speed or in a manner dangerous to the public	s 319(1); 10 years
Workplace manslaughter	Negligent breach of a workplace duty causing death	OHS Act 2004 Pt 5A; 25 years / 100,000 penalty units

Penalties for murder: the maximum is life imprisonment (level 1). Murder has a **standard sentence** of 25 years, or 30 years in certain aggravated cases such as the murder of an emergency worker on duty (s 3(2); SA ss 5A and 5B). Manslaughter carries level 3 imprisonment (20 years) (s 5).

Abolished doctrines (you may meet them in older cases):

- **Provocation** as a partial defence reducing murder to manslaughter was abolished in 2005 (s 3B). Evidence of provocation can now only be relevant to sentence.
- **Excessive self-defence manslaughter** was rejected at common law in *Zecevic v DPP (Vic)* (1987) 162 CLR 645.
- **Defensive homicide** (former s 9AD, 2005 to 2014) was abolished from 1 November 2014.
- The old "**year and a day**" rule (death had to occur within a year and a day of the act) no longer applies.