Chapter 1
The Victorian Criminal Justice System

1.1 The principles of justice

The extent to which 'justice' as a concept is embedded in our legal system or guaranteed by the Australian or state **constitutions** is a question that has no precise answer.

As David Bennett, QC, explains in his 2009 essay, 'Rights in the Constitution':

> *There are real questions as to how far the High Court in the future will find implications in Chapter III [of the Australian Constitution], dealing with the **judiciary**. **Litigants** in person regularly seek to argue cases based on an argument that Chapter III guarantees some sort of due process, or more generalised justice, which the litigant claims not to have received. As special leave to appeal is normally refused in such cases, the High Court has not yet considered the general issue.*

For the purposes of the VCE Legal Studies study, we consider the following three features to be essential to any discussion of justice in dispute resolution justice: fairness, equality and access.

Study tip

Fairness, equality and access can all be discussed independently, but the ideas contained within them overlap.

Fairness

'Fairness' is the idea that whatever happens in the administration of justice is consistent overall with community expectations concerning the way people ought to be treated.

A fair hearing therefore requires a level of impartiality and a lack of bias. All parties who come before the courts or other dispute resolution bodies ought to be treated equally, each party ought to have a real opportunity to present their side of the dispute, and the outcome ought to be reached according to consistent and transparent rules and procedures.

Study tip

A law created by a parliament is commonly called an 'act'. Note that the name of an act of parliament is written in a different style of font: the name of a piece of legislation, plus the date it was passed, should be underlined, or otherwise written with different formatting from the rest of the text. In handwriting it is easiest to do this by underlining, but in word-processed documents it is more common to use italics. The jurisdiction, which is what we call the parliament that passed the act, follows the date in brackets, and should not be underlined or in a different format. Here, the jurisdiction is Victoria.

These ideas are gathered together in what is known as the principle of 'natural justice'.

The ***Charter of Human Rights and Responsibilities Act 2006*** **(Vic)** protects the rights of people in the state to fairness in the legal system in a range of ways.

- Section 23 of the Charter protects the rights of a child to be "treated in a way that is appropriate for his or her age."
- Section 24 of the Charter protects the rights of the accused "to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;" and states that "[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires."
- Section 25 of the Charter protects the rights of the accused to be "presumed innocent until proved guilty according to law;" to "examine, or have examined, witnesses against him or her;" to "have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance;" and "to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law."

Study tip

Note that the Charter is a normal act of the Victorian Parliament, and can be overridden by the Parliament at any time, by other legislation.

- Section 26 of the Charter protects the rights of the accused to "not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law."

- Section 27 of the Charter protects the rights of the accused to "not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in."

Box 1.1 Perceptions of fairness can change over time

Because fairness is judged according to the values and expectations of the community, it is important to note that perceptions of fairness can change over time.

For example, in the UK case of *R v H* in 2004, Lord Bingham of Cornhill in the House of Lords recalled an instance from the 1840s in which a defendant convicted of theft in the Old Bailey courthouse in London pleaded not guilty, and received a trial that lasted two minutes and 53 seconds. The complete jury direction given by the judge was: "Gentlemen, I suppose you have no doubt? I have none." This at the time was thought to be consistent with the principles of fairness and justice. As was the rule until 1898 in England, that an accused person could not give evidence on their own behalf. Lord Bingham concluded by saying, "it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another."

The legal system provides a number of mechanisms to help ensure that all parties receive a fair hearing. Some examples of ways in which we attempt to achieve fairness include:

- During a police interview and during a trial a defendant has the right to silence: they are not obliged to answer questions or give evidence. In a trial the judge is required to inform the jury (if present) that the jury should not make inferences about the guilt of the accused if the accused exercises this right, nor should the jury make assumptions as to the reason for the defendant's silence.
- Because of the presumption of innocence, all defendants are considered innocent until they have been proved guilty. This approach is fairer than adopting an approach where a person is presumed guilty and punished until they prove their innocence.

Study tip

Defendants and suspects sometimes remain silent because they do not wish to accidentally incriminate themselves, regardless of whether they have done something wrong, or because they are not articulate and therefore may not respond well when questioned in a stressful environment. Usually, it is simply because their lawyer has told them not to say anything.

- Because defendants are considered innocent until proven guilty it is also presumed that the person bringing the dispute to court bears the **burden of proof,** and has the responsibility to prove their case. In a criminal case it is the state that carries the burden, because they bring the case to court. The party that makes claims about another person has the responsibility to explain and prove those claims before the defendant has to defend themselves, which ensures the defendant knows what they are supposed to defend.
- The person bringing the case not only carries the burden of proving their case, they must also meet a **standard of proof**: in other words, they must have significant evidence. This ensures a fair hearing because only by meeting this standard will a defendant be found guilty of a crime. In criminal cases the standard is **beyond reasonable doubt**. This high standard should reduce the likelihood of an innocent person being wrongfully blamed.

Study tip

In a criminal case, the state usually brings the action on behalf of the victim and the community. Private prosecutions are possible, and in the Magistrates' Court the prosecution is usually listed in the personal name of the arresting police officer, but we consider criminal acts to be against the whole community.

- The origins of the trial system used in Australia also include the concept of trial by one's peers. A **jury** is a cross-section of society that sits in judgment in a criminal trial. The jury is required to view the case based only on the facts and the evidence presented, and this helps promote fairness as the jury is composed of peers of the accused.
- A person who believes an error was made in their hearing has the right to appeal – or, at the very least, to apply for leave to appeal (for instance, to the **High Court of Australia** or the Victorian **Court of Appeal**). This helps to check that mistakes are not made and that a fair outcome has been reached.
- Parties generally have the right to an open hearing because justice should not only be done; it should also be *seen* to be done. It is generally true, therefore, apart from exceptional situations such as closed courtrooms and **suppression orders**, that court hearings are open to the public. This can create accountability within the legal system.
- Case management is used in courts to achieve a balance between speed and proper preparation. Parties should

not be rushed into resolution without adequate time to prepare and examine the arguments and evidence that will be used in trial, but both parties also have a right to efficient resolution without unnecessary delays so they can move on with their lives. There is a legal maxim that states: 'Justice delayed is justice denied.'

- Consistent and rigid trial procedures aim to encourage a thorough and fair examination of evidence. For instance, parties will always be given the opportunity to **cross-examine** witnesses led by the opposing side, and must be given adequate notice before a witness is called so that they can prepare questions. Parties will also be given time to present opening and closing statements to the court.

Equality

'Equality' is the idea that every person or organisation that has a dispute to be resolved is equal in the eyes of the law and in the legal system as a whole. No-one should be privileged and benefited, nor discriminated against or at a disadvantage, for being who they are.

For example, former High Court justice Lionel Murphy said in the McInnis case in 1992: "Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice."

The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to **substantive equality** in the legal system in a range of ways. For example:

- Section 8 of the Charter provides that "[e]very person has the right to recognition as a person before the law," and that "[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination."

  Importantly, in terms of meaningful equality, it also makes it clear that "[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination."

- Section 23 of the Charter protects the rights of a child to "be treated in a way that is appropriate for his or her age."
- Section 25 of the Charter protects the rights of the accused "to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*," and "to be told, if he or she does not have legal assistance, about the right, if eligible, to **legal aid**." Also, "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution;" and "to have the free assistance of an interpreter if he or she cannot understand or speak English."
- Section 27 of the Charter protects the rights of the accused to have equal punishment under the law, in that they are eligible for the reduced penalty "[i]f a penalty for an **offence** is reduced after a person committed the offence but before the person is sentenced for that offence."

Equality and inequality in the legal system may be affected by a range of factors including:

- **Gender**. Whether someone is a woman, a man or a non-binary gender can affect their treatment, their outcome, and their ability to achieve justice.
- **Human status.** Whether someone is a person or a legal individual such as a corporation or government body can affect their ability to achieve justice.
- **Money.** Whether someone has access to a great deal of money or not can affect their ability to achieve justice.
- **Perceived racial heritage.** Race is more a social construct than a biological fact, but the racial heritage someone is perceived to have by society can affect their ability to achieve justice.
- **Cultural and community background.** The cultural community to which someone belongs, or that they have spent a lot of time in, can affect their ability to achieve justice.
- **Physical and mental abilities and disabilities.** The particular mix of physical and mental abilities and disabilities someone has can affect their ability to achieve justice.

This is nowhere near an exhaustive list, but it gives a few things to think about when considering the ability of anyone to use the legal system in an 'equal' way to someone else, and to have the legal system give them justice and a fair resolution to their dispute.

It is also important to consider the role of **equity and equality** in the administration of justice, though. If equality is the idea that all people should be treated *the same*, equity is the idea that all people should be treated differently according

to their individual differences, in order for them to reach *the same end-point*. It is the difference between literal or superficial equality, and substantial or outcome-based equality. The difference between these two concepts is illustrated in Box 1.2.

Box 1.2 Equity and equality in the administration of justice

When considering the role of equity and equality in the administration of justice, it is important to note the difference between superficial and substantial equality. For instance, if one person starts with ten apples and another starts with two apples, superficial equality would say to give them each the same number of apples each week going forward. They will receive equal numbers of apples, but this treatment won't fix the fact that one started with eight more than the other: they will therefore always have more in the future. If your goal is to achieve substantial equality, you will need to treat them differently in order to achieve that.

Similarly, if your goal is to give everyone in the legal system exactly equal treatment, you might give everyone an interpreter or no-one an interpreter. Since the Australian legal system uses a very formal version of English, this will benefit people starting with a good knowledge of that – but will significantly disadvantage people starting without it. If you want to achieve substantial equality, taking into account *equity*, you will need to treat people differently in order to truly have equal treatment before the law.

The rules and procedures of the legal system are mostly founded on the principle of equality, but they will sometimes have to be modified to take into account the fact that human beings are not perfect, and can sometimes differ in the way they apply those rules. Former High Court justice Dyson Heydon acknowledged this tension in his 2011 paper to the Sir Samuel Griffith Society, 'Constitutional facts': "Judges are not automatons. They have individual opinions. Their background experiences may differ. Yet the whole legal system has the goal of ensuring that it should not matter for a litigant whether the case is to be determined by one particular judge, with a certain personality, background and outlook, or another particular judge, who differs sharply in these respects."

The legal system provides a number of mechanisms to help ensure that all parties achieve equality before the law. Some examples of ways in which we attempt to ensure equality include:

- Various forms of disadvantage are recognised, and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality. For instance, a range of mental disabilities and psychological disorders are supported through the Assessment and Referral List in the Magistrates' Court, and free interpreters are provided during police questioning and Magistrates' Court proceedings.
- All judicial proceedings have strict rules of evidence that work to ensure a fair and unbiased hearing. For instance, evidence of bad character and prior convictions is inadmissible as the accused is presumed innocent until proven guilty, and therefore the proof should come from evidence about this particular crime – not from past crimes committed. The judge or jury may have difficulty treating the defendant as an equal claimant if they become aware of these past offences.

- Judicial proceedings are also governed by strict rules of procedure that are consistently applied to both parties equally. For instance, evidence can be tested through cross-examination of witnesses, ensuring that all evidence is reliable. Each party is given an equal opportunity to test the evidence tendered through the witnesses called by the other side.
- All disputes require an independent third party to oversee proceedings to ensure that the rules of evidence and procedure are followed equally by both parties and that the burden of proof is satisfied. An impartial third party ensures that the defendant and prosecution are treated equally and that no party is favoured above the other.
- Appeals are permitted on questions of both law and fact. An **appeal on a question of law** can be made where one party to the dispute believes that the law was interpreted or applied incorrectly by the **judge**, **magistrate** or tribunal member; and an **appeal on a question of fact** can be made where one party believes the outcome or sentence improperly reflects the facts of the case and evidence. If one party feels they have been denied equal treatment before the law on one of these grounds, they can ask a higher court to review the matter and correct any mistakes.

- Imbalances of power are recognised where possible, and accommodations are made. For instance, the protection of **double jeopardy** is given to the accused in a criminal trial to protect them from the greater power of the state, the police, and the **Director of Public Prosecutions**. It is very difficult, and usually impossible, to charge someone a second time in relation to the same crime if they have already been found not guilty.

Access

'Access' is the idea that all people must be able to effectively utilise the legal system, and the places and systems for the resolution of disputes and the administration of justice. Access is therefore about more than just not being banned or prohibited from something: it is about the ability, in real life, of different people to use something meaningfully, and to use it in a way that is similar to how other people are able to. Access is not about simply having literal access to the legal system: it is about having access to justice.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to meaningful access to the legal system in a range of ways. For example:

- Section 23 of the Charter protects the rights of children to be "brought to trial as quickly as possible."
- Section 25 of the Charter protects the rights of the accused to "be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands;" to have "adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her;" to "have the free assistance of an interpreter if he or she cannot understand or speak English;" to be "tried without unreasonable delay;" and "to have legal aid provided if the interests of justice require it," amongst other things.

Like superficial equality versus substantive equity, there is a difference between being able to superficially access something and being able to meaningfully utilise it. The difference between these two concepts is illustrated in Box 1.3.

Box 1.3 Equity and equality in the administration of justice

When considering the role of access in the administration of justice, it is important to note the difference between superficially accessing something and being able to meaningfully utilise it. For instance, a small child is not able to gain the same kind of access to a scientific calculator as a grown person can; a grown person without CAS training is not able to gain the same kind of access as a person with that training is (sometimes, they may not even be able to figure out how to turn it on); and an elderly person suffering from arthritis is not able to gain the same kind of access as a person with more nimble fingers is.

This is why we have a range of calculators available for different people to use: some with larger buttons and clearer symbols; some with multi-function keys and others with single-function. We also have a range of instruction manuals available in different languages. We do this because we recognise and understand that different people have different abilities to access and meaningfully utilise things. Why should the same not be true in principle of the legal system?

Proper and meaningful access to the legal system may be affected by a range of factors including:

- Knowledge, experience and training. Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it, will affect their ability to meaningfully access justice.
- Money. Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can't afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.
- Physical access. Whether or not someone has access to locations where dispute resolution can occur will affect their ability to access justice. If this location is a physical place or building, the layout and design of the place may help or hinder individual access. For instance, whether it uses ramps or stairs.
- Environment and culture. Each place where justice is administered will have its own environment and culture.

This is created by the design of the location, the way in which people are treated when they are there, the rules people are expected to follow, and the procedures that occur during the resolution. If these are compatible with someone's expectations and what they already understand and feel comfortable with, they will have better access to justice; if someone doesn't understand the rules or feels confused, intimidated or offended by them, they will have comparatively reduced access.

- Time. The amount of time the legal system demands of people will affect the ability of different people to achieve meaningful access to justice. Some people have more work commitments and flexibility than others; some have responsibility for young children or are carers for ill, disabled or elderly friends or family members; some people cannot emotionally invest years and years into a dispute before achieving closure.

This is nowhere near an exhaustive list, but it gives a few things to think about when considering the ability of anyone to utilise the legal system in a way that is comparable to someone else.

Activity 1a: Corrections Victoria fails to bring prisoners to court for hearings

In 2016 Corrections Victoria received a formal criticism from the courts for its failure to bring prisoners to court for hearings, so they could be physically present. In the three years from 2013-2016 the agency was fined 650 times for holding defendants in custody rather than transporting them to scheduled court appearances, with total penalties around half a million dollars.

The Herald Sun reported in August 2016 that Victoria Legal Aid counted 455 Magistrates' Court matters affected in the first seven weeks of 2016. Some prisoners were unable to apply for bail as a result, and some missed their assessments for community-based sentences. In March 2016 The Age reported a magistrate as saying that bail was sometimes given, ironically, to help ensure some defendants would be present in courts for future hearings. Usually remand is considered a guarantee that a defendant will appear, but this is only if Corrections Victoria transports them to court from the remand centre. The magistrate was reported as saying: "I'm releasing people – not high-risk – but I'm releasing them on bail because I can't guarantee they'll appear." In August 2016 Magistrate Timothy Walsh warned Corrections officers that a number of prisoners would be released on bail automatically if they were not brought in for their bail applications.

In 2014 the auditor-general reported to the state government on the prisoner transport system and said that "Increasing prisoner numbers within the justice system means that prisoners are not always transported when and where required." The Government did not resolve this, but in 2016 announced $14.7 million in funding to improve videolink facilities in 53 courts. The *Justice Legislation (Evidence and Other Acts) Amendment Act* of 2016 also required that most Magistrates' Court hearings involving prisoners on remand be conducted by videolink.

Questions/tasks

1. **For what was Corrections Victoria formally criticised in 2016?**
2. **Outline the effect of Corrections Victoria failing to bring prisoners to court for hearings in early 2016.**
3. **Explain the irony that bail was sometimes given to help ensure defendants would be present in courts for hearings.**
4. **What was the Victorian Government's response in 2016 to the prisoner transportation problem?**

The legal system provides a number of mechanisms to help give all parties meaningful access to the law and the legal system. Some ways in which we attempt to ensure access to justice include:

- The **court hierarchy** allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction. Parties therefore have access to experts in the area under dispute, and can more quickly and cheaply go to lower courts for less serious matters. A court hierarchy also allows for administrative convenience, as parties know which court deals with which type of dispute and do not have to complete forms and pay fees that are not relevant to them.
- The Magistrates' Court, the **County Court** and the Supreme Court all have specialised divisions that deal with only certain types of law. For example, the Children's Court (a specialised division of the Magistrates' Court) provides more meaningful access for children, ensuring they are given treatment appropriate to their age and situation. There are other divisions of the Magistrates' Court that work in a similar manner, too, such as the Koori Court, the Drug Court, the Sex Workers List and the Family Violence Division.
- The legal system recognises the impact that mental and psychological disorders can have on the ability of a person to effectively use the system, and provides some support services. For instance, the Assessment and Referral List of the Magistrates' Court supports offenders with mental health issues, helping them with access to specialised personnel and services.

- The first Neighbourhood Justice Centre ('NJC') was opened in the City of Yarra in 2007. The NJC aims to improve the justice system by addressing social disadvantage and improving access to justice services. It combines support services such as drug counselling and childcare with community initiatives, and mixes the legal system with the local community. The NJC focuses on early intervention, and involves the locals in finding solutions to their social problems.

Review questions 1.1

1. Outline what is meant by the concept of 'justice'.
2. Define the following terms:
   - fairness
   - equality
   - access
3. Explain how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of people in Victoria to fairness in the legal system.
4. Outline the ways in which the legal system attempts to achieve fairness.
5. Explain how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of people in Victoria to equality in the legal system.
6. Identify the factors that may affect equality and inequality in the legal system.
7. Using an example, outline the role of equity and equality in the administration of justice.
8. Outline the ways in which the legal system attempts to ensure equality.
9. Explain how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of people in Victoria to meaningful access to the legal system.
10. Using an example, outline the role of superficially accessing something and being able to meaningfully utilise it in the administration of justice.
11. Identify the factors that may affect proper and meaningful access to the legal system.
12. Outline the ways in which the legal system attempts to ensure access to justice.

1.2 Key concepts in the Victorian criminal justice system

When resolving both criminal and civil cases in Australian courts the system of trial used is the **adversary system**. The adversary system is a system where two opposing parties put conflicting arguments before an independent judicial member, at the end of which the party with the best case wins and the other loses. Under this system the parties to the case are adversaries, or opponents, who each try to win the case; they have a lot of control over the way in which they conduct their case, although they need to follow rules of evidence and procedure that are strict, and applied equally to both of them; overseeing the case and ensuring the parties are adhering to the rules of the court is the judge or magistrate, who is an impartial adjudicator; and the ultimate aim of the adversary system is to find a winner and a loser in the court 'contest'.

This system gives rise to a number of important concepts in criminal disputes:

- The difference between summary offences and indictable offences. This determines the identity of the party bringing the charge against the accused, and the level of formality with which the rules of the adversary system will be applied.
- The burden of proof on the party bringing the charge. They have the responsibility to bring evidence to 'win' their side of the case.
- The standard of proof needing to be brought by the prosecution. There is a high standard they must reach before they are permitted to win the case.
- The presumption of innocence, protecting the accused from the abuse of government power in this contest.

Study tip

The rules of evidence and procedure used in the adversary criminal system are not directly examinable content in the current Study Design, but they will also be outlined as a significant feature in the administration of criminal justice.

Summary and indictable offences

Criminal offences are classified as either summary or indictable, depending on their seriousness.

Summary offences are the least serious offences. They are heard in the Magistrates' Court, which is the lowest court in the Victorian state hierarchy; and, under the current jurisdiction of the Magistrates' Court, can be punished by no more than two years for a single offence, or five years total for multiple offences heard at the same hearing. Summary offences are prosecuted by the arresting police officer, and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called **'hearings'**.

If the legislation does not state whether an offence is summary or indictable, it is assumed to be summary. This is provided for in the *Interpretation of Legislation Act 1984* (Vic).

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.

Indictable offences are the more serious offences, although they can be further divided into minor indictable offences and serious indictable offences.

Indictable offences are heard in the County Court and the Supreme Court (Trial Division), which are the higher two of the three state courts. Under the current jurisdiction of the County and Supreme Courts, indictable offences can be punished by unlimited sanctions – the act of parliament that provides for the offence will therefore state the range of consequences the courts can give for that particular offence. Indictable offences 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'**.

Section 25(1) of the *Magistrates' Court Act 1989* (Vic) establishes the jurisdiction of the Magistrates' Court in relation to summary offences. Many of our summary offences are listed in the *Summary Offences Act 1966* (Vic).

The County Court and Supreme Court then have the power to hear all offences outside this summary range – these are called 'indictable offences'. The two courts have roughly equal jurisdiction, except the Supreme Court is given exclusive power to resolve disputes involving the most serious crimes such as murder and terrorism. This is provided for in s36A of the *County Court Act 1958* (Vic), which includes the following:

(1) The court shall have jurisdiction to inquire into, hear and determine, and adjudge all indictable offences […] save and except the offences following […] –

   a) treason and misprision of treason;
   b) the offences referred to in sections 3, 10, 11 and 13 of the *Crimes Act 1958* [eg 'murder' is in s3; and] burglariously breaking and entering a dwelling house and assaulting with intent to murder a person therein;
   c) attempts to murder […]

The jurisdiction of the Supreme Court is partly outlined in s10 of the *Supreme Court Act 1986* (Vic) – this mainly covers the appellate jurisdiction of the Court. The original jurisdiction of the Court is mainly set out in s85 of the Victorian Constitution, the *Constitution Act 1975* (Vic). Here, it says that the Court "shall have jurisdiction in or in relation to Victoria, its dependencies, and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction."

Section 2B of the *Crimes Act 1958* (Vic) then says that all "[o]ffences under this Act are, unless the contrary intention appears, deemed to be indictable offences." Other indictable offences are also found in other legislation and the common law made by courts.

Putting the detail in these pieces of legislation together, offences can therefore be ranked from the most serious to the least serious, shown in Figure 1.1.

Figure 1.1
Ranking of offences

As you can see, our court system allows for some indictable offences to be heard summarily – that is, dealt with in the Magistrates' Court without a jury. The criteria used to determine which indictable offences can be heard summarily are set out in Schedule 2 of the *Criminal Procedure Act 2009* (Vic); generally, they are offences where the maximum term of imprisonment a guilty party could receive in the County Court is 10 years (otherwise known as 'Level 5 imprisonment') or where a fine of no more than $120,000 (otherwise known as a 'Level 5 fine') could be given.

If a person is charged with one of these offences, they may seek to have their indictable offence heard summarily in the Magistrates' Court. This means they will not have a jury, but they will also face a lower maximum penalty: the maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence, so there is less risk involved with a guilty verdict. Alternatively, the accused may be planning to plead guilty, and may wish to save themselves time and money in addition to guaranteeing themselves a lower possible maximum penalty.

It is ultimately up to the court to determine if an indictable offence should be heard summarily, but the defendant can elect or request it.

Some examples of summary offences, indictable offences and indictable offences heard summarily can be seen in Table 1.1 below:

Table 1.1: Examples of summary offences, indictable offences and indictable offences heard summarily

Summary offence	Indictable offences	Indictable offences heard summarily
• Putting up posters, stickers or similar things on public property, or on private property without permission of the owner, is a summary offence. We know this because it is in s10 of the *Summary Offences Act*. The maximum penalty provided for in s10 is 15 penalty units (in 2017-18, this is equivalent to $2378.55) or three months imprisonment.	• Murder is one of the most serious indictable offences. We know this, because it is in s3 of the *Crimes Act*, which makes it an indictable offence; section 3 also gives a "baseline" sentence for murder of 25-30 years imprisonment. We know it isn't a minor indictable offence because of this sentence, and we know it has to be one of the most serious because s36A of the *County Court Act* says that the County Court does not have jurisdiction to hear it. • Rape is a serious indictable offence. We know this, because it is in s38 of the *Crimes Act*, which means it is an indictable offence. Section 38 also states that it is a Category 1 offence under the *Sentencing Act 1991* (Vic) (like murder), which means it cannot be heard summarily in the Magistrates' Court.	• Removing property from a place that is open to the public is an indictable offence that can be heard summarily if the value of the property is $100,000 or less. We know this, because it is in s78 of the Crimes Act, and this makes it an indictable offence. It is also, however, in Schedule 2 of the *Criminal Procedure Act*, "Indictable offences that may be heard and determined summarily": • "Offences under section 78 of the *Crimes Act* (removal of articles from places open to the public), if the amount or value of the article alleged to have been removed does not in the judgment of the court exceed $100 000." • Section 78 of the Crimes Act provides for a maximum of Level 6 imprisonment – this is why the *Criminal Procedure Act* puts a cap on the value of the property for the purposes of a summary hearing. This cap of $100,000 puts the maximum penalty at Level 5 imprisonment, which means the offence is eligible to be heard in the Magistrates' Court. Property worth over $100,000 must be heard in the County Court, because it could earn the offender more than five years in prison.

The burden of proof

The **burden of proof** is the responsibility borne by the party bringing the case to prove the claims made.

The burden of proof resting on the party bringing the case is important because of the protection of the **presumption of innocence** given to the accused. The presumption of innocence is discussed later in this chapter.

Study tip

In English, the word 'burden' means a weight or responsibility that someone must carry. This physical image is helpful in understanding the conceptual burden of proof in law.

Box 1.4 Where does burden of proof come from?

Australia has gained the concept of the burden of proof from the English trial system. On a concrete pillar near Courtroom 1 in the Canberra Magistrates Court complex there were for many years three phrases written in neon signs. In bright pink, one of them read: "one golden thread always seen."

This is a reference to a famous speech given by Viscount Sankey in the Woolmington murder case appeal before the UK House of Lords in 1935. Reginald Woolmington had been convicted of the murder of his 17-year-old wife Violet. Violet had left him, and had moved back in with her mother. Reginald had come to the house with a sawn-off rifle tied under his coat, and had shot Violet through the heart. The judge had directed the jury that, if the defence replied on a theory of accidental shooting, then *it* had the burden of proof to demonstrate the accident. The accused was found guilty, and was sentenced to death.

On appeal, the House of Lords quashed the conviction and said that the prosecution still had the burden of proving that the shooting was not an accident. Viscount Sankey said:

Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. […] If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge on the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

The accused should not bear any part of the burden – in other words, they should not need to prove that they are innocent, and they should not need to prove an alternative version of events if they disagree with the version put forward by the prosecution. It should be enough for them to demonstrate that the prosecution has not discharged the burden to show that they are guilty. This might be done by cross-examining the prosecution's witnesses, by bringing defence witnesses, or by simply submitting to the court that the prosecution has not brought enough evidence.

Reversing the burden of proof

Study tip

There is a difference between a legal burden of proof and an evidential burden of proof. A legal burden of proof on the defendant requires them to prove their lack of guilt on the balance of probabilities; an evidential burden only requires them to show that there is sufficient evidence to raise an issue as to guilt. Sometimes the evidential burden is reversed but not the legal, and this means supporters of the law will often argue that the burden has not technically been reversed.

In practice, the burden of proof is sometimes reversed. For instance:

- Some terrorism offences impose a legal burden on the defendant. Section 102.6 of the *Criminal Code Act 1995* (Cth) makes it an offence to receive funds from or on behalf of a terrorist organisation, or to give funds to a terrorist organisation. If the accused is found to have done this, they will have to burden of proving that the money was solely for the purpose of providing legal representation to someone charged with terrorism offences, or for the purpose of assisting the organisation to comply with Australian law. The prosecution does not need to prove that the funds were for any other purpose.
- In 2005 offences relating to the trafficking of drugs were added to the Commonwealth *Criminal Code.* For instance, when the defendant is in possession of a 'trafficable' quantity of a controlled drug, they will be presumed (without evidence) to have the intention to traffic, or the intention to cultivate or manufacture for a commercial purpose. The onus will then be placed on the defendant to prove they did not.

Activity 1b: Laws targeting foreign fighters reverse the evidential burden of proof

In August 2014 it was reported that laws were being considered that would reverse the evidential burden of proof for citizens returning from countries involved in civil war. In other words, any citizen returning from a country the government determined was a civil war concern, such as Syria in the current climate, would be assumed by default to have been fighting in that war. They would be presumed guilty, and would then have to show evidence of their lack of involvement.

In other words, the government would not have to prove the individual had been fighting in the foreign conflict before acting: the reversal would mean the person would have to lead evidence first that they had been in the country for some other reason. The Greens argued that this would apply to humanitarian workers and journalists, who would need to prove each time they returned to Australia that they had not been involved in criminal behaviour.

These and related laws were passed in three stages towards the end of 2014 in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Acts*, which amended the *Criminal Code Act*. The federal attorney-general, George Brandis, argued that the burden of proof had not been reversed because only the evidential onus had been changed.

The Gilbert and Tobin Centre for Public Law wrote to the Australian Law Reform Commission in a public submission on the changes that "[t]he offence does not technically reverse the onus of proof, and it is not an offence of strict or absolute liability. However, it has essentially the same effect, as criminal liability will be *prima facie* established wherever a person enters or remains in a declared area [such as a foreign conflict zone]." The Australian Lawyers for Human Rights wrote in a separate submission that the effect of the law was "clearly to place the burden of proving their innocence upon the defendant." The Human Rights Committee also pointed out that "in addition to proving that they entered into or remained in the declared area solely for one of the prescribed legitimate purposes, they would also need to provide factual evidence that they did not enter into or remain in the declared area [...] in part for an illegitimate purpose."

Questions/ tasks

1. **Outline the laws that the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Acts* introduced in 2014.**
2. **Explain how these laws reversed the evidential burden of proof for citizens returning from countries involved in civil war.**
3. **Why did federal attorney-general, George Brandis, argue that the burden of proof had not been reversed?**
4. **In regards to the foreign fighters laws, outline the opinions of:**
   - **The Greens**
   - **The Gilbert and Tobin Centre for Public Law**
   - **The Australian Lawyers for Human Rights**
   - **The Human Rights Committee**

The standard of proof

The **standard of proof** is the quality or weight of evidence that must be led by the party with the burden of proof, in order for them to discharge that burden.

Study tip

Synonyms for 'standard' include quality, weight and level.

The standard of proof is important also because of the presumption of innocence, discussed next in this chapter. The standard of proof is the point at which we as a society believe it is appropriate for the presumption of innocence to be overturned.

Box 1.5 Juror understanding of beyond reasonable doubt

Prior to 2013, the position in common law in Victoria was that it was inappropriate for a judge to explain to a jury what 'beyond reasonable doubt' meant, beyond saying that it was a "common English expression that means what it conveys." This was unlikely to be helpful to a juror who had just asked exactly that – what meaning it conveyed – and research from the United Kingdom, New Zealand, Queensland and New South Wales shows that many jurors have difficulty with the concept and apply either too low or too high a standard when applying it. Nonetheless, some appeals were allowed on the basis that the judge had gone further than this.

In March 2013 the *Jury Directions Act 2013* received royal assent and permitted, for the first time in Victoria, state judges to answer juror questions on what the term 'beyond reasonable doubt' means. The law says that judges may answer the question, and gives some guidance on what that answer could be; for instance, it suggests telling jurors that thinking of an "unrealistic possibility" does not constitute reasonable doubt.

It is worth completing extra research in this area. Studies on juror understanding of 'beyond reasonable doubt' from the UK can be found summarised in a number of publications such as 'What can we learn from published jury research?' by P Darbyshire, published in the 2001 *Criminal Law Review* p970; and 'Trial by jury: 50 years of change' by P Thornton, published in the 2004 *Criminal Law Review* p683.

It is generally accepted that the high standard of proof in criminal trials lessens the risk of wrongful convictions, and this is an important principle in the justice system. Famous jurist William Blackstone wrote in 1758 in the *Commentaries on the Laws of England*, for instance, that it was: "Better that ten guilty persons escape than that one innocent suffer."

Unfortunately, research shows us that one of the most powerful deterrents for people, if they are contemplating whether to commit a criminal act, is the likelihood of them being caught and punished. It is therefore possible that an unreasonably high acquittal rate might reduce the deterrent impact of the criminal justice system. Amnesty International, for instance, criticised Australia in 2007 for its inappropriately low rate of convictions for sexual assaults.

Box 1.6 The New South Wales Judicial Commission's 'Criminal Trial Courts Benchbook'

The New South Wales Judicial Commission's Criminal Trial Courts Benchbook provides a model instruction for trial judges to give to juries when asked about the meaning of the phrase 'beyond reasonable doubt':

"It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the 'presumption of innocence'.

This expression 'proved beyond reasonable doubt' is an ancient one. It has been deeply ingrained in the criminal law of this state for almost 200 years and it needs no explanation from trial judges. [...]

In a criminal trial there is only one ultimate issue. Has the Crown proved the guilt of the accused(s) beyond reasonable doubt? If the answer is 'yes', the appropriate verdict is 'guilty'. If the answer is 'no', the verdict must be 'not guilty'.

[And, if juries seek further clarification:] The words beyond reasonable doubt are ordinary everyday words and that is how you should understand them."

The presumption of innocence

The **presumption of innocence** is the assumption that the party against whom allegations are being made is innocent of all allegations unless and until the party bringing the case shows a sufficient weight of evidence to the contrary. The presumption of innocence is protected by s25 of the Victorian Charter of Rights and Responsibilities.

Study tip

The presumption of innocence therefore connects the burden of proof and the standard of proof.

In a criminal trial or hearing, the accused will be presumed to be innocent of the charges. The responsibility on the prosecution to bring evidence is therefore the responsibility to demonstrate *proof* that the defendant is not an innocent party: it is not the responsibility to bring evidence that suggests the defendant might be or could be guilty, or even that they are *likely* guilty.

Because of the presumption of innocence, the accused does not have the responsibility to prove that they are innocent, or even that they are likely or probably innocent. They do not need to prove anything – except that the prosecution has not discharged their burden of proof.

Unless and until the prosecution discharges their burden of proof and overturns the presumption of innocence, the defendant should not be punished or face consequences in any way.

Upholding the presumption of innocence

It is easy in practice to forget the presumption of innocence, because we often jump to the conclusion that a person would not be charged unless they were guilty or probably guilty.

There are a range of procedures and rules in the criminal justice system to try to protect the presumption of innocence. These include:

- Once they have been charged with an indictable offence, an accused person will be brought before the Magistrates'

Court for a **bail hearing**. Bail is the ability of the charged person to return home, and return to their normal lives until the conclusion of their dispute or their bail is revoked, because it is recognised that they are still innocent under the law. The Victorian Parliament has reduced the presumption of bail in recent years, but more people are still given bail than are held in custody on remand.

- A **committal hearing** is a hearing before the Magistrates' Court in which the prosecution will have to demonstrate that they have enough evidence against the accused to support a conviction in a higher court. They do not need to prove guilt to the magistrate, but they do need to be able to prove that they have enough evidence that they could reasonably prove guilt. If they cannot do this, the magistrate will order that the case be dismissed – although the Director of Public Prosecutions has the power to override this ruling.
- In the court hearing or trial, the burden is on the prosecution to present evidence against the accused person first. The prosecution will give their opening address first, and all prosecution witnesses will be led before the defence has to decide whether to lead any evidence through witnesses of their own. This is because the accused is presumed innocent until the prosecution has brought enough evidence, and ought not to be asked to prove anything.
- The principle of double jeopardy protects the presumption of innocence because it prevents a person from being charged or punished twice in relation to the same crime, or a connected crime. If a person is presumed innocent and was not found to be guilty, they must be protected as an innocent person and not hounded. This protection is recognised in s26 of the Victorian Charter of Rights and Responsibilities. In 2012 the Victorian Parliament reduced the double jeopardy protection in some situations for very serious crimes, but it mostly still applies.

Rules of evidence and procedure

Rules of evidence and procedure are not required content in the Study Design, but they provide an important framework for the resolution of criminal disputes. The Study Design specifies that key concepts in the Victorian criminal justice system "include" those discussed above, but are not limited to them. A brief explanation of the rules of evidence and procedure has therefore been provided below.

Study tip

'Admissible' means that evidence can be used (admitted) in court. 'Inadmissible' means it cannot be.

Rules of evidence determine what evidence is admissible and allowed to be used in court as proof, and what evidence is inadmissible and not allowed. **Rules of procedure** are the rules dictating how a trial or hearing is run, and what happens in what order. Evidence must be relevant, reliable and legally-obtained, or else there is a risk that the trial will not be fair. It must also have more probative value than prejudicial value: in other words, the evidence must prove more about the case than it prejudices the court against the defendant. Procedure must be organised to allow both parties' versions of the case to come out effectively, and to ensure that neither party can dominate argument to the exclusion of the other.

Rules of evidence and procedure are complex and applied strictly to ensure that parties are on equal footing and that neither party can gain an unfair advantage. Rules of evidence can be illustrated by the following examples:

- Evidence of bad character is generally inadmissible because it doesn't prove the defendant committed the wrongdoing they are currently being prosecuted for. Just because they committed other wrongdoings in the past, or friends and family consider them to have little integrity and poor morals, that doesn't mean they are guilty of the charged offences. Evidence of bad character can, however, easily prejudice the court against the accused.
- Hearsay evidence is evidence that a witness is not giving first-hand: in other words, the evidence relates to something that the witness does not have personal, first-hand knowledge of. If someone tells you they committed a crime, that evidence is hearsay if you try to give it to the court because you did not see them commit the crime with your own eyes. You can therefore only be cross-examined in relation to them *saying* it, and not in relation to them *doing* it. Because of this, hearsay evidence will generally be inadmissible.

Rules of procedure can be illustrated by the following examples:

- Witnesses are only allowed to respond to the questions asked of them by either party or the judge – court procedure does not permit them to make uninterrupted narrative statements like stories. This allows the parties to control the evidence they want to come before the court, and the order in which they want those pieces of evidence to come out. Each witness led by one party will then be opened up to cross-examination by the other party.
- All of the prosecution witnesses must be led before the prosecution rests its case and the defence is given the choice to lead witnesses of its own. Because of the presumption of innocence and the burden of proof, procedure

does not allow the prosecution to force the defence to lead its own witnesses before choosing to show the remaining prosecution witnesses.

- The trial in the adversary system must be one continuous event. In some countries using different systems of trial, a verdict of 'charges not proven' can be entered and the conclusion of the trial can be delayed until more evidence is found. In Victoria, all criminal trials, once begun, must continue to run until they reach their conclusion and a verdict of guilty or not guilty is entered. This is considered an important part of procedural fairness, because it allows the accused to gain closure and move on with her or his life.

The need for rules of evidence and procedure

Former High Court justice Dyson Heydon, in his 2011 paper to the Sir Samuel Griffith Society, 'Constitutional Facts', explained the need for rules of evidence and procedure:

> *Adjudicative facts are facts which, being in issue or relevant to a fact in issue at a trial, are determined by the jury, or, if there is no jury, by the judge. The search for them is a search for answers to questions like: "Was the factory floor slippery? What did the parties say in conversations which one claims created a contract?" […]*
>
> *One good example is the rules of evidence […]. They require the proof of facts to take place through witnesses who are subject to cross-examination, or through documents, or through physical things produced to the court. They are restrictive rules which prevent some types of relevant evidence being received – because the evidence is hearsay, because it is prejudicial, because of how it was obtained. They have been worked out for 300 years or more by skillful judges and thoughtful legislatures responding to the teachings of an immense body of forensic experience.*
>
> *They may not operate perfectly but they do have advantages. They ensure that all factual material which the jurors (or the judge if there is no jury) are to consider will be methodically tendered in an orderly manner so that everyone understands what is going on; any objection will be ruled on immediately; any questionable testimony can be tested in cross-examination; debates about the significance of the material will take place in the presence of all parties and in public. The rules of evidence ensure that the parties who may lose will have been in a position to understand, call evidence about, and challenge the grounds on which they may lose. They thus reduce the chance of ill-informed and uncontrolled judicial frolics.*

Rules of evidence and procedure will evolve over time as social expectations and judgments change, and as new ways of doing things are found. For example, in June 2012 the Melbourne Magistrates' Court allowed evidence from an expert lip reader to be used in a contested committal hearing. This was the first instance of lip reading being allowed in an Australian court as evidence of a conversation captured on CCTV footage. The expert lip reader, Ms Rees, told the Court that she had relied entirely on lip reading since she was 17 years old, and that lip reading does not rely on 'guesswork' as was suggested to her during cross-examination. She had previously given lip reading evidence in court cases in England.

Box 1.7 Invalid affidavits

The case of underworld figure Tony Mokbel, who was charged with drug trafficking offences, exposed the fact that many affidavits prepared by police to get judicial warrants for evidence searches were not signed or were incorrectly sworn. Among other things, this meant that some warrants were not lawful and the legitimacy of some evidence used in his case was called into question.

Mokbel asked the Supreme Court for leave to change his guilty pleas back to not guilty, arguing that this evidence should be declared entirely inadmissible and he should be allowed to fight the case without the questionable evidence being shown to the jury. The Victorian Parliament passed retrospective legislation to change the legal requirements for signing affidavits on 1 March 2012, so that thousands of cases relying on unsigned police affidavits could not be challenged in the same way as Mokbel was doing.

Also on 1 March 2012 the Hon Justice Whelan agreed that the affidavits were invalid, but he found this did not mean the evidence itself was necessarily inadmissible. Whelan did not give detailed reasons, but the fact that no police were found to have acted deliberately, maliciously or in 'bad faith' probably played a part in this decision, in addition to the backdated changes made by the Victorian Parliament.

Mokbel's trial was therefore scheduled to go ahead as planned.

The audio of this decision was posted by the Supreme Court at: http://scv2.webcentral.com.au/sentences/ruling_on_mokbel_1mar12/main.htm

Review questions 1.2

1. Distinguish between summary and indictable offences.
2. Outline the courts that deal with:
   a. the most serious indictable offences
   b. serious indictable offences
   c. minor indictable offences
   d. indictable offences that can be heard summarily
   d. summary offences
3. Explain what it means to have an indictable offence heard summarily.
4. Outline the criteria for determining whether an indictable offence can be heard summarily.
5. Outline why an offender would choose to have an indictable offence heard summarily.
6. Explain the term 'burden of proof'.
7. Outline how the accused might demonstrate that the prosecution has not discharged the burden to show that they are guilty.
8. Using examples, explain how the burden of proof is sometimes reversed.
9. Explain what the standard of proof is in the Victorian criminal justice system and why it is important.
10. Explain the term 'presumption of innocence'.
11. Outline the relationship between the presumption of innocence, and the burden and standard of proof.
12. Explain how the presumption of innocence is upheld by our criminal justice system.
13. Distinguish between rules of evidence and rules of procedure.
14. Outline the need for rules of evidence and procedure.
15. Using examples, explain how rules of evidence ensure that parties are on equal footing and that neither party can gain an unfair advantage.
16. Using examples, explain how rules of procedure ensure that parties are on equal footing and that neither party can gain an unfair advantage.

Activity 1c: Evaluation of the ability of the criminal justice system to achieve the principles of justice

The following discussions of strengths and weaknesses have linked each of the key concepts in criminal justice back to the three principles of justice that were explained at the start of the chapter. Remember that the three principles of justice are fairness, equality, and access. Use the information in the table to respond to the following questions/ tasks.

Questions/tasks

1. **In relation to achieving the principles of justice, outline the strengths and weaknesses of each key concept in the Victorian criminal justice system.**
2. **Discuss the ability of the criminal justice system to achieve the principles of justice.**
3. **Referring to two key concepts in the Victorian criminal justice system, evaluate the ability of our criminal justice system to achieve the principles of justice.**

STRENGTHS	KEY CONCEPTS	WEAKNESSES
• Minor offences are not sent to a court with complex, lengthy and expensive procedures. The Magistrates' Court has simplified procedures and forms, and the filing fees for different actions are lower. This all helps reduce legal expenses for representation, and increase ***access*** to justice. • Court time and resources are allocated more effectively, which makes the system operate with increased efficiency and specialisation. Courts that employ more personnel dedicated to time-intensive tasks and with specialised knowledge can dedicate those to more serious cases, ensuring parties receive ***fairness*** and due process. • Giving the accused a chance to elect a summary hearing for a minor indictable offence allows them to make important choices regarding their ***access*** to justice. They can decide whether ***fairness*** would be best served by having a jury, or whether they would achieve more effective ***access*** by having the lower costs and time associated with the Magistrates' Court.	**Summary and indictable offences**	• Even hearings for summary offences have significant costs associated with them. It is often out-of-reach for the average person to ***access*** a proper defence for even a summary charge. Adverse costs awards, for instance, are when a losing party is orders to pay the costs of being taken to court by the prosecution or police. These are in addition to the costs involved with their own representation and defence. • For example, on 16 February 2012 a Brisbane case made headlines because a British man, Mark Littler, on a working visa, was unable to pay a $2.65 train fare – he claimed his electronic travel card had no money left on it because of a computer error made by the train company. He received a fine of $200, and challenged it in court. Littler's defence was dismissed by the judge and he was found guilty of fare evasion. In addition to the $200 fine he was ordered to pay $1425 in court costs. • Also, in 2010 a Victorian case made headlines when a man challenged a speeding ticket in the Magistrates' Court and won. He was awarded $18,000 in court costs and lawyer fees, payable by the government as they prosecuted him. • The accused will sometimes have the ability to elect a summary hearing for a minor indictable offence, but this decision may be made on the basis of costs and resources and not what would deliver the greatest degree of ***fairness***. • Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases ***access***. • For example, the average timeframe for resolution through the Magistrates' Court is 6-12 months; through the Supreme Court (Trial Division) it is 12-36 months. A January 2017 report by the Productivity Commission showed that, as at June 2016, more than 25 per cent of cases listed for the Magistrates' Court had already been waiting more than six months, and 8.7 per cent had been waiting more than a year.

Study tip

There is no one magic point at which fairness, equality and access are achieved. It is therefore better, with the evaluations, to think of the system being pulled a little further along the continuum with each principle, rule or procedure: sometimes becoming slightly more fair, and becoming slightly less fair in other cases; sometimes enhancing substantive equality, but allowing inequality in other cases; sometimes granting slightly greater access, but inhibiting access slightly in other cases.

• The party making the allegations must be prepared to explain what they are and prove their legitimacy before the defendant needs to prove reasons to find them not guilty. This protects the presumption of innocence, giving greater ***fairness***. • The prosecution will be discouraged from bringing unsubstantiated charges because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a prosecution is part of ***fairness***. • The individual is protected from the greater power of the state by the state having the greater burden. This achieves a closer ***equality*** between the parties, who are otherwise not on a level playing field in a criminal case. This then contributes to increased ***fairness***. For example, the prosecution must disclose all evidence to the accused at the committal hearing, then must lead that evidence first in trial. The state has greater resources for finding evidence than an individual does, but all this evidence (whether it helps the prosecution's case or hurts it) must be shown to the defence, before the defence launches its own case.	**The burden of proof**	• The state, representing the party that has already been injured, bears the burden of starting the trial and leading all of the evidence first. If they cannot do this adequately, the case is dismissed. The party that might be in the wrong, the defendant, is protected, which is ***unfair***. • The burden of proof does not do enough to ***equalise*** the parties in a criminal case. The state still has overwhelming resources compared with a private defendant, and the prosecutor is not using her or his own private money to fund investigations and court proceedings. The state will also never have suffered the disadvantage of being held in custody in the lead-up to trial. • In terms of evidence and legal arguments, ***equality*** is not achieved between the parties because the benefit is given to the defendant. The accused party can discover all evidence against them before they even start to decide what their defence is going to be.
• The defendant cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the ***fairness*** of the prosecution, because it would be ***unfair*** to prosecute someone if there was little to no evidence justifying it and they were sure to be found not guilty at the end. • It is much harder to prove a negative than a positive. This means it will be easier for the prosecution to find positive evidence of the accused person's guilt than it will be for the accused person to find evidence of their own *lack* of guilt. The high standard of proof works to ***equalise*** this situation. For example, if the accused was at the crime scene they may have been seen there; their car may have been captured on security camera; they may have left biological materials there; and so on. If the accused was *not* at the crime scene, unless they have positive evidence of an alibi, it is almost impossible for them to prove they weren't there, because a lack of evidence is not the same as evidence. • Criminal cases have serious consequences attached to them, and they are also subject to a very high standard of proof: beyond reasonable doubt. This is only ***fair***, because a person's freedom may be on the line. • The standard 'beyond reasonable doubt' asks judges and juries to use their common sense and subjective judgment. The law is not ***fair*** when applied too technically or rigidly, because context is important and technical application creates loopholes. Using judgment can therefore increase ***fairness***.	**The standard of proof**	• Juries may interpret the standard of proof differently in each case. This means there is not truly one consistent standard applied to all prosecutions and it is difficult to argue that the standard is strict and objective, and that every defendant is ***equal*** in the trial process. For example, judges under traditional common law have been prohibited from explaining to the jury what 'beyond reasonable doubt' means. This was changed in Victoria in the 2013 *Jury Directions Act*, which allowed judges to give a limited explanation. The suggested explanation is that an "unrealistic possibility" will not constitute reasonable doubt, though; this may not provide juries with much additional help. • Studies from the United Kingdom, New Zealand, Queensland and New South Wales all show consistently that jurors have difficulty with the concept of 'beyond reasonable doubt' and fail to apply it consistently or interpret it in the same way. This makes defendants in different cases ***unequal*** to each other in terms of how they are treated, and does not give them the same ***access*** to justice. • The standard 'beyond reasonable doubt' asks the judge or jury to consider subjective elements when reaching a verdict: what does that individual consider 'reasonable'? Individual biases can come into play, and what might be considered reasonable in relation to one defendant may not be the same in relation to another. This does not achieve ***fairness*** or ***equality***.
• The defendant will never be asked to defend themselves against something they have not been fully informed of and already proved guilty of. This knowledge and protection gives them greater ***access*** to justice. • The presumption of innocence is upheld by procedures such as bail. This protects human rights and ***fairness*** by not punishing someone before they have been found guilty. It also allows the defendant to prepare adequately for their case and earn money in the months or years before trial, which gives them greater ***access*** to justice and increases the ***equality*** between them and the prosecution. • The presumption of innocence is compromised by procedures such as holding an accused person on remand, but this allows the court to selectively hold defendants who pose a significant threat to the community, thus protecting innocent people. It also allows the court to ensure that defendants at significant risk of fleeing will face justice at trial. These may compromise the rights of the individual accused, but they are important for the overall ***fairness*** of the system and the ***access*** to justice of the community.	**The presumption of innocence**	• In reality, most defendants do not properly receive a presumption of innocence. Juries and members of the community tend to assume someone is guilty once they have been charged, because the police are given the benefit of the doubt. This is ***unfair***. For example, in 2014 the television show Lateline aired the results of a juror experiment in which the defendant was seated in three different places for each version of the trial: next to their lawyer, in the dock, or in a special glass-enclosed dock. 36 per cent of jurors delivered a guilty verdict when the defendant was seated next to their lawyer; 47 per cent did when they were in a dock; and 60 per cent did when the dock was enclosed. • In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. This decreases ***fairness*** because defendants can be brought back to trial even though they were presumed innocent the first time *and* found not guilty; it also decreases ***access*** to justice with the second trial because their finances will be depleted, and they are more likely to be assumed guilty if they are charged multiple times. • Procedures such as holding suspects on remand ***unfairly*** deny the defendant the right to the presumption of innocence, and jeopardises their ***access*** to justice because they are much less able to prepare for their defence and cannot earn money in the meantime. For example, some offences (such as murder) carry with them a presumption that bail will be refused, even though the defendant should receive the same presumption of innocence no matter what the charge. In 2017 the categories for which there is a presumption of refusing bail were also increased by the Victorian Parliament following the motor vehicle killings in Bourke Street mall in the CBD. • The presumption of innocence is compromised by procedures such as remand, but granting bail can mean that a suspect flees before trial and the community does not get the satisfaction of seeing justice be achieved. This is ***unfair*** in the bigger picture.

• The rules apply ***equally*** to both parties so one party is not advantaged at the expense of the other. • The strict rules for the admissibility and inadmissibility of evidence ensure a ***fair*** hearing because all evidence must be relevant, reliable and legally-obtained. Greater ***equality*** is achieved in the courtroom because evidence must have more probative than prejudicial value, so it is less likely to trigger prejudices against the defendant. • Cross-examination allows evidence to be tested to ensure that the burden and standard of proof are met and that the evidence is reliable. This gives the defendant greater ***access*** to justice, especially since they are entitled to examine every witness called by the prosecution. • Rules of procedure give both parties an ***equal*** opportunity to present their cases. • Rules of procedure make sure the trial flows more smoothly and allows parties to plan ahead, as they know what the stages and timetable will be. This gives the defendant greater ***access*** to justice because they can allocate their funds and resources. • Since evidence is heard in one continuous trial it is easier for the jury and parties to remember it, which should result in a ***fairer*** and more reliable verdict. It also means that the trial cannot be delayed indefinitely, which would cause increased stress for parties and possibly risk witnesses forgetting their evidence, both of which would decrease ***access*** to justice and fairness.	**Rules of evidence and procedure**	• Witnesses are only allowed to respond to the questions asked and cannot elaborate – this may result in some important evidence not being brought before the court, and reduce the ***fairness*** of the hearing. • Complex rules can be manipulated by experienced parties, and are confusing for inexperienced parties and the jury. Parties do not have ***equal access*** to justice when one understands the rules and the other does not. This is especially true when the prosecution is a repeat player who has been to court many times before, because the defendant often has not. In order to properly use the court rules and procedures the accused must hire legal representation, and this can costs hundreds of thousands of dollars that most people simply do not have. • Witnesses can be intimidated by the formal proceedings in court and, as a result, not be able to provide reliable or strong evidence. This may ***unfairly*** affect the outcome of the case. • Evidence is told witness-by-witness rather than in chronological order of what happened. This may make it more difficult for the jury to understand the course of events, and may make the verdict less reliable and therefore less ***fair***. • The trial cannot be paused midway through to collect more evidence. A party who is in the right may lose the case if they are not able to present all relevant evidence within the timetable set for trial – for instance, if important witnesses become unavailable, or if the prosecution does not uncover evidence until after they have 'rested' and handed control of the trial over to the defence. This can result in an ***unfair*** outcome where justice has not been achieved.

1.3 The rights of the accused

An accused person has a number of rights, including:

- The right to be tried without unreasonable delay
- The right to a fair hearing
- The right to trial by jury

Study tip

'The accused' is the person who is charged in a criminal case. Make sure that you do not confuse this terminology with 'the defendant', which can also be used for the party being sued in a civil case.

The Magna Carta

The **Magna Carta** of 1215 contains one of the earliest recordings of these rights. This was a contract between the English king and the leading lords of England, who were concerned about the way King John was using his sovereign powers against them. The clauses of the Magna Carta, or 'great charter', bound the king to particular conduct in relation to his citizens. In particular, clauses 39 and 40 describe rights that we still observe today.

Clause 39

No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals of by the law of the land.

Clause 40

To no one will we sell, to no one deny or delay right or justice.

King John signing the Magna Carta

These rights have been developed at common law, and through legislation and international treaties around the world in the 800 years since Magna Carta, which was the first time they had been written down. We now know clause 39 as the presumption of innocence, and clause 40 as the right to a fair trial.

Victorian Charter of Rights and Responsibilities 2006

Victoria is the only state in Australia to have enacted a ***Charter of Rights and Responsibilities*** ('the Victorian Charter'). It was passed by the Parliament of Victoria, received royal assent on 25 July 2006, and came into force on 1 January 2007. The Victorian Charter protects a range of rights of the accused in the criminal justice system.

For instance:

Section 21 – Right to liberty and security of the person

(5) A person who is arrested or detained on a criminal charge –

a. must be promptly brought before a court: and
b. has the right to be brought to trial without unreasonable delay; and
c. must be released if paragraph (a) or (b) is not complied with.

Section 24 – Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The right to be tried without unreasonable delay

Criminal trials should be held as quickly as possible after the events that give rise to the charges. There are a number of reasons why this is important in protecting the rights of the accused:

- The more time elapses between the alleged crime and the trial, the less reliable witness accounts become. In the adversarial process, there is emphasis on oral testimony of witnesses in court, to prove a crime beyond reasonable doubt. If a trial is delayed, witnesses' memories may become less clear, and there may be a greater risk that the accused will be convicted on the basis of witness testimony based on unreliable memories.
- Awaiting trial is a period of great uncertainty for the accused, particularly if there is a prospect of a custodial sentence should the trial result in a conviction. Avoiding lengthy delays in bringing a matter to trial reduces the uncertainty that the accused person faces, and may also minimise legal costs and other expenses.
- People accused of the most serious indictable offences are generally held on remand to await their trial. A delayed trial may result in the accused being held in custody for longer.

These principles are summarised in the legal aphorism, 'justice delayed is justice denied'. This saying captures the idea that, even when legal process delivers a just result, if that result has not been achieved in a timely manner it is the same as having no result at all.

Committal hearings minimise delays

The committal hearing is an important procedure to ensure that the time between charging and trial is minimised. All criminal matters in Victoria commence with a committal hearing in the Magistrates' Court, usually between three and six months after charging. At this hearing, the magistrate hears the prosecution's evidence and decides whether the evidence is sufficient to support a conviction by a jury at trial. If weak elements of the prosecution's case are eliminated at committal, this can reduce the amount of time needed to prepare and conduct the trial.

Case management to reduce the likelihood of delay

The right of the accused to be tried without unreasonable delay places an obligation on magistrates and judges in the criminal courts to ensure that proceedings are being conducted in a timely fashion. Between the time when charges are filed against an accused to the date of their trial, there may be a number of proceedings before the court, including bail hearings, **mentions**, committal hearings and pre-trial directions hearings. By timetabling dates for these hearings, the courts can ensure that each procedure takes place as quickly as possible. The court can ask either party to give reasons for any delays that occur, to ensure that they are reasonable.

The Supreme Court conducts trials for the most serious indictable offences. All criminal cases are listed for a **directions hearing** within 24 hours of the completion of the committal hearing in the Magistrates' Court. At this post-committal directions hearing, counsel for the prosecution and the defence are expected to advise the court of the anticipated issues at the trial, an estimate for the hearing time of the trial, and identify any problems that might prevent a trial proceeding quickly. The court will set a trial date, or arrange for case management if necessary: *Supreme Court of Victoria Practice Note SC CR1* 30 January 2017. The primary purpose of the post-committal directions hearing is to minimise any potential delay in the commencement of the trial.

Study tip

Practice Notes are issued by the courts to guide the lawyers who appear in cases. Practice Notes provide information about particular aspects of each court's practice, procedure and organisation. Lawyers are expected to be familiar with their provisions and act in accordance with them.

Activity 1d: Any more delays?

Read the extract from the *Supreme Court of Victoria Practice Note SC CR1*. Choose three of the matters listed in 4.5 and explain how they might contribute to a delay in the trial of the accused.

Supreme Court of Victoria
Practice Note SC CR1
Case Management Procedure for Criminal Trials

4.5 Supplementary to the matters contained in s181(2) of the Criminal Procedure Act 2009, counsel is expected to be in a position to address the Court on the following matters:

1. Whether the accused intends to plead guilty;
2. Whether the prosecution and the accused intend to enter into negotiations in relation to the plea of the accused;
3. The anticipated issues at the trial;
4. The admissions likely to be sought and/or offered;
5. Any potential issues that might warrant one or more early pre-trial hearings, and if so –
   (a) an estimate of the hearing time of those issues;
   (b) appropriate directions for the disposition of those pre-trial issues.
6. The identification of any other pre-trial issues and the appropriate directions for the disposal of those pre-trial issues;
7. An estimate of the hearing time of the trial;
8. Trial date problems;
9. Any potential problems that might prevent a trial proceeding expeditiously;
10. Any potential legal representation and funding problems;
11. The estimated number and availability of witnesses for trial and whether any of the witnesses are interstate or overseas;
12. Whether there are any special requirements or facilities needed for witnesses;
13. Any issues as to obtaining psychiatric reports as to fitness to stand trial or mental impairment;
14. Any other potential expert witness issues;
15. Any subpoena issues, such as whether the defence intends to subpoena substantial police or other documentation;
16. Any security issues;
17. The possibility of an application for non-publication or like orders by the prosecution or defence, or both;
18. Whether a request should be made to the Magistrates' Court for immediate preparation of the whole or any part of the transcript of the committal hearing;
19. Whether extensive pre-trial management is desirable;
20. Whether a directions hearings timetable is desirable.

Bail and remand

The question of what is an unreasonable delay frequently arises before the courts in bail applications. Section 4 of the *Bail Act 1977* (Vic) provides that courts shall refuse bail to persons accused of the most serious indictable offences of treason, murder, and trafficking or importing commercial quantities of drugs, unless the court is satisfied that exceptional circumstances exist which justify the grant of bail.

A factor that might be considered exceptional by a court considering a bail application is an unreasonable delay in the commencement of a trial. In cases where the accused is able to demonstrate that the delay amounts to an exceptional circumstance, the court may order the accused to be released on bail instead of continuing to be held on remand.

Activity 1e: Bail and delays

In the case of *DPP v Tang and others* [1995] VSC 220, the accused were arrested, charged with drug trafficking and held on remand. Their committal hearings commenced six months later, and continued for three months, after which they were ordered to stand trial. Their trial was unlikely to commence before a further delay of eight months. The court decided that a delay of 17 months between being charged and the trial commencing was a normal delay in Victoria at that time, and so did not amount to an exceptional circumstance to justify the release of the accused on bail. Justice Beach stated that an accused person must establish that there is some unusual or uncommon circumstance surrounding their case before a court is justified in releasing them on bail.

One case where the delay between charge and trial was found to be unreasonable was in the case of Tony Mokbel. Mokbel was remanded in custody on 1 October 2001, and faced charges of importing cocaine and trafficking drugs in commercial quantities. His committal hearing did not proceed on the date scheduled, and was delayed indefinitely due to the witnesses being investigated for other offences.

In considering a bail application made by Mokbel in September 2002, 11 months after his arrest, Justice Kellet of the Victorian Supreme Court said, "The community will not tolerate the indefinite detention of its citizens with no prospect of charges being tried within a reasonable period": *Mokbel v DPP (No 3)* [2002] VSC 393. Justice Kellet found that there was little prospect that the trial would commence within three years of Mokbel being charged. The judge decided that "the situation facing the applicant cannot be allowed to exist indefinitely", and therefore released Mokbel from custody on bail, under strict conditions. These conditions included reporting twice daily to the Brunswick police station.

Mokbel famously skipped bail before the conclusion of his trial, and was re-arrested 15 months later in Athens.

Questions/ tasks

1. **What were the accused charged with in *DPP v Tang and others*?**
2. **When did their committal hearings commence, and how long did they last?**
3. **When was the trial of the accused in *DPP v Tang and others* expected to commence?**
4. **Outline what the court decided in relation to the delay in *DPP v Tang and others*.**
5. **What was Tony Mokbel charged with in 2001?**
6. **Why was Mokbel's committal hearing delayed?**
7. **Explain the court's decision in relation to the delay in *Mokbel v DPP (No 3)*.**

What is a reasonable period of delay?

The length of a "reasonable period" of delay is considered on a case-by-case basis. This was decided in *Barbaro v DPP (Cth) & Anor* [2009] VSCA 26.

Factors that the court may consider include the complexity of the case against the accused, the amount of evidence to be collected by the prosecutors, the number of witnesses to be called to give evidence, and the risk that the accused will not return to trial if they are released on bail. In Barbaro's case, the accused faced a two-year delay between first being charged and the commencement of his trial. The court found that Barbaro was an unacceptable flight risk, and that the risk could not be alleviated by the court imposing bail conditions.

The delay of two years between charge and trial was held to be not sufficiently unreasonable to justify releasing Barbaro on jail and running the risk that he would flee the jurisdiction without returning for his trial.

The right to a fair hearing

The elements of a fair hearing include:

- A competent and independent arbiter is in charge of the hearing
- The hearing is conducted impartially
- The accused has adequate legal representation
- The accused has an accurate understanding of the proceedings

Competent and independent arbiter

The arbiter is the judicial officer – a judge or magistrate – who oversees the hearing. Although judicial officers are appointed by the **attorney-general**, acting on behalf of the government, they should act independently of government. In order to ensure that judicial officers act independently in the discharge of their judicial duties, their appointments are permanent, so their office cannot be terminated until they reach retirement age.

Judicial officers must also be confident in their administration of justice, so that parties to court proceedings have confidence that their criminal matter has been determined by an arbiter who understands the law and criminal procedure. Judicial officers are therefore generally drawn from members of the Victorian Bar. They have usually practised

as barristers for many years, and have developed expertise in criminal procedure and criminal law by representing clients and arguing their cases before the judge.

Impartial hearing

The public must have confidence in the *actual impartiality* of the judicial officer presiding over the trial. This means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. This means allowing each party equal time to present their case and not making statements from the bench that might prejudice one side over another. The rules of evidence and procedure are designed to ensure that a hearing is conducted fairly, and the judge must adjudicate these rules fairly and impartially to determine what evidence is admissible.

Equally as important as avoiding actual bias is the principle that judicial officer must avoid any perception of potential bias. In the case of *L A L v The Queen* [2011] VSCA 111, the Victorian Court of Appeal considered the case of a County Court judge who presided over the trial of a person convicted of raping a 15-year-old girl. The trial judge had recently experienced a crime against her own child who was similar in age, with similar circumstances to the matter being tried. The Court of Appeal held that a fair minded observer would consider that the similarity in the crimes and victims might have prevented the trial judge from "bringing an impartial mind to the conduct of the trial." The Court of Appeal decided that the judge should have disqualified herself from presiding over the rape trial. The Court of Appeal ordered that the accused by re-tried before a different judge.

Adequate legal representation

The right to a fair hearing includes the right to adequate legal representation. This means that an accused person has a qualified legal representative to argue their case in court. In the *Charter of Rights and Responsibilities 2006*, the right to legal representation is outlined as a separate provision:

Section 25 – Rights in criminal proceedings

(1) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

(f) to have legal aid provided if the interests of justice require it.

The extent of this right to legal representation was tested in 2013, as can be seen in box 1.7.

Box 1.8The extent of the right to legal representation

The extent of the right to legal representation was tested when, in 2013, Victoria Legal Aid issued practice guidelines that funding would be provided for an instructing solicitor to represent the accused only for two half-days of a trial.

In the case of *R v Chaouk* [2013] VSC 48, the accused submitted that having funding for an instructing solicitor for only two half-days of his trial for attempted murder and recklessly endangering life would be unfair, and in breach of the Charter. In the absence of forensic evidence, the prosecutor was proposing to call a number of witnesses to give oral testimony in court. While the accused would be represented only by his counsel, the prosecutor would have access to a full-time instructing solicitor and the police informant. Justice Lasry of the Supreme Court decided:

> *Such circumstances, in my opinion, substantially increase the likelihood of errors being made or important matters being overlooked by counsel – a risk that will not confront the prosecution. I am therefore of the view that in the circumstances as they are at present, the trial of the accused is likely to be unfair in the sense that it carries a risk of improper conviction.*

Justice Lasry adjourned the trial, and ordered that the trial not commence until the accused was represented by both counsel and an instructing solicitor on a daily basis.

This decision led Victoria Legal Aid to alter its guidelines concerning the provision of legal representation, so that there would be adequate funding for the accused to have a second lawyer at trial.

Accurate understanding of proceedings

Other rights that ensure a fair hearing include the free assistance of an interpreter if the accused is not fluent in English, and free assistance and access to specialised communication tools and technology if the accused has difficulties in communication. This ensures that the accused understands the proceedings and is enabled to participate in her or his own defence.

The right to trial by jury

Trial by jury is an important principle to protect the rights of the accused in the criminal justice system. A jury is used for trials of indictable offences, where the accused has pleaded not guilty. A criminal jury is made up of 12 members of the community, randomly selected from the electoral roll. The jury's function is to listen to the evidence presented against the accused at trial, follow the directions of the trial judge on the relevant law, determine the relevant facts, and reach a verdict of guilty beyond reasonable doubt, or not guilty.

In the financial year 2014-2015, there were 474 jury trials in Victoria, an increase of 4 per cent from the previous year.

Clause 39 of the Magna Carta is the earliest legislative protection of the right to trial by jury in the common law system:

> *"No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals of by the law of the land."*

Alternative to trial by jury – trial by judge alone

The alternative to trial by jury is trial by judge alone. There are a number of reasons why trial by jury is preferable to protect the rights of the accused:

- Juries spread the burden of decision-making. Instead of one person – the judge – being responsible for findings of fact, in a jury trial the evidence must be assessed as being beyond reasonable doubt by a group of people cooperating to reach a verdict. Furthermore, the verdict must be unanimous for the most serious indictable offences, or by majority for less serious indictable offences. The jury's determination of the facts and verdict and verdict therefore could be more likely to be correct, providing greater protection of the rights of the accused.
- The random selection of jurors ensures that the accused is tried by their peers. This ensures that the verdict accords with community values, and not the values of the government or of a judge who is appointed by the government.
- Juries bring impartiality to the findings of fact. As they are randomly selected, they bring a fresh and unbiased perspective to the consideration of facts and legal issues which may not be available to a judge who has heard many similar cases. Members of the jury pool who may be connected with the case may be excused, and the parties may challenge other potential jurors, providing further safeguards that the selected jurors will judge the facts of a case without preconceptions that impact their objectivity.
- The jury limits the role of the state in the accused's trial. The charges and prosecution are brought by the police and the Office of Public Prosecutions, which are both part of the **Executive branch** of government. The jury, being drawn randomly from the community, provides an objective assessment of the evidence collected and presented against the accused independent of the state.

In Victoria, s210 of the *Criminal Procedure Act 2009* provides that the trial for an indictable offence commences when the accused formally pleads not guilty in the presence of the jury panel. There is no alternative procedure for the trial of an indictable offence. Unlike the other mainland Australian states, Victoria has made no legislative provision for a trial to be held before judge alone.

Trials in other states of Australia

New South Wales, Queensland, South Australia, Western Australia and the ACT all have legislative provisions allowing an accused person the right to apply for a trial by judge alone. In New South Wales, such an application will be granted by the court where it considers trial by judge alone to be necessary in the interests of justice. The accused may have their case heard by a panel of judges, if the issues are particularly complex.

The reasons why an accused may choose against having a jury trial include:

- To avoid the risk of bias arising from extended media coverage which may prejudice potential jurors. This was one of the reasons why barrister Lloyd Rayney's application for trial by judge alone was granted in Western Australia in 2011. Rayney was subsequently acquitted for the murder of his wife by a judge of the Northern Territory, who was brought to Perth especially to sit on the trial.
- Because they cannot afford a jury trial. For instance, in New South Wales, Simon Gittany was tried in 2013 for the murder of his girlfriend by judge alone on the basis of financial hardship. Gittany was not eligible for Legal Aid. He had depleted the funds available to him for legal fees, and argued successfully that a trial by judge alone would be less expensive than a jury trial as it would be concluded two weeks earlier.
- Because they fear jury bias. Although, the New South Wales Court of Criminal Appeal has established precedent that it is *not* in the interests of justice to allow accused Muslim persons to be tried by judge alone on the basis of potential jury bias against their faith.

- The most compelling reason for an accused to seek a trial by judge alone may be that they have a greater likelihood of being acquitted. Research from the NSW Bureau of Crime and Statistics showed that, between 1993 and 2011 in New South Wales, defendants were acquitted of all charges in 55 per cent of judge-alone trials compared with 29 per cent of jury trials.

The idea that a person accused of a crime has particular rights is fundamental to our criminal justice system. These rights give practical effect to the principle of 'innocent until proven guilty' – they preserve the position of the accused person until she or he has been convicted beyond reasonable doubt.

Constitutional protection of the right to trial by jury

One of the five express rights contained in the Commonwealth Constitution is the right to trial by jury for Commonwealth offences.

> **Section 80 – Trial by jury**
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The key phrase in s80 is "trial on indictment." Remember that criminal offences are generally classed in two categories. A 'summary offence' is a less serious criminal offence. It may be tried in a briefer hearing, before a judge or magistrate sitting alone. An 'indictable offence' is a more serious criminal offence. It is tried before a judge and jury in a higher court.

The s80 right to trial by jury extends to indictable offences only, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences. Section 4G of the *Crimes Act 1914* (Cth) provides that offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears – but the Commonwealth could change this and reduce the number of offences that are regarded as indictable. Other examples of Commonwealth indictable offences include drug importation, customs offences, tax fraud and Centrelink fraud, and terrorism offences.

Commonwealth offences are tried in the state courts, in the jurisdiction where the offence occurred. So, for instance, a person who is accused of committing a terrorism offence in Victoria contrary to the anti-terrorism offences of the Commonwealth *Criminal Code Act 1995* would be tried in the Victorian Supreme Court. Because the offence is under federal law, though, the s80 rule regarding the right to a jury would apply.

Box 1.9 Commonwealth indictable offences may only be tried before a jury

In the case of *Brown v The Queen* [1986] HCA 11, the High Court interpreted s80 to mean that Commonwealth indictable offences may *only* be tried before a jury. In other words, the accused cannot elect to be tried before a judge alone, even if the accused is to be tried in a state that provides for judge-only trials in their state criminal procedure. Then-Chief Justice Gibbs in his judgment in *Brown* stated that:

> *[T]rial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached. It fosters the ideal of equality in a democratic community[.]*

The High Court recently affirmed this precedent in the case of *Alqudsi v The Queen* [2016] HCA 24. Alqudsi was charged with seven offences under Commonwealth anti-terrorism legislation for providing assistance to Australians fighting with jihadi groups in Syria. Alqudsi was to be tried in New South Wales, and sought to have his trial before a judge sitting alone. The High Court refused Aqudsi's application to be tried by a judge under NSW criminal procedure, and he subsequently faced a two-week trial by jury. After deliberating for half a day, the jury convicted him of all charges.

The right to the presumption of innocence

In addition to the rights described above, s25 of the Victorian Charter **codifies** what has always been an important principle at common law: the right to the presumption of innocence. This means that the accused does not have to prove their defence at trial. The burden is on the prosecution to prove that the accused is guilty beyond reasonable doubt.

Activity 1f: What's in the fridge?

Momcilovic v The Queen [2011] HCA 34

The High Court case of *Momcilovic v The Queen* raised the issue of the presumption of innocence in relation to Victoria's drug trafficking laws. The accused was charged with possession of a drug of dependence, methylamphetamine, in the refrigerator of the apartment she owned. Under the *Drugs, Poisons and Controlled Substances Act 1981* ('the Drugs Act'), it is up to the owner of the premises where drugs are found to disprove that the drugs were in their possession. In effect, the Drugs Act reverses the onus of proof. Momcilovic claimed that the drugs belonged to her boyfriend and that he had stored them without her knowledge. 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 convicted of possession.

On appeal to the High Court, Momcilovic argued that the Drugs Act breached the right to the presumption of innocence contained in the Charter. The High Court agreed that the Drugs Act imposed a legal burden on the accused person to disprove the offence on the balance of probabilities, and that this was inconsistent with the right to the presumption of innocence contained in the Victorian Charter, but this did not mean the law was invalid. Momcilovic's conviction was ultimately quashed on other grounds. The result is that it is within the power of the Victorian Parliament to pass legislation that reverses the onus of proof, contrary to the Charter right to the presumption of innocence. Parliament clearly considers that the individual human right to the presumption of innocence is secondary in the public interest to the successful prosecution of drug offences. Reversing the onus of proof for such offences is deemed necessary to ensure more effective law enforcement.

Questions/ tasks

1. **In *Momcilovic v The Queen*, what was the accused charged with?**
2. **In what way does the *Drugs, Poisons and Controlled Substances Act 1981* reverse the burden of proof?**
3. **Who did Momcilovic claim the drugs found in her apartment belong to?**
4. **Explain the finding of the High Court in *Momcilovic v The Queen*.**
5. **Outline the impact of *Momcilovic v The Queen* on the power of the Victorian Parliament to pass legislation that reverses the onus of proof.**
6. **Explain why Victorian Parliament reverses the onus of proof in relation to drug trafficking laws.**

Review questions 1.3

1. Identify the two rights described in clauses 39 and 40 of the Magna Carta that we still observe today.
2. Identify the rights described in s21(5) and s24 of the Charter of Rights and Responsibilities Act.
3. Outline the reasons why it is important to hold criminal trials as quickly as possible to protect the rights of the accused.
4. Explain how the following procedures may be used to reduce the likelihood of delays between charge and trial:
   - Committal hearings
   - Case management
   - Bail and remand
5. Using examples, outline what is a reasonable period of delay between charge and trial.
6. Identify the factors that a court may consider when deciding what is a reasonable period of delay.

7. Identify the elements of a fair hearing.
8. Explain how our legal system ensures that judicial officers are competent and independent arbiters.
9. Explain what is meant by the term 'impartial hearing'.
10. Explain what it means to have adequate legal representation.
11. Outline the rights that an accused is entitled to that can ensure that she or he has an accurate understanding of proceedings.
12. Explain the importance of trial by jury in protecting the rights of the accused in the criminal justice system.
13. In your own words, outline what s80 of the Australian Constitution states in regard to the right to trial by jury.
14. Explain which Commonwealth offences are indictable offences.
15. In your own words, explain the right to the presumption of innocence.

Activity 1g: Evaluation of the rights of the accused

The following discussions of strengths and weaknesses have linked each of the rights of the accused back to the three principles of justice that were explained at the start of the chapter. Remember that the three principles of justice are fairness, equality, and access. Use the information in the table to respond to the following questions/tasks.

Questions/tasks

1. **Explain the arguments in support and the arguments against the right to be tried without unreasonable delay.**
2. **Outline the strengths and weaknesses in relation to the right to a fair hearing.**
3. **Outline the strengths and weaknesses in relation to the right to trial by jury.**
4. **Discuss the ability of the rights of the accused to achieve the principles of justice.**
5. **Referring to two rights, evaluate the ability of the rights of the accused to achieve the principles of justice.**

STRENGTHS	KEY CONCEPTS	WEAKNESSES
• The courts oversee case management to ensure that unreasonable delays in proceedings do not occur • Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude. This improves ***access*** for people accused of a criminal offence. • The legal costs to the accused are likely to increase the longer a criminal proceeding continues. Reducing delays enhances ***access*** for an accused person by reducing the cost of their defence. • Evidence is more likely to be reliable if a criminal trial is held quickly after the incident. This ensures ***fairness*** in the hearing.	**The right to be tried without unreasonable delay**	• However, if cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. This can be a weakness, which impacts the ***fairness*** of a trial for the accused. If an accused has not adequately prepared their defence, they may be susceptible to pleading guilty even though they have an arguable defence, which may lead to an unjust outcome. • For example, 76 per cent of criminal cases resolved in guilty pleas in 2013-2014 in Victoria. This means that, for most accused people, important decisions about the contestability of the case against them are being made in the pre-trial process. There is a risk that, if cases are being hurried to trial to avoid delay, an accused person is not given appropriate opportunity to consider the strength of their case and the likelihood of them being able to successfully defend themselves.
• Courts are constituted to ensure that judges are expert and impartial. This ensures ***fairness*** in criminal proceedings for all people. • The rules of evidence and procedure ensure that only evidence that is relevant is introduced in a criminal trial. For example, evidence of prior convictions is not admissible as evidence of the offence. This contributes to ***fairness*** by ensuring that the accused is tried impartially. • The accused may have a legal representative to argue their case, to ensure that their defence is presented in the best light. This ensures ***accessibility***. • Court facilities support the accused to understand the case against them, by providing interpreting and disability support services. This ensures they are treated ***equally*** in criminal procedures.	**The right to a fair hearing**	• The high cost of legal representation may reduce an accused person's ***access*** to the legal system. If an accused person does not qualify for legal aid, they may make decisions to confine the scope of their defence, or plead guilty in order to minimise costs. • A person with greater access to resources to pay for expert legal defence may have a better outcome than a person whose resources are constrained. This may lead to a disparity in the outcomes achieved by an accused with unlimited resources, compared with an accused who suffers socio-economic disadvantage, which undermines fairness and equality in the justice system. • The right to a fair hearing may not cover all the pre-trial procedures that an accused person may face in the criminal justice system, from arrest and formal interview through to pre-trial procedures. If a formal police interview is conducted unfairly, and the accused makes admissions, it is up to the accused to raise this as an issue at trial before the judge. In another example, pre-trial negotiations over the seriousness of charges and recommended sanctions are conducted between the prosecutors and the accused's legal representatives. There are no formal procedures to ensure that these negotiations are conducted fairly.
• Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures ***fairness*** in the adjudication of a criminal trial.	**The right to trial by jury**	• For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective ***access*** for an accused person to exercise sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions. For example, a person accused of a terrorism offence under Commonwealth legislation may be concerned that it is not possible for them to obtain a fair trial before an unbiased jury due to extensive media coverage. Their only alternative to a trial before a jury is to plead guilty. Some examples of cases which have been tried before judge alone in New South Wales include a murder and a rape which were extensively reported by the news media, and where the accused feared they would not get a fair trial before a jury. • Juries do not have to give reasons for their verdicts, so there is no way to ensure that their decision-making is free from bias. If juries do not act impartially in reaching a verdict, this reduces the ***fairness*** of the criminal justice system.

1.4 The rights of victims

The *Victims Charter Act 2006* (Vic) outlines many of the rights accorded to victims of crime in the Victorian criminal justice system. The objects of the Act are to recognise the impact of crime on victims and their families, to recognise that all persons affected by crime should be treated with respect, and to reduce the likelihood that victims of crime will suffer secondary victimisation by the criminal justice system.

Study tip

It is important to ensure that you use appropriate legal terminology when referring to victims. A victim is not a party to criminal legal proceedings. They may be called as a witness by the prosecution. Therefore, do not refer to the victim as a party, or as the accused, or as the plaintiff. If the accused is acquitted, the victim has not 'lost' the case.

Vulnerable witnesses

Criminal trials in Victoria follow the adversary system of trial. The governing principle of this system of trial is that opposing parties vigorously contest the evidence introduced by the prosecution. The court relies on oral testimony from witnesses, in order that the opposing parties can test the reliability and credibility of their evidence. A key component of this contest is cross-examination. Witnesses who give evidence for the prosecution can expect to be vigorously questioned by counsel for the defence, who will seek to place sufficient doubt on the witness's testimony that the accused cannot be found guilty beyond reasonable doubt.

While this process has the objective of ensuring that no accused person is convicted improperly, cross-examination can have a brutal impact on victims of crime who act as witnesses for the prosecution. This may particularly be the case for victims of sexual offences, family violence and for minors. In addition to the unfamiliar formality of court hearings, there are strict rules of evidence and procedure governing oral testimony which witnesses may find inhibits their ability to give evidence. The requirement to recount evidence that involves personal and intimate details, in front of the accused, and in an atmosphere that appears hostile and unsympathetic, can be deeply distressing.

Victorian legislation therefore provides a range of procedures for witnesses to give evidence in such trials.

Legislation providing procedures for witnesses to give evidence

For sexual offence and family violence charges, Division 4 of the *Criminal Procedure Act 2009* provides that the court *may* make a number of alternative arrangements for witnesses to give evidence, including:

- Giving evidence to the court via closed circuit television from another venue.
- Using screens to obstruct the direct line of vision between the accused and the witness.
- Allowing the witness to have a support person beside them while giving evidence.

If the witness is the complainant in a sexual offence charge, the court *must* make these arrangements for their testimony, unless the complainant is aware of these rights and waives them. This applies also if the complainant is under the age of 18 at the time the proceeding commenced, or if they have a cognitive impairment.

Other arrangements that the court may make to enable witnesses to give evidence in sexual offence and family violence trials include:

- Restricting the number of people in court while the witness gives evidence.
- Requiring lawyers not to wear robes, and to sit down while questioning the witness.

The court may declare that any witness in a sexual assault or family violence case is a protected witness. A protected witness must not be cross-examined by the accused in person. If the accused does not have legal representation, they are offered the chance to obtain it, or it must be provided by Victoria Legal Aid for the purposes of cross-examination of a protected witness.

Section 41 of the *Evidence Act 2008* gives courts the power to disallow improper questioning of a vulnerable witness. The *Evidence Act* defines people under the age of 18, and people who have a cognitive impairment, as vulnerable. However, the court may consider other factors that may contribute to a witness' vulnerability, including age, education, ethnic and cultural background, gender, language skills, disabilities, and the context of the question.

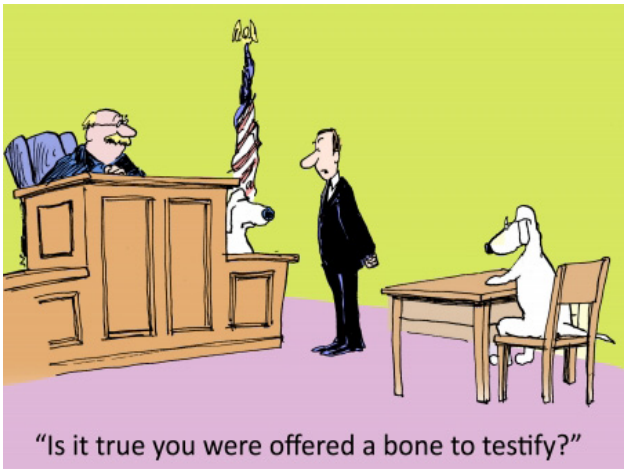
The *Evidence Act* places an obligation on the court: it must disallow an improper question, or inform the witness not to answer it, unless the court is satisfied that the question is necessary.

The Act defines 'improper questions' as questions that are:

- Misleading or confusing.
- Annoying, intimidating, offensive, humiliating or repetitive.
- Put to the witness in a manner that is insulting.
- Based on stereotype.

Information on proceedings

In the criminal justice system, the victim of a crime is not a party to the criminal proceedings. Our criminal justice system regards a crime against another person to be a crime against the state. For this reason, criminal investigations are conducted by the police, and criminal prosecutions are conducted by the Office of Public Prosecutions ('OPP'). Both the police force and the OPP are administered by the executive branch of government. This approach ensures that the victim of a crime does not bear the burden of proving the offence. The role of the state in prosecuting deters victims of crime from seeking their own form of retributive justice against the alleged offender. Centralising the skills of investigation and prosecution ensures that law enforcement is competent and effective.



However, there is a risk that by being relegated to the position of a witness in the criminal justice process, the victim of a crime may feel marginalised. For this reason, the *Victims Charter Act 2006* places obligations on prosecutors to provide relevant information to victims. Prosecutors must give the victim timely information regarding:

- Applications for bail, their outcome and any conditions imposed.
- Offences with which the accused is charged.
- Reasons why the accused was not charged with an offence.
- The hearing of the charges.
- The outcome of criminal proceedings, including the sentence.
- Any appeals, and their outcome.

During court proceedings, the prosecutor is required to minimise unnecessary contact between the victim and the accused, and protect the accused from intimidation by the accused and people connected with the accused.

Likely release date

Study tip

An accused who is released from custody is likely to continue to report to the Parole Board, and be subject to continued restrictions on employment and residence.

If the accused is convicted of a criminal offence, they may be sentenced to a term of imprisonment. Section 17 of the *Victims Charter Act* enables the victim to be included on the register for a criminal act of violence. The victim may then be provided with information concerning the offender such as the length of their sentence and the likely date of their release from imprisonment. A person included on the victims register may make a submission to the Adult Parole Board about the effect of the offender's potential release on them as the victim of the offender's crime. The Board must consider this submission when determining whether to place the offender on parole.

Victorian Law Reform Commission review

In August 2016, the Victorian Law Reform Commission ('VLRC') tabled in Parliament its report on the Role of Victims of Crime in the Criminal Trial Process. The VLRC supported the current legal position; that victims are participants in the criminal trial process, but are not parties to proceedings. The VLRC made a number of recommendations for legislative amendments to protect and enhance the role of victims in criminal trials, including to provide a definition of protected victims in the *Criminal Procedure Act 2006* to enable fair witness testimony.

Review questions 1.4

1. Identify the legislation that outlines many of the rights accorded to victims of crime in the Victorian criminal justice system.
2. Outline the objects of this Act.
3. Explain why providing evidence as a witness can be particularly onerous on a victim.
4. Outline the ways in which Victorian legislation provides procedures for witnesses to give evidence in trials.
5. Explain why our criminal justice system does not regard the victim of a crime as a party to criminal proceedings.
6. Outline the risk in relegating the victim to the position of a witness in the criminal justice process.
7. Outline the timely information that prosecutors must give the victim according to the *Victims Charter Act 2006*.
8. Explain what s17 of the *Victims Charter Act* enables the victim to do.
9. Describe the recommendations of the Victorian Law Reform Commission's report on the Role of Victims of Crime in the Criminal Trial Process.

Activity 1h: Evaluation of the rights of victims

The following discussions of strengths and weaknesses have linked the rights of victims back to the three principles of justice that were explained at the start of the chapter. Remember that the three principles of justice are fairness, equality, and access. Use the information in the table to respond to the following questions/ tasks.

Questions/tasks

1. **Explain the arguments in support and the arguments against the right to give evidence as a vulnerable witness.**
2. **Outline the strengths and weaknesses in relation to the right to be informed about the proceedings and the likely release date of the accused.**
3. **Evaluate the ability of the rights of victims to achieve the principles of justice.**

STRENGTHS	KEY CONCEPTS	WEAKNESSES
• The requirement of our criminal justice system to vigorously test the testimony of a witness can be onerous on a victim. Court processes and facilities support victims who must give evidence in criminal proceedings, and help to protect them from being re-traumatised by this process. By recognising the special needs of witnesses, court procedures ensure that they are treated ***equally*** in a criminal trial, and that the rights of the accused do not predominate. • Accommodating the special needs of witnesses such as children or those involved in an alleged sexual offence ensures that such people have appropriate ***access*** to give evidence in court. It ensures they are treated ***fairly*** by legal procedures such as cross-examination.	**The right to give evidence as a vulnerable witness**	• Providing some witnesses with different conditions in which to give evidence may prejudice a jury in their assessment of the credibility of all witness testimony at trial. A jury may be biased by sympathy in favour of accepting the evidence of a vulnerable witness or they may not believe a witness they have not seen in the courtroom in person. Conversely, a jury may be biased against accepting the oral testimony of other witnesses at trial who gave evidence by conventional cross-examination. These circumstances may impact the *fairness* of a trial unless carefully managed by the presiding judge
• The participation of victims in criminal trials ensures that the criminal justice system does not become solely focused on the rights of the accused. The recognition that victims are interested and concerned in every stage of criminal proceedings, until the conclusion of an offender's sanction, ensures ***equal*** treatment for victims in the criminal justice process. • The obligation to inform victims about proceedings ensures that the prosecution considers the role of victims in a criminal trial. This enhances ***access*** for victims to criminal legal procedures.	**The right to be informed about the proceedings and the likely release date of the accused**	• This right may unfairly intrude on the convicted person's right to privacy after they have served the sanction imposed by the court. This may compromise their right to *equal* treatment under the law.

"Acquitted, acquitted, acquitted. Very impressive."

Multiple choice review questions

1. The principles of justice include:
a) The burden of proof, the standard of proof and the presumption of innocence
b) Fines, imprisonment and community correction orders
c) Summary offences, indictable offences and indictable offences heard summarily
d) Fairness, equality and access

2. An indictable offence is
a) A more serious crime
b) A minor, or a less serious crime
c) A serious criminal offence that can be heard in the Magistrates' Court without a jury
d) A person who commits a crime

3. Which of the following statements is true?
a) Burden of proof refers to the amount of evidence that a party must present to prove a case
b) Standard of proof refers to the party that has the responsibility for proving a case in a Victorian court
c) Burden of proof refers to who has the responsibility of proving a case in court
d) Burden of proof rests on the accused in a criminal hearing or trial in Victoria

4. It is generally accepted that the high standard of proof in criminal trials
a) Reverses the burden of proof
b) Lessens the risk of wrongful convictions
c) Provides a model instruction for trial judges to give to juries
d) Is the responsibility to demonstrate proof that the defendant is likely to be guilty

5. Because of the presumption of innocence
a) A guilty verdict can only be given if the prosecution brings evidence that suggests the defendant might be or could be guilty
b) The accused does not have the responsibility to prove that they are innocent
c) Evidence need not be relevant, reliable and legally-obtained
d) All people must be able to effectively utilise the legal system

6. To protect the rights of the accused, criminal trials should be held as quickly as possible after the events that give rise to the charges because
a) The more time elapses between the alleged crime and the trial, the less reliable witness accounts become
b) Awaiting trial is a period of great uncertainty for the accused, particularly if there is a prospect of a custodial sentence
c) A delayed trial may result in the accused being held in custody for longer than what is considered reasonable
d) All of the above

7. Which of the following statements in relation to the right to a fair hearing is not true?
a) A competent and independent arbiter will oversee a fair hearing
b) A fair hearing will be conducted impartially
c) The accused will have adequate legal representation in a fair hearing
d) A fair hearing will involve the victim as a party to criminal legal proceedings

8. The express right contained in s80 of the Australian Constitution is the right to
a) Trial by jury for Commonwealth offences
b) Receive 'just terms' when property is acquired by the Commonwealth
c) Be tried without unreasonable delay
d) Be informed about the proceedings

9. Division 4 of the *Criminal Procedure Act 2009* provides that
a) Courts will have the power to disallow improper questioning of a vulnerable witness
b) The victim will be given reasons why the accused was not charged with an offence
c) The court may make a number of alternative arrangements for witnesses to give evidence
d) The victim will be informed of the outcome of criminal proceedings, including the sentence

10. The *Victims Charter Act 2006* places obligations on prosecutors to give the victim timely information regarding:
a) Any appeals, and their outcomes
b) Disallowing an improper question
c) Trial by jury
d) All of the above

Chapter 1 summary

1. There are three features that are essential to any discussion of justice in dispute resolution justice. These features are fairness, equality and access.
2. 'Fairness' is the idea that whatever happens in the administration of justice is consistent overall with community expectations concerning the way people ought to be treated. A fair hearing therefore requires a level of impartiality and a lack of bias. All parties who come before the courts or other dispute resolution bodies ought to be treated equally, each party ought to have a real opportunity to present their side of the dispute, and the outcome ought to be reached according to consistent and transparent rules and procedures.
3. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of people in the state to fairness in the legal system in a range of ways. The legal system provides a number of other mechanisms to help ensure that all parties receive a fair hearing. Some examples of ways in which we attempt to achieve fairness include: a defendant has the right to silence, all defendants are considered innocent until they have been proved guilty, the party bringing the dispute to court bears the burden of proof and has the responsibility to prove their case, the party bringing the case must also meet a standard of proof (beyond reasonable doubt in criminal cases), a jury composed of peers of the accused is required to view the case based only on the facts and the evidence presented, any party who believes an error was made in their hearing has the right to appeal (or to apply for leave to appeal), parties generally have the right to an open hearing (because justice should not just be done, it should also be seen to be done), case management is used in courts to achieve a balance between speed and proper preparation, and consistent and rigid trial procedures aim to encourage a thorough and fair examination of evidence.
4. 'Equality' is the idea that every person or organisation that has a dispute to be resolved is equal in the eyes of the law and in the legal system as a whole. No-one should be privileged and benefited, nor discriminated against or at a disadvantage, for being who they are.
5. Equality and inequality in the legal system may be affected by a range of factors including gender, human status, money, perceived racial heritage, cultural and community background, physical and mental abilities and disabilities. It is also important to consider the role of equity and equality in the administration of justice. If equality is the idea that all people should be treated the same, equity is the idea that all people should be treated differently according to their individual differences, in order for them to reach the same end-point. It is the difference between literal or superficial equality, and substantial or outcome-based equality.
6. The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to substantive equality in the legal system in a range of ways. The legal system provides a number of other mechanisms to help ensure that all parties achieve equality before the law. Some examples of ways in which we attempt to ensure equality include: various forms of disadvantage are recognised and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality, all judicial proceedings have strict rules of evidence that work to ensure a fair and unbiased hearing, judicial proceedings are also governed by strict rules of procedure that are consistently applied to both parties equally, all disputes require an independent third party to oversee proceedings to ensure that the rules of evidence and procedure are followed equally by both parties and that the burden of proof is satisfied, appeals are permitted on questions of both law and fact, imbalances of power are recognised where possible and accommodations are made.
7. 'Access' is the idea that all people must be able to effectively utilise the legal system, and the places and systems for the resolution of disputes and the administration of justice. Access is not about simply having literal access to the legal system: it is about having access to justice.
8. Proper and meaningful access to the legal system may be affected by a range of factors including: knowledge, experience and training, money, physical access, environment and culture, time. There is a difference between being able to superficially access something and being able to meaningfully utilise it.
9. The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to meaningful access to the legal system in a range of ways. The legal system provides a number of other mechanisms to help give all parties meaningful access to the law and the legal system. Some ways in which we attempt to ensure access to justice include: the court hierarchy allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction, the courts have specialised divisions that deal with only certain types of law, the legal system recognises the impact that mental and psychological disorders can have on the ability of a person to effectively use the system and provides some support services, the Neighbourhood Justice Centre aims to improve the justice system by addressing social disadvantage and improving access to justice services.
10. The system of trial used in criminal cases in Australian courts is the adversary system. The adversary system is where two opposing parties put conflicting arguments before an independent judicial member, at the end of which the party with the best case wins and the other loses. Under this system the parties to the case are adversaries, or opponents, who each try to win the case; they have a lot of control over the way in which they conduct their case, although they need to follow rules of evidence and procedure that are strict, and applied equally to both of them;

overseeing the case and ensuring the parties are adhering to the rules of the court is the judge or magistrate, who is an impartial adjudicator; and the ultimate aim of the adversary system is to find a winner and a loser in the court 'contest'.

11. Summary offences are the least serious offences. They are heard in the Magistrates' Court, and can be punished by no more than two years for a single offence, or five years total for multiple offences heard at the same hearing. Summary offences are prosecuted by the arresting police officer, and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called 'hearings'.
12. Indictable offences are the more serious offences. They are heard in the County Court and the Supreme Court (Trial Division). Indictable offences can be punished by unlimited sanctions – the act of parliament that provides for the offence will therefore state the range of consequences the courts can give for that particular offence. 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'. Indictable offences can be further divided into minor indictable offences and serious indictable offences.
13. Some indictable offences can be heard summarily – that is, dealt with in the Magistrates' Court without a jury. 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 (otherwise known as 'Level 5 imprisonment') or where a fine of no more than $120,000 (otherwise known as a 'Level 5 fine') could be given. If a person is charged with one of these offences, they may seek to have their indictable offence heard summarily in the Magistrates' Court. This means they will not have a jury, but they will also face a lower maximum penalty: the maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence, so there is less risk involved with a guilty verdict. Alternatively, the accused may be planning to plead guilty, and may wish to save themselves time and money in addition to guaranteeing themselves a lower possible maximum penalty. It is ultimately up to the court to determine if an indictable offence should be heard summarily, but the defendant can elect or request it.
14. The burden of proof is the responsibility borne by the party bringing the case to prove the claims made. In a criminal hearing or trial, the burden will be on the prosecution to bring evidence to prove the allegations they have made against the accused. This proof must be brought before the accused has a responsibility to defend herself or himself. The accused should not need to prove that they are innocent, and they should not need to prove an alternative version of events if they disagree with the version put forward by the prosecution. It should be enough for them to demonstrate that the prosecution has not discharged the burden to show that they are guilty. This might be done by cross-examining the prosecution's witnesses, by bringing defence witnesses, or by simply submitting to the court that the prosecution has not brought enough evidence.
15. In practice, the burden of proof is sometimes reversed. For instance, some terrorism offences impose a legal burden on the defendant. Offences relating to the trafficking of drugs have resulted in defendants found in possession of a 'trafficable' quantity of a controlled drug, for instance, being presumed without evidence to have the intention to traffic, or the intention to cultivate or manufacture for a commercial purpose. The onus will then be placed on the defendant to prove they did not.
16. The standard of proof is the quality or weight of evidence that must be led by the party with the burden of proof, in order for them to discharge that burden. In a criminal hearing or trial, the standard of proof is the quality of evidence required for the prosecution to demonstrate that the accused is guilty of the charges. The precise standard required is 'beyond reasonable doubt', meaning that it must be beyond reasonable doubt that the accused is legally and criminally responsible for the offence. The standard of proof is the point at which we as a society believe it is appropriate for the presumption of innocence to be overturned. It is generally accepted that the high standard of proof in criminal trials lessens the risk of wrongful convictions, and this is an important principle in the justice system. However, it is possible that an unreasonably high acquittal rate might reduce the deterrent impact of the criminal justice system.
17. The presumption of innocence is the assumption that the party against whom allegations are being made is innocent of all allegations unless and until the party bringing the case shows a sufficient weight of evidence to the contrary. The responsibility on the prosecution to bring evidence is therefore the responsibility to demonstrate proof that the defendant is not an innocent party: it is not enough for them to only bring evidence that suggests the defendant might be or could be guilty, or even that they are likely guilty. The accused does not have the responsibility to prove that they are innocent, or even that they are likely or probably innocent. They do not need to prove anything – except that the prosecution has not discharged their burden of proof. Unless and until the prosecution discharges their burden of proof and overturns the presumption of innocence, the defendant should not be punished or face consequences in any way. The presumption of innocence is protected by s25 of the Victorian *Charter of Rights and Responsibilities*.
18. There are a range of procedures and rules in the criminal justice system to try to protect the presumption of innocence. These include: once they have been charged with an indictable offence an accused person will be

brought before the Magistrates' Court for a bail hearing, a committal hearing involves the prosecution having to demonstrate that they have enough evidence against the accused to support a conviction in a higher court, the burden is on the prosecution to present evidence against the accused person first, and the principle of double jeopardy prevents a person from being charged or punished twice in relation to the same crime (or a connected crime) because if a person is presumed innocent and was not found to be guilty they must be protected as an innocent person and not hounded.

19. Rules of evidence determine what evidence is admissible and allowed to be used in court as proof, and what evidence is inadmissible and not allowed. Rules of procedure are the rules dictating how a trial or hearing is run, and what happens in what order. Evidence must be relevant, reliable and legally-obtained, or else there is a risk that the trial will not be fair. It must also have more probative value than prejudicial value: in other words, the evidence must prove more about the case than it prejudices the court against the defendant. Procedure must be organised to allow both parties' versions of the case to come out effectively, and to ensure that neither party can dominate argument to the exclusion of the other.
20. Evidence of bad character is generally inadmissible because it doesn't prove the defendant committed the wrongdoing they are currently being prosecuted for. Just because they committed other wrongdoings in the past, or friends and family consider them to have little integrity and poor morals, that doesn't mean they are guilty of the charged offences. Hearsay evidence is evidence that a witness is not giving first-hand: in other words, the evidence relates to something that the witness does not have personal, first-hand knowledge of. If someone tells you they committed a crime, that evidence is hearsay if you try to give it to the court because you did not see them commit the crime with your own eyes. You can therefore only be cross-examined in relation to them saying it, and not in relation to them doing it. Because of this, hearsay evidence will generally be inadmissible.
21. Witnesses are only allowed to respond to the questions asked of them by either party or the judge – court procedure does not permit them to make uninterrupted narrative statements like stories. This allows the parties to control the evidence they want to come before the court, and the order in which they want those pieces of evidence to come out. Each witness led by one party will then be opened up to cross-examination by the other party. All of the prosecution witnesses must be led before the prosecution rests its case and the defence is given the choice to lead witnesses of its own. Because of the presumption of innocence and the burden of proof, procedure does not allow the prosecution to force the defence to lead its own witnesses before choosing to show the remaining prosecution witnesses. The trial in the adversary system must be one continuous event. In Victoria, all criminal trials, once begun, must continue to run until they reach their conclusion and a verdict of guilty or not guilty is entered. This is considered an important part of procedural fairness, because it allows the accused to gain closure and move on with her or his life.
22. The accused has the right to be tried without unreasonable delay. Criminal trials should be held as quickly as possible after the events that give rise to the charges. There are a number of reasons why this is important in protecting the rights of the accused: witness accounts will become increasingly less reliable as time elapses between the alleged crime and the trial, avoiding lengthy delays in bringing a matter to trial reduces the uncertainty that the accused person faces and may also minimise legal costs and other expenses, and a delayed trial may result in the accused being held in custody for longer as he or she awaits their trial.
23. The committal hearing is an important procedure to ensure that the time between charging and trial is minimised. If weak elements of the prosecution's case are eliminated at committal, this can reduce the amount of time needed to prepare and conduct the trial.
24. Case management involves timetabling dates for hearings including bail hearings, mentions, committal hearings and pre-trial directions hearings. This ensures that each procedure takes place as quickly as possible. The court can ask either party to give reasons for any delays that occur, to ensure that they are reasonable. For example, all criminal cases are listed for a directions hearing in the Supreme Court within 24 hours of the completion of the committal hearing in the Magistrates' Court. Following the counsel for the prosecution and the defence advising the court of the anticipated issues at the trial, estimating the hearing time of the trial, and identifying any problems that might prevent a trial proceeding quickly, the court will set a trial date, or arrange for case management if necessary.
25. Courts will refuse bail to persons accused of the most serious indictable offences of treason, murder, and trafficking or importing commercial quantities of drugs, unless the court is satisfied that exceptional circumstances exist that justify the grant of bail. A factor that might be considered exceptional by a court considering a bail application is an unreasonable delay in the commencement of a trial.
26. When deciding what is a reasonable period of delay, a court may consider the complexity of the case against the accused, the amount of evidence to be collected by the prosecutors, the number of witnesses to be called to give evidence, and the risk that the accused will not return to trial if they are released on bail.
27. The accused has the right to a fair hearing. The elements of a fair hearing include: a competent and independent arbiter is in charge of the hearing, the hearing is conducted impartially, the accused has adequate legal representation, and the accused has an accurate understanding of the proceedings.

28. Judicial officers should act independently of government. In order to ensure that judicial officers act independently in the discharge of their judicial duties, their appointments are permanent, so their office cannot be terminated until they reach retirement age. Judicial officers must also be confident in their administration of justice. Judicial officers are therefore generally drawn from members of the Victorian Bar. They have usually practised as barristers for many years, and have developed expertise in criminal procedure and criminal law by representing clients and arguing their cases before the judge.
29. An impartial hearing means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. It means allowing each party equal time to present their case and not making statements from the bench that might preference one side over another. The rules of evidence and procedure are designed to ensure that a hearing is conducted fairly, and the judge must administer these rules fairly and impartially to determine what evidence is admissible. The public must have confidence in the actual impartiality of the judicial officer presiding over the trial. The judicial officer must avoid any perception of potential bias.
30. Adequate legal representation means that an accused person has a qualified legal representative to argue their case in court. The *Charter of Rights and Responsibilities 2006* states that a person charged with a criminal offence is entitled to have legal aid provided if the interests of justice require it.
31. The accused should have an accurate understanding of proceedings. To ensure a fair hearing the accused has the right to free assistance of an interpreter if she or he is not fluent in English, and free assistance and access to specialised communication tools and technology if she or he has difficulties in communication. This ensures that the accused understands the proceedings and is enabled to participate in her or his own defence.
32. The accused has the right to trial by jury. The jury's function is to listen to the evidence presented against the accused at trial, follow the directions of the trial judge on the relevant law, determine the relevant facts, and reach a verdict of guilty beyond reasonable doubt, or not guilty.
33. The alternative to trial by jury is trial by judge alone. There are a number of reasons why trial by jury is preferable to protect the rights of the accused: juries spread the burden of decision-making and, because the verdict must be unanimous for the most serious indictable offences, or by majority for less serious indictable offences, the jury's determination of the facts and verdict is therefore more likely to be correct; the random selection of jurors ensures that the accused is tried by their peers; juries bring impartiality to the findings of fact; and the jury limits the role of the state in the accused's trial.
34. There is no alternative procedure for the trial of an indictable offence in Victoria. Unlike the other mainland Australian states, Victoria has made no legislative provision for a trial to be held before judge alone. The reasons why an accused in New South Wales, Queensland, South Australia, Western Australia and the ACT may choose not to have a jury trial include: to avoid the risk of bias arising from extended media coverage which may prejudice potential jurors, or because they cannot afford a jury trial, they fear jury bias, or they may have a greater likelihood of being acquitted.
35. One of the five express rights contained in the Commonwealth Constitution (s80) is the right to trial by jury for Commonwealth offences. The s80 right to trial by jury extends to indictable offences only, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences. Section 4G of the *Crimes Act 1914* (Cth) provides that offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears – but the Commonwealth could change this and reduce the number of offences that are regarded as indictable. Other examples of Commonwealth indictable offences include drug importation, customs offences, tax fraud and Centrelink fraud, and terrorism offences.
36. The accused also has the right to the presumption of innocence. This means that the accused does not have to prove their defence at trial. The burden is on the prosecution to prove that the accused is guilty beyond reasonable doubt.
37. The *Victims Charter Act 2006* (Vic) outlines many of the rights accorded to victims of crime in the Victorian criminal justice system. The objects of the Act are to recognise the impact of crime on victims and their families, to recognise that all persons affected by crime should be treated with respect, and to reduce the likelihood that victims of crime suffer secondary victimisation by the criminal justice system.
38. Victims have the right to give evidence as a vulnerable witness. The requirement of our criminal justice system to vigorously test the testimony of a witness can be onerous on a victim. Witnesses who give evidence for the prosecution can expect to be vigorously questioned by counsel for the defence, who will seek to place sufficient doubt on the witness's testimony that the accused cannot be found guilty beyond reasonable doubt. In addition to the unfamiliar formality of court hearings, there are strict rules of evidence and procedure governing oral testimony which witnesses may find inhibits their ability to give evidence. The requirement to recount evidence that involves personal and intimate details, in front of the accused, and in an atmosphere that appears hostile and unsympathetic, can be deeply distressing.
39. Victorian legislation provides a range of procedures for witnesses to give evidence. For example, for sexual offence and family violence charges, Division 4 of the *Criminal Procedure Act 2009* provides that the court may make a

number of alternative arrangements for witnesses to give evidence, including: giving evidence to the court via closed circuit television from another venue, using screens to obstruct the direct line of vision between the accused and the witness, and allowing the witness to have a support person beside them while giving evidence. If the witness is the complainant in a sexual offence charge, the court must make these arrangements for their testimony, unless the complainant is aware of these rights and waives them. This applies also if the complainant is under the age of 18 at the time the proceeding commenced, or if they have a cognitive impairment. Other arrangements that the court may make to enable witnesses to give evidence in sexual offence and family violence trials include restricting the number of people in court while the witness gives evidence, and requiring lawyers not to wear robes and to sit down while questioning the witness.

40. The court may declare that any witness in a sexual assault or family violence case is a protected witness – this means that they must not be cross-examined by the accused in person. Section 41 of the *Evidence Act 2008* gives courts the power to disallow improper questioning of a vulnerable witness. The *Evidence Act* defines people under the age of 18 and people who have a cognitive impairment as vulnerable. However, the court may consider other factors that may contribute to a witness' vulnerability, including age, education, ethnic and cultural background, gender, language skills, disabilities, and the context of the question.
41. Victims have the right to be informed about criminal proceedings. In the criminal justice system, the victim of a crime is not a party to the criminal proceedings. This approach ensures that the victim of a crime does not bear the burden of proving the offence. The role of the state in prosecuting deters victims of crime from seeking their own form of retributive justice against the alleged offender. Centralising the skills of investigation and prosecution ensures that law enforcement is competent and effective. However, there is a risk that by being relegated to the position of a witness in the criminal justice process, the victim of a crime may feel marginalised. For this reason, the *Victims Charter Act 2006* places obligations on prosecutors to provide relevant information to victims.
42. Victims have the right to be informed about the likely release date of the accused. Section 17 of the *Victims Charter Act* enables the victim to be included on the register for a criminal act of violence. The victim may then be provided with information concerning the offender such as the length of their sentence and the likely date of their release from imprisonment.
43. In 2016, the Victorian Law Reform Commission tabled its Report on the Role of Victims of Crime in the Criminal Trial Process in Parliament, supporting the current legal position that victims are participants in the criminal trial process, but are not parties to proceedings. The VLRC made a number of recommendations for legislative amendments to protect and enhance the role of victims in criminal trials, including to provide a definition of protected victims in the *Criminal Procedure Act 2006* to enable fair witness testimony.

"Don't deny it, Mr. Bull. We have a reliable witness who says you were indeed in the China shop."