

## Chapter 2

### Criminal Law

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### 2.1 Criminal law

As we saw in chapter 1, **criminal law** is the area of law concerned with behaviour that society deems to be against the law and harmful to society. It also clarifies types of crimes such as assault, murder, rape and theft and provides a range of sanctions for those people who break the law.

Criminal law has a number of purposes or aims. These include:

- Punishment of those individuals who break the law
- To discourage/ deter people from committing crimes
- Rehabilitation of offenders
- Protection of individuals and the community.



#### The purposes of criminal law

##### *Punishment of those individuals who break the law*

Criminal law must punish offenders so that there is some **retribution** for the crime. As criminals have harmed individuals or society as a whole in some way, criminal law imposes on them some form of unpleasant consequence. Without criminal law, victims or their families may pursue other forms of retribution, perhaps by pursuing justice in their own way. If this was to occur, then criminal behaviour may become worse and society could decline. Imprisonment deprives offenders of their freedom, so it is considered to be the ultimate form of punishment in our society.

##### *To discourage/deter people from committing crimes*

Criminal law aims to deter offenders and other individuals in society from committing the same or similar crimes in the future. A penalty or punishment imposed on those who commit crimes will therefore act as a **deterrence** and discourage other individuals from committing those crimes. By discouraging people from committing crimes, criminal law protects society and allows people to feel safe.

##### *Rehabilitation of offenders*

Criminal law aims to transform and **rehabilitate** an offender into a worthwhile member of the community. By establishing conditions or programs associated with modifying the behaviour of an offender, it tries to prevent further unlawful or harmful behaviour by convincing the offender that his or her behaviour was wrong.

##### *Protection of individuals and the community*

Criminal law protects all of us as individuals by establishing what is a crime, how unlawful and harmful behaviour will be dealt with and how it will be punished. Sanctions such as imprisonment protect us by removing offenders from society, keeping us safe. They also act as a deterrent, thereby reducing criminal behaviour and protecting individuals and the community from harmful actions. The rehabilitation of offenders also has the effect of protecting individuals and society from future wrongdoing. Furthermore, criminal law protects the property that we own, such as land and

personal possessions. This includes both private property and public property. For example, it is against the law to steal another person’s possessions and it is against the law to damage property. Criminal law also protects the community in general. For example, it is against the law to manufacture, sell and use illicit drugs. This is because we consider that the use of illicit drugs harms society.

Criminal law also protects the accused. Our legal system provides procedural safeguards that reduce the risks of mistakes and abuse by the state, as well as disproportionate punishment dispensed by victims of crime in the form of retribution.

### What is a crime?

In considering the purposes of criminal law, it is worthwhile to consider what **crime** actually is. When we refer to the term ‘crime’ what are we actually talking about? In chapter 1, we defined crime as an action or omission (a failure to act) that is regarded as unacceptable according to existing laws and is punishable by the law. An act occurs when someone does something. An example of an act is taking another person’s property without that person’s permission (theft). An omission occurs when someone fails to do something. An example of an omission is a parent failing to take good care of their child (criminal neglect of a minor child).

The word ‘crime’ is a term that is used to describe a range of activities that are considered to be unlawful. What is a crime is decided by what the law-makers (the parliament and the courts) of the day proclaim it to be. This concept can change over time and can differ between cultures. For example, it is illegal to use a mobile phone while driving in Victoria. This was not the case thirty years ago because mobile phones did not exist. Laws against businesses operating on Sundays and laws against homosexuality are relics of the past. By contrast, in some countries including Pakistan, Indonesia and Saudi Arabia, blasphemy is illegal. Behaviours that are legal in Australia, such as kissing in public and consuming alcohol, are crimes in some countries.

**Study tip**

*The Legal Dictionary for Australians (Peter Alderson) defines crime as “an act or omission committed against the community at large that is punishable by the criminal law in a court of competent jurisdiction.”*

There are four major features or characteristics of a crime, which can be seen in Figure 1 below.

**Figure 2.1**  
**Characteristics of a crime**



#### **Against the law**

A crime can be described as an act that is against the existing law of the state. Parliament and the courts make these laws. For example, the *Crimes Act 1958* (Vic) states that it is a crime to assault or threaten to assault another person.

#### **Against morality**

A crime can be described as an act that is against morality, or against what society considers to be moral behaviour at a given point in time. Morality refers to a particular system of values and principles of conduct based on what is right or wrong. Most societies value the preservation of human life. For this reason, murder, assault and rape are criminal offences in our society.

The values that society holds change over time. As these values change, so does society's understanding of what is a crime. For example, homosexuality was a crime in Victoria until 1980, and as values have changed is no longer against the law. At times, there can be a variety of views related to morality issues. For example, issues such as abortion, prostitution and drug use can be very divisive.

### Harmful to society

A crime can be described as harmful or damaging to society as a whole or harmful to individuals. Crimes such as murder, assault or rape can harm society by causing physical or mental injury to both the victim/s and other people in society. As well as the impact on the victim, criminal behaviour can lead to feelings of fear in the community and may damage the belief that we can live safely and harmoniously. Crimes such as theft, burglary or fraud can result in harm by causing economic loss. Crimes such as corruption, pollution or conspiracy can also harm or damage society in general.

### Punishable

A crime can be described as punishable by the state or punishable by the law. The imposition of a sanction, including a fine or imprisonment, can punish any individual found guilty of committing a crime.

## Sources of criminal law in Victoria

In Victoria, most criminal law is contained in:

- the Victorian **Crimes Act 1958** (Vic)
- common law (judge made law and therefore not found in legislation)
- the Federal **Crimes Act 1914** (Cth) and the **Criminal Code Act 1995** (Cth)
- other Victorian legislation, such as the **Summary Offences Act 1966** (Vic) and the **Road Safety Act 1986** (Vic)
- local laws (made by local councils)

## Review questions 2.1

1. Describe the purposes or aims of criminal law.
2. Define the term 'crime'.
3. Outline the four features or characteristics of a crime.
4. Using examples, outline an act that is now considered to be a crime and an act that is no longer considered to be a crime.
5. List the main sources of criminal law in Victoria.

## Application exercise 2a

### Pirates ahoy

Examine the cartoon carefully and answer the questions that follow:

#### Questions/tasks

1. What is meant by 'piracy'?
2. Distinguish 'traditional piracy' from 'internet piracy'.
3. Explain how internet piracy can be harmful to society and is therefore illegal and punishable.
4. Have you, or anyone you know, engaged in internet piracy over the past two years? so, do you consider yourself (or them) as criminals?
5. Why do people generally find it easier to break this law compared to other laws such as theft or vandalism?



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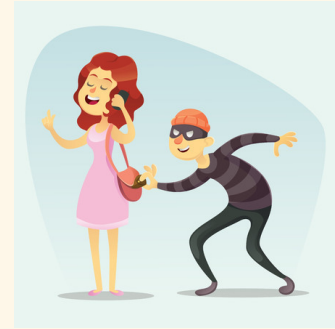
## Application exercise 2b

A crime can be defined as an action or omission that is regarded as unacceptable according to existing laws and is punishable by the law.

The four major characteristics of a crime are that the act or omission in question is

- Against the law
- Against morality
- Harmful to society
- Punishable

Using the table below, assess whether each of the acts or omissions described in each cell is a crime or not a crime.



Act or omission	Is the act or omission a crime? Yes or no
Jaan took a basketball from a sports store without paying for it.	
Jessica suffered from postnatal depression when she killed her six-week-old baby who would not stop crying.	
Vani saw someone stealing a bottle of soft drink but did not report it.	
Karina found a wallet full of cash in the gutter and kept it.	
Li is a bouncer at a nightclub and, in trying to break up a fight, knocked a patron to the ground. That person later died.	
Olivia was not wearing a seat belt in the back seat of her friend's car.	
Luke was driving a motor vehicle in a suburban street at 3:30 p.m. at a speed of 120 kilometres per hour which resulted in a pedestrian being run over and eventually dying in hospital that afternoon.	
Lourdes cheated on an exam at school.	
Nadel sprayed graffiti on a public wall.	
Tobee hit a tennis ball over the fence and then trespassed on his neighbour's property to retrieve the ball.	
Jossane was driving at 45 kilometres per hour in a 50 km/h zone and hit a pedestrian who was looking at his phone. The person was knocked to the ground.	
Flavio is under the age of 18 and consumed alcohol at home with his parents' permission.	
Bailey emailed a threatening message to Danni.	
Isaac was pulled over by the police at a booze bus testing station and was asked to complete a breath test. He refused to comply with the test.	
Dasher stands by idly as his one year old step child walks onto a busy road and is hit by a cyclist. The child suffers facial cuts and a broken arm.	

## 2.2 The presumption of innocence

Have you ever been accused of doing something that you did not do? A teacher may have told you to stop talking in class when it was, in fact, someone else. Or a friend may have accused you of starting a rumour about them – also not true. In such cases, you would hope that you might be assumed to be innocent until it was proven that you actually had done something wrong. Similarly, we expect that a person who is charged with a crime will be presumed to be innocent until proven guilty.

### Innocent until proven guilty

According to the **presumption of innocence**, all defendants are considered innocent until the prosecution proves that they are guilty. This is a fundamental principle of criminal law. It means that in a criminal trial or hearing, it is the responsibility of the prosecution to prove that the accused is not innocent and therefore guilty. An accused person can only be found guilty if the magistrate, judge or jury is reasonably certain that the accused person committed the crime. Furthermore, the presumption of innocence means that, in a criminal trial or hearing, the accused has a right to silence because they do not have to prove that they did not commit a crime.

#### Study tip

*In Momcilovic v The Queen [2011] HCA 34, French CJ said that, "The common law "presumption of innocence" in criminal proceedings is an important incident of the liberty of the subject." This case is described in more detail in application exercise 2b.*

The principle of the presumption of innocence enables our society to be underpinned by justice and, in particular, fairness. We have a tendency to prejudge people who have been charged with an offence and often conclude that they are guilty or are probably guilty based on what we see or hear in the media, rather than on the basis of the facts of the case and evidence presented in court.

### Where presumption of innocence comes from

Our legal system inherited the presumption of innocence from English common law. The presumption of innocence is contained in article 11 of the Universal Declaration of Human Rights, indicating that it is a significant principle in international law. Australia is a party to several international human rights treaties, including the International Covenant on Civil and Political Rights. Article 14(2) of this treaty states that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) also guarantees the presumption of innocence, as seen in Box 2.1.

#### Study tip

*You may notice that the presumption of innocence connects the burden of proof and the standard of proof, which will be examined in the next section.*

### Box 2.1 The Victorian Charter of Human Rights and Responsibilities

The main purpose of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is to protect and promote human rights. The legislation sets out the basic rights, freedoms and responsibilities of all Victorians. Section 25(1) states that, "A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law."

### Upholding the presumption of innocence

There is a range of procedures and rules in criminal law that attempt to protect the presumption of innocence. These include:

- the accused has the **right to silence** – they are not required to answer questions – their silence should not be understood to be an admission of guilt.
- a person who is charged with a criminal offence can apply for **bail** – this is an agreement to release the accused from being held in custody into society until the conclusion of their dispute or until their bail is revoked. Bail may be granted with or without conditions, such as a surety (a person who gives an undertaking to provide security to a court to ensure that the accused appears at court), surrendering a passport, remaining at the same address or a guarantee to pay a sum of money for failing to appear. Bail usually applies only to serious cases. It allows the accused to go home to wait for the trial, rather than stay in custody until he or she must go to court, recognising that they are still innocent under the law. There are cases where the court may suspect that an accused person who is charged with a serious crime might not turn up to court, or might be at risk of causing danger to the public. In this case, bail would be refused and the accused would be detained in custody until the trial.



- the Magistrates' Court holds **committal proceedings** for more serious cases to determine whether there is evidence of sufficient weight against the accused to support a conviction in a higher court – either the County Court or the Supreme Court, depending on the crime. If there is insufficient evidence, the magistrate may release the accused until the prosecution is able to find additional evidence.
- in a criminal trial or hearing, the **burden of proof** is on the prosecution to bring evidence against the accused – this is because the accused is presumed to be innocent until the prosecution has presented enough evidence to demonstrate that they are not an innocent party. The accused is not required to prove anything. Furthermore, the case against the accused must be proved beyond reasonable doubt that he or she is legally and criminally responsible for the offence.
- evidence of the accused's bad character and previous convictions are typically not admissible in court until he or she is found, or pleads, guilty and sentencing commences – this is because the accused is presumed to be innocent until proven guilty, and therefore any proof should come about through evidence about a particular offence.
- a person found guilty by a court who is not happy with the outcome of their case has the right to appeal a wrongful conviction or harsh sentence, if there are sufficient grounds for appeal – however, there are restrictions on who can appeal and under what conditions he or she can appeal. In many cases, leave to appeal must be sought from a higher court before an appeal can occur.



## Review questions 2.2

1. Explain the term 'presumption of innocence'.
2. Outline why the presumption of innocence is a fundamental principle of criminal law.
3. Explain where the presumption of innocence comes from.
4. Outline the ways in which the presumption of innocence is upheld in criminal law.
5. What is bail and when can it be granted?
6. Describe the importance of presumption of innocence in our legal system.



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## Application exercise 2c

### Drugs laws – when one is presumed to be not innocent

Parliaments in recent times have legislated to reverse the burden of proof, which is contrary to the right to the presumption of innocence. This has occurred because it is considered reasonable in order to pursue justice. It is considered that people who participate in certain crimes should know that their actions are wrong and should therefore be required to prove that they are innocent.

Given the use of illegal drugs has become a serious social problem, and because only a small proportion of drug transactions and drug consumptions are caught by authorities, placing the burden of proof on the accused in this area of law has become justified. Reversing the burden of proof is believed to deter other offenders and make it easier to prosecute drug offences. The *Drugs, Poisons and Controlled Substances Act 1981* (Vic) is one such example of a law that places the legal burden of proof on the defendant in relation to possession. Under section 5 of this Act, it is up to the owner of the premises where substances (or drugs) are found to disprove that the drugs are in their possession.



The High Court case of *Momcilovic v The Queen* raised the issue of the presumption of innocence in relation to these drug trafficking laws. In 2006, Victorian woman Vera Momcilovic was arrested after a police raid uncovered quantities of methylamphetamine at various places in her apartment (including the refrigerator and the kitchen cupboard). She was charged with possession of a drug of dependence. Momcilovic provided evidence in the County Court of Victoria that the drugs belonged to her boyfriend (a convicted drug trafficker) and that he had stored them without her knowledge. He admitted that the drugs were his. However, she was unable to prove to the satisfaction of the court that she did not know the drugs were on her property, and she was deemed to be in possession of the drugs. As the quantity of drugs found was so large, she was convicted of trafficking methylamphetamine.

Momcilovic appealed against her conviction to the Supreme Court of Victoria - Court of Appeal, submitting that the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') meant laws that removed the presumption of innocence should be declared invalid. The court held that s. 5 of the *Drugs, Poisons and Controlled Substances Act*, which required Momcilovic to prove she did not know the drugs were in her house, was inconsistent with the Charter and issued a 'declaration of inconsistent interpretation'. However, the court refused Momcilovic's leave to appeal against her conviction.

In 2011, Momcilovic appealed to the High Court, arguing that the *Drugs, Poisons and Controlled Substances Act* breached the right to the presumption of innocence contained in the Charter. Further questions were raised concerning the interaction between the Charter, the Australian Constitution and the *Drugs, Poisons and Controlled Substances Act*. The High Court agreed that the *Drugs, Poisons and Controlled Substances Act* imposed a legal burden on the accused to disprove the offence on the balance of probabilities, and that this is inconsistent with the right to the presumption of innocence contained in the Victorian Charter. A majority of the High Court upheld Momcilovic's appeal and her conviction was quashed.

#### Questions/tasks

1. Explain why parliaments have legislated to reverse the burden of proof, contrary to the right to the presumption of innocence.
2. In what way does the *Drugs, Poisons and Controlled Substances Act 1981* reverse the burden of proof?
3. In *Momcilovic v The Queen*, what was Momcilovic charged with?
4. Who did Momcilovic claim the drugs found in her apartment belonged to?
5. Explain what the Court of Appeal of the Supreme Court of Victoria found.
6. Explain the finding of the High Court in *Momcilovic v The Queen*.
7. In your opinion, what are the advantages and disadvantages of the presumption of innocence?
8. Imagine that our legal system works on the rule that a person accused of a crime is presumed to be guilty until he or she has been proven innocent. Identify the advantages and disadvantages of this rule.

## 2.3 Key concepts of criminal law

In determining an appropriate sentence to be imposed on the offender, a court must consider a number of factors. For the purposes of the VCE Legal Studies course, we will examine the following key concepts of criminal law:

- the elements of a crime: *actus reus* and *mens rea*
- strict liability
- the age of criminal responsibility
- the burden of proof
- the standard of proof.

### The elements of a crime: *actus reus* and *mens rea*

In most crimes, two elements must be proved in regards to the behaviour of the accused. For a person to be convicted of committing a crime, the prosecution must show that there was ***actus reus*** (a Latin term meaning ‘guilty act’) and ***mens rea*** (a Latin term meaning ‘guilty mind’). Essentially, this means that to be found guilty of a criminal offence, the accused must have behaved in a wrongful way and actually committed the crime, and must also have had a certain state of mind with the intention to carry out that behaviour. In other words, there must be a wrongful physical act and the intent to commit that act for a crime to occur. Importantly, in most cases, if only one of these elements is proved to be present at the time the accused was alleged to have committed an offence, no crime will have been carried out.

#### Study tip

The two terms *actus reus* and *mens rea* came from English law. They are expressed in a famous maxim, *Actus non facit reum nisi mens sit rea*, which means ‘an act does not make a person guilty unless the mind is guilty’.

Therefore, if a person is involved in an accident, with no intention, there is no crime. Likewise, no matter how much someone thinks about committing a crime, if the person does not act on the thought then there is no crime.



### *Actus reus* – the physical element of a crime

*Actus reus* refers to the act of committing a crime. This could involve a physical act or a failure to act (an omission). The *actus reus* of a criminal offence will depend on the definition of that crime. For example, section 75 of the Victorian *Crimes Act* states that “a person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force.” Therefore, the *actus reus* of robbery is a) stealing, and b) using force or putting a person in fear that they will be subjected to force. Both of these acts must be met for *actus reus* to be established.

*Actus reus* is usually the easiest element to prove. Physical evidence and witness testimony can assist the prosecution to prove that the accused committed an act.

### *Mens rea* – the mental element of a crime

*Mens rea* refers to the intent to commit a criminal offence. The *mens rea* of every crime will also differ according to the nature of the crime. For example, section 16 of the Victorian *Crimes Act* states that “a person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.” Therefore, the *mens rea* of causing serious injury intentionally is the intent to cause serious injury. It is difficult to define *mens rea*, but generally it relates to the state of mind of an accused in regards to his or her knowledge of the facts that make the behaviour criminal. In other words, an act is regarded as intentional if it is performed voluntarily or willingly by a person with a conscious and capable mind. Usually, if the police or the Crown is not able to prove that the accused acted intentionally, knowingly, recklessly, negligently or wilfully, the person will not be convicted of committing a crime.



## Application exercise 2d

The two fundamental elements that apply in most criminal offences are *actus reus* (the accused actually committed the crime) and *mens rea* (the accused intended to commit the crime).

The table below refers to four separate situations where a person has been accused of murder and the accused person has been named.

Indicate in columns 1 and 2 whether each situation involves *actus reus* and/or *mens rea*. In column 3, determine whether the crime of murder has been committed.



Situation	1 Actus reus (tick)	2 Mens Rea (tick)	3 Has a crime occurred? Yes or No
Zane states, 'I killed him because he wouldn't hand over his phone when I asked for it. I wanted everyone to know that I meant business'.			
Khanya says, 'I did kill him but I didn't intend to. I didn't know anyone was standing on the shooting range at the time'.			
Jesh says, 'I wish I'd killed her. She was threatening people at work. But I didn't do it. It was someone else'.			
Lara says, 'I had to kill him, he was assaulting me. I didn't know if I was going to live or die, and it was the only way I could stop him'.			

### Strict liability

In some cases, it is not necessary for the prosecution to prove *mens rea*. For some offences, all that needs to be shown is *actus reus*. These criminal offences are called **strict liability** crimes. For example, it is an offence to speed, but the police are not required to prove that a person intended (the *mens rea*) to drive over the speed limit. They must only prove that the accused did speed (the *actus reus*). For this reason, a person only needs to be caught speeding to receive a fine.

A strict liability crime means that the Crown does not need to prove that the accused intended to commit the criminal offence and he or she can be found guilty simply because they committed the act. It is up to the accused to prove otherwise. Other examples of strict liability crimes include selling alcohol and cigarettes to minors, occupational health and safety offences and many environmental offences. Most such crimes are created by statute, and have been established by Parliament to regulate daily activities. Therefore, strict liability crimes tend to be summary offences and the usual penalty is a fine. Another argument in favour of strict liability is convenience/ efficiency. It would not make sense for the state to have to prove *mens rea* for every traffic offence that appeared in court.

### The age of criminal responsibility

The **age of criminal responsibility** refers to the age below which a child is considered to be incapable of committing a criminal offence. In Victoria, a child under the age of 10 cannot be charged with having committed a criminal offence. It is assumed that a child does not understand the consequences of his or her actions. Section 127 of the *Children and Young Persons Act 1989* (Vic) states that "It is conclusively presumed that a child under the age of 10 years cannot commit an offence." Therefore, according to this legislation, only children who are 10 years or older will be liable for a criminal offence.

If a child is aged between 10 and 13 inclusive at the time they are alleged to commit an offence, the law assumes that he or she does not have sufficient understanding to know that they are doing something that is considered to be wrong. However, this presumption is allowed to be rebutted. This means that if the prosecution can present evidence that proves that the child knew that it was morally wrong to take part in a certain act, the child can be charged.

The legal concept that you need to be aware of here is known as **doli incapax** – a Latin term that means "incapable of crime". In common law it is presumed that a child under the age of 14 years does not know the difference between right and wrong and does not have the capacity to be liable for his or her behaviour. Whether or not a child is *doli incapax* will vary according to the nature of the allegation and the child – their experience, school and home life, their age and their behaviour at the time of the alleged offence will affect this.

#### Study tip

*The idea behind doli incapax is that children are not developmentally aware of the wrongfulness of criminal acts.*



## Application exercise 2e

### Too young to commit the crime? [*Doli incapax* in *RP v The Queen*]

In December 2016, the High Court allowed an appeal against a decision of the New South Wales Court of Criminal Appeal. RP was convicted in August 2014 in the District Court of New South Wales of aggravated indecent assault and two counts of sexual intercourse with a child. He was aged approximately 11 and a half years at the time of the two latter offences. The victim was his brother, who was aged six years and nine months at the time of the two counts of sexual intercourse. RP was sentenced to two years and five months' imprisonment with a non-parole period of 10 months.

RP appealed against his convictions and sentence to the NSW Court of Criminal Appeal. His conviction for the aggravated indecent assault was quashed and a verdict of acquittal entered. However, the appeal against the convictions for the two counts of sexual intercourse with a child was dismissed. The appeal against sentence was also dismissed.

In the High Court, RP's appeal was unanimously allowed on the presumption of lack of criminal responsibility by offenders under 14 years of age. The High Court found that the prosecution had failed to prove that RP "understood the moral wrongness of his acts". The Court found that it could not be proved beyond reasonable doubt that an 11-year-old understood that his conduct was seriously wrong in a moral sense. RP's convictions were quashed.

The plurality (Kiefel, Bell, Keane and Gordon JJ) stated that, "The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*."

#### Questions/tasks

1. Explain why the High Court allowed the appeal from the NSW Court of Criminal Appeal.
2. Explain whether the 'actus reus' and/or 'mens rea' was being questioned by the High Court.
3. What did the prosecution 'fail to do' in the eyes of the High Court? In your answer make reference to both 'the burden of proof' and the 'standard of proof'.
4. In the context of this case, what is the relevance of the legal concept known as *doli incapax*? In your answer, make reference to 'mens rea'.



## 2.4 Types of crime

There are a number of types of crime. The Crime Statistics Agency (CSA) processes, analyses and publishes Victorian crime statistics, independent of Victoria Police. As seen in Table 2.1 below, it has devised an offence classification to group offences into categories that are representative of similar criminal behaviours that can be easily understood and interpreted. The data can also be used in a logical and meaningful way by policy makers and the community in Victoria. The classification comprises three levels: divisions (the broadest level), subdivisions and groups.

### Study tip

The CSA functions independently of Victoria Police and aims to improve the accessibility of crime statistics for policy makers, researchers and the Victorian public. It publishes quarterly statistical releases of reported crime data. These releases include the number and rate of offences across Victoria, demographic characteristics of victims and alleged offenders and family and domestic violence incidents.

Type of offence (CSA offence division)	Offences (CSA Offence Subdivision)
Crimes against the person	<ul style="list-style-type: none"> <li>• Homicide and related offences</li> <li>• Assault and related offences</li> <li>• Sexual offences</li> <li>• Abduction and related offences</li> <li>• Robbery</li> <li>• Blackmail and extortion</li> <li>• Stalking, harassment and threatening behaviour</li> <li>• Dangerous and negligent acts endangering people</li> </ul>
Property and deception offences	<ul style="list-style-type: none"> <li>• Arson</li> <li>• Property damage</li> <li>• Burglary/Break and enter</li> <li>• Theft</li> <li>• Deception</li> <li>• Bribery</li> </ul>

Drug offences	<ul style="list-style-type: none"> <li>• Drug dealing and trafficking</li> <li>• Cultivate or manufacture drugs</li> <li>• Drug use and possession</li> <li>• Other drug offences</li> </ul>
Public order and security offences	<ul style="list-style-type: none"> <li>• Weapons and explosives offences</li> <li>• Disorderly and offensive conduct</li> <li>• Public nuisance offences</li> <li>• Public security offences</li> </ul>
Justice procedures offences	<ul style="list-style-type: none"> <li>• Justice procedures offences</li> <li>• Breaches of orders</li> </ul>
Other offences	<ul style="list-style-type: none"> <li>• Regulatory driving offences</li> <li>• Transport regulation offences</li> <li>• Other government regulatory offences</li> <li>• Miscellaneous offences</li> </ul>

For the purposes of the VCE Legal Studies course, we will examine in more detail the following types of crime:

- crimes against the person
- crimes against property.

### Crimes against the person

**Crimes against the person** are the offences that involve a person being physically harmed or threatened with harm. Common crimes against the person include, assault, sexual offences, stalking, harassment and threatening behaviour and robbery. Another (not so common) crime against the person is homicide.

#### Homicide

**Homicide** is the killing of a human being by another person. Some homicides are unlawful, such as murder, manslaughter, culpable driving and infanticide. Some homicides, however, are lawful. Taking another person's life might be recognised as lawful when the death is:

- caused by self-defence. In exceptional cases, if a person believes that it is necessary to defend themselves or another person, they can be found not guilty of homicide, but they must go no further than reasonably necessary to defend themselves (*R v McNamara* [1963] VR 32).
- caused by an act during a war. A soldier killing an enemy soldier will not be charged with a crime.
- required by punishment. A death sentence (or capital punishment) is part of the legislation in some countries. The person carrying out the punishment cannot be charged with murder. All states and territories in Australia have abolished the death penalty.
- a result of enforcing justice. If a person is killed while resisting arrest or escaping from lawful custody, such as in the case of a police shooting, then the homicide may be lawful.
- caused by accident. If the death occurs unexpectedly during a lawful activity, such as in a football match, then no crime has been committed. If the death was caused by someone acting recklessly, then the death may become manslaughter.



#### Murder

**Murder** is the unlawful killing of another person with the intention to kill or cause serious harm (malice aforethought). It is considered to be the most serious crime. This offence can occur when there is:

- the intent to kill
- the intent to cause grievous bodily harm (with the knowledge that it was probable that death or grievous bodily harm would occur (reckless indifference to life)
- without intent to kill in the course of committing a violent crime.



Under the *Crimes Act 1958*, murder carries a maximum sentence of life imprisonment. Murder will be covered in more detail later in this chapter.

## Manslaughter

**Manslaughter** is the unlawful killing of another person in circumstances where the offender's culpability is less than that required to establish murder. The law recognises that a killing may occur when a person is deprived of their self-control, under circumstances amounting to a reduction in responsibility or without the intention to kill, because of a careless, dangerous, negligent, reckless, or unlawful act. Under the *Crimes Act*, manslaughter is a serious indictable offence and it carries a maximum sentence of imprisonment for 20 years.

In Victoria, an accused may be convicted of manslaughter, rather than murder, if they have killed another person as a result of a suicide pact (an agreement between two or more people to die together at the same time). Section 6b of the *Crimes Act* states that the survivor of a suicide pact who kills the other party is guilty of manslaughter and the maximum penalty is 10 years imprisonment.

Amendments introduced in 2014 added "single punch or strike taken to be dangerous act" to the *Crimes Act*. According to the *Crimes Act*, a single punch or strike delivered to any part of a person's head or neck causing an injury to the head or neck is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act. A single punch or strike may be the cause of a person's death even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person's head or neck. According to the *Sentencing Act 1991* (Vic), when sentencing an offender guilty of manslaughter by single punch or strike, the court must impose a term of imprisonment with a 10-year non-parole period.

## Culpable driving causing death

**Culpable driving causing death** is an indictable offence where death is caused through driving a motor vehicle in a way that is considered culpable. The driving is considered culpable if the accused drives:

- recklessly, with disregard for potential deaths that may result (consciously and unjustifiably disregarding a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his or her driving; or
- negligently (if he or she fails unjustifiably and to a gross degree to observe the standard of care which would have reasonably been observed in all the circumstances of the case); or
- under the influence of alcohol or drugs that render that person incapable of controlling a vehicle.

Culpable driving causing death carries a maximum penalty of 20 years imprisonment. It will be covered in more detail later in this chapter.

## Dangerous driving causing death

**Dangerous driving causing death** occurs when the death of another person is caused by a person driving a motor vehicle at a speed or in a manner that is dangerous to the public. This is an indictable offence and is liable for a maximum of 10 years imprisonment. If, however, the person causes serious injury to another person, he or she may be liable for a maximum of 5 years imprisonment.

Dangerous driving causing death is a less serious offence compared to culpable driving causing death. Culpable driving causing death is distinct because the death is caused by driving a motor vehicle in a manner that significantly increased the risk of harming other people – whether recklessly, negligently or under the influence of alcohol or drugs. In contrast, dangerous driving causing death means that the accused drove in a speed or manner that was dangerous to the public, but not necessarily reckless or negligent. For example, a driver who briefly exceeds the speed limit and crosses double lines to overtake a slower vehicle runs the real risk of being charged with dangerous driving causing death. However, a person who is driving well above the speed limit, weaving in and out of traffic for a sustained period, and overtakes multiple vehicles across double lines, is more likely to be charged with the more serious offence of culpable driving causing death. This is because the driving is likely to be considered reckless and/or negligent, particularly if the person is also driving under the influence of alcohol or drugs.

### Study tip

According to the Sentencing Advisory Council, between 1 July 2011 and 30 June 2016 the higher courts of Victoria sentenced 74 charges of manslaughter and 73 cases where manslaughter was the principal offence – 95.89 per cent received an imprisonment sentence and the average length of imprisonment was 8 years.

### Study tip

According to the Sentencing Advisory Council, between 1 July 2011 and 30 June 2016 there were 55 people sentenced for the offence of culpable driving causing death. 89.09 per cent of people who were sentenced for the offence of culpable driving causing death received a prison sentence, while 10.91 per cent received an 'other' sentence, including orders that have been phased out (such as suspended sentences, community-based orders and intensive correction orders).



## Infanticide and child homicide

According to s. 6 of the *Crimes Act*, **infanticide** applies to the situation where a woman causes the death of her child aged under 2 years (in circumstances that would constitute murder), and it is found that her mind is disturbed because:

- she had not fully recovered from the effect of giving birth
- she had developed a disorder as a consequence of giving birth.

The maximum penalty is five years imprisonment. Note that a woman found not guilty of murder may be found guilty of infanticide.

The crime of **child homicide** is outlined in s. 5A of the *Crimes Act*. A person who kills a child under the age of 6 years, in circumstances that would normally amount to manslaughter, is guilty of child homicide, and not of manslaughter. The offence of child homicide is punishable by a maximum of 20 years imprisonment.

## Assault

**Assault** is defined in the *Crimes Act* as the direct or indirect application of force by a person to the body, clothing or equipment of another person, where the application of force was a) unlawful and b) intentionally or recklessly resulting in bodily injury, pain, discomfort, damage, insult or deprivation of liberty. It is important to note that threatening to use force is assault (indirect application of force) as is the physical contact (which is the direct application of force). There are a number of types of assault, including:

- Common Assault – generally, an individual will be charged with common assault if he or she assaults another person without causing injury. The penalty is a fine of 15 penalty units or three months' imprisonment.
- Assaulting a Police Officer – the direct and confrontational infliction of force, injury or violence upon a police officer (or emergency services worker or other authorised officer) when on duty. The maximum penalty for assaulting a police officer is 5 years imprisonment.
- Assault/threaten to assault with intent to commit an indictable offence – this is a serious assault found in s. 31(1)(a) of the *Crimes Act*. The maximum penalty is 5 years imprisonment.

### Study tip

*Penalty units determine the amount that a person will be fined when they commit an infringeable offence. The value of a penalty unit changes each year and can be found in the Victorian Government Gazette and on the Victorian Legislation and Parliamentary Documents website. The current value of a penalty unit is \$158.57 (as at 1 July 2017).*

## Sexual offences

Sexual offences include any act, or the intent to commit an act, of a sexual nature against another person, which is non-consensual or where consent is prohibited (for example, where the person is legally deemed incapable of giving consent because of youth or temporary/permanent incapacity).

## Rape

**Rape** is the intentional sexual penetration of another person without that person's consent, failing to withdraw from a person on becoming aware that the person is not consenting or might not be consenting, or compelling another person to sexually penetrate oneself or another person. Section 38(1) of the *Crimes Act* states that the accused commits rape if:

- the accused intentionally sexually penetrates another person
- the other person does not consent to the penetration
- the accused does not reasonably believe that the other person consents to the penetration.

A person who commits rape is liable to a maximum of 25 years imprisonment.



## Incest

**Incest** is sexual intercourse between people who are closely related. The *Crimes Act* states that a person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child. The penalty imposed under the *Crimes Act* for sexual penetration of a daughter or son or step-child is imprisonment for a maximum period of 25 years.

## Stalking, harassment and threatening behaviour

**Stalking**, harassment and threatening behaviour are acts that are intended to cause physical or mental harm to the victim, or arouse apprehension or fear through repetition in unreasonable conduct. According to s. 21A(2) of the *Crimes Act*, a person stalks another person if the offender engages any of the following conduct:

- following the victim or any other person
- contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever
- publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material (i) relating to the victim or any other person; or (ii) purporting to relate to, or to originate from, the victim or any other person
- causing an unauthorised computer function in a computer owned or used by the victim or any other person
- tracing the victim's or any other person's use of the Internet or of e-mail or other electronic communications
- entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person
- interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property)
- making threats to the victim
- using abusive or offensive words to or in the presence of the victim
- performing abusive or offensive acts in the presence of the victim
- directing abusive or offensive acts towards the victim
- giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person
- keeping the victim or any other person under surveillance
- acting in any other way that could reasonably be expected (i) to cause physical or mental harm to the victim, including self-harm; or (ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person - with the intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.



The offender has the intention to cause physical or mental harm to the victim, including self-harm, or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if:

- the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or
- the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

The maximum penalty for stalking another person is 10 years imprisonment.

## Robbery

**Robbery** is when a person uses force, or threatens the use of force, while stealing. Under s. 75 of the *Crimes Act*, a person found guilty of robbery may be liable for a 15-year maximum term of imprisonment. If the offender is using some type of firearm or weapon while threatening the victim, then this increases the charge to armed robbery. A person guilty of armed robbery is liable to a maximum of 25 years imprisonment.

## Crimes against property

**Crimes against property** make up the highest proportion of offences in Victoria. In general, these are crimes that have the purpose of obtaining money, property, or some other benefit. The most common crime against property is theft followed by property damage and burglary.

### Theft

Under s. 72 of the *Crimes Act*, **theft** is defined as dishonestly appropriating (taking) property that belongs to another person with the intention of permanently depriving that person of it. However, it is not theft if the person taking the property believed they had a right to deprive the other person of it, on behalf of himself or a third person, if someone takes property believing that he or she would have the other person's consent if that person was aware of the appropriation, or if someone takes the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

Theft may include theft of a motor vehicle, stealing from a motor vehicle, stealing from a retail store, receiving or handling stolen goods, or fare evasion. A person guilty of theft is guilty of an indictable offence and liable to a maximum of 10 years imprisonment.

### Property damage

**Property damage** is the wilful and unlawful destruction, damage or defacement of property. The offence of destroying or damaging property is contained in s. 197 (1) of the *Crimes Act*, which states: "a person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence". Property damage may include criminal damage or graffiti. A person who destroys or damages any property is liable to a maximum of 10 years imprisonment.

### Burglary

**Burglary** occurs when a person unlawfully enters a building with the intent to steal or commit an offence. The offence may involve assaulting a person in the building or damaging the building or property. It carries a maximum penalty of 10 years' imprisonment. Burglary can be aggravated (armed with a weapon or a person was present in the building) or non-aggravated. A person found guilty of **aggravated burglary** could be sentenced to 25 years imprisonment. Burglary will be covered in more detail later in this chapter.



## Review questions 2.4

1. Using examples, identify the different types of crimes.
2. Outline what is meant by the term 'crimes against the person'.
3. Define the term 'homicide'.
4. Using examples, explain the difference between lawful killing and unlawful killing.
5. Distinguish between murder and manslaughter.
6. Outline the elements of manslaughter, referring to examples.
7. Explain the difference between culpable driving causing death and dangerous driving causing death.
8. Outline what infanticide and child homicide are.
9. Explain the elements of assault.
10. Outline what rape and incest are.
11. Outline the conduct indicating that a person has stalked another person.
12. Explain robbery.
13. Outline what is meant by the term 'crimes against property'.
14. Distinguish between theft and burglary.
15. Explain what is involved in the crime of property damage.

## 2.5 The distinction between summary offences and indictable offences

In criminal law, offences are classified according to their seriousness. They may therefore be classified as either **summary or indictable**. Whether an offence is summary or indictable determines in which court and in what manner the offence will be heard. It is important to note that some indictable offences can be heard summarily.

### Summary offences

Summary offences are minor or less serious crimes, which are heard by a magistrate in the Magistrates' Court sitting without a jury. Summary offences are specified in legislation such as the *Summary Offences Act*, the *Road Safety Act* and other Victorian regulations and legislation. When a person is charged with a summary offence in Victoria they will be prosecuted by Victoria Police. The court proceedings used in summary offences are called 'hearings'. A summary offence can be heard without the accused being present in court.

### Indictable offences

Indictable offences are the more serious crimes. They are usually heard in the County Court (serious indictable offences) and the Supreme Court (most serious indictable offences) by a judge or justice sitting with a jury. The judge or justice administers the law, and the jury reaches a verdict of guilty or not guilty after considering the facts and evidence. The Victorian *Crimes Act* lists indictable offences and their maximum penalties. When a person is charged with an indictable offence in Victoria they will be prosecuted by the Office of Public Prosecutions. The court proceedings used in indictable offences are called 'trials'. Indictable offences cannot be heard without the person accused of the crime being present in court.

#### Study tip

*The word 'indictable' is pronounced with a silent 'c'. In other words, it is pronounced in-DITE-able. You may wish to remember it phonetically, though, if it helps you spell it correctly.*

Some examples of summary offences and indictable offences are listed in Table 2.2 below:

Summary offences	Indictable offences
<ul style="list-style-type: none"> <li>Road traffic offences (for example, careless driving, drink driving, speeding and unlicensed driving)</li> <li>Minor assaults</li> <li>Property damage</li> <li>Obscene, indecent, threatening language and behaviour in public</li> <li>Disorderly conduct</li> <li>Drunk and disorderly in a public place</li> <li>Begging</li> </ul>	<ul style="list-style-type: none"> <li>Aggravated burglary</li> <li>Robbery</li> <li>Culpable driving causing death</li> <li>Indecent assault</li> <li>Drug trafficking offences</li> <li>Manslaughter</li> <li>Murder</li> <li>Treason</li> <li>Rape</li> <li>Stalking</li> </ul>

### Indictable offences heard summarily

Some indictable offences may be heard summarily – that is, heard in the Magistrates' Court without a jury as if they are summary offences, rather than heard as indictable offences in the County Court. This will only occur if the court determines that it is appropriate for the offence to be dealt with by a magistrate. The accused can elect or request for an indictable offence to be heard summarily, but it is ultimately up to the court to decide. However, if the Magistrates' Court is to hear and determine an indictable offence summarily, the accused must consent.

There are a number of indictable offences that can be heard summarily. These offences include theft, robbery and burglary. Schedule 2 of the *Criminal Procedure Act 2009* (Vic) specifies that an **indictable offence heard summarily** is generally:

- any offence punishable by 10 years imprisonment or less
- any offence punishable by a maximum fine not exceeding 120 penalty units.

A higher court must hear some indictable offences regardless of the wishes of the accused, for example, murder and rape.

An accused person may choose to have an indictable offence heard summarily to save themselves time and money in addition to guaranteeing a lower possible maximum penalty. A hearing in the Magistrates' Court will take much less

time to be heard. Legal costs will also be significantly less. The maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence and five years for multiple offences, so there is less risk involved with a guilty verdict. In contrast, the County Court is only limited by maximum penalties set by legislation and general principles of sentencing.

The differences between summary offences, indictable offences and indictable offences heard summarily can be seen in the table below:

Summary offences	Indictable offences	Indictable offences heard summarily
<ul style="list-style-type: none"> <li>• A minor/ less serious offence that is tried by a magistrate in the Magistrates' Court</li> <li>• The judgement and sanction are determined by the magistrate</li> <li>• The charge is usually laid by Victoria police.</li> <li>• The sanction is usually less severe such as fine or community correction order.</li> </ul>	<ul style="list-style-type: none"> <li>• A more serious offence (such as murder or rape) tried by a judge and jury in the County Court and the Supreme Court</li> <li>• The judgement is determined by the jury and the sanction is determined by a judge</li> <li>• The charge is brought by the Office of Public Prosecutions</li> <li>• The sanction will usually be imprisonment or a large fine</li> </ul>	<ul style="list-style-type: none"> <li>• A serious offence that can be heard summarily (in the Magistrates' Court without a jury)</li> <li>• The judgement and sanction are determined by the magistrate</li> <li>• The charge is brought by the Office of Public Prosecutions</li> <li>• The sanction will usually be imprisonment or a fine</li> </ul>

## Review questions 2.5

1. Using examples, explain the difference between indictable offences and summary offences.
2. Explain what is meant by the term 'indictable offence heard summarily', providing examples.
3. Outline the conditions for determining whether an indictable offence can be heard summarily.
4. Outline the benefits for an offender in choosing to have an indictable offence heard summarily.
5. Identify the courts that deal with:
  - a. indictable offences
  - b. indictable offences that can be heard summarily
  - c. summary offences

## Application exercise 2f

### Fine for Melbourne Cup push

Sarah Jane Finn was charged with assault of a police officer after she pushed Acting Superintendent Steven Cooper at the Melbourne Cup in 2015. The unsuspecting police officer fell backwards into a conifer – he was more embarrassed than injured (though his sunglasses ended up broken). Footage of the incident went viral on the Internet.

Finn appeared in the Magistrates' Court in early 2016. Her defence lawyer told the court that she had been encouraged to do something by the media. Apparently, a member of the press looked after her handbag while she approached the officer to push him. The defence lawyer explained that Finn had a history of "poor impulse control" and that she suffered from and received treatment for anxiety. She had offered a sincere apology to the police officer, and had requested that a fine be imposed.

The magistrate accepted that the assault was not malicious – reckless and stupid – but that Finn meant no harm. Finn was fined \$800, and costs of \$117 (plus \$150 to repair the broken glasses of Superintendent Cooper). She was given three months to pay.

#### Questions/tasks

1. Identify the offence that Ms Finn was charged with.
2. Outline the incident that led to Finn being charged with this offence.
3. In what court did Finn appear?
4. Outline the sanction that Finn received.
5. Explain why the crime referred to in this case study is a summary offence.





## Application exercise 2g

### Imprisonment for fatal car crash

Gemma Sargent was charged with culpable driving causing death and negligently causing serious injury, and a number of other charges, following her involvement in a single car crash at Mount Mercer, which killed 19-year-old Nathaniel Merritt-Price. Sargent, 19, was unlicensed when she was driving four friends from Ballarat to Geelong for a party on New Year's Eve in 2015.



Sargent was travelling up to 140 kilometres an hour when she lost control of her car at Mount Mercer, which flipped and rolled over, killing 19-year-old Nathaniel Merritt-Price. Sargent was an L plater at the time of the incident and on one in the car was qualified to supervise a learner driver. At one point, the car overtook another vehicle which was being driven at 130km/hr.

Sargent pleaded not guilty to the charges of in the County Court in 2017. Following a week-long trial in September, a jury found her guilty of culpable driving causing death and negligently causing serious injury. She was sentenced to eight years' imprisonment and will be eligible for parole in five years.

#### Questions/tasks

1. Identify the offence that Ms Sargent was charged with.
2. Outline the incident that led to Sargent being charged with this offence.
3. In what court did Sargent appear?
4. Outline the sanction that Sargent received.
5. Explain why the crime referred to in this case study is an indictable offence.

## 2.6 Possible participants in a crime such as principal offenders and accessories

The responsibility for a crime does not always fall on one person. There may be other people who, in one way or another, assist that person to commit a criminal offence. The participants in a crime include principal offenders and accessories.

### Principal offenders

The **principal offender** is the person who actually commits the crime. According to the Victorian *Crimes Act*, anyone who is involved in the commission of an offence, whether it is indictable or summary, is considered to have committed the offence and is liable to the maximum penalty for that offence. As seen in Box 2.2, section 323(1) states that a person is involved in the commission of an offence if he or she intentionally assisted, intentionally encouraged or intentionally directed the commission of the offence (or another offence carried out in the course of committing the original offence). A person can also be involved in the commission of an offence if he or she enters into an agreement, arrangement or understanding with another person to commit the offence (or another offence carried out in the course of committing the original offence).

#### Box 2.2: Section 323(1) of the *Crimes Act 1958* (Vic)

... a person is involved in the commission of an offence if the person—

- (a) intentionally assists, encourages or directs the commission of the offence; or
- (b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or
- (c) enters into an agreement, arrangement or understanding with another person to commit the offence; or
- (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence.

The *Crimes Act* notes that a person may be involved in the commission of an offence by act or omission. Furthermore, involvement in a crime does not require the person to be physically present when the offence, or an element of the offence, is committed. A person may also be involved in the commission of an offence whether or not the person realises that the facts constitute an offence.

A person involved in the commission of an offence may be found guilty of the offence whether or not any other offender has been prosecuted for or found guilty of the offence. However, a person is not taken to have committed an offence if the person withdraws from the offence.

## Accessories

An **accessory** is a person who obstructs or hinders the apprehension, prosecution, conviction or punishment of the principal offender, despite knowing or believing that the offender is guilty of a serious indictable offence, without a lawful or reasonable excuse. This is outlined in section 325(1) of the Victorian *Crimes Act*, as seen in box 2.4. a serious indictable offence is a crime that carries a punishment of five years or more in prison.

### Box 2.3: Section 325(1) of the *Crimes Act 1958* (Vic)

(1) Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

## Review questions 2.6

1. Explain the difference between a principal offender and an accessory. Provide one example to support your answer.
2. Explain how the Victorian *Crimes Act* defines a person who is involved in the commission of an offence.
3. Outline how the law will treat:
  - a) a person who is involved in a crime but is not physically present when the offence is committed.
  - b) a person who is involved in a crime but does not realise that the facts constitute an offence.
4. Identify the section in the *Crimes Act* that outlines who is involved in the commission of an offence.
5. Identify the section in the *Crimes Act* that defines accessories.

## Application exercise 2h

### The participants in crimes

A principal offender is any person involved in the commission of a criminal offence, whereas an accessory is any person who impedes the apprehension, prosecution, conviction or punishment of the principal offender. Complete the table below by identifying the principal offender/s or accessory for each criminal case, and justifying your decision.



Criminal case	Identification of the principal offender/s or accessory	Reason why
Tejas stole laptops from a local primary school.		
Pavel organises and plans a burglary at a warehouse. He persuades Michael and Will to perform the job for an equal share of the takings.		
Daniel's partner knows he murdered Nick, but quickly washed the bloodstained clothing and told police that Daniel remained at home on the night of the murder.		
The owner of a bar asks Danny and Brendan to leave the premises. Danny's older brother, Damian, hit the owner from behind. Danny then started to kick and punch the owner. Brendan encouraged Danny to hit the owner harder. The owner of the bar eventually managed to get away from the area.		
Klae shot and killed his wife. Brodie tried to convince him to give himself up after he had confessed to him. Klae refused and decided to flee interstate. Brodie drove him to another town where he then hitchhiked to Queensland.		

## 2.7 Possible defences

When an accused is charged with an offence, there may be circumstances surrounding the incident or reasons for the person's behaviour that need to be considered by the court. These circumstances or reasons may be used as the defence for the accused. Defences have developed in law over hundreds of years – they are now found in common law and in legislation such as the *Crimes Act 1958*.

Some defences are 'complete' or 'full' defences and they may result in the defendant being acquitted. Proving self-defence, for example, in an assault case means that the accused may be found not guilty of assault. Some defences are partial defences and, if accepted by the judge or jury, result in a lesser charge. For example, a woman might plead infanticide as a partial defence to murder.

### Self-defence

Victorian parliament abolished **self-defence** as a common law defence in 2014. Self-defence occurs when a person uses force to defend himself, herself or another person from death or serious injury. Under section 322K of the *Crimes Act*, a person is not guilty of an offence if he or she "carries out the conduct constituting the offence in self-defence". This will be the case if the person believes that the conduct is necessary in self-defence and the conduct is a reasonable response in the circumstances as the person perceives them. Self-defence will only apply in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

In a case where self-defence in the context of family violence is in issue, a person may believe that his or her conduct is necessary in self-defence. Therefore the conduct may be considered to be a "reasonable response in the circumstances as the person perceives them", even if:

- the person is responding to harm that is not immediate; or
- the response involves the use of excessive force.

When this defence is used, the court will examine the history of violence in the accused's family and its social, cultural, economic and psychological effects.

S. 322L of the *Crimes Act* notes that self-defence does not apply where the person is responding to lawful conduct and the person knows that the conduct is lawful. According to the *Crimes Act*, the accused has the onus of raising self-defence by presenting or pointing to evidence that suggests a reasonable possibility that it existed. If the accused satisfies this evidential onus, the prosecution has the legal onus of proving beyond reasonable doubt that the accused did not carry out the conduct in self-defence.



### Infanticide

Used as a defence, infanticide reduces a charge of murder (life imprisonment) to infanticide (maximum of 5 years imprisonment). Infanticide applies when a woman kills her own child (under two years of age) as a result of a mental disturbance or disorder as a consequence of giving birth.

### Sudden or extraordinary emergency

A **sudden or extraordinary emergency** is an urgent situation that involves a serious consequence, such as risk of death or injury. S. 322R of the *Crimes Act* outlines the defence of sudden or extraordinary emergency. An accused will be found not guilty of an offence if it is found that the conduct carried out by him or her was during circumstances of a sudden or extraordinary emergency. The person must reasonably believe that the circumstances of sudden or extraordinary emergency existed and that the conduct was the only way to deal with the emergency. The court must find that the conduct of the person was a reasonable response to the emergency. Sudden or extraordinary emergency will only apply in the case of murder if the person believes that the emergency involves a risk of death or really serious injury.

According to the *Crimes Act*, the accused has the onus of raising sudden or extraordinary emergency by presenting or pointing to evidence that suggests a reasonable possibility that it existed. If the accused satisfies this evidential onus, the prosecution has the legal onus of proving beyond reasonable doubt that the accused did not carry out the conduct in circumstances of sudden or extraordinary emergency.

## Duress

**Duress** is the threat or use of force or compulsion to coerce another person to carry out a particular act. Victorian parliament abolished duress as a common law defence in 2014. Under s. 3220 of the *Crimes Act*, a person is not guilty of an offence if the action is carried out under duress, with a reasonable belief that:

- a threat of harm will be carried out unless an offence is committed
- committing the offence is the only reasonable way that the threatened harm can be avoided



The court must believe that the conduct is a reasonable response to the threat. The defence of duress will only apply in a murder case if the person believes that the threat is to inflict death or really serious injury. An accused cannot claim that he or she carried out his or her conduct under duress if the threat is made by or on behalf of a person with whom the accused is voluntarily associating for the purpose of carrying out a violent offence. For example, if the accused is involved in an armed robbery, he or she cannot claim that they were forced to use violence.

It is very difficult to prove duress successfully. According to the *Crimes Act*, the accused has the onus of raising duress by presenting or pointing to evidence that suggests a reasonable possibility that it existed. If the accused satisfies this evidential onus, the prosecution has the legal onus of proving beyond reasonable doubt that the accused did not carry out the conduct under duress.

## Mental impairment

The defence of **mental impairment** refers to a severe mental illness or disorder where a person is not able to know the nature and quality of his or her actions or that their conduct was wrong. A person is presumed not to have been suffering from a mental impairment, until the contrary is proved. If the prosecution or the defence raises the defence of mental impairment, the party raising it bears the onus of rebutting the presumption.

For this defence to be used by the accused, it must be proved that at the time of engaging in the offence, the person was suffering from a mental impairment that had the effect that he or she:

- did not know the nature and quality of his or her actions, or
- did not know that the conduct was wrong (he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

If the accused is found not guilty, they are released from custody and the court process will end. However, section 20(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) states that if the defence of mental impairment is established, the person must be found not guilty because of mental impairment. That is, he or she will be found to have committed the crime, but is not guilty because of his or her mental impairment.

If a person is found not guilty because of mental impairment, the court must either declare that the person is liable to supervision using a supervision order (a court order that commits the person to custody or releases them on conditions specified in the order), or release the person unconditionally.



## Automatism

**Automatism** is a defence that suggests that the defendant committed a crime without conscious thought. The act must have been committed as a result of muscle spasms or reflexes, or while not conscious by virtue of a state such as sleepwalking.

## Intoxication

An accused may use the defence of **intoxication**: the claim that he or she was so affected by alcohol, a drug or any other substance, they were unaware of what they were doing, and so could not form the intention to commit a crime. Intoxication is a full defence that will be used in conjunction with self-defence, duress and sudden or extraordinary emergency.

The *Crimes Act 1958* states that if intoxication is self-induced, the accused's actions or beliefs must be compared to a "reasonable person who is not intoxicated". Consequently, where a person is voluntarily intoxicated, their intoxication cannot be used as a defence.

S. 322T of the *Crimes Act* states that intoxication is assumed to be self-induced unless it came about:

- involuntarily
- as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force
- from the use of a prescription drug that was used according to directions
- from the use of a medicinal cannabis product in accordance with a patient medicinal cannabis access authorisation
- from the use of a non-prescription drug (other than a medicinal cannabis product) that was used for a purpose and in accordance with the dosage level, recommended by the manufacturer.



If the accused was using a drug and knew, or had reason to believe, when they took the drug that the drug would significantly impair their judgment or control, then the accused's intoxication is taken as being self-induced.

In a case where intoxication is not self-induced, the court will give consideration to the impact of the intoxication on the defendant's intention to commit an offence. The actions of the intoxicated person will be compared to those "of a reasonable person who is intoxicated to the same extent as the accused".

## Consent

**Consent**, or free agreement, is a defence that can only be used in certain cases, such as a sexual offence. In the case of rape, for example, the defendant might argue that consent was given or that he or she was not aware that the other person was not consenting. Consent can also be given in situations that might otherwise be seen as assault; for example, in a medical procedure or in a sporting contest. The belief that a victim was consenting to an act must be reasonable. Just because someone consents to an act that is against the law does not make the act legal. For example, consent is not a defence to murder.

In relation to sexual offences, s. 36 of the *Crimes Act* identifies circumstances in which a person does not consent to an act. These circumstances include (but are not limited to):

- the person submits to the act because of force or the fear of force, whether to that person or someone else
- the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal
- the person submits to the act because the person is unlawfully detained
- the person is asleep or unconscious
- the person is so affected by alcohol or another drug as to be incapable of consenting to the act
- the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act
- the person is incapable of understanding the sexual nature of the act
- the person is mistaken about the sexual nature of the act
- the person is mistaken about the identity of any other person involved in the act
- the person mistakenly believes that the act is for medical or hygienic purposes
- if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes
- the person does not say or do anything to indicate consent to the act
- having given consent to the act, the person later withdraws consent to the act taking place or continuing.



## Accident

An accused may try to claim that their action was a result of an **accident** – an unfortunate incident happening unexpectedly or unintentionally and resulting in some sort of damage or injury. The person would therefore be arguing that there was no intention, or no *mens rea*, to cause the damage or injury. The defence of accident only applies where an accused is engaged in lawful conduct. Ultimately, a court would need to decide on the facts of each individual case as to whether or not the defence of accident was established.

## Review questions 2.7

1. Explain what constitutes self-defence in a criminal case.
2. Outline the law in relation to family violence and self-defence.
3. Outline how infanticide can be used as a defence.
4. Explain what is involved when using the defence of sudden or extraordinary emergency.
5. Explain the elements of the defence of duress.
6. How can mental impairment be used as a defence?
7. Outline what will happen if a person is found not guilty because of mental impairment.
8. Do you think it is appropriate that mental impairment can be used as a defence to an offence? Explain your answer.
9. Under what circumstances can automatism be used as a defence?
10. Outline the difference between self-induced intoxication and intoxication that is not self-induced. Which type can be used as a defence?
11. Outline what is meant by consent and describe a possible crime where consent is available as a defence.
12. In relation to sexual offences, under what circumstances might a person not consent to an act?
13. Explain what an accident as a legal defence and outline what the defendant needs to show for this defence to be valid.

## Application exercise 2i

### A legal defence?

Using the table below, advise each of the accused as to whether or not they could use a legal defence to assist their case and justify your choice.



Situation	Legal defence	Reason why/ why not
Adrian went to a party and drank too much alcohol. He then threatened to assault Lachie if “he didn’t pull his head in”. Lachie stabbed Adrian, killing him.		
Sadiki has to make a snap decision in a situation where he believes another person is going to blow up a building. He shoots the person in order to avoid the disaster and save lives.		
Pierrot woke up to the sound of a gunshot, only to discover a gun in his hand, his father lying on the ground in front of him and his mother screaming. His father died of a bullet wound to the head.		
Following a local soccer match, Satish and Billy argued about whose team was better. Satish was heard by witnesses to angrily exclaim, ‘Shut up, or I’ll kill you’. He then punched Billy’s face. Billy fell to the ground, knocking his head against the ground. Two days later, Billy died in hospital.		
Hope met Catherine during an early morning walk. Hope killed Catherine with a kitchen knife because she believed that Catherine was a zombie who was preparing to attack her.		

## 2.8 Trends, statistics and the impact of offences on individuals and society

As we briefly observed in section 2.4, the Crime Statistics Agency (CSA) collects crime statistics covering the whole of Victoria. The CSA is an independent organisation that processes, analyses and publishes Victorian crime statistics. The legal basis for this agency is the *Crime Statistics Act 2014* (Vic), which provides for the publication and release of crime statistics, research into crime trends, and the employment of a Chief Statistician for that purpose.

Section 12 of the act defines “crime statistics data” as:

- any law enforcement data obtained by the Chief Statistician from the Chief Commissioner of Police; or
- any information derived from data by the Chief Statistician or an employee or consultant assisting the Chief Statistician in the performance of functions under the Act, other than information published by the Chief Statistician

### Study tip

*The Australian Bureau of Statistics (ABS) conducts regular crime and victim surveys that attempt to capture a snapshot of both reported and unreported crimes.*

CSA’s crime data consist of offences recorded in the Victoria Police Law Enforcement Assistance Program (LEAP), where Victoria Police have recorded a crime prohibited by criminal law. These include crimes that have been reported to police as well as those identified by police.

When we look at statistics and data, we can usually find trends – patterns of gradual change in conditions, or an average or general tendency of a series of data points to move in a certain direction over time, represented by a line or curve on a graph.

### Trends and statistics in relation offences in Victoria

Let’s have a look at some of the statistics published by the Crime Statistics Agency. Chart 2.1 shows Victoria’s offence rate per 100,000 population across the last ten years. The rate is calculated using the number of offences for each time period and an estimate of population. This rate is helpful for comparing the number of offences among areas, cities, states or countries of different size.

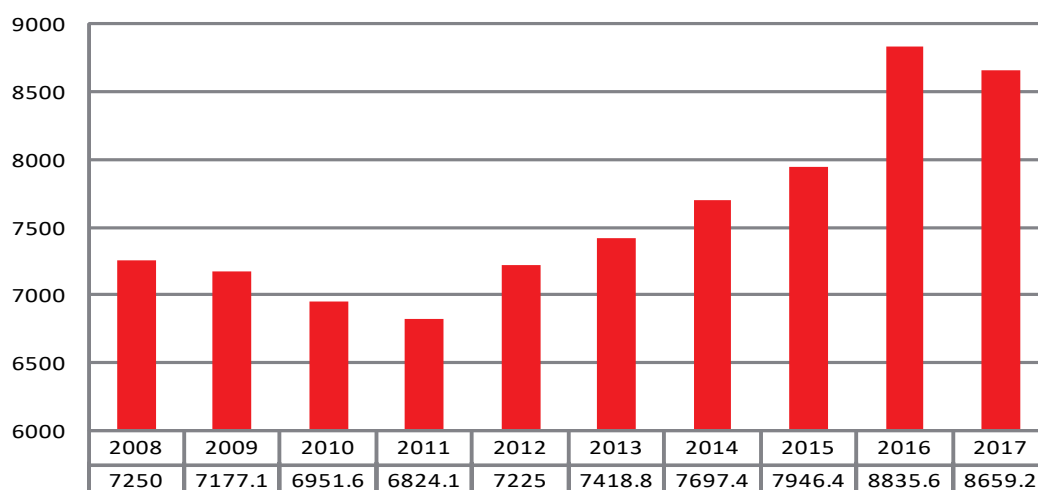
### Study tip

*Offence rates per 100,000 population are calculated using the offence count for the reference period and the most recent Estimated Resident Population (ERP). The offence rate is calculated using the following formula:*

$$(Offence\ count / ERP\ count) * 100,000$$

*ERPs for Victoria (and for local government areas) are based on populations provided by the Australian Bureau of Statistics.*

**Chart 2.1: Victorian offence rate per 100,000 of population**



Source: Crime Statistics Agency, Recorded offences (for the year ending 30 June 2017)

While Victoria’s offence rate per 100,000 population dropped between 2008 and 2011 (a fall of 5.9 per cent) and has dipped slightly between 2016 and 2017 (a fall of almost 2 per cent), the rate has been steadily increasing over the past five years, with an average annual increase of 4 per cent. The overall trend across the ten years is upwards – the offence rate has increased from 7,250 in 2008 to 8,659.2 in 2017 (an increase of 19 per cent).

The following table and charts highlight offences recorded by offence type for Victoria (all local government areas) between June 2015 and June 2017. The statistics are compared for each offence type between two years: June 2015-16 and June 2016-17. This allows the data user to quickly see where a particular offence has increased or decreased between the two time periods.

<b>Table 2.4 Offences recorded by offence type, Victoria 2015 - 2017</b>		
<b>Offence division/subdivision</b>	<b>June 2015-June 2016</b>	<b>June 2016-June 2017</b>
<b>Crimes against the person</b>		
Homicide and related offences	225	248
Assault and related offences	41,232	42,809
Sexual offences	12,619	13,438
Abduction and related offences	809	761
Robbery	2,885	3,189
Blackmail and extortion	191	203
Stalking, harassment and threatening behaviour	12,680	11,807
Dangerous and negligent acts endangering people	5,309	6,076
<b>Property and deception offences</b>		
Arson	4,499	3,136
Property damage	43,377	42,349
Burglary/Break and enter	52,099	52,042
Theft	180,744	181,681
Deception	39,088	35,888
Bribery	26	5
<b>Drug offences</b>		
Drug dealing and trafficking	5,192	4,436
Cultivate or manufacture drugs	1,754	1,540
Drug use and possession	23,101	24,165
Other drug offences	16	18
<b>Public order and security offences</b>		
Weapons and explosives offences	15,992	15,881
Disorderly and offensive conduct	16,972	16,390
Public nuisance offences	3,486	3,377
Public security offences	88	73
<b>Justice procedures offences</b>		
Justice procedures offences	12,718	12,655
Breaches of orders	57,612	57,210
<b>Other offences</b>		
Regulatory driving offences	18	16
Transport regulation offences	611	836
Other government regulatory offences	558	641
Miscellaneous offences	481	290
<b>TOTAL</b>	<b>534,382</b>	<b>531,160</b>

Source: Crime Statistics Agency, Recorded offences (for the year ending 30 June 2017)

Chart 2.2 Types of offences in Victoria (2016 -17)

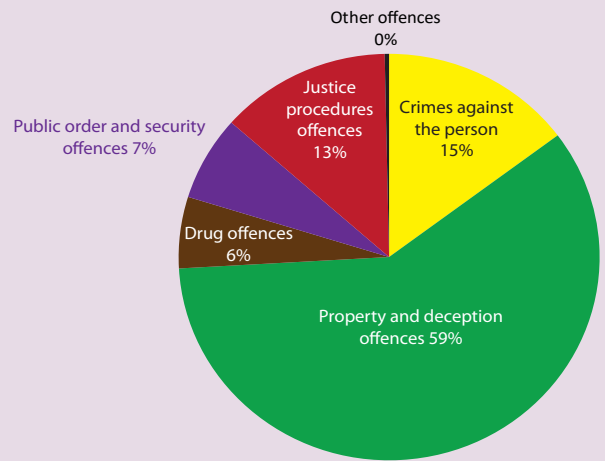


Chart 2.3 Crimes against the person (2016-7)

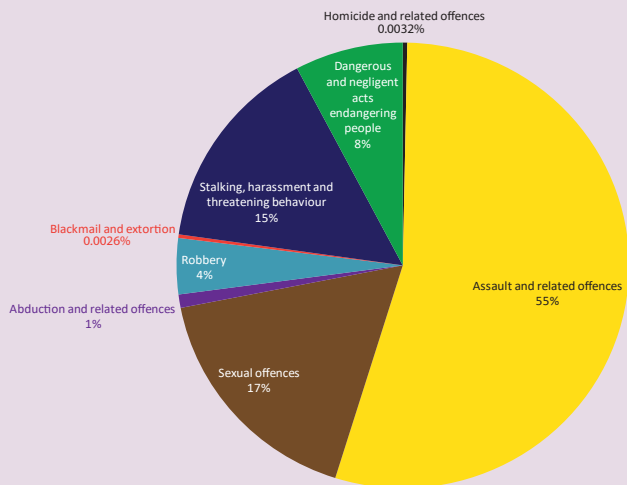


Chart 2.4 Property and deception offences (2016-17)

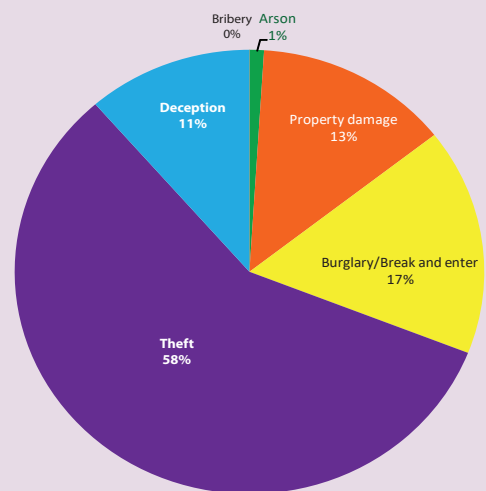


Chart 2.5 Drug offences (2016-17)

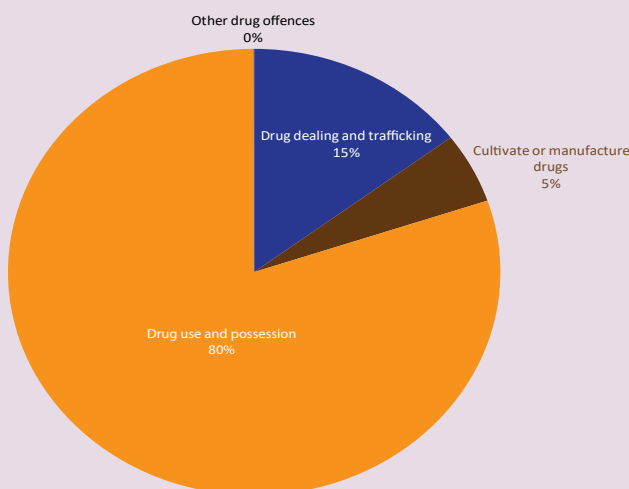
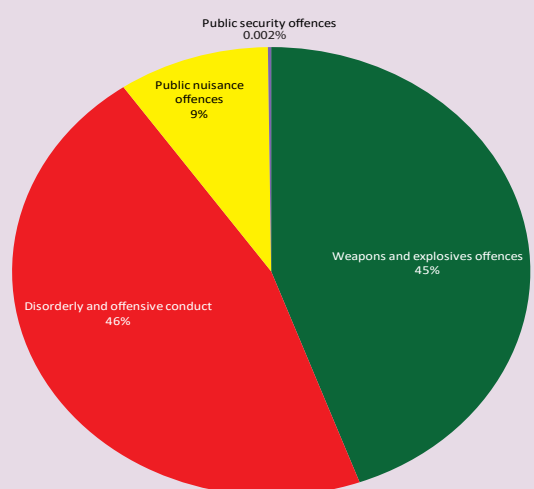


Chart 2.6 Public order and security offences



CSA noted that over the period between June 2015 and June 2017, the major offence categories that showed significant upward trends were: robbery (up 10.5 per cent from 2,885 to 3,189), dangerous and negligent acts endangering people (up 14.4 per cent from 5,309 to 6,076), transport regulation offences (up 36.8 per cent from 611 to 836).

One major offence category showed a significant downward trend: drug dealing and trafficking (down 14.6 per cent from 5,192 to 4,436). All other major offence categories showed a stable trend over the last 24 months.

There are some important points to note when looking at crime statistics and trends. For some offences, the recorded crime statistics do not accurately reflect the actual level of crime in the community. This is because the number of incidents recorded may be affected by other factors that are not easy to measure. These include:

- The public is not always willing to report crime. Many crimes, such as assaults and robberies, are never reported to the police. Sometimes, people in society become more willing to report crimes; this can lead to a false assumption that there has been an increase in crime.
- Policing policies can change. This may result in particular offences being detected by police as they target these areas – while other areas can remain largely unreported.
- Population affects crime statistics. If population increases as crime increases, the amount of crime per population may stay the same. This is why it is important to be aware of rates per 100,000 population.
- Reporting practices can change. The way an organisation reports on crime statistics can change or the organisation that collects and presents statistics may change (for example, from January 2015, the Crime Statistics Agency took over responsibility for processing, analysing and publishing Victorian crime statistics from Victoria Police). An organisation may change its period of reporting, for example from monthly to quarterly or vice versa, which can make comparisons of statistics difficult.



## Trends and statistics in relation to offences in one other jurisdiction: New South Wales

It is important to compare crime trends and statistics between jurisdictions to measure the amount of crime in the community and determine how the legal system will respond to it. When comparing crime statistics from different jurisdictions it is worth noting the points above as well other issues relating to the difficulties in making comparisons. The way in which crime is recorded differs across jurisdictions, as too are the way that crimes are defined and classified. This presents problems for comparing crime statistics. Differences between police procedures also make comparisons between jurisdictions problematic.

NSW Bureau of Crime Statistics and Research (BOCSAR) is a statistical and research agency within the Department of Justice that was established in 1969. BOCSAR develops and maintains statistical databases on crime and criminal justice in NSW, conducts research on crime and criminal justice issues and problems, monitors trends in crime and criminal justice, and provides information and advice on crime and criminal justice in NSW. The NSW agency's crime data consists of criminal incidents, victims and alleged offenders (or persons of interest (POIs)) recorded on the NSW Police Force's Computerised Operational Policing System (COPS).

Table 2.5 shows the number of recorded criminal incidents for 62 offences over the 24 months to June 2017 for NSW. Similar to the Victorian data in Table 2.4, the offences are recorded by offence category and the statistics are compared between two years: June 2015-16 and June 2016-17.

You will notice from this data, that some offences have decreased in number, some have increased and some are stable. For example, blackmail and extortion, break and enter dwelling, receiving or handling stolen goods, steal from person, fraud, possession and/or use of cannabis, possession and/or use of amphetamines, dealing / trafficking in amphetamines, manufacture drug, other drug offences, offensive conduct, offensive language, escape custody and other offences have all decreased significantly. By contrast, steal from retail store, possession and/or use of cocaine, breach bail conditions and transport regulatory offences have all increased significantly. BOCSAR considers that all other offence categories showed a stable trend over the last 24 months.

You may also notice, if you compare this set of BOCSAR statistics to the CSA statistics in Table 2.4, that there are some similarities and differences between the reporting. For example, the CSA statistics report crimes against the person, such as homicide, assault, sexual offences, abduction and related offences, robbery and so on. The BOCSAR statistics



also report homicide, assault, sexual offences, abduction and kidnapping, robbery and so on, but does not categorise these as crimes against the person. Some offences are named differently, for example, CSA reports on the offence called 'Stalking, harassment and threatening behaviour' whereas BOCSAR reports on 'Harassment, threatening behaviour and private nuisance'. BOCSAR reports on a huge range of offences under the heading of 'theft' (which includes 'Break and enter dwelling' and 'Break and enter non-dwelling' – or burglary) whereas the CSA reports on crimes against property that includes burglary and theft as separate offences. Furthermore, the CSA identifies four offences under the offence division of 'drug offences' whereas BOCSAR identifies a range of offences under the heading of 'drug offences' referring to the possession and dealing of specific drugs. Not all offences identified in the CSA statistics can be identified in the BOCSAR statistics, and vice versa.

A final point of difference emphasising the problems associated with comparing statistics from different jurisdictions relates to homicide. In the CSA statistics presented here, homicide is identified under the offence division of 'crimes against the person'. On the CSA website, a data user may 'drill into' the data and find more specific details for 'murder', 'attempted murder', 'accessory or conspiracy to murder', 'manslaughter' and 'driving causing death'. However, in its statistics, BOCSAR indicates that homicide includes 'murder', 'attempted murder', 'murder accessory, conspiracy' and 'manslaughter'.

## The impact of offences on individuals and society

**Table 2.5 Number of recorded criminal incidents for 62 offences over the 24 months to June 2017, NSW**

Offence category		over the 12 months to June 2016	over the 12 months to June 2017
Homicide	Murder	58	67
	Attempted murder	25	20
	Murder accessory, conspiracy	6	3
	Manslaughter	7	4
Assault	Domestic violence related assault	29,305	28,639
	Non-domestic violence related assault	31,425	31,885
	Assault Police	2,396	2,326
Sexual offences	Sexual assault	5,159	5,449
	Indecent assault, act of indecency and other sexual offences	6,978	7,038
Abduction and kidnapping		252	213
Robbery	Robbery without a weapon	1,373	1,418
	Robbery with a firearm	159	150
	Robbery with a weapon not a firearm	843	791
Blackmail and extortion		135	102
Harassment, threatening behaviour and private nuisance		30,521	30,298
Other offences against the person		1,321	1,355
Theft	Break and enter dwelling	30,469	28,969
	Break and enter non-dwelling	11,412	11,040
	Receiving or handling stolen goods	8,489	7,611
	Motor vehicle theft	13,230	13,416
	Steal from motor vehicle	39,875	40,070
	Steal from retail store	22,827	24,053
	Steal from dwelling	20,936	20,786
	Steal from person	5,354	4,705
	Stock theft	516	484
	Fraud	51,935	47,934
	Other theft	29,912	28,042
Arson		5,361	5,601
Malicious damage to property		63,552	62,262

		2015-16	2016-17
Drug offences	Possession and/or use of cocaine	1,763	2,357
	Possession and/or use of narcotics	1,170	1,290
	Possession and/or use of cannabis	27,355	25,646
	Possession and/or use of amphetamines	9,908	9,395
	Possession and/or use of ecstasy	3,461	4,134
	Possession and/or use of other drugs	4,685	5,152
	Dealing, trafficking in cocaine	439	508
	Dealing, trafficking in narcotics	544	422
	Dealing, trafficking in cannabis	782	772
	Dealing, trafficking in amphetamines	2,343	1,903
	Dealing, trafficking in ecstasy	601	660
	Dealing, trafficking in other drugs	307	286
	Cultivating cannabis	1,147	1,087
	Manufacture drug	87	51
	Importing drugs	49	55
Other drug offences	5,430	5,135	
Prohibited and regulated weapons offences		12,822	12,126
Disorderly conduct	Trespass	10,011	10,005
	Offensive conduct	5,773	5,223
	Offensive language	3,920	3,404
	Criminal intent	2,286	2,240
Betting and gaming offences		152	97
Liquor offences		11,028	10,941
Pornography offences		609	566
Prostitution offences		51	87
Against justice procedures	Escape custody	225	174
	Breach Apprehended Violence Order	14,977	15,132
	Breach bail conditions	39,446	42,516
	Fail to appear	751	699
	Resist or hinder officer	6,461	6,175
	Other offences against justice procedures	561	608
Transport regulatory offences		113,095	130,311
Other offences		15,647	14,579

Source: NSW Bureau of Crime Statistics and Research, New South Wales Recorded Crime Statistics (Quarterly Update June 2017)

Crime trends and statistics are important because they allow the legal system to understand how it is performing, as well as evaluating the impact of crime on individuals and society. Crime impacts on individuals and society in a number of ways. It is also important to be aware of trends and statistics because a high rate of crime can have social, economic and psychological effects.

### The impact of offences on individuals

**Victims of crime** will be affected differently, and their experiences or reactions will vary from person to person. They may be impacted:

- **physically and/or psychologically** – a victim may feel anxious, may have physical injuries or other health conditions, may need to cope with changes to his or her lifestyle, might feel guilt or blame or even anger.
- **socially** – a victim may face difficulties with important relationships, become socially withdrawn, face difficulties in trusting others, avoid things or places associated with a traumatic event, be concerned about their personal safety or the safety of others.
- **financially** – a victim may need to pay expensive medical bills or other costs associated with an injury or health condition such as occupational therapy or medical equipment, pay for mental health counselling and therapy, may lose wages (because of time away from work due to their injury, to repair any damage from property crime, participate in criminal proceedings as a witness, or seek medical or mental health treatment), may need to pay relocation expenses, may need to invest in increased security including stronger locks or extra lighting.

Offenders will also be impacted by crime. After committing an offence an offender may feel guilt, remorse or shame. He or she may lose certain freedoms for a period of time if they are sentenced to imprisonment. He or she may face financial issues if a fine needs to be paid or if their family loses income while they are in custody. The offender's family may also be affected socially and psychologically. The offender may need to pay for damage caused.

### The impact of offences on society

#### Economic

Crime can have economic impacts, as productivity is lost as victims of crime miss work. There are also costs associated with assistance to victims, security, insurance and household precautions as well as the identification, investigation, prosecution and prevention of crime. Crime can also harm the economy through the erosion of public confidence. According to the Australian Criminal Intelligence Commission, the cost of serious and organised crime to Australia is more than \$36 billion a year (this was estimated in 2013-14). A report by the Australian Institute of Criminology in 2011 found that the estimated cost of crime to the Australian economy for 2011 was \$47.5 billion or 3.4 per cent of national GDP.

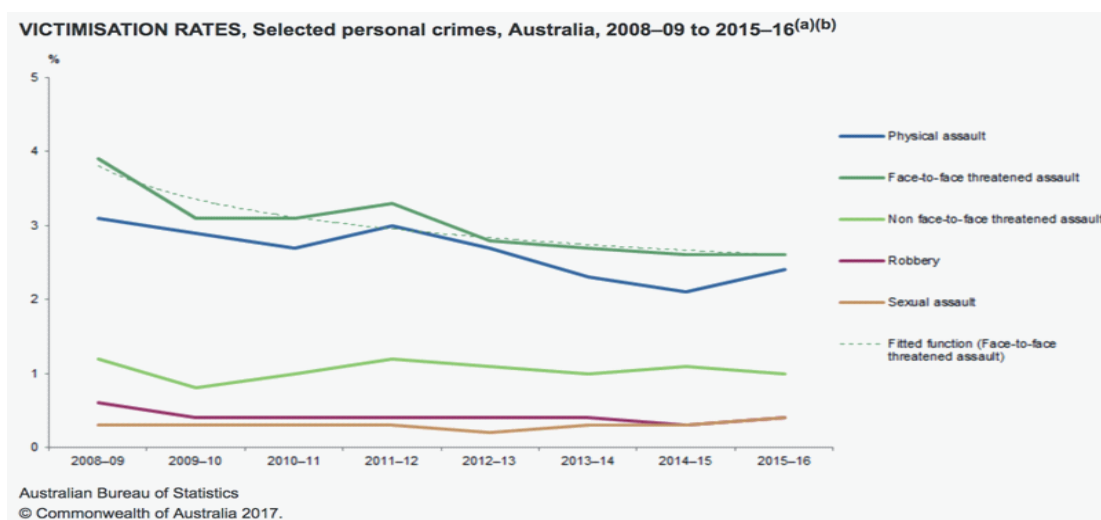
#### Social

Crime can also have a social impact. People may change their day-to-day behaviour to avoid crime. A high number of offences committed in one area can lead to the decline of that community. As individuals and businesses move away from a particular area, local rental values and property prices may decline, the loss of employment and development of 'no-go areas'. When crime is occurring in a society, there will be policy and political ramifications in response to deal with the crime. Governments will be expected to introduce policies and methods for reducing crime.

Crime can lead to other people in society committing crimes. For example, if certain individuals see other people 'getting away' with crime or believe that crime is not being policed, they may also be inclined to participate in committing offences.

An important consideration is the perception that there is crime in society, or fear that crime will occur. There may be the perception in the community that crime is increasing when in fact it is not. The Australian Bureau of Statistics (ABS) undertakes an annual national Crime Victimization Survey. The survey collects data, via personal telephone interview, about people's experiences of crime victimisation for a range of selected personal and household crimes. Some statistics from 2015-16 survey is presented in charts 2.7 and 2.8 below. An analysis of these statistics will tell you that property crime in Australia has been declining since 2008-09, while the proportion of Australians experiencing personal crimes such as physical assault and robbery has remained stable over this time.

Chart 2.7

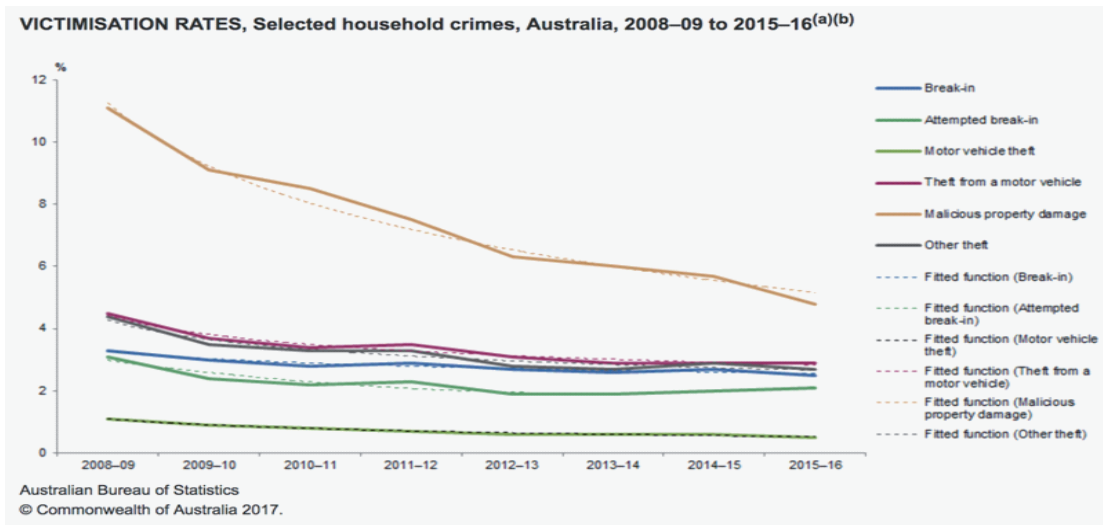


Source: ABS 4530.0 - Crime Victimization, Australia, 2015-16

According to the ABS, the results for selected personal crimes from the 2015-16 survey were similar to those from

the 2014–15 survey, with no significant change in the victimisation rates for personal crime. Since 2008–09, there has been a general decline in the victimisation rate for face-to-face threatened assault. There was no clear change in the victimisation rates for physical assault, non face-to-face threatened assault, robbery and sexual assault over the same time period.

Chart 2.8



Source: ABS 4530.0 - Crime Victimisation, Australia, 2015-16

According to the ABS, the results for selected household crimes from the 2015–16 survey were similar to those from the 2014–15 survey, with the only significant change in the national victimisation rate for malicious property damage, which fell from 5.7 per cent in 2014–15 to 4.8 per cent in 2015–16. Since 2008–09, there has been a general decline in the victimisation rate for all selected household crimes (break-in, attempted break-in, motor vehicle theft, theft from a motor vehicle, malicious property damage and other theft).

### Psychological

Crime, particularly violent crime, can have a significant psychological impact on society. Victims can suffer mental health issues such as anxiety, depression and post-traumatic stress disorder. This can lead to difficulties with education and work, and then further mental health problems, substance abuse or violence. Crime can therefore lead to flow-on effects for families and society.

## Review questions 2.8

1. Outline the role of the Crime Statistics Agency (CSA).
2. Explain what crime statistics are.
3. In your own words, describe the trend in offences per 100,000 population in Victoria.
4. Describe the change in the statistics for 'robbery' and 'drug dealing and trafficking' in Victoria between June 2015-16 and June 2016-17.
5. Outline the difficulties in using crime statistics.
6. Compare the figures for homicide in Victoria between June 2015 and June 2017 to figures for homicide in NSW over the same time period.
7. Outline the problems in comparing statistics and trends between jurisdictions.
8. Explain some of the impacts that crime has on individuals.
9. Explain some of the impacts that crime has on society.





## Possible defences to murder

There are a number of defences that an accused could use to avoid being found guilty of murder. These defences may include:

- arguing that the killing was lawful.
- arguing that the accused did not cause the victim's death.
- self-defence – the accused could argue that their actions were reasonable and necessary in defending themselves, or another person, from death or really serious injury.
- infanticide.
- sudden or extraordinary emergency – the accused might argue that they believed that there was a sudden or extraordinary emergency, that they believed that the emergency involved a risk of death or really serious injury and that the conduct was the only way to deal with the emergency. The court must find that the conduct of the person was a reasonable response to the emergency.
- duress – the accused could argue that he or she acted under duress. The accused must have believed that there was a threat of harm, that a threat of harm would be carried out unless an offence was committed and that committing the offence was the only reasonable way that the threatened harm could be avoided. The court must believe that the conduct was a reasonable response to the threat.
- mental impairment – the accused could argue that at the time of the offence, he or she was suffering from a mental impairment and did not know the nature and quality of his or her actions, or did not know that the conduct was wrong.
- automatism.
- intoxication – the accused would need to prove that his or her intoxication was not self-induced, otherwise their actions or beliefs would be compared to a reasonable person who is not intoxicated.
- accident.

### Study tip

*According to the Sentencing Advisory Council, between 1 July 2011 to 30 June 2016, 106 murder cases were determined. All of the offenders received an imprisonment sentence - 99 males and 7 females were sentenced.*

## The impact of murder on individuals and society

The offence of murder can have a number of effects on individuals and society. They include:

- Besides the loss of the victim and his or her future dreams and aspirations, the family and friends of a victim of murder will need to deal with grief, pain, anger, distress or emotional trauma. Friends and family may also need to deal with an ensuing investigation and court case, which can be stressful.
- Offenders will be affected as they are most likely to be imprisoned – this can have an effect on their family as well as their freedom. Furthermore, the offender will need to live with the feeling of guilt that they have taken someone else's life.
- The costs associated with assistance to victims, security, insurance and household precautions as well as the identification, investigation, prosecution and prevention of crimes such as murder have an economic impact. The crime of murder can lead to the perception that there is an increase in violent crime across the community, resulting in a feeling across society that individuals and households are not safe. People can become anxious or fearful, particularly if they believe that they could become a victim. The prevalence of crime may encourage others to commit crime. If certain individuals see other people successfully committing crime, they may also be inclined to participate in committing similar offences.



## Application exercise 2j

### Murder of mum Karen Chetcuti [*The Queen v Cardamone* [2017] VSC 493]

On the night of 12 January 2016, Michael Cardamone physically attacked his neighbour at her house in Whorouly, a settlement about 30 kilometres from Wangaratta. Karen Chetcuti, a 49-year-old divorcee and mother of two, was living alone on her property at the time. Cardamone lived with his mother on a property adjacent to Chetcuti.

Cardamone restrained Ms Chetcuti by binding her with duct tape, cable ties and rope and possibly gagged her. He then left her either at her premises or his premises for some period of time. It is most likely that Cardamone left Ms Chetcuti in a shed on his property.

Cardamone then drove Ms Chetcuti's Citroen car to Myrtleford (both his phone and Ms Chetcuti's phone, which was left in her car, registered in the Myrtleford area). He obtained methylamphetamine and drove back to Whorouly in Ms Chetcuti's car, arriving close to midnight. In the early hours of the next morning, he again drove to Myrtleford in Ms Chetcuti's car. He left the car parked (in an attempt to conceal his crime) and returned home by taxi. Cardamone got into his own vehicle and drove back towards Myrtleford, presumably with Ms Chetcuti in the car. He drove to the Lake Buffalo area, about 20 kilometres south of Myrtleford. It is believed that this is where he killed Ms Chetcuti.

Using her skirt, cable ties and duct tape, Cardamone bound and gagged her. He administered her with both Xylazine (a very strong veterinary sedative) and methylamphetamine. He also injected battery acid into her. He inflicted severe injuries to her head and torso. He burnt her alive and repeatedly drove over her body. He left her body in the scrubland – this was not found until six days later.

Cardamone never provided a truthful account to police of what happened to Ms Chetcuti, and attempted to cover up his actions with elaborate lies. He told the police a number of different stories that kept changing. Initially, he said that Ms Chetcuti was at his house on the night of her disappearance to collect some cherry tomatoes. He also tried to blame the death on two Lebanese men whom he claimed had kidnapped him and threatened him to stay quiet. Cardamone also attempted to shift the blame to a friend who had unwittingly helped him set fire to Ms Chetcuti's car.

After being charged, Cardamone told a fellow prisoner that he was responsible for the crime and had "been watching her for some time". Furthermore, while in prison he attempted to arrange to kill the man who helped him to burn Ms Chetcuti's car, so as to prevent him from giving evidence at trial.

Cardamone pleaded guilty to the charge of murder. The court heard that the likely motivation for Cardamone committing the crime was his "sexual interest" in the mother of two.

Justice Lasry said, "Your conduct in relation to the murder of Ms Chetcuti was extraordinarily vicious, callous and thoroughly unprovoked. The crime you committed was, quite simply, horrifying, depraved and disgusting." He also noted that he found it very difficult to accept that Cardamone was remorseful for this crime and regarded his prospects of rehabilitation as virtually non-existent. Justice Lasry mentioned the dramatic impact that the crime had on the family, friends and colleagues of Ms Chetcuti, as well as the wider Wangaratta district generally. He said, "There has been significant concern about what you have done because, apart from the sheer violence of your actions, it was so futile and inexplicable."

Cardamone was sentenced to imprisonment for life without parole.

#### Questions/tasks

1. Identify the elements of murder in relation to *The Queen v Cardamone* [2017].
2. Explain how Michael Cardamone demonstrated malice aforethought in this case.
3. Explain two defences that Cardamone might have used to avoid being found guilty of murder.
4. Do you think that Cardamone should have been found guilty or not guilty? Explain your response with reasons.
5. In your opinion, what impact might this crime have on individuals? Justify your opinion with reasons.
6. In your opinion, what impact might this crime have on society? Justify your opinion with reasons.



## Application exercise 2k

### Murder and mental impairment [*DPP v Bailey* [2017] VSC 195]

In the Supreme Court in 2017, Stephen Bailey, a former VFL footballer, pleaded not guilty by way of mental impairment to murdering his mother, Penelope two years previously. Bailey, aged 36, killed his mother, aged 59, in Mont Albert North in 2015.

Bailey telephoned his uncle on 6 October 2015, expressing concern about the whereabouts of his mother. Bailey's sister, Shannon, attended the unit in Mont Albert North where her brother and mother lived. Bailey claimed he did not know where his mother was. Shannon later returned to the unit with other family and discovered blood in several places around the unit. Police testing tests indicated that attempts had been made to clean it up. Blood was also detected on the rear bumper bar of Bailey's vehicle parked in the garage. The police located a knife handle inside a plastic bag and a blood stained cloth in the clothes dryer at the premises.

Bailey was arrested that night on the other side of the city in Kensington, where he was found running in and out of traffic in his underwear. When the police asked for his name, he replied "Aristotle". Bailey told the police that he had killed his mother. However, he was muttering incoherently and not making sense. He continued to say that his name was Aristotle.

Bailey was transferred to hospital where he described the location of where he had buried his mother. Penny's body was found on 8 October, near Mullum Mullum Creek in Donvale. A stainless steel knife, and a knife blade with part of the tip missing, was also found at this location. Furthermore, police found a cloth and blue flannelette shirt which was of the same description as one that was depicted by CCTV footage as being worn by Bailey on 5 October. The cause of Penny's death was found to be multiple stab wounds.

Bailey stood trial before a single judge in the Supreme Court in April 2017. The court heard that Bailey was schizophrenic and was in a state of severe psychosis when he killed his mother. The court also heard that Bailey's delusions revolved around the belief that he was 'special', had been chosen to lead the new world order, was in league with the Gods who communicated to him by means of thought directives and that he was actively persecuted by a group of powerful individuals out to kill him called the "Mime Order".

Psychiatrist Dr Mark Ryan gave evidence that Bailey believed that he had been abducted at birth from his true parents, the Greek gods Athena and Zeus. Dr Ryan said Bailey was convinced his mother was intimately involved with the Mime Order. "It is my opinion that Mr Bailey did know the nature and quality of his conduct but was, at the time of the offence, so overwhelmed by active psychosis that he was not able to reason with sense and composure as to the wrongfulness of his actions," he told the court.

Bailey pleaded not guilty by way of mental impairment to murdering his mother. The prosecution did not oppose the mental impairment defence. Justice Kaye accepted the not guilty plea and found that Bailey's mental state had been deteriorating in the years preceding the homicide. He said, "... the evidence does establish, on the balance of probabilities, that he did not know that his conduct was wrong, that is, that he was incapable of reasoning, with a moderate degree of sense and composure, as to whether his conduct, as perceived by reasonable people, was wrong."

Bailey was expected to be required to serve a custodial term at the Thomas Embling psychiatric hospital.

#### Questions/tasks

1. Identify the elements of murder in relation to *DPP v Bailey* [2017].
2. Explain how Stephen Bailey demonstrated mental impairment in this case.
3. Explain two other defences that Bailey might have used to avoid being found guilty of murder.
4. Do you think that Bailey should have been found guilty or not guilty? Explain your response with reasons.
5. In your opinion, what impact might this crime have on individuals? Justify your opinion with reasons.
6. In your opinion, what impact might this crime have on society? Justify your opinion with reasons.



## Application exercise 2I

Examine the following statistics and respond to the questions/tasks below.

Murder offences recorded, Victoria, June 2014 to June 2017					
Offence division	Offence subdivision	Offence subgroup	June 2014- June 2015	June 2015- June 2016	June 2016- June 2017
Crimes against the person	Homicide	Murder	50	66	57
		Total	174	212	233
<b>Grand Total</b>			<b>472,531</b>	<b>536,287</b>	<b>533,194</b>

Source: Crime Statistics Agency, Recorded offences (for the year ending 30 June 2017)

Number of recorded murders over the 36 months to June 2017, NSW				
Offence category		over the 12 months to June 2015	over the 12 months to June 2016	over the 12 months to June 2017
Homicide	Murder	84	58	67

Source: NSW Bureau of Crime Statistics and Research, New South Wales Recorded Crime Statistics (Quarterly Update June 2017, Quarterly Update June 2016)

### Questions/tasks

1. Explain the trend in murder offences in Victoria between June 2014-15 and June 2016-17.
2. Explain the trend in murder offences in NSW between June 2014-15 and June 2016-17.
3. Calculate the proportion of murders in Victoria of the total homicides for June 2016-17 and the proportion of murders of the total offences in Victoria for June 2016-17. What does this tell you about the offence of murder?
4. In your opinion, are the murder statistics for Victoria and NSW roughly similar, or are they drastically different?
5. Use the Crime Statistics Agency website and NSW Bureau of Crime Statistics and Research website to find the most up-to-date statistics related to murder.

## Review questions 2.9

1. Explain the statute law and common law related to murder.
2. Outline the elements of murder.
3. Define the terms 'malice aforethought' and 'causation'.
4. Identify the possible defences to murder.



"Twenty years in the Force and I've never seen such a puzzling case...!"

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## 2.10 The offence of burglary

**Burglary** occurs when a person unlawfully enters a building with the intent to steal or commit an offence. The offence may involve assaulting a person in the building or damaging the building or property. Under common law, the felony of burglary was referred to as breaking and entering into a dwelling-house at night with the intent to commit a felony. Committing this same offence during daylight hours was a misdemeanour referred to as housebreaking. However, burglary is now defined under statute law. In Victoria, the *Crimes Act 1958* provides a definition of burglary, as seen in Box 2.4. As you can see, a person found guilty of burglary could be sentenced to a maximum of ten years imprisonment.

### Box 2.4: Definition of burglary in the *Crimes Act 1958*

Section 76 of the Crimes Act states that:

- (1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent—
  - (a) to steal anything in the building or part in question; or
  - (b) to commit an offence—
    - (i) involving an assault to a person in the building or part in question; or
    - (ii) involving any damage to the building or to property in the building or part in question—which is punishable with imprisonment for a term of five years or more.
- (2) References in subsection (1) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.
- (3) A person guilty of burglary is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

The *Crimes Act* notes that a building is an inhabited vehicle or vessel. The offence of burglary applies to a vehicle or vessel when the person having a habitation in it is not there as well as the times when he or she is.

Burglary can be aggravated (the accused at the time was armed with a weapon or a person was present in the building) or non-aggravated. A person found guilty of aggravated burglary could be sentenced to 25 years imprisonment. The *Crimes Act* also provides a definition of aggravated burglary, as seen in Box 2.5.

### Box 2.5: Definition of aggravated burglary in the *Crimes Act 1958*

Section 77(1) of the Crimes Act states that:

A person is guilty of aggravated burglary if he or she commits a burglary and —

- (a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or
- (b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.

## Elements of burglary

For a person to be found guilty of burglary, the following elements need to be established by the prosecution:

- the accused entered a building (or part of a building)
- the accused entered as a **trespasser** – without the right or the authority to enter the building (or to enter the building at that time)
- the accused had the intent to steal anything in the building (or part of a building), commit an offence involving an assault to a person in the building (or part of a building) or commit an offence involving any damage to the building or to property in the building (or part of a building) – intention formed after the accused entered the building will not fulfil this element. Furthermore, the accused does not need to successfully commit an offence involving theft, assault or property damage to satisfy this element – he or she just needs to have had the intention to do so at the time of entering the building.



To be found guilty of **aggravated burglary**, the prosecution would need to prove that the accused committed a burglary and had some sort of weapon or explosive (either imitation or real) with him or her at the time, or that there was a person present in the building (or part of the building) and the accused knew that the person was present or was reckless as to whether or not a person was then so present.

### Possible defences to burglary

The defences that an accused could use to avoid being found guilty of burglary are likely to depend on the circumstances of the burglary. Possible defences to burglary include:

- arguing that there was no intent at the time of entry into the building (or part of the building) to steal anything, commit an assault, or damage the building or property
- consent – the accused could argue that the victim let the accused into the premises
- mistaken identity – the accused could argue that they were not at the building, or that the person seen committing the crime by witnesses was someone else
- duress
- mental impairment
- automatism
- intoxication – the accused would need to prove that his or her intoxication was not self-induced, otherwise their actions or beliefs would be compared to a reasonable person who is not intoxicated
- accident.

#### Study tip

*According to the Sentencing Advisory Council, between 1 July 2011 to 30 June 2016, 59 burglary cases were determined. Of these offenders, 76.27 per cent received an imprisonment sentence and the average length was 2.75 years. For the offence of burglary, 55 males and 4 females were sentenced.*

### The impact of burglary on individuals and society

The offence of burglary can have a number of effects on individuals and society:

- The victim or victims of burglary will suffer a loss of their property and may feel unsafe or violated. It is likely that a victim of burglary will need to spend time dealing with police, working with insurance companies and replacing stolen items or repairing damage. Some items stolen or damaged may have sentimental value or may be irreplaceable which can be devastating.
- Offenders will be affected as they are likely to be imprisoned – this can have an effect on their family as well as their freedom.
- The costs associated with assistance to victims, security, insurance and household precautions as well as the identification, investigation, prosecution and prevention of burglary have an economic impact. The perception that there is crime in the community can increase, resulting in a feeling across society that individuals and households are not safe. People can become anxious or fearful, particularly if they believe that they could become victims of burglary. The prevalence of crimes such as burglary may encourage others to commit crime. If certain individuals see other people successfully committing burglaries, they may also be inclined to participate in committing similar offences.



## Application exercise 2m

### Shopping Centre burglary [DPP v Nicholson, County Court of Victoria (unreported, 2016)]

On the morning of Saturday 14 August 2015, Stephen Nicholson wandered around South Melbourne Central Shopping Centre. He left and returned shortly before midnight the same day. Nicholson entered the shopping centre through the afterhours access door. He then went to the premises of a business called 'Spotlight Photography' and applied force to a door of the premises, opening it without any damage. Nicholson entered the premises and used a screwdriver to open a deadlocked storage room door. He then went into the room and placed a number of cameras, photographic equipment and \$250 in cash inside his backpack. He picked up a bottle of bleach, splashed it around the storage room, and then left with the stolen items. Nicholson was captured entering and leaving the shopping centre on CCTV footage and his face was clearly visible in the footage.



Nicholson travelled to Armadale and sold the stolen items to an acquaintance. The stolen goods were valued at more than \$112,000. After obtaining the CCTV footage, the police identified Nicholson and arrested him. He was subsequently interviewed, where he made full admissions regarding the incident.

Nicholson pleaded guilty in the County Court in 2016 and was sentenced to imprisonment of 18 months on the charge of burglary. He was also found guilty of a number of other offences, and was therefore given a total effective sentence of 21 months.

#### Questions/tasks

1. Identify the elements of burglary in relation to *DPP v Nicholson* (2016).
2. Explain why the prosecution would be able to establish that Nicholson was a trespasser at South Melbourne Central Shopping Centre.
3. Explain two defences that Nicholson might have used to avoid being found guilty of burglary.
4. Do you think that Nicholson should have been found guilty or not guilty? Explain your response with reasons.
5. In your opinion, what impact might this crime have on individuals? Justify your opinion with reasons.
6. In your opinion, what impact might this crime have on society? Justify your opinion with reasons.

## Application exercise 2n

### Permission to enter into a home, but not to steal [Barker v The Queen (1983) 153 CLR 338]

In December 1979, Robert Curl went on a holiday. Before leaving, he asked Richard Barker, his neighbour and acquaintance, to keep an eye on his house in Brighton while he was away. Curl kept a key to his house concealed and told Barker where it was in case he needed to enter.



Whilst Curl was on his holiday, his two sons who normally lived with him, stayed elsewhere. However, in late December the two boys visited Curl's house. They found a truck parked in the driveway and Barker and another man, McFarlane, were present. Barker told the boys he was looking after the house for Curl and he was going to fix a broken window or windows. The boys then went for a swim in a neighbour's pool and returned to find Barker and McFarlane inside the house. The two men left shortly afterwards. Nothing appeared to be missing from the house.

Curl's sons visited the house once again the next morning and found many goods missing. They informed the police and Barker and McFarlane were detained. They were charged with entering Curl's house as trespassers with intent to steal.

Curl returned from his holiday in early 1980 and learned of the removal of the goods. He found that Barker had been charged. In mid-January, Curl left his house for most of the day with the stolen items still missing and returned home in the evening to find that all the property had been returned (except a lounge suite which was in the hands of the police). A few days later Barker telephoned Curl and told him that he had returned the goods.

In the County Court, Barker admitted taking the goods but said that he had removed them for their protection. Curl gave evidence that Barker had his authority to enter his house but had no express authority to remove goods, though he conceded that Barker would have had his authority to remove goods had that been necessary for their preservation.

McFarlane was acquitted but Barker was convicted of the offence of burglary. Barker appealed the conviction, but the

Court of Criminal Appeal in Victoria refused leave to appeal. Barker then sought special leave to appeal to the High Court. Special leave to appeal was granted but the appeal was dismissed.

In the reason for his decision, Mason J stated, "... the applicant entered the building with the intention of stealing, a purpose alien to the authority given to him. His entry was quite unrelated to the invitation or licence which he had with the result that he entered without any right or authority."

#### Questions/tasks

1. Identify the elements of burglary in relation to *Barker v The Queen* (1983).
2. Explain why the prosecution would be able to establish that Barker was a trespasser in Barker's house.
3. Explain the defences that Barker used to avoid being found guilty of burglary.
4. What does this case tell you about the effectiveness of defences in burglary offences, such as consent?
5. Do you think that Barker should have been found guilty or not guilty? Explain your response with reasons.
6. In your opinion, what impact might this crime have on individuals? Justify your opinion with reasons.
7. In your opinion, what impact might this crime have on society? Justify your opinion with reasons.

## Application exercise 2o

Examine the following statistics and respond to the questions/tasks below.

Burglary offences recorded, Victoria, June 2014 to June 2017					
Offence division	Offence subdivision	Offence subgroup	June 2014- June 2015	June 2015- June 2016	June 2016- June 2017
Property and deception offences	Burglary/ Break and enter	Residential aggravated burglary	2,542	3,554	3,959
		Non-residential aggravated burglary	84	118	180
		Unknown aggravated burglary	24	13	3
		Residential non-aggravated burglary	29,082	31,365	31,568
		Non-residential non-aggravated burglary	14,306	16,861	16,258
		Unknown non-aggravated burglary	213	193	102
		Total	46,251	52,104	52,061
<b>Grand Total</b>			<b>472,531</b>	<b>536,287</b>	<b>533,194</b>

Source: Crime Statistics Agency, Recorded offences (for the year ending 30 June 2017)

Number of recorded break and enters over the 36 months to June 2017, NSW				
Offence category		over the 12 months to June 2015	over the 12 months to June 2016	over the 12 months to June 2017
Theft	Break and enter dwelling	32,795	30,469	28,969
	Break and enter non-dwelling	12,927	11,412	11,040

Source: NSW Bureau of Crime Statistics and Research, New South Wales Recorded Crime Statistics (Quarterly Update June 2017, Quarterly Update June 2016)

#### Questions/tasks

1. Explain the trend in burglary offences in Victoria between June 2014-15 and June 2016-17.
2. Explain the trend in break and enter offences in NSW between June 2014-15 and June 2016-17.
3. Calculate the proportion of aggravated burglaries in Victoria of the total burglaries for June 2016-17. Which is more common in Victoria - aggravated burglaries or non-aggravated burglaries?
4. Calculate the proportion of burglaries of the total offences in Victoria for June 2016-17. What does this tell you about the offence of burglary?
5. In your opinion, are the burglary statistics for Victoria and NSW roughly similar, or are they drastically different?
6. Using the Crime Statistics Agency website and the NSW Bureau of Crime Statistics website, research these websites to find the most up-to-date statistics related to burglary. Record the statistics in your workbook.

## Review questions 2.10

1. Explain the statute law and common law related to burglary.
2. Outline the elements of burglary.
3. Define the term 'aggravated burglary'.
4. Identify the possible defences to burglary.

## 2.11 The offence of culpable driving causing death

**Culpable driving causing death** (or ‘culpable driving’) is an indictable offence where death is caused through driving a motor vehicle. The offence of culpable driving was first introduced in the *Crimes (Driving Offences) Act 1967* (Vic). Before 1967, if a person was deemed to have killed another person as a result of a serious motor vehicle accident they would be charged with manslaughter. However, juries would be reluctant to convict drivers of such a serious offence despite cases appearing straightforward. For this reason, the Victorian Parliament created the statutory offence of culpable driving causing death.

In Victoria, the *Crimes Act 1958* provides a definition of culpable driving, as seen in Box 2.6 below. As you can see, a person found guilty of culpable driving could be sentenced to a maximum of 20 years imprisonment. When culpable driving was introduced in 1967, it had a statutory maximum penalty of seven years’ imprisonment. Since then, there have been three increases in the maximum penalty for culpable driving:

- in 1991 the maximum penalty was increased to 10 years’ imprisonment
- in 1992 the maximum penalty was increased to 15 years’ imprisonment
- in 1997 the maximum term of imprisonment was increased to the current 20 years’ imprisonment.

### Box 2.6:

#### Definition of culpable driving causing death in the *Crimes Act 1958*

Section 318 of the Crimes Act states that:

- (1) Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both.
- (1A) The baseline sentence for an offence under subsection (1) is 9 years.
- (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle—
  - a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or
  - b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or
  - c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or
  - d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.
- (3) An indictment for an indictable offence under this section shall specify which form of culpability within the meaning of subsection (2) is charged but evidence of the whole of the circumstances shall be admissible on the trial on the indictment.
- (4) A person who is convicted or acquitted of an indictable offence under this section shall not in respect of the death concerned subsequently be prosecuted for unlawful homicide or under this section.
- (5) A person who is convicted or acquitted of any form of unlawful homicide not referred to in this section shall not in respect of the death concerned subsequently be prosecuted under this section and no other form of unlawful homicide shall be charged in the same indictment with an indictable offence under this section.
- (6) A person who is convicted or acquitted of an indictable offence under this section shall not in respect of the circumstances concerned be proceeded against under the Road Safety Act 1986 or the Marine Act 1988 for having driven a motor vehicle whilst under the influence of alcohol or a drug and no such offence shall be charged in the same indictment with an indictable offence under this section.
- (7) “Drug” means a drug within the meaning of the Road Safety Act 1986.





## Elements of culpable driving causing death

For the accused to be found guilty of culpable driving causing death, the following elements need to be established by the prosecution beyond a reasonable doubt:

- the accused drove a motor vehicle
- the driving was culpable
- the culpable driving caused another person's death.

### *The accused drove a motor vehicle*

The first element of culpable driving that the prosecution must prove beyond reasonable doubt is that the accused drove a motor vehicle. The term 'driving' is not defined in the *Crimes Act* so therefore its definition can take on an ordinary English meaning. However, according to common law, a person is 'driving' when they are in a position to control the movement and direction of a vehicle. The term 'motor vehicle' is defined in the *Road Safety Act 1986 (Vic)* as any vehicle propelled by a motor that forms part of the vehicle and intended to be driven on a highway (such as a car, truck, motorbike or bus). A motor vehicle does not include a vehicle intended to be used on a railway or tramway, or a motorised wheel-chair capable of a speed of not more than 10 kilometres per hour which is used solely for the conveyance of an injured or disabled person

### Box 2.7: Driving a vessel?

The Crimes Act includes driving a vessel as part of the interpretation of driving offences connected with motor vehicles, including culpable driving causing death. The word 'vessel' is defined in the *Marine Act 1988 (Vic)* as any kind of vessel that is used, or capable of being used, in navigation by water, however propelled or moved. For example, a vessel might be a barge, an air-cushion vehicle or any aeroplane designed for and capable of being waterborne. Prominent Victorian businesswoman and charter boat operator, Torie Mackinnon, was charged with culpable driving causing death following an accident in 2013 that caused the death of Paul McVeigh. McVeigh was killed after he jumped into the water as Mackinnon was reversing a 21-metre Moonraker vessel. In 2015, she pleaded guilty in the Supreme Court to the lesser charge of driving a vessel in a dangerous manner causing death. Mackinnon was handed an 18-month Community Corrections Order.



### *The driving was culpable*

The prosecution must also prove beyond reasonable doubt that the accused drove culpably. The circumstances where an accused is considered to drive culpably are outlined in s. 318(2) of the *Crimes Act* (see Box 2.6). An accused will be found to have driven a motor vehicle culpably if she or he was driving in one of the following ways:

- reckless driving – the accused consciously and unjustifiably disregarded a substantial risk that the death of another person, or the infliction of grievous bodily harm upon another person, might have resulted from her or his driving. For example, the accused may have been driving well above the speed limit in conditions of poor visibility. The question here is whether or not the accused realised the possible consequences that may arise from her or his driving but continued to drive.
- negligent driving – the accused unjustifiably and to a gross degree failed to observe the standard of care which a reasonable person would have observed in all the circumstances of the case. For example, driving a motor vehicle when fatigued and falling asleep or losing control of the vehicle would constitute negligent driving. However, an error of judgement in a situation where there is a sudden crisis would not constitute negligent driving.
- driving whilst under the influence of alcohol – the accused was impaired by alcohol to such an extent that she or he was incapable of having proper control of the motor vehicle.
- driving whilst under the influence of a drug – the accused was impaired by drugs to such an extent that she or he was incapable of having proper control of the motor vehicle.

### *The culpable driving caused another person's death*

The prosecution must also prove beyond reasonable doubt that the accused's culpable driving contributed to the victim's death or was a substantial cause of it.



## Possible defences to culpable driving causing death

There are a number of defences that an accused could use to avoid being found guilty of culpable driving. These defences may include:

- the accused was not driving the motor vehicle.
- the accused's driving was not culpable.
- the accused's driving did not cause the other person's death.
- sudden or extraordinary emergency – the accused might argue that they believed that there was a sudden or extraordinary emergency, that they believed that the emergency involved a risk of death or really serious injury, and that the conduct was the only way to deal with the emergency. The court must find that the conduct of the person was a reasonable response to the emergency.
- duress – the accused could argue that she or he acted under duress. The accused must have believed that there was a threat of harm, that a threat of harm would be carried out unless an offence was committed, and that committing the offence was the only reasonable way that the threatened harm could be avoided. The court must believe that the conduct was a reasonable response to the threat.
- mental impairment – the accused could argue that at the time of the offence, she or he was suffering from a mental impairment and did not know the nature and quality of her or his actions, or did not know that the conduct was wrong.
- automatism – the accused could argue that her or his actions were performed without conscious thought or intention (such as sleep walking or under hypnosis).
- intoxication – the accused would need to prove that her or his intoxication was not self-induced, otherwise their actions or beliefs would be compared to a reasonable person who is not intoxicated
- accident.

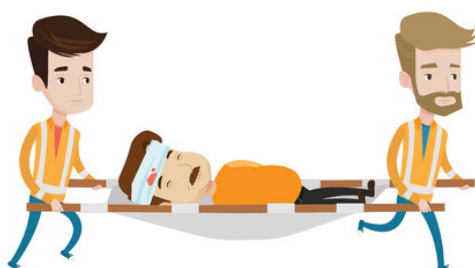
### Study tip

According to the Sentencing Advisory Council, of the 55 people who were sentenced for the offence of culpable driving causing death in Victoria between 1 July 2011 to 30 June 2016, 48 were males and 7 were females.

## The impact of culpable driving causing death on individuals and society

The offence of culpable driving can have a number of effects on individuals and society:

- Besides the loss of the victim and her or his future dreams and aspirations, the family and friends of a victim of culpable driving will need to deal with grief, pain, anger, distress or emotional trauma. Friends and family may also need to deal with an ensuing investigation and court case, which can be stressful.
- Offenders will be affected as they are most likely to be imprisoned – this can have an effect on their family as well as their freedom. Furthermore, the offender will need to live with the feeling of guilt that, through their actions, they have caused someone else's death. The accused may need medical treatment, which may take time to heal and may also be expensive.
- The financial costs associated with assistance to victims, motor vehicle insurance, as well as the identification, investigation, prosecution and prevention of crimes such as culpable driving, have a negative economic impact. There is also an increased need for emergency services, such as police, fire and ambulance services as well as the added cost to the health system as victims are hospitalised and require expensive treatment and rehabilitation over time.
- The emotional and/or human costs associated with people becoming more anxious or fearful driving on our roads in light of the increased risk of road accidents and trauma. In addition, dealing with a car accident is likely to be a traumatic experience for emergency workers and other road users.



## Application exercise 2p

### Acquitted of culpable driving, guilty of dangerous driving causing death

#### *DPP v Singh* [2016] VCC 1826

At about 3.20 pm on 31 July 2015, Sukhuinder Singh's Holden Commodore ploughed head-on into the Ford Falcon XR8 being driven along Bridge Inn Rd in Wollert by John Voss. Mr Voss died instantly at the scene. Just prior to the collision, Singh had been driving on the incorrect side of the road – most likely at or just above the speed limit in an 80km zone. At the time he was either coming up or down from methamphetamine (ice). Singh was an L-plater driving without a full licence holder beside him.



Singh was on his way to work. Approximately halfway along Bridge Inn Road he attempted to overtake two cars against double white lines on a bend. He overtook the car in front of him (a Toyota Kluger). In front of the Kluger was another car (a Toyota Corolla). As Singh passed the Kluger, he saw Mr Voss' car approaching. Instead of pulling over to the correct side of the road, between the Kluger and Corolla, he sped up to 166 km/h. He attempted to get in front of the Corolla, and in doing so, the rear passenger side of his car clipped the Corolla and he lost control, veering into the path of the car driven by Mr Voss.

Singh was charged with culpable driving causing death and two counts of conduct endangering lives. In the County Court, Singh pleaded guilty to dangerous driving causing death. He also pleaded guilty to failing to have an experienced driver with him in the car.

Singh argued at his trial that there had been insufficient space to move back between the cars. However, the driver of the first car gave evidence that she had slowed down to leave two car spaces in front of her car in order for Singh to overtake her. He could not explain why he decided to overtake the car. In court, he denied that he was in a hurry or frustrated at the slower speed of the car in front of him. Singh admitted that in crossing double lines and overtaking, he drove dangerously and accepted responsibility for causing the death of Mr Voss.

Judge Wilmoth ruled out telling the jury that Singh had a small amount of methamphetamine in his system at the time of the crash to ensure he received a fair trial. The jury found Singh not guilty of culpable driving causing death and acquitted him of the other charges. However, as Singh had already pleaded guilty to dangerous driving causing death (and guilty to failing to have an experienced driver with him in the car) then this is what he was sentenced for.

In sentencing Singh, Judge Wilmoth said, "In assessing the degree of culpability in this case, I have considered the features which may be said to be aggravating. They are that the driving occurred on a stretch of road that provided for a single lane of traffic in each direction with a speed limit of 80 km/h on a busy road at a busy time of day, the dangerous driving itself being the overtaking of two cars across double lines. The high speed that you reached was a consequence of the situation you placed yourself in by deciding to overtake. It is put by the prosecution that the overtaking occurred on the narrow bridge but as I have already said, there is no evidence of this and your own uncertainty and that of the witness means I cannot draw that conclusion."

Singh was sentenced to four years' imprisonment. He was ordered to serve a minimum period of two years and six months before being eligible for parole. He was also fined \$1000 for failing to have an experienced driver with him in the car. Judge Wilmoth cancelled any licence or driver's permit he still held, and disqualified him from obtaining a licence for four years

#### Questions/tasks

1. Identify the elements of culpable driving causing death.
2. Explain why Sukhuinder Singh was found not guilty of culpable driving.
3. Do you think that Singh should have been found guilty or not guilty of culpable driving? Explain your response.
4. Describe the negative impact that this crime can have on individuals.
5. Describe the negative impact that this crime can have on society. In your response, make reference to both human and financial costs.

## Application exercise 2q

### Culpable driver jailed over toddler's death

*DPP v Chadwick* [2017] VCC 1692

In the County Court of Victoria in 2017, Blake Chadwick pleaded guilty to culpable driving causing death and negligently causing serious injury. He also pleaded guilty to a summary driving offence (driving a motor vehicle with a blood/alcohol concentration that exceeded .05 per cent).

Chadwick, aged 25, had a blood alcohol reading of 0.156 per cent when he failed to observe a 'Stop' sign at Phillip Island on December 17, 2016. Despite being called to "slow down" or "stop" by one of his passengers, he drove into the intersection of Smiths Beach and Back Beach roads and into the path of another vehicle. A 16-month old girl died following the collision and her mother, also a passenger in the other vehicle, suffered a punctured lung and fractured ribs. However, the driver of the other vehicle and his other daughter were not injured.

In court, Judge Lacava noted that Chadwick had been drinking in the afternoon before the collision. He also pointed out that there were earlier road signs warning of the upcoming junction and that the collision was caused by Chadwick.

In sentencing Chadwick, Judge Lacava said, "It is obvious that your driving skills would have been adversely affected by the amount of alcohol in your system at the time of the collision and this was a major cause of the collision which caused the death of a doubtless beautiful 16 month old girl."

Judge Lacava stated that Chadwick had led an otherwise "unblemished life" and concluded that he had good prospects for rehabilitation. He had evidenced genuine remorse, writing two letters to the family expressing his regret and shame.

Chadwick was sentenced to a total of seven years in prison – six years for culpable driving. He will need to serve a minimum term of four years and eight months before being eligible for release on parole.

#### Questions/tasks

1. Identify the elements of culpable driving causing death in relation to *DPP v Chadwick*.
2. Explain two defences that Chadwick might have used to avoid being found guilty of culpable driving causing death.
3. Do you think that Chadwick should have been found guilty or not guilty? Explain your response.
4. Explain why this type of crime can impact negatively on the quality of life enjoyed by members of society.
5. Explain how this type of crime can add to the financial burden faced by individuals and society more generally.



## Review questions 2.11

1. Explain the statute law and common law related to culpable driving.
2. Outline the elements of culpable driving.
3. In your opinion, how serious is the offence of culpable driving? Explain your answer.
4. Identify the possible defences to culpable driving.
5. Outline the impact that culpable driving can have on individuals and society



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## Application exercise 2r

Examine the following statistics and respond to the questions/tasks below.

Driving causing death offences recorded, Victoria, June 2014 to June 2017					
Offence division	Offence subdivision	Offence subgroup	June 2014- June 2015	June 2015- June 2016	June 2016- June 2017
Crimes against the person	Homicide	Driving causing death*	65	85	73
		Total	174	212	233
<b>Grand Total</b>			<b>472,531</b>	<b>536,287</b>	<b>533,194</b>

Source: Crime Statistics Agency, Recorded offences (for the year ending 30 June 2017)

\* Note that the offence subgroup 'driving causing death' includes the unlawful killing of another person without intent to kill, as a result of culpable, reckless, or negligent driving.

Number of recorded break and enters over the 36 months to June 2017, NSW			
OFFENCES AGAINST THE PERSON	2014- 2015	2015- 2016	2016- 2017
HOMICIDE AND RELATED OFFENCES	72	54	57
Other homicide and related offences*	53	32	35

Source: South Australia Police, State summary of offences reported or becoming known to police (2012-2017)

\* Note that 'Other homicide and related offences' includes the offences of attempted murder, manslaughter and dangerous driving causing death.

### Questions/tasks

1. Explain the trend in driving causing death offences in Victoria between June 2014-15 and June 2016-17.
2. Explain the trend in other homicide and related offences in South Australia between June 2014-15 and June 2016-17.
3. Calculate the proportion of driving causing death offences in Victoria of the total homicides for June 2016-17 and the proportion of driving causing death offences of the total offences in Victoria for June 2016-17. What does this tell you about driving causing death offences?
4. What do these statistics for Victoria and South Australia tell you about culpable driving offences?
5. Do these statistics indicate anything about the difficulty in comparing trends and statistics between jurisdictions?
6. Use the Crime Statistics Agency website and South Australia Police website to find the most up-to-date statistics related to culpable driving and driving causing death.

## 2.12 Multiple choice review questions

1. A purpose of criminal law is to:
  - a) enforce individual rights
  - b) harm the community's welfare as a whole
  - c) return an affected person to their original position or compensate that person for their loss
  - d) punish individuals who break the law
2. Which of the following is not a source of criminal law in Victoria?
  - a) Local laws made by councils
  - b) The Universal Declaration of Human Rights
  - c) The Victorian *Crimes Act 1958* (Vic)
  - d) The *Road Safety Act 1986* (Vic)
3. The right to silence is a rule in criminal law that exists to uphold:
  - a) The victim
  - b) The Charter of Human Rights
  - c) The principle of innocence
  - d) The presumption of innocence
4. *Actus reus* refers to:
  - a) A minor (less serious) criminal offence that can be heard in a Magistrates' Court without a jury.
  - b) The act of committing a crime.
  - c) The intent to commit a criminal offence.
  - d) The amount of evidence that a party must present to prove a case
5. A strict liability crime means that:
  - a) Both action and intention need to be proven
  - b) It is only necessary to prove *actus reus*
  - c) Intention is highly relevant
  - d) Being caught in the act and having the intention to commit a crime are both necessary

**6. *Doli incapax* means “incapable of crime”. At what age is a child presumed to be incapable of being liable for his or her behaviour in Victoria?**

- a) under 10
- b) between 12 and 16
- c) under 14
- d) under 8

**7. Which of the crimes below is not an example of an indictable offence?**

- a) Robbery
- b) Murder
- c) Rape
- d) Begging

**8. An accessory is best defined as a person who:**

- a) Is involved in the commission of a criminal offence
- b) Enters into an agreement with another person to commit an offence
- c) Assists the commission of an offence
- d) Impedes the apprehension, prosecution, conviction or punishment of the principal offender

**9. The difference between robbery and burglary is:**

- a) The maximum sentence of imprisonment
- b) Robbery makes use of a weapon and burglary does not
- c) Robbery is a crime against the person whereas burglary is a crime against property
- d) There is no difference

**10. Murder is:**

- a) The unlawful killing of another person with the intention to kill or cause serious harm (malice aforethought).
- b) An indictable offence where death is caused through driving a motor vehicle – recklessly with disregard for potential deaths that may result, negligently or under the influence of alcohol or drugs.
- c) An offence that occurs when a person contacts, follows or engages in a course of conduct towards another person when that person does not want them to and it causes them fear or mental harm
- d) Dishonestly taking property that belongs to another person with the intention of permanently depriving that person of it.

## 2.13 Chapter crossword puzzle

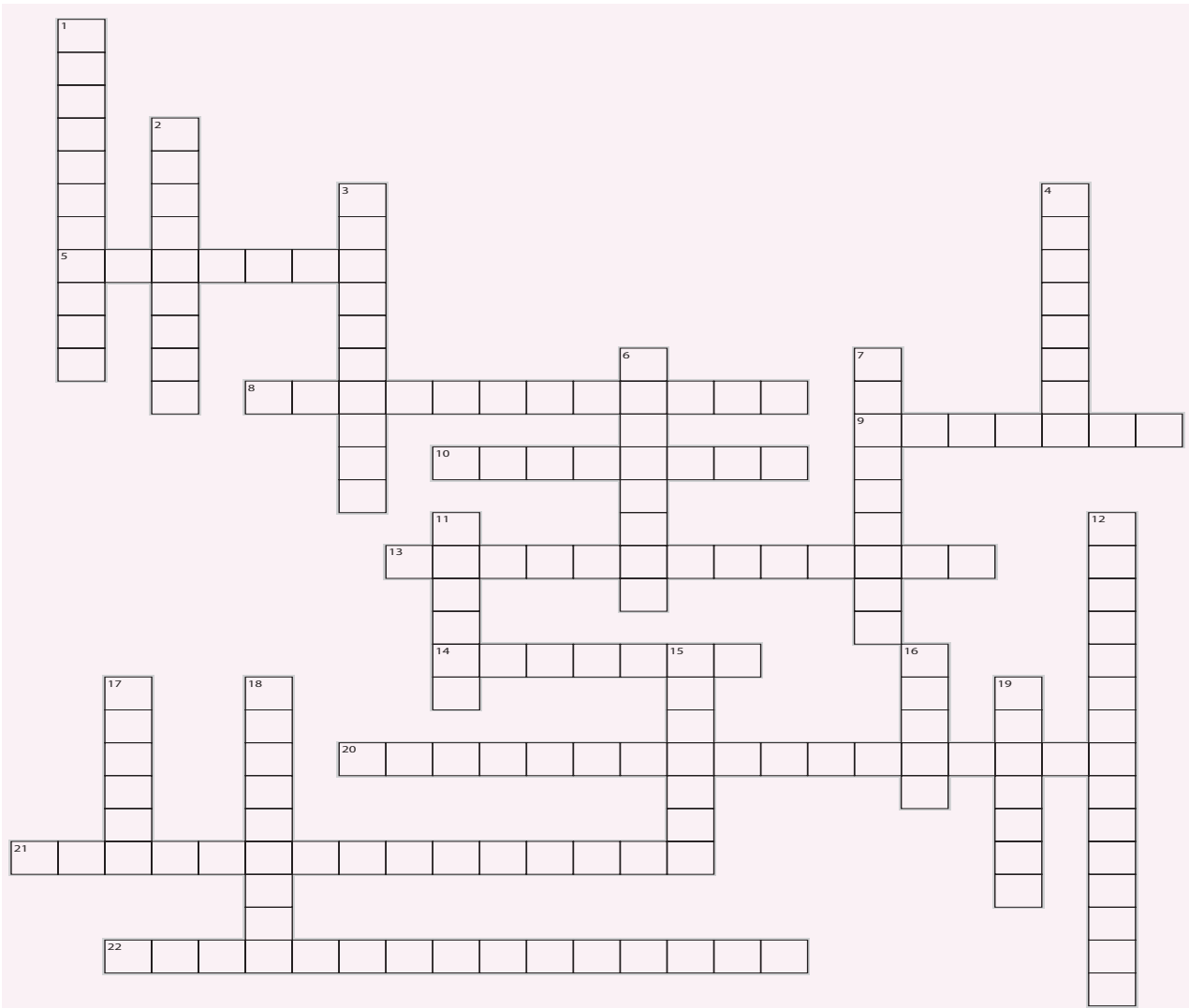
### Across

- 5. An offence involving the threat to commit, or committing, some form of physical harm to another person
- 8. The state of being so affected by alcohol, a drug or any other substance, that a person is unaware of what he or she was doing, and so could not form the intention to commit a crime
- 9. Free agreement to do something or for something to happen
- 10. An offence occurring when a person unlawfully enters a building with the intent to steal or commit an offence
- 13. Who has the responsibility of proving a case in court (3 words)
- 14. A minor (less serious) criminal offence that can be heard in a Magistrates’ Court without a jury
- 20. A serious crime for which the defendant is entitled to have a trial by judge and jury (2 words)
- 21. The situation involving legal responsibility where the Crown is not required to prove mens rea – that the accused intended to commit the offence (2 words)
- 22. The amount of evidence that a party must present to prove a case (3 words)

### Down

- 1. The presumption that a child under the age of 14 years does not know the difference between right and wrong and does not have the capacity to be liable for his or her behaviour (2 words)
- 2. The act of committing a crime (2 words)
- 3. The defence used when a person commits a crime as a result of muscle spasms or reflexes, or she or he is not conscious by virtue of a state such as sleepwalking
- 4. The killing of a human being by another person
- 6. An offence that occurs when a person contacts, follows or engages in a course of conduct towards another person when that person does not want them to and it causes them fear or mental harm
- 7. A person who impedes the apprehension, prosecution, conviction or punishment of the principal offender
- 11. The threat or use of force or compulsion to coerce another person to carry out a particular act
- 12. An indictable offence where death is caused through driving a motor vehicle – recklessly with disregard for potential deaths that may result, negligently or under the influence of alcohol or drugs (2 words)
- 15. An offence that occurs when a person uses force, or threatens the use of force, while stealing
- 16. Dishonestly taking property that belongs to another person with the intention of permanently depriving that person of it
- 17. The unlawful killing of another person with the intention to kill or cause serious harm (malice aforethought)
- 18. The link between the behaviour of the accused and the alleged offence
- 19. The intention to commit a criminal offence (2 words)





## 2.14 Chapter summary

1. Criminal law relates to behaviour that breaches existing laws against society and is harmful to society. It also clarifies types of crimes such as assault, murder, rape and theft and provides a range of sanctions for those people who break the law. A crime is an action or omission (a failure to act) that represents an offence and is punishable by law. The major features or characteristics of a crime include that it is against the law, against morality, harmful to society and punishable.
2. The purposes of criminal law include punishment of those individuals who do break the law, discouraging people from committing crimes, rehabilitation of offenders and protection of individuals and the community.
3. In Victoria, most criminal law is contained in the Victorian *Crimes Act 1958* (Vic), common law (judge made law and therefore not found in legislation), the *Federal Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth), other Victorian legislation such the *Summary Offences Act 1966* (Vic) and the *Road Safety Act 1986* (Vic), local laws (made by local councils).
4. The presumption of innocence is the legal principle that the accused is regarded as being innocent until the prosecution proves that they are guilty. In a criminal trial or hearing, it is the responsibility of the prosecution to prove that the accused is not innocent. An accused person can only be found guilty if the magistrate, judge or jury is reasonably certain that the accused person committed the crime. Furthermore, the presumption of innocence means that the accused has a right to silence because they do not have to prove they did not commit a crime.
5. The presumption of innocence is contained in article 11 of the Universal Declaration of Human Rights. Article 14(2) of the International Covenant on Civil and Political Rights states that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption of innocence is also protected by section 25 of the *Victorian Charter of Rights and Responsibilities*.
6. There is a range of procedures and rules in the criminal justice system to try to protect the presumption of innocence.

These include: the accused has the right to silence, a person who is charged with a criminal offence can apply for bail, committal proceedings, in a criminal trial or hearing the burden is on the prosecution to bring evidence against the accused, evidence of the accused's bad character and previous convictions are typically not admissible in court until he or she is found, or pleads, guilty and sentencing commences, a person found guilty by a court who is not happy with the outcome of that case has the right to appeal a wrongful conviction (if there are sufficient grounds for appeal).

7. For a person to be convicted of committing a crime, the prosecution must show that there was *actus reus* (a Latin term meaning 'guilty act') and *mens rea* (a Latin term meaning 'guilty mind'). *Actus reus* refers to the act of committing a crime. This could involve a physical act or a failure to act (an omission). *Mens rea* refers to the intent to commit a criminal offence. The *actus reus* and the *mens rea* of every offence will differ according to the nature of the crime. *Actus reus* is usually the easiest element to prove. Physical evidence and witness testimony can assist the prosecution to prove that the accused committed an act. *Mens rea* generally relates to the state of mind of an accused in regards to his or her knowledge of the facts that make the behaviour criminal. In other words, an act is regarded as intentional if it is performed voluntarily or willingly by a person with a conscious and capable mind.
8. A strict liability crime is one where the Crown is not required to prove *mens rea* – that the accused intended to commit the offence. The accused can be found guilty simply because they committed the act. It is up to the accused to prove otherwise. Most such crimes are created by statute, and have been established by Parliament to regulate daily activities. Therefore, strict liability crimes tend to be summary offences and the usual penalty is a fine.
9. The age of criminal responsibility refers to the age below which a child is considered to be incapable of committing a criminal offence. In Victoria, a child under the age of 10 cannot be charged with having committed a criminal offence. It is assumed that a child does not understand the consequences of his or her actions. If a child is aged between 10 and 13 inclusive at the time they are alleged to commit an offence, the law assumes that he or she does not have sufficient understanding to know that they are doing something that is considered to be wrong. However, this presumption is allowed to be rebutted – if the prosecution can present evidence that proves that the child knew that it was morally wrong to take part in a certain act, the child can be charged. *Doli incapax* is a Latin term that means "incapable of crime". In common law it is presumed that a child under the age of 14 years does not know the difference between right and wrong and does not have the capacity to be liable for his or her behaviour. Any child aged 14 or over is presumed to have the same knowledge and understanding of the difference between right and wrong as an adult in criminal matters, and is therefore liable for their behaviour.
10. The burden of proof refers to who has the responsibility of proving a case in court. This burden rests on the person or party bringing the case. For this reason, the burden of proof lies with the prosecution in criminal law. In a criminal hearing or trial, the prosecution must bring evidence to prove the allegations made against the accused.
11. The standard of proof refers to the amount of evidence that a party must present to prove a case. In criminal law, the prosecution must demonstrate that the accused is guilty of a crime beyond reasonable doubt. This means that there must be no reasonable doubt that the accused is legally and criminally responsible for an offence.
12. There are a number of types of crime. The Crime Statistics Agency (CSA) classifies crimes by three levels: divisions (the broadest level), subdivisions and groups. According to the CSA, the types of crimes (by offence division) include: crimes against the person, property and deception offences, drug offences, public order and security offences, justice procedures offences and other offences.
13. Crimes against the person are the offences that involve a person being physically harmed or threatened with harm. They include homicide, assault, sexual offences, stalking, harassment and threatening behaviour and robbery.
14. Homicide is the killing of a human being by another person. Some homicides are unlawful, such as murder, manslaughter, culpable driving and infanticide. Some homicides, however, are lawful. Taking another person's life might be recognised as lawful when the death is: caused by self-defence, caused by an act during a war, required by punishment, a result of enforcing justice, caused by accident.
15. Murder is the unlawful killing of another person with the intention to kill or cause serious harm (malice aforethought). For the accused to be found guilty of murder, the following elements need to be established by the prosecution: the killing was unlawful – the accused will not have had a lawful reason for killing the victim, malice aforethought existed – the intention to commit murder or to cause serious harm existed, the accused was responsible for the victim's death – the accused's actions must have caused the victim's death (causation), the victim was a human being – the victim must be a person who was alive at the time of the murder (not an unborn foetus or an animal, the accused was of sound mind at the time the murder was committed – only if a person is considered to be of sound mind (sane) at the time of the act can he or she be found guilty, the accused was over the age of discretion – in Victoria, only people over the age of 10 can be charged with having committed a criminal offence. Malice aforethought is the intention to commit murder or to cause serious harm. For malice aforethought to exist, it must be shown that the accused: intended to kill the victim, or intended to inflict serious harm, but may not have meant to kill the victim, or acted with reckless indifference – that is, knowing that death or grievous bodily harm was probable as a result of their actions, but not caring about the consequences, or was committing, or attempting to commit, a serious and violent crime which resulted in the victim's death.

16. Manslaughter is an unlawful killing of another person occurring when the death is caused without the same level of intention as murder. The law recognises that a killing may occur when a person is deprived of their self-control, under circumstances amounting to a reduction in responsibility or without the intention to kill, because of a careless, dangerous, negligent, reckless, or unlawful act. In Victoria, an accused may be convicted of manslaughter, rather than murder, if they have killed another person as a result of a suicide pact. According to the *Crimes Act*, a single punch or strike delivered to any part of a person's head or neck causing an injury to the head or neck is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
17. Culpable driving is an indictable offence where death is caused through driving a motor vehicle – recklessly with disregard for potential deaths that may result, negligently or under the influence of alcohol or drugs.
18. Dangerous driving causing death is an indictable offence where the death of another person is caused by a person driving a motor vehicle at a speed or in a manner that is dangerous to the public.
19. Infanticide is an offence where a woman kills her child (under two years of age) as a result of a mental disturbance such as postnatal depression.
20. Child homicide is an offence where a person kills a child who is under the age of 6 years, in circumstances that would normally be called manslaughter.
21. Assault is an offence involving the threat to commit, or committing, some form of physical harm to another person. There are a number of types of assault, including common assault (generally, an individual will be charged with common assault if he or she assaults another person without causing injury) assaulting a Police Officer (the direct and confrontational infliction of force, injury or violence upon a police officer (or emergency services worker or other authorised officer) when on duty) and assault/threaten to assault with intent to commit an indictable offence.
22. Rape is the intentional sexual penetration of another person without that person's consent, failing to withdraw from a person on becoming aware that the person is not consenting or might not be consenting, or compelling another person to sexually penetrate oneself or another person.
23. Incest is sexual intercourse between people who are closely related. The *Crimes Act* states that a person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.
24. Stalking, harassment and threatening behaviour are acts that are intended to cause physical or mental harm to the victim, or arouse apprehension or fear through repetition in unreasonable conduct. Stalking is an offence that occurs when a person contacts, follows or engages in a course of conduct towards another person when that person does not want them to and it causes them fear or mental harm.
25. Robbery is an offence that occurs when a person uses force, or threatens the use of force, while stealing. If the offender is using some type of firearm or weapon while threatening the victim, then this increases the charge to armed robbery.
26. Crimes against property make up the highest proportion of offences in Victoria. In general, these are crimes that have the purpose of obtaining money, property, or some other benefit. The most common crime against property is theft followed by property damage and burglary.
27. Theft is dishonestly appropriating (taking) property that belongs to another person with the intention of permanently depriving that person of it. However, it is not theft if the person taking the property believed they had a right to deprive the other person of it, on behalf of himself or a third person, if someone takes property believing that he or she would have the other person's consent if that person was aware of the appropriation, or if someone takes the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. Theft may include theft of a motor vehicle, stealing from a motor vehicle, stealing from a retail store, receiving or handling stolen goods, or fare evasion.
28. Property damage is the wilful and unlawful destruction, damage or defacement of property. The offence of destroying or damaging property is contained in s. 197 (1) of the *Crimes Act*, which states: "a person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence". Property damage may include criminal damage or graffiti.
29. Burglary occurs when a person unlawfully enters a building with the intent to steal or commit an offence. The offence may involve assaulting a person in the building or damaging the building or property. Burglary can be aggravated (armed with a weapon or a person was present in the building) or non-aggravated. Aggravated burglary is burglary that occurs while the offender is in possession of a weapon or explosive, or while a person is present in the building and the offender knew the person was present or was reckless as to whether or not the person was present.
30. Summary offences are minor, or the least serious crimes. Summary offences are prosecuted by Victoria Police and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called 'hearings'.
31. Indictable offences are the more serious crimes. They are heard in the County Court and the Supreme Court (Trial

Division). They are prosecuted by the Office of Public Prosecutions, and are heard by a single judge or justice sitting with a jury: the judge or justice administers the law, and the jury decides the facts and reaches a verdict. The court proceedings used in indictable offences are called 'trials'.

32. Some indictable offences can be heard summarily – that is, dealt with in the Magistrates' Court without a jury. This will only occur if the court determines that it is appropriate for the offence to be dealt with by a magistrate. The accused can elect or request for an indictable offence to be heard summarily, but it is ultimately up to the court to decide. However, if the Magistrates' Court is to hear and determine an indictable offence summarily, the accused must consent. The criteria used to determine which indictable offences can be heard summarily includes: offences where the maximum term of imprisonment a guilty party could receive in the County Court is 10 years or offences punishable by maximum fines not exceeding 120 penalty units. An accused person may choose to have an indictable offence heard summarily to save themselves time and money in addition to guaranteeing a lower possible maximum penalty. A hearing in the Magistrates' Court will take much less time to be heard. Legal costs will also be significantly less. The maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence and five years for multiple offences, so there is less risk involved with a guilty verdict. In contrast, the County Court is only limited by maximum penalties set by legislation and general principles of sentencing.
33. The principal offender is the person who actually commits the crime. According to the Victorian *Crimes Act*, anyone who is involved in the commission of an offence, whether it is indictable or summary, is considered to have committed the offence and is liable to the maximum penalty for that offence. A person is involved in the commission of an offence if he or she intentionally assisted, intentionally encouraged or intentionally directed the commission of the offence (or another offence carried out in the course of committing the original offence). A person can also be involved in the commission of an offence if he or she enters into an agreement, arrangement or understanding with another person to commit the offence (or another offence carried out in the course of committing the original offence).
34. An accessory is a person who obstructs or hinders the apprehension, prosecution, conviction or punishment of the principal offender, despite knowing or believing that the offender is guilty of a serious indictable offence, without a lawful or reasonable excuse.
35. When an accused is charged with an offence, there may be circumstances surrounding the incident or reasons for the person's behaviour that need to be considered by the court. These circumstances or reasons may be used as the defence for the accused.
36. Self-defence refers to conduct occurring when someone uses force to defend himself, herself or another person from death or serious injury. This will be the case if the person believes that the conduct is necessary in self-defence and the conduct is a reasonable response in the circumstances as the person perceives them. Self-defence will only apply in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury. In a case where self-defence in the context of family violence is in issue, a person may believe that his or her conduct is necessary in self-defence. Therefore the conduct may be considered to be a "reasonable response in the circumstances as the person perceives them", even if the person is responding to harm that is not immediate; or the response involves the use of excessive force. When this defence is used, the court will examine the history of violence in the accused's family and its social, cultural, economic and psychological effects.
37. Infanticide can be used as a defence. It will reduce a charge of murder (life imprisonment) to infanticide (maximum of 5 years imprisonment).
38. A sudden or extraordinary emergency is an urgent situation that involves a serious consequence, such as risk of death or injury. The person must reasonably believe that the circumstances of sudden or extraordinary emergency existed and that the conduct was the only way to deal with the emergency. The court must find that the conduct of the person was a reasonable response to the emergency. Sudden or extraordinary emergency will only apply in the case of murder if the person believes that the emergency involves a risk of death or really serious injury.
39. Duress is the threat or use of force or compulsion to coerce another person to carry out a particular act. A person is not guilty of an offence if the action is carried out under duress, with a reasonable belief that a threat of harm will be carried out unless an offence is committed and committing the offence is the only reasonable way that the threatened harm can be avoided. The court must believe that the conduct is a reasonable response to the threat. The defence of duress will only apply in a murder case if the person believes that the threat is to inflict death or really serious injury. An accused cannot claim that he or she carried out his or her conduct under duress if the threat is made by or on behalf of a person with whom the accused is voluntarily associating for the purpose of carrying out a violent offence.
40. The defence of mental impairment refers to the state of mind where a person is not able to know the nature and quality of his or her actions or that their conduct was wrong. If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.
41. Automatism is a defence used when a person commits a crime as a result of muscle spasms or reflexes, or he or she

is not conscious by virtue of a state such as sleepwalking.

42. Intoxication is the state of being so affected by alcohol, a drug or any other substance, that a person is unaware of what he or she was doing, and so could not form the intention to commit a crime. Intoxication is assumed to be self-induced unless it came about involuntarily, or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or from the use of a prescription drug that was used according to directions, or
43. from the use of a medicinal cannabis product in accordance with a patient medicinal cannabis access authorisation, or from the use of a non-prescription drug (other than a medicinal cannabis product) that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer. The actions of the intoxicated person will be compared to those “of a reasonable person who is intoxicated to the same extent as the accused”. If intoxication is self-induced, the accused’s actions or beliefs must be compared to a “reasonable person who is not intoxicated”.
44. Consent is the free agreement to do something or for something to happen. Consent is a defence that can only be used in certain cases, such as a sexual offence. Consent can also be given in situations that might otherwise be seen as assault; for example, in a medical procedure or in a sporting contest. The belief that a victim was consenting to an act must be reasonable. Just because someone consents to an act that is against the law does not make the act legal.
45. An accused may try to claim that their action was a result of an accident – an unfortunate incident happening unexpectedly and unintentionally and resulting in some sort of damage or injury. The person would therefore be arguing that there was no intention, or no *mens rea*, to cause the damage or injury. The defence of accident only applies where an accused is engaged in lawful conduct.
46. The CSA is an independent organisation that processes, analyses and publishes Victorian crime statistics. The legal basis for this agency is the *Crime Statistics Act 2014* (Vic), which provides for the publication and release of crime statistics, research into crime trends, and the employment of a Chief Statistician for that purpose.
47. When we look at statistics and data, we can usually find trends – patterns of gradual change in conditions, or an average or general tendency of a series of data points to move in a certain direction over time, represented by a line or curve on a graph.
48. There are some important points to note when looking at crime statistics and trends. For some offences, the recorded crime statistics do not accurately reflect the actual level of crime in the community. This is because the number of incidents recorded may be affected by other factors that are not easy to measure. These include: the public is not always willing to report crime (many crimes are never reported to the police, sometimes people in society become more willing to report crimes and this can lead to a false assumption that there has been an increase in crime), policing policies can change (this may result in particular offences being detected by police as they target these areas – while other areas can remain largely unreported), population affects crime statistics (if population increases as crime increases, the amount of crime per population may stay the same), reporting practices can change (the way an organisation reports on crime statistics can change or the organisation that collects and presents statistics may change; an organisation may change its period of reporting)..
49. The way in which crime is recorded differs across jurisdictions, as too are the way that crimes are defined and classified. This presents problems for comparing crime statistics. Differences between police procedures also make comparisons between jurisdictions problematic.
50. Victims of crime will be affected differently, and their experiences or reactions will vary from person to person. They may be impacted: physically and/or psychologically (a victim may feel anxious, may have physical injuries or other health conditions, may need to cope with changes to his or her lifestyle, might feel guilt or blame or even anger), socially (a victim may face difficulties with important relationships, become socially withdrawn, face difficulties in trusting others, avoid things or places associated with a traumatic event, be concerned about their personal safety or the safety of others), financially (a victim may need to pay expensive medical bills or other costs associated with an injury or health condition such as occupational therapy or medical equipment, pay for mental health counselling and therapy, may lose wages (because of time away from work due to their injury, to repair any damage from property crime, participate in criminal proceedings as a witness, or seek medical or mental health treatment), may need to pay relocation expenses, may need to invest in increased security including stronger locks or extra lighting).
51. Offenders will also be impacted by crime. After committing an offence an offender may feel guilt, remorse or shame. He or she may lose certain freedoms for a period of time if they are sentenced to imprisonment. He or she may face financial issues if a fine needs to be paid or if their family loses income while they are in custody. The offender’s family may also be affected socially and psychologically. The offender may need to pay for damage caused.
52. Crime can have economic impacts, as productivity is lost as victims of crime miss work. There are also costs associated with assistance to victims, security, insurance and household precautions as well as the identification, investigation, prosecution and prevention of crime. Crime can also harm the economy through the erosion of public confidence.
53. Crime can have a social impact. People may change their day-to-day behaviour to avoid crime. A high number of offences committed in one area can lead to the decline of that community. As individuals and businesses move away from a particular area, local rental values and property prices may decline, the loss of employment and development



of 'no-go areas'. When crime is occurring in a society, there will be policy and political ramifications in response to deal with the crime. Governments will be expected to introduce policies and methods for reducing crime. Crime can lead to other people in society committing crimes. For example, if certain individuals see other people 'getting away' with crime or believe that crime is not being policed, they may also be inclined to participate in committing offences. An important consideration is the perception that there is crime in society, or fear that crime will occur. There may be the perception in the community that crime is increasing when in fact it is not.

54. Crime, particularly violent crime, can have a significant psychological impact on society. Victims can suffer mental health issues such as anxiety, depression and post-traumatic stress disorder. This can lead to difficulties with education and work, and then further mental health problems, substance abuse or violence. Crime can therefore lead to flow-on effects for families and society.