

# Chapter 2

## Determining a Criminal Case

### 2.1 The role of institutions available to assist an accused

Half of all Australians will experience a legal problem in any given year. Most of these people will not obtain assistance from a legal practitioner, nor will they come into contact with the courts or other legal institutions. For some, this will be because they resolve their legal issue by other means. However, a significant number will not be able to do this satisfactorily because they are unaware of their legal rights, or because they lack the time and resources needed to enforce their legal rights. This can be true for any person who is accused of committing a crime.

There are some public institutions that address these issues in a variety of ways, from the provision of public information that improves general awareness of legal rights, to the provision of free legal representation in a trial for an indictable offence.

#### Victoria Legal Aid

**Victoria Legal Aid** (VLA) is an independent statutory authority established under *the Legal Aid Act 1978* (Vic). The organisation is funded by Commonwealth and Victorian governments but operates independently of government. VLA's objectives, outlined in s4 of the *Legal Aid Act 1978* are to:

- provide legal aid in the most effective, economic and efficient manner
- manage resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state
- provide to the community improved access to justice and legal remedies
- pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.

#### Study tip

*Legal aid is the provision of legal advice and information to those involved in a criminal matter who are unable to pay for legal representation. Each state and territory has its own legal aid commission that provide legal assistance, information and advice, lawyers to represent those who attending court but cannot afford legal representation, and grants of money to help people to obtain legal representation. However, the study design states that students need to know the role of Victoria Legal Aid. Community legal centres also provide legal aid and the study design states that students need to know Victorian community legal centres.*

#### VLA Duty Lawyers for criminal proceedings

Every person who is arrested, taken into custody and charged with a criminal offence has free access to a Legal Aid Duty Lawyer at the Magistrates Court. All criminal offences commence in the Magistrates Court, and Legal Aid has lawyers stationed at the courts to support accused people. The priority of the Duty Lawyers is to provide legal assistance to people in custody, who have been brought to court for the first time on a charge. The duty lawyer will provide legal advice, and make an application for bail if necessary. If the accused has their own lawyer, the duty lawyer will contact them to advise that their client is in custody.

#### Grants for legal representation

Where a person needs court representation for their criminal matter, they must apply for a grant of legal assistance. VLA does not have unlimited funds, therefore grants must meet eligibility criteria. Firstly, VLA will consider: what the case is about

- the likely benefit to the claimant
- whether legal assistance will be of benefit to the public
- the claimant's financial situation.

Secondly, VLA grants are subject to a means test: if a claimant earns above a specified amount, they will not be entitled to a grant of legal aid. The means test ensures that VLA's limited funds are allocated to people who could not otherwise afford legal representation in their criminal matter.

A person who is eligible for a grant of legal assistance can be represented by a VLA lawyer, or by a private lawyer who

has been appointed to the VLA criminal practice panel. 65 per cent of criminal law grants were assigned to private legal practitioners in this way in the 2015/16 financial year. Having a mix of public and private practitioners providing legal aid representation provides a variety of choice for clients who are reliant on public funding. It also ensures that publicly funded legal advice is commensurate with the legal advice accessible to other accused people who have the means to pay for their own defence. This helps to ensure that there is no disparity in the quality of advocacy or the expertise of advice provided to accused people who need legal aid.

VLA services are funded jointly by the Victorian and Commonwealth governments. These services are susceptible to government funding cuts: since 1997, Commonwealth contributions to the VLA budget have fallen from 50 per cent to 33 per cent. In 2013, Legal Aid faced a funding shortfall of \$13 million dollars, and introduced a range of strategies to address this, which included:

- restricting the funding of instructing solicitors in criminal trials, leaving the barrister to perform these tasks
- restricting the funding of appeals on sentence to the Court of Appeal and The High Court to only those cases which have a reasonable prospect of reducing the total effective sentence or non-parole period.



As discussed in Chapter 1, the case of *R v Chaouk* [2013] VSC 48 revealed the inadequacy of funding a solicitor for only two half-days in a trial for an indictable offence. VLA now considers funding needs on a case-by-case basis.

In its 2014 'Report on Access to the Legal System', the Productivity Commission found that disadvantaged Australian are "more susceptible to, and less equipped to deal with, legal disputes." This means that disadvantaged people are more likely to become involved in a criminal matter, and have fewer resources to defend themselves.

### Box 2.1 Snapshot of accused people who benefit from VLA services

In the 2015-2016 financial year, VLA provided the following:

- 86,847 people provided with lawyers
- 13 per cent increase in grants for criminal representation
- 17,899 people from culturally and linguistically diverse backgrounds
- 3,961 people needed an interpreter
- 25 per cent increase in assistance to homeless people
- 13 per cent increase in assistance to Aboriginal and Torres Strait Islander people, who experience over-representation in the criminal justice system.
- Over 1.7 million visits to the VLA website, which provides online legal information. The most visited page was 'Going to court for criminal charge'.

Source: Victoria Legal Aid 'Annual Report 2015-16'.



## Victorian community legal centres

**Community legal centres** (or CLCs) are independent community organisations that provide free advice, casework and legal education to their communities. There are CLCs located in metropolitan Melbourne and around Victoria. Victoria Legal Aid funds the operations of 38 of these CLCs, in a relationship that focuses on improving community legal education to increase people's awareness of their legal rights and responsibilities. Victoria Legal Aid refers clients to CLCs where they can provide more appropriate assistance; and the CLCs in turn may refer clients to Victoria Legal Aid for assistance with their legal issue.

There are two types of community legal centres: generalist CLCs and specialist CLCs. Generalist community legal centres provide general legal services to people in their local geographical area whereas specialist community legal centres focus on particular groups of people or areas of the law. Some CLCs are able to provide legal aid to clients, where VLA has provided a grant for legal assistance. In 2015 – 16, Victoria Legal Aid made 529 grants of legal assistance to CLCs, an increase of 30 per cent from the previous year.

Like VLA, community legal centres also face funding cuts. In April 2017, a nationwide campaign caused the Commonwealth government to announce that it had reversed proposed funding cuts to the community legal sector that had been proposed for the 2017-18 budget.

## Fitzroy Legal Service – an example of a generalist CLC

Fitzroy Legal Service (FLS) was established in 1972, to provide free legal advice to all comers, in what was then the poorest suburb in Melbourne. It operates a free, drop-in legal advice service which operates every weeknight. Volunteer lawyers are able to provide legal advice on criminal matters, with interpreters available. If the FLS is unable to provide advice on a particular matter, it will refer the client to an appropriate organization. It has a range of specialist service, including a family law clinic, and a LGBTIQ legal advice service.

### Study tip

*If there is a Victoria Legal Aid service or a community legal centre in your area, you or your class could invite a representative from the organisation to speak to your class or school about legal aid and how the organisation can assist an accused.*

FLS also provides legal representation in criminal matters for people who are eligible for a VLA grant. In addition, it can provide legal representation to an accused person who is not eligible for a VLA grant. Fitzroy Legal Service's fees are designed to assist clients who may struggle to pay for private legal representation, reflecting the Service's role as a community legal resource.

In 2015 – 2016, FLC provided legal advice in 328 criminal matters. 33 per cent of the 1641 cases it opened were concerned with criminal issues.

### Box 2.2 Drug outreach and criminal law practice case study

A client with a history of homelessness, substance abuse and ill-managed schizophrenia first engaged with FLS through the Drug Outreach Program. He was subsequently arrested for a serious violent assault committed in a dissociative psychotic state. The Drug Outreach Lawyer and Senior Criminal Lawyer collaborated on the preparation of a defence of mental impairment, with a view to the client being removed from the prison system and placed on a therapeutic supervision order that assures proper medication, treatment and housing.

*Source: Fitzroy Legal Service Annual and Financial Report 2015 - 2016*



## First Step Legal – an example of a specialist CLC

First Step Legal is a branch of the community organization First Step, a community non-profit organization located in St Kilda that operates to assist people in overcoming their dependence on drugs or alcohol. It is a community legal centre that provides legal support to clients facing criminal charges.

First Step Legal offers legal assistance on a *pro bono* (no cost) basis, however it receives no funding from the Victorian or Commonwealth governments.

### Box 2.3 About First Step Legal

The stress of pending criminal proceedings and other (non-criminal) legal issues can lead to ill health and periods of relapse and reoffending. The objective of First Step Legal is to provide an on-site, fully funded legal service to clients of First Step, in order to ensure that legal issues, and in particular, historical criminal offending do not derail rehabilitation efforts. First Step Legal aims to reduce the burden and stress on clients arising from their legal issues, thereby allowing the rehabilitative work of the First Step health service to continue uninterrupted.



Eligible clients are patients of First Step (health service) who are actively engaged in treatment and may be facing criminal proceedings in Victoria, or have other legal issues such as those related to tenancy, infringement, intervention orders, civil debt, or family law.

In addition, First Step Legal ensures that clients are more well-informed about the legal process throughout the proceedings, which contributes to better decision making. The First Step treating professionals are advised of the status of the proceedings, at each stage of the process, to ensure that the client receives adequate support throughout this stressful period. Moreover, having the legal service situated on-site with the First Step Health service, facilitates a more trusting relationship between client and lawyer, such that the lawyer becomes a part of the triangular rehabilitation model of care.

*Extract from First Step Legal's website <http://www.firststep.org.au/services/#first-step-legal>*

## Review questions 2.1

1. Describe the legal assistance offered by Victoria Legal Aid.
2. Outline the considerations that Victoria Legal Aid will make when deciding who is eligible for a grant of legal assistance.
3. Explain the role of a Victoria Legal Aid Duty Lawyer.
4. Describe the legal assistance offered by community legal centres.
5. Using examples, distinguish between generalist community legal centres and specialist community legal centres.
6. Explain the difference between Victoria Legal Aid and Victorian community legal centres.

### Activity 2a:

#### Who has the right to apply for legal aid in Victoria?

The media often condemn Victoria Legal Aid (VLA) for providing funding to certain accused.

In March 2016, Sean Price was convicted of the murder of Melbourne schoolgirl Masa Vukotic and rape of a woman at a Christian bookshop. Both crimes occurred within days of each other in 2015. Price pleaded guilty to both offences, as well as a number of other crimes, and was sentenced by the Supreme Court to a minimum of 38-years in prison.



In 2017, Price sought legal aid to appeal his conviction for the 2015 rape. The rape conviction also prompted a breach of a supervision order charge (Price had been placed on a 10-year supervision order in 2012, following crimes which included stalking, rape, and making threats to kill). Price also applied to contest this charge with the assistance of legal aid.

VLA was heavily criticised for considering the provision of funding to Price to support the appeal. The Herald Sun was particularly scathing, stating that the rape and appeal were “spurious actions by a monster who should have forfeited his right to further taxpayer-funded assistance. It again confirms that running through the DNA of the Victorian justice system is an in-built bias towards the rights of the guilty at the expense of victims and the innocent.”

The Victims of Crime Commissioner, Greg Davies, suggested that Price’s application ignored the human rights of victims. Mr Davies told AAP, “He’s been charged, tried, convicted and sentenced all on the public purse. Surely you only get one go, don’t you? Almost everyone forgets the victims but they’re taxpayers too, and he wants taxpayers’ money.”

In a media release, VLA said, “Everyone has the right to apply for legal aid and we must process those applications we do receive. Sometimes those applications are granted and sometimes they are not, our obligation is to assess those applications with fairness and impartiality... While we appreciate community concern, community outrage is not a safe basis on which to make decisions.”

It later emerged that Price had been granted legal aid funding to defend the breach charge, but not to conduct his appeal.

#### Questions/tasks

1. What was Sean Price convicted of in 2016?
2. Why did Price face a charge of breaching a supervision order?
3. Discuss whether Price ‘forfeited his right to further taxpayer-funded assistance’ and whether the Victorian justice system has ‘an in-built bias towards the rights of the guilty at the expense of victims and the innocent’.
4. Discuss the role of VLA in assisting an accused person ‘with fairness and impartiality’.

### Activity 2b: Institutions available to assist an accused

Replicate the following table in your notebooks and recommend where each of the accused could seek legal assistance. Justify your decision.

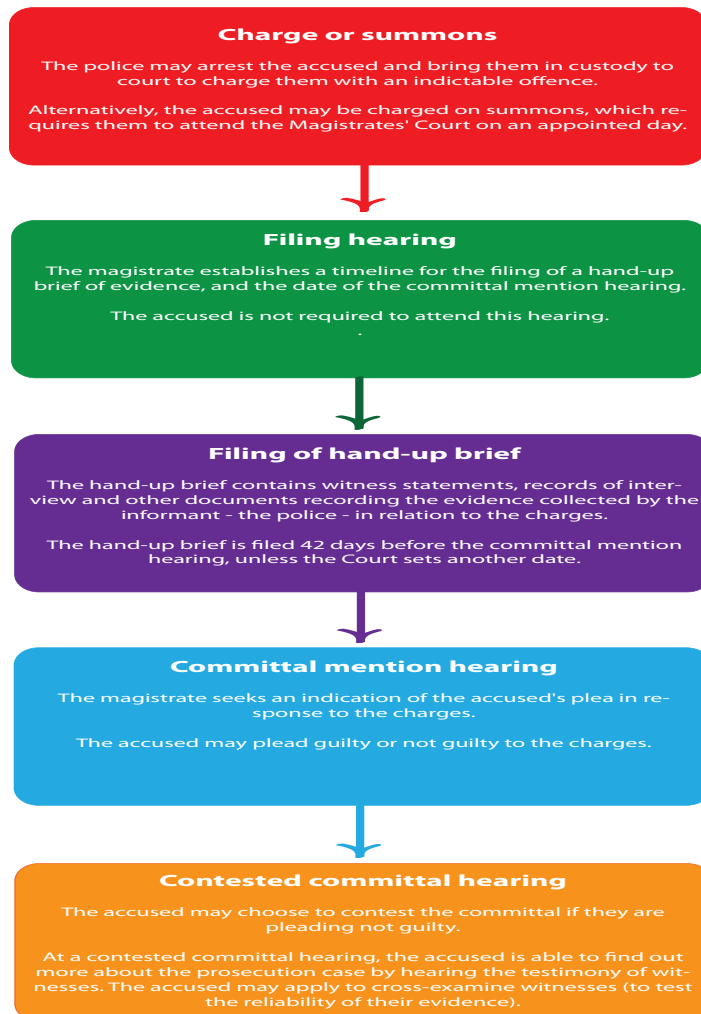
Situation	Victoria Legal Aid or a Victorian community legal centre	Justification
Billy is a teenager who was involved in a riot at a youth justice centre		
Femi Rabiū is a young African male who was a passenger in a car pulled over by the police, and was subsequently charged with assaulting a police officer		
Catherine is a 33-year-old woman who has struggled with methamphetamine addiction since she was 21, and has been charged with multiple counts of theft		
Kaleesha is an Aboriginal and Torres Strait Islander who has been charged with assault		
Harry is unemployed and has been charged with possessing and cultivating cannabis for commercial use.		



## 2.2 Committal proceedings

When a person has been charged with an indictable offence, the first court procedure they will face is **committal proceedings**. All committal proceedings take place in the Magistrates' Court. These proceedings are summarised in Figure 2.1 below.

Figure 2.1  
Summary of committal proceedings



"In my opinion, the three pigs did their share of huffing and puffing."

### Elements of the process

During committal proceedings the prosecution must present all available evidence against the accused in support of the charges. The magistrate reviews the available evidence, and decides whether a **prima facie** case exists. This is a Latin term meaning 'on first examination'. A case is said to be prima facie when there is sufficient evidence to support a conviction of the accused by a properly instructed jury at trial.

Evidence is generally presented in writing by a hand-up brief containing sworn witness statements. Sometimes witnesses may be summoned to court to give oral testimony. They may be cross-examined by the defence to determine their credibility.

A committal hearing should be held within a short time of the accused being charged with an indictable offence. In general, this means within six months of charges being laid.

After reviewing the evidence presented by the prosecution, if the magistrate considers that there is sufficient evidence against the accused to support a conviction at trial, she or he will order the accused to stand trial. The accused will then be asked to enter a plea: either 'guilty', or 'not guilty'. If the accused pleads guilty, there is no need for a trial – the matter will continue straight to sentencing. If the accused pleads not guilty, the matter will be referred to the appropriate court and a trial date will be set.

## Purposes of committal proceedings

The main purpose of committal proceedings is to determine whether there is a *prima facie* case. As mentioned earlier, the Latin term *prima facie* means 'on first examination'. Committal proceedings have a number of other purposes.

### Informs the accused of the case against them

Committal proceedings give the accused access to all evidence collected by the police in their investigation to support the prosecution of the charges. This includes witness statements and exhibits. By understanding the strength of the evidence, the accused can then determine how strong the prosecution's case is and make a decision about whether to plead guilty or not guilty. The accused is not required to enter a plea until the magistrate decides that there is sufficient evidence to support a conviction at trial. If the accused considers that there is little prospect they can successfully defend the charges, they can take advantage of receiving a discounted sentence by pleading guilty at an early stage.

#### Study tip

Section 97 of the Criminal Procedure Act 2009 (Vic) sets out the purposes of committal proceedings in Victoria.

Once the accused is informed of the case against them through the committal, they can prepare their defence. The accused does not need to prepare a global defence: they only need to defend the evidence against them. This is another important advantage of the committal process.

### Improves the efficiency of the courts

If at a committal hearing, the magistrate finds there is insufficient evidence to support a conviction at trial, the case will be discontinued and the accused discharged. There are several benefits of this:

The committal promotes greater efficiency in the County and Supreme Courts, as weak cases with no prospect of conviction are eliminated at the committal stage without going to trial.

- The accused avoids the delay and expense of defending a weak case at trial.
- In matters where an accused is charged with a number of offences, the magistrate may simplify the case by scrutinising each charge carefully and dismissing any that have insufficient evidence to support a conviction at trial.
- If there is insufficient evidence to support a conviction, the police have the opportunity to investigate further, and bring new charges if better evidence emerges. By contrast, if a prosecution is unsuccessful at trial, resulting in a verdict of 'not guilty', there are limited opportunities to bring charges again under double jeopardy laws.

### Ensures timely collection of evidence

Another purpose of committal proceedings is to require the prosecution to assess evidence of an offence and present it to the court at an early stage in the criminal proceedings. This ensures a speedy preparation of the prosecution's case, while evidence is fresh and reliable, reducing delays for the accused and ensuring that witness testimony is accurate. This contributes to a fair hearing for the accused.

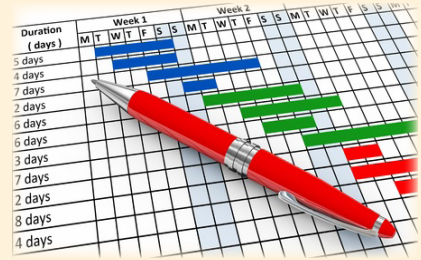


## Activity 2c: A timeline of committal proceedings in recent cases

The media often condemn Victoria Legal Aid (VLA) for providing funding to certain accused.

### *The Queen v Guode* [2017] VSC 285

- 8 April 2015** The accused drove into Gladman Lake at Wyndham Vale, in a car containing her four children as passengers. Three of the children died, and a fourth survived.
- 11 August 2015** Police charge Guode with three counts of murder and one count of attempted murder, following investigations.
- 27 June 2016** Committal hearing commences in Melbourne Magistrates Court. 49 witnesses give evidence in the proceeding, which ran for four weeks.
- 4 August 2016** Magistrate Carolene Gwynn finds that there is sufficient evidence to support a conviction at trial. Guode pleads not guilty, and is committed to stand trial in the Supreme Court. Guode's bail application is denied, and she is remanded in custody.
- 16 January 2017** After the prosecution substitutes a charge of infanticide for one of the charges of murder, Guode pleads guilty to all charges.
- 8 March 2017** A sentencing hearing in the Supreme Court before Justice Lasry hears submissions on the appropriate sentence for Guode.
- 30 May 2017** Justice Lasry sentences Guode to 26 years and 6 months imprisonment, with a minimum of 20 years, having regard to Guode's personal circumstances as a refugee from South Sudan, her mental state, and the likelihood of her deportation on completion of her term of imprisonment.



### *DPP v Jakobsson* [2017] VCC 688

- 23 Sept 2015** Jakobsson is riding a "monkey bike" at the Carrum Downs Shopping Centre. He strikes Andrea Lehane as she crosses a pedestrian crossing in the car park, and rides away from the scene without stopping. Mrs Lehane dies the following day.
- 25 Sept 2015** Jakobsson is arrested and interviewed by police at Melbourne City West Police Station. He is charged with 14 offences including culpable driving, dangerous driving, speeding, driving while unlicensed and failing to stop and render assistance.
- 4 July 2016** A two-day contested committal hearing commences in the Melbourne Magistrates Court.
- 5 July 2016** Following a contested hearing, Jakobsson is committed to stand trial on 13 of the original charges arising from the incident. He pleads not guilty.
- 2 March 2017** Jakobsson pleads guilty to one charge of culpable driving causing death, and one charge of failing to stop after an accident. The other 11 charges are withdrawn by the Director of Public Prosecutions.
- 17 May 2017** A sentencing hearing in the County Court is heard by Judge Campton.
- 30 May 2017** Judge Campton sentences Jakobsson to seven years imprisonment, with a non-parole period of four years. Jakobsson's early guilty plea earned him a discount of two years from the sentence.

### Questions/tasks

1. What crime was the accused charged with in the *Queen v Guode*?
2. Outline the committal proceedings used in the *Queen v Guode*.
3. What crime was the accused charged with in *DPP v Jakobsson*?
4. Outline the committal proceedings used *DPP v Jakobsson*.
5. Explain the outcome of the committal hearing in each case.
6. Explain why committal proceedings were used in both of the cases.

## The impact of committal proceedings on the criminal justice system

In 2014-15, the Magistrates' Court finalised 2,839 committal proceedings. The County Court publishes indicative time periods from initial directions hearings to trial in the criminal division. In May 2017, the indicative time to trial was nine months. In the Supreme Court Trial Division 88 per cent of criminal cases were resolved within 12 months.

Committal proceedings is an important element of criminal procedure in ensuring that most trials are held in a timely manner. While it could be argued that committals delay the commencement of a trial, they provide compensatory benefits to the criminal process by adequately informing the accused, enabling them to plead guilty at an early stage, and eliminating weak cases from the trial divisions of the County Court and Supreme Court.

The most time consuming aspect of committal proceedings is cross-examination of witnesses. However, most committal hearings do not require witness examination; witness statements are provided via a hand up brief, a collection of documents recording the prosecution evidence in the case. Witnesses may only be required to give evidence in person and undergo cross-examination at a contested committal hearing.



## Activity 2d: Recent reforms to the committal process

In 2012, the Victorian Government undertook a review of the committal process. This came about because of increasing delays in the commencement of committal proceedings following the laying of charges. In 2014, the Victorian Parliament introduced amendments to the *Criminal Procedure Act 2009*. This provided greater scope for magistrates to regulate the cross-examination of witnesses in committal hearings (which can extend the length of hearings). The accused may now apply for leave to cross-examine witnesses at committal, identifying the issue to be examined, the relevance of the issue to the case, and the reason why cross-examination of the witness is justified. If the Magistrates' Court grants leave to cross-examine a witness, the court must identify each issue on which the witness may be cross-examined. The Court may not later grant leave to cross-examine on other issues unless it is satisfied by the accused that the issue is relevant and cross-examination is necessary.



This reform aimed to reduce the most time consuming aspect of committal hearings, which is cross-examination of witnesses.

The Supreme Court of Victoria has introduced another recent reform to the committal process. The Court's Practice Note No 6 of 2014 requires a Post-Committal Directions Hearing to be held within 24 hours of the completion of committal proceedings in the Magistrates Court. This aims to expedite the time taken to commence the trial, which in 2014 was a median period of 8.8 months.

### Questions/tasks

1. Why did the Victorian Government undertake a review of the committal process in 2012?
2. Outline the changes that amendments to the *Criminal Procedure Act* in 2014 made to committal proceedings.
3. What was the aim of this 2014 reform?
4. Outline the reform that the Supreme Court of Victoria introduced in 2014 to the committal process.

## Review questions 2.2

1. Define 'committal proceedings'.
2. Outline the steps involved in committal proceedings.
3. Describe the elements of committal proceedings.
4. Explain the purposes of committal proceedings.
5. Outline the strengths and weaknesses of committal proceedings.

## 2.3 Plea negotiations and sentence indications in determining criminal cases

As we have seen, committal proceedings inform the accused of the evidence in the case against them. This enables the accused to decide whether to plead guilty or not guilty to the charges.

A **plea negotiation** is a private negotiation between the accused and the prosecution that may take place at any time between the time when the accused is charged, and the completion of a criminal trial. A plea negotiation may involve discussion about the appropriate charges against the accused, the reliability and relevance of any evidence in the case, and the likely sentencing consequences if the accused pleads guilty.

In order to understand the purpose and appropriateness of plea negotiations in criminal proceedings, it is important to first understand the role of the prosecution, and the legal framework in which prosecution lawyers operate.

### Background: the role of the prosecutor

The Office of Public Prosecutions (OPP) is responsible for preparing and presenting prosecutions against people charged with serious crimes. The OPP is led by the Director of Public Prosecutions (DPP). Victoria was the first Australian jurisdiction to establish a DPP in 1983. The current DPP is John Champion QC.

The DPP's functions and powers are outlined by the *Public Prosecutions Act 2009* (Vic). Section 24 provides that the DPP must have regard to "the need to conduct prosecutions in an effective, economic and efficient manner."



Guilty pleas are necessary for the effective, economic and efficient conduct of prosecutions,



as outlined in the DPP's *Policy on Resolution* (2014). A plea of guilty to a charge for an indictable offence provides two potential benefits to the community:

- It relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them
- It also provides certainty of outcome and saves the community the cost of trials.

The *Policy on Resolution* provides that at every stage of the prosecution case the responsible solicitor must consider whether a plea of guilty to appropriate charges may resolve the case, having regard to:

- the strength of the evidence
- any probable defences
- the views of the victims and the informant
- the need to minimise inconvenience and distress to witnesses, particularly those who may find it onerous to give evidence
- the accused's criminal history
- the likely length of a trial
- whether the accused will give evidence for the prosecution after pleading guilty. In considering this, regard should be had to both the value of the accused's evidence, and the culpability of the accused (compared with the culpability of those against whom the accused's evidence will be used).

The prosecutor also needs to consider whether the charges the accused is facing are "appropriate". This means considering whether the charges:

- adequately reflect the accused's criminality, based on what can be proved beyond reasonable doubt ; and
- allow for the imposition of a sentence which adequately reflects the accused's criminality.



### ***The role of plea negotiations***

In deciding whether to plead guilty, and what charges to plead guilty to, the accused may need to have several discussions with the prosecution. These discussions are called plea negotiations. It may involve the prosecution and defence counsel discussing and negotiating about a number of issues, including:

- which charges against the accused are appropriate on the available evidence;
- the likely sentence that would apply for a guilty plea, and submissions that the prosecution would be prepared to make on sentence;
- any assistance the accused may be prepared and is able to give as a witness for other criminal prosecutions, and the value of that assistance to other prosecution cases; and
- whether the prosecution is prepared to reduce or substitute any charges for a lesser offence.

### ***The appropriateness of plea negotiations***

Plea negotiations are an important step in the criminal process, as they help the accused to understand the case against them, and consider the merits of pleading guilty. They may give the accused a sense of control in their situation, enabling the accused to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence. There is a steady trend towards more matters being resolved as pleas in Victoria. In a speech to the 14th International Criminal Law Congress, DPP John Champion QC said that in 2013-14, 76 per cent of cases handled by the OPP resolved in guilty pleas. 83 per cent of these guilty pleas occurred at or prior to committal, saving the OPP substantial resources in prosecution.

However, there has been criticism of the role of plea negotiations in the media, from academics, and from the general community. This criticism centres on the issue of the lack of transparency in conducting plea negotiations.

Firstly, plea negotiations take place privately between the prosecution and the accused. Criminal court proceedings, on the other hand, generally take place in public, and the verdict of the court may be scrutinised on appeal. By contrast, the discretion of the prosecution to negotiate with an accused person and reach an agreement that results in a guilty plea cannot be readily scrutinised by the public. The prosecutor's decisions about the strength of available evidence in the prosecution case, and the likelihood of obtaining a conviction at trial, cannot be reviewed. The process for negotiating

a plea with an accused person is not regulated by legislation, and the only effective check on the outcome of a plea negotiation is that the sentencing judge is not bound to follow the prosecutor's submissions on appropriate sentence.

Secondly, the DPP does not publicise its reasons for varying charges, such as when it reduces a charge of murder to manslaughter, or drops charges altogether. This can lead to community concern that the accused has been 'let off', and that the accused has not been convicted of an appropriate offence. There were national protests in July 2017, for example, when a man charged with the manslaughter of an aboriginal teenager in Kalgoorlie who was riding a stolen motorbike, was convicted of the lesser offence of dangerous driving instead. When the decision-making process of the prosecution is not available, members of the public become concerned that the accused has not been convicted for the appropriate crime, or that issues such as racism or sexual discrimination have influenced the outcome.

It is for this reason that the OPP has adopted the procedure of consulting with both the victim of any crime, and the informant (the witness providing evidence) prior to resolving a plea of guilty with an accused. The prosecutor should take into account the views of the victim and the informant when negotiating a plea with the accused, and must inform them if the matter is resolved by a guilty plea.

### Activity 2e: Plea negotiations with the prosecutor

*Zirilli v The Queen* [2014] HCA 2

Zirilli had pleaded guilty to a range of Commonwealth offences related to drug trafficking. Following plea negotiations with the prosecutor, Zirilli was sentenced to 26 years jail in the Supreme Court of Victoria, with a non-parole period of 18 years.

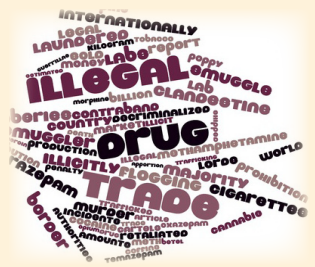
Zirilli appealed against his sentence to the High Court of Australia, arguing that Justice King's refusal to hear submissions from the prosecution on the appropriate sentence range was procedurally unfair, and failed to take into account a relevant consideration. A majority of the High Court decided that the sentencing judge was not required to listen to prosecution submissions on sentencing range. The accused had an opportunity to make submissions during the sentencing hearing, and the judge is already required to have regard to sentencing principles and the range of sentences given in comparable cases. In this case, while Zirilli claimed that the prosecution accepted that Zirilli had expressed remorse for his crimes, Justice King found in sentencing that Zirilli was not remorseful. Any submission that the prosecution may have made on an appropriate sentence would therefore have relied on the false premise that Zirilli was remorseful.

The High Court made the following observations of the role of plea negotiations.

*First, it is for the prosecution, alone, to decide what charges are to be preferred against an accused person. Second, it is for the accused person, alone, to decide whether to plead guilty to the charges preferred. That decision cannot be made with any foreknowledge of what sentence will be imposed. Neither the prosecution nor the offender's advisers can do anything more than proffer an opinion as to what might reasonably be expected to happen. Third, and of most immediate importance in these applications, it is for the sentencing judge, alone, to decide what sentence will be imposed.*

## Questions/tasks

1. Outline the process that led to Zirilli being sentenced to 26 years jail, with a non-parole period of 18 years.
2. What did Zirilli argue in his appeal?
3. Outline the High Court's decision in *Zirilli v The Queen*.
4. According to the High Court, what is the role of plea negotiations in determining criminal cases?



## The role of sentence indications

The purpose of **sentence indications** is to provide an accused person with information about the likely sentence they will face if they decide to plead guilty. The procedure for providing sentence indications were introduced as amendments to the Criminal Procedure Act 2009, and permanently adopted in the Magistrates Court, County Court and Supreme Court after a trial period.

As we have seen, the benefits of pleading guilty to a criminal offence are increased the earlier the guilty plea is entered, both for the accused person and for the criminal justice system. These benefits are outlined here:

- The accused person benefits because they are entitled to a greater discount from the sentence they would otherwise have received, and also benefit by reducing their legal costs in defending the charge.
- The courts benefit because time and resources are freed for other contested matters.
- Public institutions such as the OPP benefit, by reducing the amount of time and the expense of preparing a prosecution.
- Witnesses and victims benefit by not having to appear and give evidence under cross-examination at a contested trial.

As explained by former state Attorney-General, Rob Hulls, in his Second Reading Speech to introduce the Bill amending the criminal procedure legislation to enable the scheme, “sentence indications ... are designed to place defendants who may ultimately plead guilty in a better position to make this decision early in the proceedings”.

### Procedure for sentence indications

For the County Court and the Supreme Court, the procedure for giving a sentence indication is outlined in sections 207 to 209 of the *Criminal Procedure Act 2009*. In these courts, a sentence indication may be given at any stage of the proceeding, but may only be given once (unless the prosecutor agrees otherwise). The court will indicate to the accused whether it would be likely or not to impose a term of imprisonment that commences immediately, if the accused pleads guilty.



The court will give a sentence indication only if the accused applies for it, and only if the prosecution agrees. Even then, the court may refuse to give a sentence indication, if it considers that it does not have sufficient information to assess the impact of the offence on any victim. In this circumstance, the criminal proceeding will continue under a different judge, unless the parties agree.

The court may indicate that it is not likely to impose a sentence of imprisonment that commences immediately. If the accused subsequently pleads guilty, the court cannot then impose a sentence that commences immediately. This ensures that an accused person who pleads guilty is not placed in a worse position by relying on the sentence indication.

In the Magistrates' Court, a magistrate may at any stage of proceedings give an indication that the court would be likely to impose a sentence of imprisonment commencing immediately, if the accused pleads guilty. In addition, the magistrate may indicate whether they are likely to impose a specified type of sentence, which is a key difference from the higher courts. If the accused subsequently pleads guilty at the first possible opportunity, the court is not able to impose a more severe type of sentence than that indicated.

### The appropriateness of sentence indications

One potential risk of the sentence indication scheme is that by focusing on speed and efficiency in processing the accused's criminal charges, there may be a loss of procedural fairness to the accused. This means that the case against the accused has not been considered in detail by the court. This may be of greater concern in relation to accused persons who lack adequate legal representation.

However, the benefit to the accused of having their case processed efficiently and quickly through the courts is considered to be of primary importance. The right to be tried without reasonable delay is contained in s 25 2(c) of the Victorian *Charter of Rights and Responsibilities Act 2008*.

The benefits to the accused of having their charges processed expeditiously include:

- avoiding the accumulation of legal fees to defend their case.
- reducing the amount of time they may spend being held on remand awaiting their trial.
- reducing the period of uncertainty, and the associated distress of this, in awaiting an outcome of their case. This is particularly the case if the accused may be facing a custodial sentence if they are convicted.

Victims and witnesses may also benefit from a scheme which enables an accused person to plead guilty at an early stage in proceedings. The uncertainty and anticipation which may accompany the prospect of having to give evidence at a contested trial, particularly for sexual offences, will be substantially reduced by an early guilty plea. This consequently enables victims and witnesses to move on from a criminal incident more readily.

Consider also how the procedure for a plea negotiation includes safeguards to reduced procedural unfairness both to the accused and to the victim. In the higher courts, the prosecution may oppose a sentence indication if they consider that there is insufficient evidence for the court to rely on. Even if the prosecution agrees to a sentence indication, any of the courts may refuse to give a sentence indication. The Office of Public Prosecutions is obliged under the *Public Prosecutions Act 1994* (Vic) and the *Victims' Charter Act 2006* (Vic) to take account of the needs of victims and keep victims informed of proceedings. This ensures that the interests of victims are observed throughout the plea negotiation process.

#### Study tip

The then Attorney-General asked the Sentencing Advisory Council to monitor the pilot sentence indication scheme, which it did so between 1 July 2008 and 30 June 2009. There was only one case in the review period in which the court declined to give a sentence indication. This case is described in case study 1 of Activity 2f.

## Activity 2f: Case studies on sentence indications

### Case study 1

The defendant requested a sentence indication before a listing judge on a charge of recklessly causing serious injury. The Crown consented to the application but the judge refused to give a sentence indication due to the nature of the offence. The matter was returned to the list and was listed for trial before a different judge. A subsequent sentence indication was sought before the trial judge and this was consented to by the Crown.

The circumstances of the offence were such that it was difficult to determine the cause of the victim's injuries, as both the offender and the victim had fallen through a mirror during a struggle. There were also several mitigating circumstances: absence of a prior criminal history, the youthfulness of the offender, his gainful employment, the fact that he was undertaking tertiary education and his very good prospects of rehabilitation. The Crown submitted that a term of imprisonment was warranted but it was a matter for the Court as to how this should be served. The judge indicated that an immediate custodial sentence would not be likely to be imposed. The defendant pleaded guilty at the next available opportunity.



### Case study 2

The defendant sought an indication on a charge of recklessly causing serious injury. The Crown consented to the request and the judge indicated that an immediate custodial sentence would be likely to be imposed. The defendant pleaded guilty at the next available opportunity. At the plea hearing, a victim impact statement was tendered.

The Crown submitted that an immediately servable sentence was within range. The defendant had significant prior convictions and was sentenced to an immediately servable period of imprisonment.

*Source: Sentence Indication A Report on the Pilot Scheme Sentencing Advisory Council February 2010*

### Questions/tasks

1. Under what circumstances will a court consider giving the accused a sentence indication?
2. Outline why the court in case study 1 declined to give a sentence indication.
3. Outline what happens when a court refuses to give a sentence indication.
4. Describe the outcome of the case in case study 1.
5. In case study 2, what sentence indication did the judge give the accused?
6. What sentence did the accused receive in case study 2?

## Review questions 2.3

1. Explain what a plea negotiation is.
2. Describe what occurs during plea negotiations.
3. Outline the purposes of plea negotiations in determining criminal cases.
4. Summarise the criticism of the role of plea negotiations.
5. In your opinion, how appropriate are plea negotiations in determining criminal cases?
6. Define the term 'sentence indications'.
7. Outline the purposes of sentence indications in determining criminal cases.
8. Outline the benefits for the accused and for the criminal justice system of entering an early guilty plea.
9. Describe the procedures for sentence indications.
10. Explain how appropriate sentence indications are in determining criminal cases.





## 2.4 The court hierarchy in determining criminal cases

A hierarchy ranks the elements of an organisation from lowest to highest, according to status or authority. In our legal system, courts are arranged in a hierarchy according to their **jurisdiction**. A court's jurisdiction is the power to hear and determine cases, which includes trials at first instance and appeals from earlier decisions. The jurisdiction of a court is outlined in the legislation that establishes that court. This legislation is summarised in the following table.

Table 2.1: Courts and their legislation	
Children's Court	Children Youth and Families Act 2005
Magistrates Court	Magistrates' Court Act 1989
County Court	County Court Act 1958
Supreme Court and Court of Appeal	Supreme Court Act 1986

In addition, other specific legislation confers on each court jurisdiction for particular procedures. For example, the jurisdiction to hear committal proceedings and other criminal pre-trial procedures is conferred on the Magistrates' Court by the *Criminal Procedure Act 2009*.

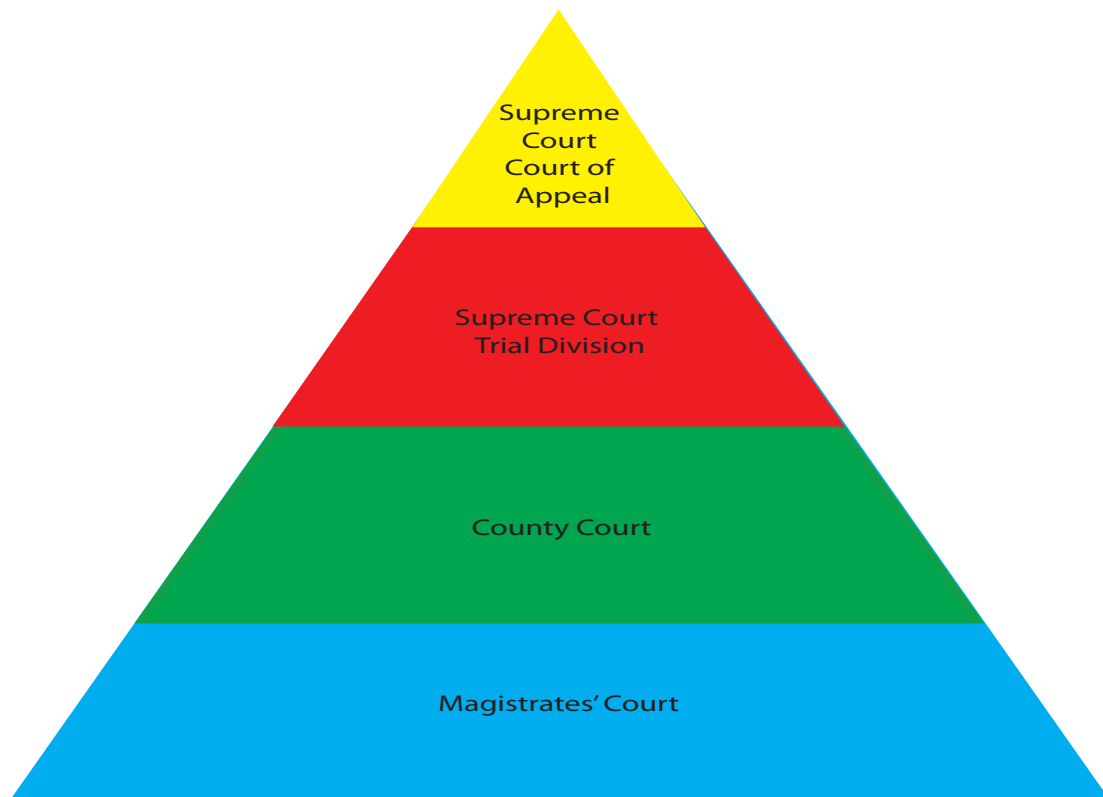
### The Victorian Criminal Court Hierarchy

As illustrated in Figure 2.2 below, the Victorian court hierarchy consists of the Magistrates' Court, the County Court and the Supreme Court (Trial Division and Court of Appeal).

#### Study tip

While students do not need to know the jurisdiction of each court, it is important to be able to name the courts in the hierarchy, and give examples to illustrate answers.

Figure 2.2  
Victorian Criminal Court Hierarchy



Above the Court of Appeal is the High Court of Australia. While this court is in a different hierarchy of Federal Courts, it has jurisdiction to hear appeals from each of the state hierarchies, including from the Victorian Court of Appeal.

## Reasons for a court hierarchy

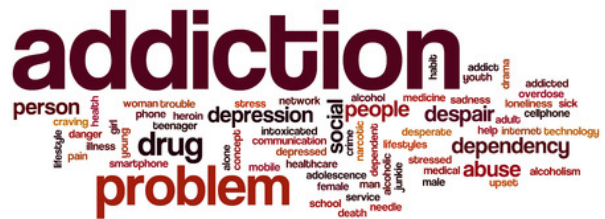
The reasons for arranging the courts in order of authority and jurisdiction fall into four categories.

### Specialisation

Each court has its own jurisdiction to hear particular types of cases. Because they hear similar types of cases on a daily basis, the courts can develop expertise in the relevant law and in the procedure for hearing matters. This means that judicial officers and court staff have experience in understanding the underlying causes of particular crimes, or may have a particular empathy with witnesses and victims who may need to give evidence in particular crimes. This allows the courts to provide specific services for the benefit of all people participating in a criminal case.

For example, the Magistrates' Court has jurisdiction to hear summary offences. It has developed simplified procedures for submitting evidence by way of written summary, which is quicker and more efficient. By contrast, the Supreme Court hears the most serious indictable offences such as homicide and drug trafficking offences. It therefore has procedures for the submission of complex forensic or expert evidence. In the County Court, which specialises in hearing the more serious sexual offence cases, there are specialised procedures for hearing evidence from victims which aims to reduce the impact of giving oral testimony while ensuring that evidence is reliable.

Another example of specialisation is the Drug Court at the Dandenong Magistrates Court. This is a sentencing court, which specialises in applying appropriate sanctions to offenders who plead guilty to criminal offences, and who acknowledge that drug addiction is the underlying cause of the offending. The Drug Court may suspend a custodial sentence in favour of a drug treatment and supervision order, to ensure that the sanction addresses the offender's drug or alcohol dependence. The Drug Court will be expanded to the Melbourne Magistrates Court, where services can be extended to a greater number of people, with the participation of Legal Aid Victoria.



### System of appeals

A person who has been convicted of a criminal offence may appeal their conviction if they can establish one of the following grounds:

- there has been a mistake in the interpretation of evidence
- there has been a mistake in the application of the relevant law
- there has been a mistake in sentencing.

Likewise, the prosecution may appeal a mistake in law or sentence. In cases where a conviction results from a jury verdict, the appeal must establish that the jury was misdirected by the trial judge in summing up.

A court hierarchy allows for a system of appeals to operate, whereby the decision of a court can be reviewed by a court that is higher in the hierarchy. This provides a number of benefits. Judges in higher courts generally have greater experience and expertise in relevant areas of law. Their review of a decision on appeal takes advantage of this judicial expertise, and enables rigorous review of lower court decisions. This provides reassurance for participants in criminal proceedings that the outcome of their case is legally sound, and ensures that convictions and sentences are fair and just.

For example, appeals on questions of law from a conviction in the Magistrates' Court are heard in the Supreme Court. The Court of Appeal hears all appeals on questions of law from the County Court and the Trial Division of the Supreme Court. The parties to a criminal proceeding may take an appeal from a decision of the Court of Appeal to the High Court of Australia, if that court grants leave.

## Activity 2g: The interpretation of evidence in the Rapovski case

*Rapovski v The Queen* [2017] VSCA 175

Rapovski was charged with the attempted murder of a man named Taleski in February 2014. Rapovski had gone with his friend Sazdanovski, to meet Taleski for a fight near the KFC in Dalton Road, Thomastown. When Rapovski and Sazdanovski arrived at the scene of the fight that Sazdanovski had arranged, Taleski was with two other men, who threw two bottles at Rapovski's car, seriously injuring a woman who was a passenger in the car. Rapovski and Sazdanovski jumped out of the car, and Taleski was shot in the neck, leaving him a paraplegic.

The prosecution alleged that it was Rapovski who fired the gun at Taleski. Rapovski pleaded not guilty, and at trial in the Supreme Court his defence was that it was Sazdanovski who fired the gun at Taleski. The jury reached a verdict of 'guilty', and Rapovski was sentenced to 12 years imprisonment.



Rapovski appealed to the Court of Appeal, on the ground that the verdict was unreasonable or could not be supported by the evidence. The issue for the Court of Appeal to determine was whether the evidence was capable of supporting the jury's verdict of guilty beyond reasonable doubt.

The Court of Appeal reviewed the transcript of all the witness testimony from the trial, and dismissed Rapovski's appeal. The judges concluded that it was open to the jury on the evidence to be satisfied beyond reasonable doubt that Rapovski was the shooter in the incident. Justice Priest observed that, "The jury had the advantage — as I have said, an advantage not enjoyed by this Court — of seeing and hearing the crucial witnesses give their evidence." If the evidence had led the court to believe that there was a significant possibility that an innocent person had been convicted, then the appeal court would be bound to set aside the jury's verdict.

### Questions/tasks

1. What was Rapovski charged with?
2. Outline the facts of the case.
3. What was the finding of the jury in the Supreme Court (Trial Division)?
4. Explain why Rapovski appealed to the Court of Appeal.
5. Explain the Court of Appeal's decision.

## Activity 2h: A mistake in law?

*Duong v The Queen* [2017] VSCA 78

Duong was charged with attempting to possess a commercial quantity of cocaine, after receiving three FedEx parcels containing the drug, which were addressed to her and delivered to her address.

At Duong's trial in the County Court, the prosecution commenced with an opening address to the jury in accordance with s225 of the Criminal Procedure Act 2009. Duong's counsel then made an address to the jury in response. Both the prosecution's opening address and the accused's response are required to be filed in written form with the court beforehand, and are restricted to outlining the issues in dispute at the trial.



When Duong's counsel was addressing the jury, the trial judge interrupted him on two occasions to ask that he confine his address to the issues in dispute, as required by the rules of procedure. Duong's counsel then made an application that the jury be discharged, claiming that the jury had been prejudiced by the judge's interruptions of his address. The judge refused the application to discharge the jury. The trial continued, and resulted in Duong being convicted and sentenced to ten years' imprisonment.

Duong appealed on the ground that the judge had made a mistake in law by not discharging the jury.

The Court of Appeal dismissed the appeal, finding that the trial judge was not in error. On reviewing the transcript of the accused's counsel's address to the jury, the Court of Appeal judges decided that his address was "repetitive", and that the trial judge was entitled under s225 of the Criminal Procedure Act to interrupt and limit the length of the response in the way that she had. The trial judge had therefore not made any error when she dismissed the application to discharge the jury.

### Questions/tasks

1. What was Duong charged with?
2. Describe what occurred when the prosecution and the defence addressed the jury at Duong's trial.
3. Outline the outcome of Duong's trial.
4. On what grounds did Duong appeal to the Court of Appeal?
5. Explain the Court of Appeal's decision.

## Activity 2i: A mistake in sentencing?

*Stocks v The Queen* [2017] VSCA 137

The accused was involved in a collision between two vehicles in Narre Warren in March 2015 that caused injuries to three other people. He was charged with three charges of negligently causing serious injury, and two summary offences associated with driving under the influence of alcohol and drugs. The accused pleaded guilty at the first possible opportunity. In the County Court, the judge sentenced him to a term of imprisonment for each of the five offences.

Stocks appealed his sentence for the summary offences, arguing that the judge had made a mistake in sentencing him to imprisonment, because the maximum penalty for these offences was a fine. The Court of Appeal allowed Stocks's appeal and imposed a new sentence of a fine totalling \$400.

### Questions/tasks

1. What was Stocks charged with?
2. In what court did Stocks plead guilty?
3. What was Stocks sentence?
4. Outline why Stocks appealed to the Court of Appeal.
5. Explain the Court of Appeal's decision.



## Administrative convenience

A key object in managing the courts in Victoria is to ensure that cases listed for hearing proceed as quickly as possible. Avoiding unreasonable delay in the trial of a criminal offence is a key right outlined in s25 of the *Charter of Human Rights and Responsibilities Act 2006*. Arranging the courts in a hierarchy contributes to the efficiency of the courts by making their administration more effective. Matters can be allocated to an appropriate court according to the seriousness and complexity of each case. Courts can arrange their daily lists with an accurate assessment of the time each hearing will take, because similar cases are being heard together. Courts need only provide the appropriate facilities necessary for the type of cases they hear. In the Magistrates' Court, for example, there is no need to provide the facilities for a jury trial, such as a jury room and box in the court, because the Magistrates' Court only tries cases in summary form, and not before a jury.

## Doctrine of precedent

The **doctrine of precedent** relies on the principle of *stare decisis*, that courts should stand by previous decisions. The court hierarchy enables judges to determine which precedents are binding, and which are merely persuasive. For example, the ratio decidendi of a County Court judgment would bind the Magistrates' Court in a case of similar fact, but would be merely persuasive on the Supreme Court. Without a court hierarchy, the doctrine of precedent could not operate. All trial courts in Victoria must follow precedents set in the Court of Appeal, because it is the highest court in the hierarchy. Decisions of the High Court of Australia are binding on all the Victorian courts, which rank below it.



## Review questions 2.4

1. Explain what a court hierarchy is.
2. Briefly outline the Victorian court hierarchy.
3. Using examples, outline why specialisation is an important reason for the court hierarchy.
4. Outline the grounds on which a court's decision can be appealed.
5. Outline why a court hierarchy allows for a system of appeals to operate.
6. Explain the benefits of a system of appeals.
7. Outline how a court hierarchy provides for administrative convenience.
8. Explain the relationship between the court hierarchy and the doctrine of precedent.



## 2.5 The responsibilities of key personnel in a criminal trial

The key principles of a criminal trial in Victoria are outlined in section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). They include:

- the right to be tried without unreasonable delay
- the right to be tried in person
- the right to examine witnesses against the accused
- the right not to be compelled to testify against themselves.

In order for the accused's trial to proceed fairly and without delay, the co-operation of key personnel participating in a criminal trial is required. These personnel include the judge, jury, parties and legal practitioners.

### The responsibilities of the judge

The most important responsibility for a judge is to act as an independent umpire in the conduct of a criminal trial. They must oversee proceedings impartially and, just as importantly, without the perception of having any bias towards either party.

#### Study tip

The Supreme Court of Victoria website states that, "Judges preside over court proceedings, either alone, as part of a panel or with a jury. Most importantly they are impartial decision-makers in the pursuit of justice. The judge provides an independent and impartial assessment of the facts and how the law applies to those facts. Their role is to interpret the law, assess the evidence and control how hearings and trials are conducted."

### Activity 2j: Trial judge related to victim of a similar crime

*LAL v The Queen* [2011] VSCA 111

LAL was convicted of sexual assault of a child under the age of 16 and sentenced to a term of imprisonment.

After the trial, LAL became aware that the trial judge had a child who had experienced a similar sexual assault at a similar age. LAL appealed his conviction to the Court of Appeal, arguing that the trial judge had an apprehended bias that affected the fairness of his trial.

The Court of Appeal considered the nature of the offence alleged, and the trial judge's experience of a similar offence in her immediate family. The Court of Appeal concluded that the mere fact that a judge is related to a victim of crime is not sufficient to disqualify the judge from presiding at a trial of a person accused of a like crime. However, in the present case, the offence at trial was so similar to the judge's personal experience that a fair minded observer might consider that the trial judge was unable to bring an impartial mind to the conduct of the trial. The Court of Appeal allowed the appeal, set aside the conviction and ordered that LAL be retried before a different judge.

**BIAS**

#### Questions/tasks

1. What was LAL convicted of?
2. Explain the grounds on which LAL appealed his conviction.
3. What did the Court of Appeal need to consider?
4. Outline the Court of Appeal's decision.

### Conducting the trial

The judge may ask questions to clarify any aspect of the evidence, but in general the judge must allow the parties to a criminal trial to introduce evidence and make submissions without interference. If a party is unrepresented by legal counsel at trial, the judge must ensure that this does not disadvantage them.

### Interpreting and applying the rules of evidence and procedure

Criminal trials must be conducted fairly to ensure that neither the prosecution nor the defence has any advantage over the other. Consequently, there are a number of rules of evidence and procedure that the parties must follow to ensure that the trial is fair. These rules are outlined in legislation such as the *Criminal Procedure Act 2009*, the *Evidence Act 2008*, and the rules of procedure for each court, such as the *Supreme Court (Criminal Procedure) Rules 2008*.

The judge, as the person with the most legal expertise in the courtroom, must be an expert in these various rules of evidence and procedure. It is the judge's responsibility to ensure that the trial follows these rules, to ensure that the trial is fair.

If the parties to a criminal trial disagree about the application of a rule of evidence or procedure, the judge must make a decision to resolve that disagreement so that the trial may proceed. This may involve the judge ruling whether evidence is *inadmissible* – that is, whether it should not be put before the jury. Examples of inadmissible evidence include:

- hearsay evidence – testimony given by a witness of what others have said to them. It is not admissible because the accused is unable to cross-examine the other party to a conversation to test the veracity of what they said. A witness may only give evidence of facts or incidents that they have personal knowledge of.
- irrelevant evidence – only evidence that contributes to establishing relevant facts in the case is admissible. If evidence is irrelevant, it could waste time and mislead or confuse a jury. Such evidence could assist the defence by preventing a jury from making a finding beyond reasonable doubt, or it may assist the prosecution by casting a negative light on the accused while having little probative value in relation to the charge.
- evidence obtained illegally – the judge must be satisfied that evidence such as recordings of phone calls, or exhibits obtained through searches, have been properly obtained by warrant. If evidence is obtained illegally, the judge may rule that it is excluded from the prosecution's case.
- evidence of prior convictions – evidence that related to past records or prior convictions of the accused is not admissible in a trial. The accused should be tried on the facts and circumstances of the current case only. However, in some circumstances propensity can be allowed to prove the accused has a tendency to commit this type of crime. This evidence can include prior convictions or past records.

While listening to the evidence of the prosecution, it is also the responsibility of the judge to consider whether the prosecution's evidence is capable of supporting a verdict of guilty beyond reasonable doubt. If the judge has concerns about the strength of the prosecution case, the judge may advise the jury that they have a right to enter a verdict of 'not guilty' without hearing more evidence, and invite them to do so in. This is known as a '**Prasad direction**', following the case of *R v Prasad* (1979) 23 SASR 161.

#### Box 2.4 Prasad direction used in *Rapovski v DPP*

In *Rapovski v DPP* (discussed in Application exercise 2.g) Justice Beale gave a Prasad direction to the jury following the conclusion of the prosecution's case, because of doubts about the credibility and reliability of the prosecution's witnesses about who shot at the victim. The jury however, indicated that they would like to continue the trial, and ultimately found the accused guilty.



## Cross-examination

A key part of a criminal trial is cross-examination. This may occur at two stages in the proceedings: firstly, the accused may cross-examine witnesses for the prosecution; and secondly, the prosecution may cross-examine witnesses for the defence.

Cross-examination is important to test the reliability and veracity of a witness. The principle is that if a witness can maintain their story in the face of rigorous questioning under oath, it is more likely to be true. The jury's assessment of a witness as they give evidence in court is a vital element in their determination of whether the witness is telling the truth, and therefore whether a case has been proved beyond reasonable doubt.

Cross-examination can, therefore, be harrowing for a witness. This is particularly the case for witnesses who are children, or who are the victims of sexual assault. An important responsibility for the judge is to balance the accused's need for rigorous cross-examination against the public interest in protecting witnesses from harassment or intimidation from question by counsel in court. The judge should therefore ensure that a witness is as comfortable as possible and disallow any questions that are not relevant to the case. The judge is empowered to make arrangements that will reduce the stress to a witness of giving evidence, such as allowing for testimony by closed circuit television, permitting a witness to be accompanied by a support person, or placing screens in the court so that a witness is not required to make direct eye contact with the accused.

## Concluding the trial

Once both sides have concluded their evidence, it is the responsibility of the judge to provide directions to the jury. Trial judges give juries directions in order to assist them reach fair and just verdicts. In this the judge is assisted by the *Jury Directions Act 2015* (Vic), whose purpose is to reduce the complexity of jury directions in a criminal trial, and to guide the judge in giving directions that are clear, brief and simple. The Act came into force on 29 June 2015, and its provisions are summarised in Box 2.5.

**Box 2.5 Provisions in the *Jury Directions Act***

It is the responsibility of the trial judge to determine what matters were at issue in the trial in consultation with the prosecution and defence at the conclusion of the case, and explain them in summing up to the jury.

**Section 65:** The judge must explain to the jury only so much of the law as is necessary for the jury to decide those issues, and may do this orally or in writing.

**Section 66:** The judge must identify only the evidence necessary to assist the jury to determine the issues.

**Sections 14 and 63:** The judge must respond to any direction which the jury requests, and may explain the meaning of “beyond reasonable doubt” in response to a jury question on this issue.



In the Magistrates’ Court, where there is no jury, the magistrate must determine a verdict of guilty or not guilty at the conclusion of the trial.

### Imposing sanctions

When a person has been convicted of a criminal offence, either by pleading guilty or having been proven guilty at the conclusion of a trial, it is the responsibility of the judge to impose an appropriate sanction. In doing this, the judge is guided by the provisions of the *Sentencing Act 1991* (Vic).

When sentencing, the judge must consider a number of different factors, which are explored further in Section 2.8.

### The responsibilities of the jury

Jury trials are held only for the most serious indictable offences in the County Court and Supreme Court, where the accused pleads not guilty. In the Supreme Court, jury trials accounted for around half of the 86 criminal matters finalised in 2014-15. In the County Court, jury trials accounted for around one fifth of the 2,236 criminal matters finalised in the same period. Given that the Magistrates’ Court finalised over 275,000 criminal matters in the same period, it can be seen that jury trials represent under 2 per cent of all criminal cases in Victoria.

#### Study tip

You might wonder, ‘why are there 12 people on a jury?’ While there are some historical explanations (which may or may not be accurate), the only sensible response is, ‘there just is’. It is worth noting that, in criminal matters, a jury can actually have more than 12 people. When a criminal trial is expected to last for a long time, up to 15 people may be selected to the jury. According to the *Juries Act 2000* (Vic), if there are more than 12 jurors remaining when the jury retires to consider its verdict, a ballot must be held to reduce the jury to 12. It is also important to note that the *Juries Act* also states that a criminal trial cannot continue with less than 10 jurors.

In a criminal trial in the County Court or the Supreme Court, a jury of 12 members is responsible for determining the facts of the case where the accused pleads not guilty. In doing this, the jury performs an important role in representing a cross-section of the community: ensuring that the accused is judged by their peers. This is achieved by random selection of jurors from the electoral roll.

Once they have been selected to participate in a jury trial for an indictable offence, the responsibilities of individual jurors include:

- Choosing a foreperson to represent the jury and deliver the verdict to the court
- Listening attentively and objectively to the evidence without any bias
- Follow the directions of the judge regarding the relevant law and its application to key evidence
- Deliberate on the evidence and reach a verdict of ‘not guilty’ or ‘guilty’ beyond reasonable doubt.

Listening attentively to the evidence can be a challenging task – particularly when we consider that the role of defence counsel is to introduce sufficient doubt to defeat the prosecution from proving their case beyond reasonable doubt. Nevertheless, the jury must assess the strength of the evidence continually throughout the case. Note that, as occurred in *Rapovski v DPP* (explored earlier in the chapter), the jury may be invited by the judge to consider a ‘not guilty’ verdict before the case has concluded.

When they come to deliberate a verdict, the jury retires to the jury room to consider the evidence. The foreperson chairs jury discussions and ensures that every juror has the opportunity to express their view. The jury may vote regularly and progressively to determine whether they are able to reach a verdict. There are three conclusions that a jury may reach:

- **Unanimous verdict** – this means that all twelve jurors agree that the accused is ‘guilty’, or ‘not guilty’, of each charge in the indictment.
- **Majority verdict** – The court may accept a verdict that all but one of the jurors agrees to. If the jury has deliberated for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial, the court may accept a majority verdict. This means that eleven of the twelve jurors agree that the accused is ‘guilty’ or ‘not guilty’ of each charge in the indictment.
- **Hung jury** – this means that the jury is unable to reach a verdict on a charge. Where the number of jurors voting ‘guilty’ or ‘not guilty’ is between two and ten, the votes are split, and the jury is unable to reach a verdict. If, after continued deliberation, the jury remains unable to reach a verdict, the trial is aborted. The prosecution has the option of seeking a retrial.

### Study tip

*The legal definition of ‘majority’ in relation to guilty verdicts is not the same as the common definition, which is more than 50 per cent. In legal procedure, a majority verdict means that all but one of the jurors agree that the accused is guilty or not guilty. If there were 12 members of a jury, eleven must agree for there to be a majority verdict.*

The *Juries Act 2000* (Vic) outlines a number of legal responsibilities for jurors in a criminal trial; and there are substantial penalties if they are contravened. These responsibilities include:

- Jurors must disclose known reasons that would prevent them acting impartially. A person must disclose if they are *disqualified* from being a juror, by reason of having a serious criminal record. The presumption is that such a person may be biased in favour of the accused. A person must disclose if they are *ineligible* to be a juror because their profession is associated with the criminal justice system, such as being a lawyer or a police officer. The principle is that such a person has superior knowledge that may unduly influence other jury members. Failure to inform the Juries Commissioner as soon as practicable is an offence, punishable by a fine.
- Jurors must keep their deliberations secret. It is an offence under s78 to disclose any information such as opinions expressed, votes cast or arguments made in the course of reaching a verdict. In addition, it is an offence under s77 to publish the identity of any juror. The maximum sanction for these offences is five years imprisonment.
- Jurors can only rely on the evidence introduced at trial in reaching a verdict. Section 78A creates an offence for making inquiries about a matter the subject of a trial, including Internet searches.

## Responsibilities of the parties

The parties to a criminal charge are responsible for preparing and presenting their own case. For example, the parties will investigate the law and gather evidence that is relevant to their case. In criminal cases, the DPP will initiate action against the accused. The prosecution will need to decide what evidence to present, and what legal arguments to submit in order to prove that the accused is guilty beyond reasonable doubt.

For the accused, preparing and presenting a case may involve a number of different decisions:

- Whether to have legal representation or to be self-represented. This consideration may rely on whether an accused person has access to Legal Aid to fund their representation. If an accused person cannot obtain Legal Aid funding, their decision about retaining counsel may depend on their capacity to pay.
- Whether to plead guilty or not guilty to charges. A decision to contest charges at trial will depend on the outcome of any plea negotiations with the prosecution.
- What evidence to present, and what legal arguments to submit in order to defend a case. This may involve deciding whether he or she should waive their privilege against giving testimony, and take the stand in their own defence.

There may be substantial risks for an accused person in these choices, particularly if their defence is unsuccessful and they are convicted of a serious indictable offence. An accused may seek to appeal a conviction to a higher court where decisions about how to run their case have proven to be misguided, but it can be difficult to convince judges on appeal that such a situation involves a judicial error which requires correction on appeal. This is demonstrated by the case of *R v Getachew* [2012], which is the subject of Activity 2k.

### Study tip

*Criminal cases in the Magistrates’ Court are usually prosecuted by a police officer. Criminal cases in the higher courts are usually prosecuted by the OPP.*



## Activity 2k: Not giving evidence!

*R v Getachew* [2012] HCA 10

Getachew was convicted of rape in the County Court of Victoria. The complainant gave evidence that she was asleep at the time the offence commenced, and did not consent to the sexual act. Getachew did not introduce any evidence to defend the charges at his trial. Instead, his defence relied on submissions by counsel that the evidence did not prove beyond reasonable doubt that the sexual act took place. The jury reached a verdict of 'guilty', and Getachew was sentenced to imprisonment.

Getachew successfully appealed his conviction to the Court of Appeal. Two of the three judges decided that the judge had made a mistake by not instructing the jury to consider whether Getachew might have believed that the complainant was consenting to the sexual act, in reaching their verdict.

The prosecution appealed this decision to the High Court of Australia. The Full Bench allowed the prosecution's appeal and reinstated Getachew's conviction. The High Court decided that, as Getachew had not introduced any evidence to contest the complainant's evidence that she was not consenting, or that he believed she was consenting, there was no reason for the trial judge to direct the jury about the issue of consent. The trial judge had therefore not made any error in directing the jury, and the jury's verdict should therefore stand.



### Questions/tasks

1. What was Getachew convicted of in the County Court?
2. What did Getachew's defence rely on?
3. Outline why the Court of Appeal upheld Getachew's appeal.
4. Explain why the High Court reinstated Getachew's conviction.
5. What does this case suggest about the need to present evidence that is relevant to each party's case?

## Responsibilities of legal practitioners

In a criminal trial, the parties may be represented by a legal practitioner to present their case to the judge and jury. A **solicitor** is a party's primary legal adviser. It is the solicitor's responsibility to understand the client's case, advise them of the relevant law, and prepare a brief for the **barrister**, also known as **counsel**. Barristers are specifically trained legal practitioners who specialise in presenting a case to the court. For complex cases, parties may have numerous solicitors and barristers to prepare their case for trial.

### Preparing evidence

Before the trial, a key responsibility of the solicitor is to prepare the witness statements their client will seek to rely on in evidence. A witness statement is a written record of the evidence that a witness is able to give to the court. Each party to the criminal trial files its witness statements with the court and exchanges them with the opposing side, in order to avoid the element of the surprise and ensure that the trial is fair.



At trial, it is the barristers' responsibility to vigorously test the credibility and reliability of witness evidence introduced by the opposing team through cross-examination. This involves questioning the witnesses, often minutely, about the evidence contained in their witness statement. For the defence, counsel's key objective in cross-examining prosecution witnesses is to introduce doubt in the minds of the jury that their evidence establishes that guilt of the accused to the required standard – beyond reasonable doubt.

### The responsibility of legal practitioners to the court

While a barrister is hired, or "retained" by their client, and paid by them to present their case to the best of their ability, barristers are also sworn officers of the courts under the *Legal Practice Act 1996* (Vic). They therefore have special obligations to the court in presenting a case on behalf of their client.

The Legal Practice Act specifically states that a legal practitioner has professional obligations that include duties to the Supreme Court and ethics, as well as duties to their clients.

In the High Court case of *Gianarelli v Wraith* (1988) 165 CLR 543, Chief Justice Mason considered that a legal practitioner's duty to the court is in the public interest of dispensing justice, and overrides the duty owed to their client.

A legal practitioner presenting a case in a criminal trial therefore has several additional responsibilities to the court. According to the High Court, a legal practitioner is required to:

- not mislead the court
- not cast unjustifiable aspersions on any party or witness
- not withhold documents or case precedents from the other party which may detract from a client's case
- raise any irregularity that occurs at trial so that it may be remedied, rather than staying quiet in order to use the incident as a ground for appeal.

Mason CJ stated that these responsibilities to the court are “paramount and must be performed”, even if the client gives instructions to the contrary. The legal practitioner, rather than being an agent for the client, must exercise an independent judgment in the interests of the court when performing their duties. They must present their client's case in a way that assists the court to achieve the correct outcome.

## Review questions 2.5

1. Outline the main responsibility of a judge.
2. What is the responsibility of the judge in conducting the trial?
3. Explain the responsibility of the judge in interpreting and applying the rules of evidence and procedure.
4. Outline what the judge can do if she or he has concerns about the strength of the prosecution case.
5. Explain what a judge can do to ensure that cross-examination occurs, yet protect witnesses from harassment or intimidation from question by counsel in court.
6. What are the responsibilities of the judge at the conclusion of the trial?
7. Outline the main responsibility of the jury in a criminal trial.
8. Identify the responsibilities of individual jurors in a criminal trial.
9. Explain what happens when a jury retires to consider its verdict.
10. Outline the legal responsibilities that jurors in a criminal trial have.
11. Using examples, distinguish between the terms ‘disqualified’ and ‘ineligible’ as they relate to jurors.
12. Explain the main responsibilities of the parties in a criminal trial.
13. Distinguish between a solicitor and a barrister.
14. Outline the responsibilities of a solicitor in a criminal trial.
15. Outline the responsibilities of a barrister in a criminal trial.
16. Explain the responsibilities that legal practitioners have to the court.

## 2.6 The purposes of sanctions

A **sanction** is a legal penalty given to a person who has been convicted of a criminal offence. The sanction is decided on and ordered by the sentencing judge or magistrate. If there was a contested trial, the presiding judge or magistrate will impose the sentence.

Section 5 of the *Sentencing Act 1991* (Vic) outlines the five purposes of criminal sanctions. As illustrated in Figure 2.3, these are the only purposes for which a sanction can be imposed.

Each sanction available to the court varies in its ability to achieve these purposes. A sentencing judge or magistrate will carefully consider each sentencing options, and combinations of them, to achieve the purposes of sanctions.

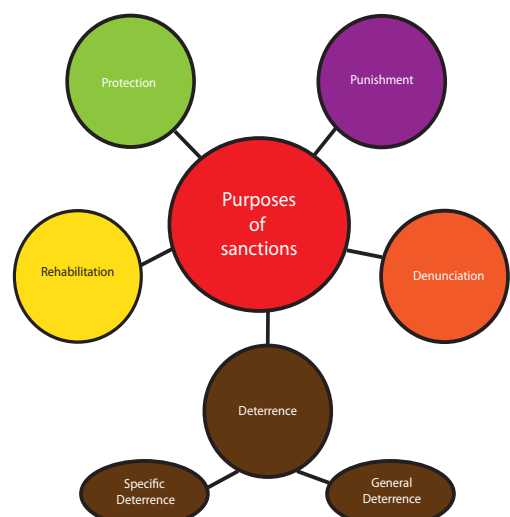
### Rehabilitation

A sanction should attempt to change the offender from a criminal into a law-abiding member of society. If the convicted person is successfully rehabilitated, they will not cause greater burden on society by committing further crimes.

### Punishment

By punishing the offender for their crime, society obtains revenge against the offender for the harm they have done. Although this seems primitive,

Figure 2.3



unless the state takes such action, individual victims of crime may seek retribution personally, which would reduce law and order. A sanction should be appropriate to the crime, and be just in all the circumstances.

## Deterrence

A sanction imposed by the state will specifically discourage the offender from committing the offence again. This is known as specific deterrence. A sanction will also generally discourage other people from committing the same or similar offences, for fear of receiving the same penalty. This is referred to as general deterrence as it is directed at discouraging the general public.

## Denunciation

Public disapproval of the offender, expressed by the court, demonstrates the community's view that the offender's role in committing the crime is not acceptable.

## Protection

The community may need to be protected from future offending by the convicted person. This is most likely to be achieved by a term of imprisonment, as the offender is removed from public life, and is therefore physically unable to commit further crimes in the general community.

Only some sanctions are capable of achieving each of these purposes. A fine, for example, has little role in rehabilitating an offender.

## Review questions 2.6

1. Define the term 'sanction'.
2. Identify the five purposes of sanctions.
3. In relation to sanctions, explain what the term 'rehabilitation' means.
4. Outline how a sanction might result in an offender's rehabilitation.
5. Explain why it is better for society to punish offenders rather than for victims of crime to seek their own personal retribution.
6. Outline how sanctions can deter an offender or other people from committing the same or similar offences.
7. Distinguish between specific deterrence and general deterrence.
8. Explain how sanctions have the purpose of denunciation.
9. Explain why imprisonment is the sanction that is most likely to achieve the purpose of protection of the community.
10. Which purpose of sanctions do you consider to be the most important? Explain why you hold this opinion.

### Activity 21: Motorbike rider sentenced to imprisonment

*DPP v Jakobsson* [2017] VCC 688

In 2017, Caleb Jakobsson faced charges in the County Court of Victoria. He was convicted of one count of culpable driving causing death and one count of failing to stop after an accident. Jakobsson hit and killed the victim, Andrea Lehane, on a pedestrian crossing while riding an unregistered motorbike at speed in a suburban shopping centre.

In sentencing Jakobsson to seven years' imprisonment, Her Honour Judge Campton made the following remarks:

*In a number of decisions, the Court of Appeal has also emphasised the importance of the moral and legal obligation of a driver to remain at the scene after an accident, and the gravity of that offence. When you left the scene, you were aware that you had hit a pedestrian. You knew, or ought to have known, that your actions could have resulted in the person being killed or suffering serious injury. In your record of interview, you acknowledge that you should have stopped. While I accept that you panicked, and that there were others on the scene who could attend to the victim, your actions were morally reprehensible, and I denounce your conduct."* (*DPP v Jakobsson* [2017] VCC 688)



#### Questions/tasks

1. What was Jakobsson convicted of in the County Court?
2. What sanction did Jakobsson receive?
3. Which purpose of sanctions did Judge Campton emphasise in her speech?
4. Outline two other purposes of imprisonment.

## Activity 2m: Culpable driver sentenced to imprisonment [Part A]

*DPP v Dunkley-Price & Anor* [2013] VCC 2048

Travis Dunkley-Price was charged with culpable driving arising from an accident near the Myrniong off-ramp on the Western Highway, where the speed limit was 110 kph. He had stopped in the left lane of the road to make a mobile phone call, when the victim was forced to stop behind him, as she was trying to exit the highway. Another driver, Stevenson, then drove into the back of the victim's car at high speed, forcing her car into the back of Dunkley-Price's car. The victim was killed and her passenger seriously injured. Dunkley-Price pleaded not guilty to one charge of culpable driving causing death, and one charge of culpable driving causing serious injury. At trial, his defence was that he was not in the left lane but in the emergency lane. In 2013, Dunkley-Price was convicted of culpable driving in the County Court of Victoria.

At the time of the culpable driving offence, Dunkley-Price was unlicensed, having been suspended from driving due to a speeding offence. He pleaded guilty to the summary offence of driving while his licence was suspended for a previous speeding offence. The jury also convicted Stevenson of dangerous driving.

The sentencing judge, Her Honour Judge Pullen, observed that it was necessary to protect the community from Dunkley-Price's continued driving offences. She imposed a term of imprisonment.

Judge Pullen also considered it necessary to impose a sentence that would provide general deterrence to other road users from driving in a similar way. In addition, the sentence needed to specifically deter Dunkley-Price from driving in a similar fashion in future, because he was driving while disqualified when the offence occurred, and he had a history of other driving offences. Dunkley-Price was sentenced to a lengthy term of imprisonment – seven years and three months' jail.



### Questions/tasks

1. Outline the facts of the Dunkley-Price case.
2. What was Dunkley-Price convicted of in the County Court?
3. What sanction did Dunkley-Price receive?
4. Which purposes of sanctions did Judge Pullen consider when imposing the sentence?
5. Outline two other purposes of imprisonment.

## 2.7 Fines, community corrections orders and imprisonment

### The purposes of fines

A fine imposes a monetary penalty on an offender. A court can impose a fine either with or without recording a conviction. Fines are the most common penalty imposed for any offence.

In determining the amount of the fine and costs, the court must take into consideration, among other things, the financial circumstances of the offender.

The penalty for any offence is stated in the legislation outlining the offence, and is expressed as a number of 'penalty units'. An example of this can be seen below in Box 2.6. The value of a penalty unit is set annually by the Department of Treasury and Finance, and updated on 1 July. This saves Parliament from having to amend each Act separately to keep fines in line with inflation. The value of a penalty unit in Victoria from 1 July 2017 to 30 June 2018 was \$158.57.

#### Box 2.6 *Juries Act 2000* (Vic)

Section 71. Failing to attend for jury service

- (1) A person who is summoned for jury service must not, without reasonable excuse, fail to comply with the summons.

Penalty: 30 penalty units or imprisonment for 3 months.

This fine would amount to \$9514.20 in the 2017–2018 financial year.



A fine is the least onerous of the criminal sanctions available to the sentencing judge. Its purpose is to punish the offender, although the extent of the punishment depends on the quantum of the fine. A large fine may operate to provide specific and general deterrence for future similar offences.



To demonstrate this, a corporation that terminates or threatens to terminate the employment of a person who is absent from work due to jury service may face a fine under s76 of the *Juries Act* of 600 penalty units (or \$95,142 in the 2017–2018 financial year). The penalty for individuals committing the same offence is 120 units or 12 months imprisonment. Because it is not possible to jail a corporation, the fine must be of a higher amount than for an individual in order to have the same deterrent effect.

A fine has little value in rehabilitating an offender, or providing community protection. A large fine may reinforce the court's denunciation of an offender's conduct.

### *The purposes of community correction orders*

A **community correction order (CCO)** is a flexible order served in the community, and is outlined in Part 3A of the *Sentencing Act 1991*. A CCO may only be made for less serious indictable offences. It cannot be ordered for the most serious offences such as murder, rape and drug trafficking. A CCO can only be made for special reasons, such as mental impairment, for more serious offences such as manslaughter, kidnapping and arson causing death.

Every CCO has four standard terms that extend for the duration of the order. In every case, an offender:

- must not reoffend for the duration of the order
- must not leave Victoria without permission
- must regularly report to a community corrections centre
- must comply with written directions from the Department of Justice.

Each CCO must have at least one condition attached. These conditions may require the offender to:

- undertake medical treatment or rehabilitation programs for drug or alcohol abuse
- avoid licensed premises that serve alcohol
- complete unpaid community work up to a total of 600 hours
- be supervised, monitored and managed by a corrections worker
- avoid association with specified people, such as co-offenders
- live at, or avoid living at, a specified address
- avoid particular nominated places
- comply with a curfew for between 2 and 12 hours each day
- be monitored and reviewed by the court to ensure compliance with the order
- pay a bond that must be surrendered if the offender fails to comply with any condition imposed.

In the Magistrates Court, a CCO can be imposed for a maximum of two years for one offence, two years for two offences, and five years for three or more offences. In the Supreme and County Courts, a CCO can be imposed for up to five years. A CCO may be ordered in addition to a fine or a term of imprisonment of up to one year.

An offender who breaches a term or condition of a CCO may be re-sentenced for their offence, and receive an additional sentence of three months imprisonment for their breach.

CCOs prioritise the rehabilitation of an offender within the community. Rehabilitation is more likely to be effective and successful for an offender in the community, by enabling them to remain connected with their support networks, continue their employment, and have access to more diverse treatment programs that address the reasons for their criminal conduct.

#### **Box 2.7 Extract from Victoria Legal Aid Annual Report 2015–16**

##### **A greater focus on rehabilitation through increased use of community correction orders**

At Victoria Legal Aid, we ensure that wherever appropriate our lawyers advocate for clients to be placed on community correction orders so that they have an opportunity to undertake programs with a rehabilitative focus. This year, 2,279 clients assisted by one of our in-house duty lawyers received a community correction order, an increase of 8 per cent. For grants of legal aid that were concluded in 2015–16, 3,864 clients were issued a community correction orders, an increase of 33 per cent from last.



CCOs provide a range of methods for punishing an offender. The mandatory terms materially impact an offender's liberty. If the offender breaches any condition of their CCO, they are likely to face a term of imprisonment for this offence. The range of conditions available to accompany the order place obligations and limitations on the offender which restrict them, and coerce them into altering their behaviour.

CCOs may be a particularly effective sanction for serious criminal conduct when combined with short terms of imprisonment; and for applying an appropriate sanction to young offenders who have the greatest opportunities for rehabilitation. In its guideline judgement on CCOs, the Full Bench of the Court of Appeal made the following observation:

*Even in cases of objectively grave criminal conduct, the court may conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment of up to two years if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending, directed at rehabilitative purposes.*

*Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342

A short prison term may therefore punish, deter and denounce the offender while protecting the community, while the CCO can effectively address the rehabilitation needs of the offender in detail, and under continuous court supervision for the duration of the order.

## The purposes of imprisonment

**Imprisonment** is the most severe sanction available in Victoria. This sanction removes an offender's liberty by denying them the right to live in the community for a period of time, depending on the severity of the offence committed. The *Sentencing Act* 1991 outlines the penalty scale for imprisonment. The penalty scale has nine levels, ranging from Level 9 (six months' imprisonment) to Level 1 (life imprisonment).

A prison term is the sanction that effectively addresses each of the purposes of criminal sanctions. It rehabilitates an offender, by providing programs and educational opportunities during their imprisonment. It punishes the offender, by depriving them of their liberty. It denounces the offender and the criminal behaviour, because being sent to prison is considered shameful. It provides deterrence, both specific and general, because the offender and other community members will seek to avoid conduct that may result in a future prison sentence. Finally, a prison term protects the community from continued criminal conduct, by removing the offender from participation in public life for the term of their sentence.

### Study tip

From 2006 to 2016, there was a substantial increase in the number of people imprisoned in Victoria. As at 30 June 2016, there were 6,520 prisoners in Victorian prisons, whereas in 2006 there were 3,908 prisoners. This means that Victoria's prison population is now 67 per cent larger than it was in 2006. At the same time, Victoria's imprisonment rate has increased from 93.3 persons per 100,000 adults in 2005–06 to 138 persons per 100,000 adults in the June quarter of 2016. The vast majority of these prisoners are male (approximately 93 per cent).

However, the effectiveness of prison-based rehabilitation programs may be judged by the rate of recidivism. In its report "Reoffending following Sentencing in Victoria", statistics collected by the Sentencing Advisory Council demonstrate that 44 per cent of prisoners released during 2012–13 returned to prison within two years. This would suggest that rehabilitation programs in prison are not adequately addressing the needs of prisoners once they are paroled into the community, or that there are inadequate services to support their reintegration into community life without engaging in criminal conduct.



There is a range of sentencing options available to the courts in Victoria. These are described in Table 2.2.

Table 2.2: The range of sentencing options available to the courts	
Concurrent sentences	A concurrent sentence refers to an offender serving two or more terms of imprisonment at the same time. For example, if a person is sentenced to twelve months' imprisonment for the most serious charge and three months' imprisonment for a second charge to be served concurrently, a total of twelve months will be served.
Cumulative sentences	A cumulative sentence involves two or more terms of imprisonment being added together. For example, if a person is sentenced to twelve months' imprisonment for the most serious charge and three months' imprisonment for a second charge to be served cumulatively, a total of 15 months will be served.
Serious offenders	'Serious offenders' are defined in Part 2A of the Sentencing Act. Serious offenders include serious sexual offenders, serious arson offenders, serious drug offenders, and serious violent offenders. When a serious offender is sentenced to imprisonment for more than one offence, the jail terms must be served cumulatively (one after the other), unless the court directs otherwise. When sentencing serious offenders, the court must regard the protection of the community as the primary purpose. To achieve this purpose, the court may impose a longer prison sentence than is proportionate to the gravity of the offence.
Indefinite sentence	An indefinite sentence refers to a sentence of imprisonment with no set end date. Under the Sentencing Act, a court may impose an indefinite sentence on an offender convicted of a serious offence (such as a sex crime, murder or manslaughter). When ordered by the court, the offender will serve their full sentence and then the court will assess whether or not the offender should return to the community. Release will only be granted when the court finds that the offender is no longer a serious danger to the community.

When sentencing an offender, a judge will usually specify a period of imprisonment and set a minimum non-parole period to be served. This minimum term is what must be served before the offender can apply for **parole**. Being released on parole means the offender is released from prison on certain conditions; standard conditions include supervision, reporting to a parole officer, and restrictions on where he or she can live. It is important to note that release on parole is not automatic. The parole board will hear the application and decide whether or not to grant the offender parole.

The extent to which fines, CCOs and imprisonment address the purposes of sanctions are summarised in Table 2.3.

### Study tip

*Courts will sentence concurrently and cumulatively because offenders will often be sentenced for multiple charges at the same hearing. This can result from multiple charges arising from many offences or from multiple charges arising from a single incident. Courts order concurrent and cumulative sentences to ensure that sentences are just and appropriate to the overall criminality of an offender's behaviour. This is called the totality principle. If we didn't have concurrency, an offender might face a sentence that is disproportionate to her or his behaviour. Such a sentence might diminish any expectation of a useful life for the offender upon release.*

Table 2.3: The extent to which fines, CCOs and imprisonment address the purposes of sanctions			
Purpose	Fines	CCOs	Imprisonment
Rehabilitation	A fine has no rehabilitative effect on the offender	Drug and alcohol treatment programs tailored to the offenders needs in the community have the greatest change of achieving successful rehabilitation.	Rehabilitation and education programs provided in prison aim to rehabilitate the offender's criminal behaviour before their release on parole.
Punishment	A fine punishes the offender by personally depriving them of a fixed sum.	Restricting the offender's liberty, by placing terms and conditions on the CCO, punishes the offender.	Imprisonment dramatically restricts the offender's liberty for a fixed amount of time.
Deterrence	Specific and general deterrence can be achieved, depending on the amount of the fine	A CCO specifically deters an offender, by addressing the reasons for their offending. Non-compliance with the CCO risks being sent to prison.	Both specific and general deterrence are achieved, because the offender and other community members will seek to avoid future conduct that may result in a prison sentence.
Denunciation	A large fine may effectively denounce the offender.	A CCO denounces the offender by placing restrictions on their liberty, and obligations on them to complete programs ordered by the court to address their criminal behaviour.	The offender's crime is denounced by the shame of a prison term.
Protection	A fine provides no protection to the community.	The community is somewhat protected from future offending, because the offender's freedom of movement is constrained by the terms of the order. The community is further protected because conditions aim to achieve rehabilitation by addressing criminal behaviour.	The community is comprehensively protected by removing the offender to prison, preventing them from engaging in further criminal conduct.

## Review questions 2.7

1. Explain what a fine is.
2. Describe how penalty units work.
3. Outline the purposes of sanctions that fines achieve.
4. Explain what a community corrections order is.
5. Outline the four standard terms that every community corrections order will have.
6. Outline the conditions that may be attached to a community corrections order.
7. What may happen if an offender breaches a term or condition of a community corrections order?
8. Outline the purposes of sanctions that community corrections orders achieve.
9. Explain what imprisonment is.
10. Explain the purposes of sanctions achieved by imprisonment.
11. How effective is imprisonment in achieving the purpose of rehabilitation?
12. Describe the range of sentencing options available to the courts.
13. Distinguish between a concurrent sentence and a cumulative sentence.
14. Explain what a serious offender is and how they must be sentenced for more than one offence.
15. Explain what an indefinite sentence is.

### Activity 2n: What sanction might be applicable?

Replicate the following table in your notebooks. Indicate whether each fictitious case is likely to result in a fine, community corrections order and/or imprisonment by placing a tick, or ticks, in the appropriate box/es. Briefly outline the purpose/s of the sanction/s in the last box.

Case	Fine	Community corrections order	Imprisonment	Purpose/s
Georgia has been convicted of culpable driving				
Tony has been found guilty of criminal damage				
Jasmine has pleaded guilty to fraud offences				
Eamon was found guilty of intentionally causing injury				
Jodie has pleaded guilty to trafficking ice				
A jury has found Abdi guilty of murder				





## 2.8 Factors considered in sentencing

In determining on an appropriate sentence to be imposed on the offender, a court must consider a number of factors. In the VCE Legal Studies course, these factors include **aggravating factors**, **mitigating factors**, guilty pleas and **victim impact statements**. No specific sentence for each particular offence exists, as each criminal act and associated offender will involve a different set of circumstances that will affect the nature of the sentence. This is where the phrase ‘do the crime – do the time’ is a little misleading. Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the range of factors that must be regarded by the court when sentencing an offender in Victoria, which include:

- the maximum penalty for the offence
- current sentencing practices
- the nature and gravity of the offence
- the offender’s culpability (blameworthiness) and degree of responsibility for the offence
- whether the offence was motivated (wholly or partly) by hatred or prejudice for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated
- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss, or damage resulting directly from the offence
- whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so
- the offender’s previous character
- the presence of any aggravating factor or mitigating factor concerning the offender or of any other relevant circumstances.

### Study tip

*In R v Ivan Leonard Storey [1996] VSC 75, the majority (Winneke P, Brooking and Hayne JJA, and Southwell AJA) stated that, “Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single ‘right’ answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the ‘instinctive synthesis’ which takes account of the various purposes for which sentences are imposed - just punishment, deterrence, rehabilitation, denunciation, protection of the community - and which pays due regard to principles of totality, parity, parsimony and the like.”*

When weighing up the nature and gravity of the offence committed by the offender, a court might consider the intention of the offender and the consequences of the offence, the use of weapons, any breach of trust, the offender’s history of offending, the offender’s response to previous court orders and/ or alcohol or drug addiction.

### Aggravating factors

An aggravating factor increases the seriousness of the offence or the offender’s culpability. There are several factors that can aggravate a sentence, including:

- premeditation (pre-planning the crime)
- committing the crime as part of a group against an outnumbered victim
- use of a weapon
- a breach of trust by the offender towards the victim
- the cruelty of the crime.

### Activity 2o: Culpable driver sentenced to imprisonment (Part B)

*DPP v Dunkley-Price & Stevenson [2013] VCC 2048*

Dunkley-Price was charged with culpable driving arising from an accident near the Myrniong off-ramp on the Western Highway, where the speed limit was 110 kph. The victim died after she was forced to stop behind Dunkley-Price, and another car drove into the back of her car at high speed. Dunkley-Price pleaded not guilty in the County Court of Victoria to one charge of culpable driving causing death, and one charge of culpable driving causing serious injury. At trial, his defence was that he was not in the left lane but in the emergency lane. The jury found Dunkley-Price guilty of culpable driving, accepting that the prosecution had proven beyond reasonable doubt that Dunkley-Price had stopped in the left lane and not the emergency lane. He pleaded guilty to the summary offence of driving while his licence was suspended for a previous speeding offence. The jury also convicted Stevenson of dangerous driving.

In sentencing, Judge Pullen found that an aggravating feature of Dunkley-Price’s offence was that he was driving while unlicensed, because if he had complied with the licence suspension the accident would not have occurred. This made the seriousness of the offending high.

At the time of the offence, Dunkley-Price was also serving a suspended sentence for breach of an intervention order. While the judge viewed this as concerning, she did not consider it an aggravating factor in relation to the conviction for culpable driving, because it was offending of a very different type of conduct.



Her Honour Judge Pullen imposed the following sentences:

Charge	Offence	Sentence	
Charge 1	Culpable driving causing death	6 years and 6 months	Base sentence
Charge 2	Negligently causing serious injury	2 years	8 months to be served cumulatively with Charge 1
Charge 3	Driving while unlicensed	4 months	1 month to be served cumulatively with charge 1.
<b>TOTAL:</b> 7 years 3 months. Non-parole period: 5 years and 3 months.			

Dunkley-Price appealed his conviction to the Court of Appeal. He argued that his conviction had involved a mistake in fact. He submitted that it was not open to the jury to find that his action in stopping in the left lane had caused the accident. Instead, he said that it was the conduct of Stevenson in hitting the victim's car at high speed that caused the accident.

The Court of Appeal decided that there had been no mistake of fact in the jury's verdict, and dismissed the appeal. The court considered that the question for the jury was not whether Dunkley-Price's conduct was the sole or principal cause of the accident. The jury only needed to be satisfied, beyond reasonable doubt, that Dunkley-Price's conduct was a substantial and operative cause of the accident.

#### Questions/ tasks

1. Briefly outline the facts of the Dunkley-Price case.
2. Outline Dunkley-Price's convictions in the County Court.
3. What aggravating feature of Dunkley-Price's offence did Judge Pullen find?
4. What offending did Judge Pullen not consider to be an aggravating factor in Dunkley-Price's culpable driving conviction?
5. Explain the sentence given to Dunkley-Price.
6. Briefly outline what happened in Dunkley-Price's appeal over his conviction to the Court of Appeal.

## Mitigating factors

A mitigating factor reduces the seriousness of the offence or the offender's culpability. This may mean that the sentencing judge will discount the offender's sentence to take account of the mitigating factor.

There are several factors that can mitigate a sentence, including:

- the age of the offender
- the background of the offender
- the previous good character of the offender
- the remorse shown by the offender for the crime
- whether imprisonment would be particularly hard on the offender.

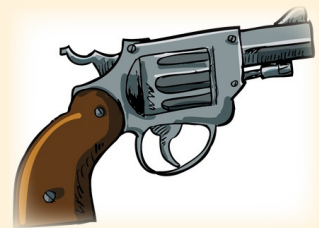
### Study tip

*In sentencing, aggravating factors and mitigating factors can act a little like a 'tug of war'. Aggravating factors will tend to pull towards a heavier sentence while mitigating factors will tend to pull towards a lighter sentence.*

## Activity 2p: Mates sent to prison for the manslaughter of their friend

*The Queen v Armstrong & Ors* [2014] VSC 256,

The Supreme Court of Victoria accepted that a number of factors mitigated the sentence for two men (Tyson Haver and Scott Wald) convicted of recklessly causing serious injury and of the manslaughter of their friend, Anthony Armstrong. The two offenders had been with the victim beating up another man, when their gun discharged accidentally. The offenders took the victim to Frankston Hospital, where he was found outside dead from gunshot wounds.



The factors that the sentencing judge accepted as mitigating the sentence were:

- early pleas of guilty to charges where the prosecution case relied on circumstantial evidence and therefore faced some uncertainty
- genuine remorse, evidenced by expressions of guilt, shame and sadness, letters of apology and attempted suicide
- the "extra-curial" punishment of having lost a friend through their own criminal behaviour, which they will experience for the rest of their lives
- the absence of prior convictions
- personal matters of untreated ADHD and deprived education
- good to excellent prospects of rehabilitation
- the uncertainty which the accused experienced because of the delay of two-and-a-half years between being charged and being sentenced.

Haver and Wald were sentenced to eight and nine years imprisonment respectively. The judge stated that, but for the pleas of guilty, these sentences would have been extended by three years for each offender.

#### Questions/tasks

1. What were Haver and Wald convicted for?
2. Briefly outline the facts related to the death of Anthony Armstrong.
3. Outline the factors that the sentencing judge accepted as mitigating the sentence.
4. Explain why the sentencing judge discounted both offenders' sentences.

## Guilty pleas

Pleading guilty to an offence provides an important benefit to the legal system. In the case of *DPP (Cth) v Thomas* [2016] VSCA 237, the Court of Appeal described the principle as follows:

*The law in Victoria has long been that for Commonwealth and State offences a sentencing judge must take into account a plea of guilty, regardless of whether or not it reflects or is accompanied by evidence of remorse or contrition. This is because, of itself, a plea of guilty spares the community the expense of a contested trial and equally spares witnesses and victims the experience of such a trial. The discount that a plea of guilty nearly always attracts on this basis is often referred to as a discount for 'utilitarian benefit'.*

Because the avoidance of a contested trial in order to obtain a conviction is a benefit to the community, substantial incentives are provided to an accused person to plead guilty to the charges against them. A key benefit to the accused of pleading guilty is that the sentencing judge will consider reducing the sentence. Section 5(2) of the *Sentencing Act 1991* requires the sentencing judge or magistrate to take into account any guilty plea by the convicted person, and the stage of proceedings when they make that plea.

An accused person can enter a guilty plea at any stage of proceedings, but the utilitarian benefit recognised by the court will be different depending on the timing of the plea. The DPP's *Policy on Resolution* (2014) provides that the prosecutor will make submissions about sentence reduction based on the guidelines presented in Table 2.4 below.

Table 2.4: Guidelines for sentence reduction	
If the accused pleaded guilty at the committal mention	the prosecutor at the plea should submit that the accused pleaded guilty at the earliest opportunity.
If the accused indicated an intention to plead guilty after the committal	the prosecutor at the plea should submit that the accused did not plead guilty at the earliest possible opportunity.
If the accused indicated an intention to plead guilty after the trial had been listed	the prosecutor at the plea should submit that the reduction of the sentence should reflect the late plea of guilty.

Section 6AAA of the *Sentencing Act 1991* requires the sentencing judge to give a **specified sentence discount** in their sentencing reasons. When the judge imposes a less severe sentence because the offender has pleaded guilty to a charge, the judge must state what sentence would have been imposed had the offender not pleaded guilty.

## Victim impact statements

Victims of crime may, under Division 1A of the *Sentencing Act 1991*, prepare a legal statement outlining how a crime has affected them. This is called a Victim Impact Statement, and its purpose is to assist the sentencing judge or magistrate in determining an appropriate sentence for the offender.

The statement must be in writing, accompanied by a statutory declaration, and filed prior to sentencing. It must focus on the impact of the crime on the victim. The court may rule any part of the statement inadmissible if it does not comply with the rules of evidence, or is in other ways inappropriate. The statement may address the physical, emotional, financial or social impacts of a crime on the victim, who may be a person directly affected by the offender's conduct, or who may be a relative of a person who was injured or killed by the offender's conduct. The person making the statement may request that the statement be read aloud in court. The statement can include additional material such as a poem, drawing or photo, and substantiating material such as medical report.



Any Victim Impact Statement will be considered by the relevant court at the plea hearing. The judge or magistrate will include the statement in determining the appropriate sentence, and may refer to it in their published reasons. This can be seen in Box 2.8.

### Box 2.8 Victim Impact Statement considered in the sentencing of hit-run motorbike rider

In 2017, Caleb Jakobsson was convicted in the County Court of Victoria of one count of culpable driving causing death and one count of failing to stop after an accident (for more detail see Application exercise 2.1). Jakobsson hit and killed the victim, Andrea Lehane, on a pedestrian crossing while riding an unregistered motorbike at speed in a suburban shopping centre.

In her sentencing remarks, Judge Campton included the following observation:

*"I note that in her victim impact statement, Andrea Lehane's sister said: 'What I find most upsetting about her death was the fact that the accident happened and she was left. Such an inhumane act was done to my little sister. I think 'how much pain did she feel?', 'how aware was she?', 'how could someone just leave her there?'. That fact just grates against the most core of morals and values we have instilled in us as kids, and it hurts like hell.'"*  
(DPP v Jakobsson [2017] VCC 688)



## Activity 2q: Prison rioter sentenced to another year of imprisonment

DPP v Luca [2016] VCC 1573

Johnathan Luca was a remand prisoner at the Melbourne Remand Centre on 30 June 2015, when prisoners rioted over the implementation of a non-smoking ban. It was the largest prison riot in Victoria's history, involving up to 300 prisoners over 15 hours, and caused \$12 million in damage.

Luca pleaded guilty to one charge of riot, and was sentenced by His Honour Chief Judge Kidd to two years and five months imprisonment.

In sentencing Luca, Chief Judge Kidd made the following reference to victim impact statements in the case:

*There were seven Victim Impact Statements tendered by the Prosecution at the plea hearing. They have been made by prison officers at the MRC. The overwhelming themes arising from these statements is that the riot had a major impact on the staff at the MRC. Several have reported difficulties in both their professional and personal lives since the riot. Some have experienced flash backs, which have disturbed their sleep. The stress has affected their satisfaction at work, and has also affected their home life and relationships with their families. Some sustained physical injuries, although it is not put by the prosecution that you were responsible for inflicting any of these injuries directly. It has affected the way that they now interact with the prisoners on a day-to-day basis.*



#### Questions/tasks

1. What was Johnathan Luca charged with in 2016?
2. What sentence was imposed on Luca by Chief Judge Kidd?
3. Explain why Chief Judge Kidd referred to Victim Impact Statements when sentencing Luca.
4. Summarise the impact of Luca's crime according to the Victim Impact Statements.

## Review questions 2.8

1. Outline the factors, according to section 5(2) of the *Sentencing Act*, which a court must regard when sentencing an offender in Victoria.
2. Distinguish between aggravating factors and mitigating factors.
3. Outline the factors that can aggravate a sentence.
4. Outline the factors that can mitigate a sentence.
5. When can an accused enter a guilty plea?
6. Explain why substantial incentives are provided to an accused who pleads guilty to the charges against them.
7. Describe how a prosecutor will make submissions about sentence reduction if the accused:
  - a) pleaded guilty at the committal mention.
  - b) indicated an intention to plead guilty after the committal.
  - c) indicated an intention to plead guilty after the trial had been listed.
8. Outline what a specified sentence discount is.
9. Outline what a Victim Impact Statement is and explain its purpose.
10. Explain the role of Victim Impact Statements in the sentencing process.



## Activity 2r: Bookkeeper stole from bosses

*DPP v Dimitrievski* [2016] VCC 1314

Dianna Dimitrievski was the bookkeeper for a family-owned engineering firm, Bora Engineering Pty Ltd. Over three years, she passed 130 fraudulent cheques in order to steal more than \$330,000 from her employer. Dimitrievski spent the money she stole on consumer goods and living expenses, as well as methylamphetamine and cannabis for herself and her friend. She pleaded guilty to five theft-related charges in April 2016. Each charge carried a maximum penalty of ten years' imprisonment.

In sentencing, Judge Parrish referred to a Victim Impact Statement made by one of the directors of Bora. The director described the devastation that Dimitrievski caused to the business which, in turn, affected the director's relationship with her husband and her family.

Judge Parrish considered that there were three aggravating factors for Dimitrievski's offence: a gross breach of trust; the careful planning of the offence, and the fact that the offending was sustained, frequent and ongoing over three years. He found that Dimitrievski's offending was of a serious nature. Judge Parrish came to the view that there was no particular reason such as gambling addiction or medical reasons for Dimitrievski to commence the offending other than to accommodate her greed.

Dimitrievski was sentenced to 21 months imprisonment in the County Court of Victoria and ordered to serve a community corrections order for two years. The judge stated that, but for the plea of guilty, a sentence of 5 years imprisonment with a non-parole period of 38 months would have been imposed.



### Questions/tasks

1. Briefly outline the facts of the Dimitrievski case.
2. What did Dimitrievski plead guilty to and what is the maximum penalty for this offence?
3. Explain why Judge Parrish referred to a Victim Impact Statement written by one of Bora's directors when sentencing Dimitrievski.
4. Outline the impact of Dimitrievski's crime according to the Victim Impact Statement.
5. What aggravating factors relating to Dimitrievski's offence did Judge Pullen Parrish consider?
6. Outline the sentence given to Dimitrievski.
7. Why, do you think, did Dimitrievski plead guilty?
8. Outline the benefit to Dimitrievski, and to the legal system, in pleading guilty.

## Activity 2s: Evaluation of the means used to determine a criminal case

The table below contains a number of arguments in relation to the means used to determine a criminal case. The arguments have been organised by feature, to assist with paragraph organisation. Use the information in the tables to respond to the following questions/ tasks.

### Questions/tasks

1. Explain the arguments in support and the arguments against one institution assisting an accused.
2. Referring to two features, explain the arguments in support and the arguments against committal proceedings.
3. Discuss the appropriateness of plea negotiations to determine a criminal case.
4. Referring to two features, explain the arguments in support and the arguments against the use of the Victorian court hierarchy in determining criminal cases.
5. Discuss the responsibilities of two key personnel in a criminal trial.
6. Discuss the ability of sanctions to achieve their purposes.
7. Evaluate the appropriateness of sentencing factors in determining a criminal case

Institutions assisting the accused		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>• Every person accused of an indictable offence is provided with public funding to defend a criminal charge in court, if they cannot afford to pay for an advocate.</li> <li>• Adequate funding of legal aid reduces the likelihood that an accused person will conduct their own defence. This ensures an accused person has an adequate defence, and reduces the burden on the courts of supporting unrepresented defendants.</li> <li>• VLA funding to public and private practitioners ensures that a person who is granted legal aid has scope to choose their legal representative, and that their lawyer will provide expert legal advice.</li> <li>• VLA's focus on people who suffer social and cultural disadvantage enables them to specialise in understanding the issues facing such clients in their criminal matter.</li> </ul>	<p><b>VLA provides Duty Lawyers at first instance, and in-court advocacy where an accused person meets an income means test.</b></p>	<ul style="list-style-type: none"> <li>• VLA's services are susceptible to government funding cuts, which can substantially impact access to justice.</li> <li>• The capping of VLA representation may place restrictions on the scope of an accused person's defence. An accused person may be more likely to plead guilty if they do not have adequate defence for their case. Around 76% of criminal matters are resolved by guilty pleas in the County Court and Supreme Court each year.</li> </ul>
<ul style="list-style-type: none"> <li>• Criminal representation is targeted to support accused people with special needs, and integrated with other programs. Legal advisers have expertise in advocating to the court for appropriate sanctions that will not derail an accused person's rehabilitation process.</li> <li>• CLCs provide free legal services at community-based locations, according to the needs of their clients.</li> </ul>	<p><b>CLCs provide legal representation combined with other community support services</b></p>	<ul style="list-style-type: none"> <li>• CLS are susceptible to funding cuts, despite the significant contribution they make in diverting people from the criminal justice system.</li> <li>• CLCs that operate in communities with higher social disadvantage may struggle to provide appropriate services to all their clients.</li> </ul>

Committal proceedings		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>Committal proceedings impose a discipline on the prosecution and the police to gather evidence in a timely manner. It ensures that evidence is more likely to be reliable and credible.</li> </ul>	Committal proceedings are heard at an early date after charging the accused, ideally within 3-6 months.	<ul style="list-style-type: none"> <li>Committal proceedings are an additional step in criminal procedure that require the accused to fund legal representation.</li> </ul>
<ul style="list-style-type: none"> <li>The committal process eliminates weak cases, and relieves the accused of the burden of having to prepare a defence to a prosecution that cannot succeed. It also relieves the burden on the courts.</li> </ul>	The Magistrate is able to dismiss charges if they consider that there is insufficient evidence to support a conviction at trial.	<ul style="list-style-type: none"> <li>Committal hearings may contribute to extending the delay to a resolution of a criminal matter, in cases where a full trial of the facts is required, or where the evidence will resolve on the credibility of the victim's testimony.</li> </ul>
<ul style="list-style-type: none"> <li>The accused is informed of the case against them at an early stage, allowing them to prepare a defence only in relation to issues in dispute. This allows the accused to decide how to plea.</li> <li>Key issues are identified at committal, ensuring only that matters in dispute proceed to a full trial. This reduces the length and cost of trial for all parties.</li> </ul>	The prosecution must disclose their evidence to the accused at the committal.	<ul style="list-style-type: none"> <li>The accused is not required to indicate a defence until trial, while the prosecution must disclose its case at committal. This may create a disparity which makes obtaining a conviction more difficult for the prosecution.</li> </ul>
Plea negotiations		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>The accused may recognise an incentive in pleading guilty at an early stage in proceedings.</li> </ul>	The prosecutor and accused conduct private negotiations about appropriate charges and the consequence of a guilty plea.	<ul style="list-style-type: none"> <li>The negotiations between prosecutor and accused are private, so there is no public scrutiny of the decision-making process in accepting a guilty plea to a lesser charge.</li> </ul>
<ul style="list-style-type: none"> <li>It is in the interests of justice that an accused person be charged only with offences that are appropriate to their crime.</li> </ul>	The prosecutor may consider reducing the severity of some charges or dropping other charges on considering the strength of all the evidence available after negotiating with the accused.	<ul style="list-style-type: none"> <li>Members of the public may feel unconvinced that just punishment has been achieved when an accused person receives a discounted prison sentence because they pleaded guilty. There may be perceptions that the offender is not genuinely remorseful despite their guilty plea.</li> </ul>
<ul style="list-style-type: none"> <li>Witnesses and victims may be relieved of the stress of giving evidence under cross-examination at trial.</li> <li>The accused avoids the stress and uncertainty of a trial, and can adjust to their sentence more quickly.</li> <li>The courts are relieved of the burden of a contest trial, which is time-consuming.</li> <li>The accused is relieved of the burden of extended legal expenses.</li> </ul>	The accused may decide to plead guilty to some offences, on considering the strength of available evidence after negotiating with the prosecution.	<ul style="list-style-type: none"> <li>An accused person who lacks adequate legal representation may feel coerced into pleading guilty.</li> <li>In cases where the evidence is circumstantial, an accused person may feel pressured into pleading guilty in order to benefit from a discounted sentence, rather than to take their chances with a jury verdict in court.</li> </ul>
The Victorian court hierarchy		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>Mistakes in fact, sentence or interpretation of the law may be reviewed and corrected by a more experienced judge in a higher court.</li> <li>Parties may be reassured that the outcome of a criminal case is sound</li> </ul>	A hierarchy of courts allows for a system of appeals to operate.	<ul style="list-style-type: none"> <li>There may be too many avenues and opportunities for appeals, which extends the duration of a criminal proceeding. For example, a conviction in the County Court can be appealed to the Court of Appeal, and potentially the High Court. Appeal procedures can take years to resolve, causing additional distress for victims.</li> </ul>
<ul style="list-style-type: none"> <li>The needs of parties to a particular type of proceeding can be more easily identified and met by court staff.</li> <li>Specific training of judicial officers and court staff ensures best practice for the accused, witnesses and victims.</li> </ul>	A court hierarchy allows different courts to specialise in particular types of cases.	<ul style="list-style-type: none"> <li>While specialisation can identify particular needs in some courts, innovative approaches to case management or delivery of services to parties involved in a criminal proceeding may not be easily shared across the justice system, if these innovations are seen as being particular to specialised courts.</li> </ul>
<ul style="list-style-type: none"> <li>Creates administrative convenience, where more serious and complex cases are heard in higher courts by more experienced judges.</li> <li>Delays in the judicial system may be minimised due to the separation of simple factual cases from complex issues of law and fact.</li> </ul>	Cases are separated according to complexity and subject.	<ul style="list-style-type: none"> <li>Having separate courts increases the cost of administration in each.</li> <li>Cases in lower courts may be receiving a lower level of judicial expertise than in higher courts, resulting in increased numbers of appeals to correct mistakes in law, fact or sentencing.</li> </ul>
<ul style="list-style-type: none"> <li>Parties to a criminal proceeding have some certainty about the relevant law that will apply in their case.</li> </ul>	Allows for the doctrine of precedent to operate: decisions of higher courts are binding on lower courts in the same hierarchy.	<ul style="list-style-type: none"> <li>Precedents from higher courts may be inappropriate in lower courts, or they may be avoided by distinguishing facts.</li> </ul>

Key trial personnel		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>The judge acts as an impartial and unbiased adjudicator in the trial, to ensure that it is conducted fairly.</li> </ul>	Judge	<ul style="list-style-type: none"> <li>The judge's expertise in matters of evidence and law may not be fully utilised as they cannot be closely involved in the process of examining questions of fact at trial.</li> </ul>
<ul style="list-style-type: none"> <li>The jury represents a trial by one's peers.</li> <li>The presence of the jury in the court room ensures that legal procedures and principles are readily understood by ordinary people.</li> <li>By spreading the burden of reaching a verdict to a jury of 12, the accused has the greatest confidence in a just verdict.</li> </ul>	Jury	<ul style="list-style-type: none"> <li>Jury members are inexperienced in legal principles, and may fail to apply the law accurately and appropriately in their deliberations.</li> <li>Juries are not required to give reasons for their decisions, so it is difficult to scrutinise their verdict.</li> <li>If a jury cannot reach a verdict, the accused may face a re-trial on the same charges, and witnesses and victims must give evidence again.</li> </ul>
<ul style="list-style-type: none"> <li>Parties control their own cases, choosing the issues to contest, the evidence to rely on, and the legal principles to argue. This gives them greater satisfaction in the outcome of their case.</li> </ul>	Parties	<ul style="list-style-type: none"> <li>Party decision-making about the conduct of their defence may substantially lengthen a trial, increasing delays in justice, and the costs of the court system.</li> </ul>
<ul style="list-style-type: none"> <li>By advocating for the accused, a legal practitioner ensures that the accused has the best defence possible.</li> <li>Legal practitioners owe a duty to the court to act ethically and in the interests of justice.</li> </ul>	Legal practitioners	<ul style="list-style-type: none"> <li>The best legal defence provided by an experienced legal practitioner may cost a substantial amount of money. This may mean that access to effective advocacy may be out of reach for most accused people. An accused person who can pay for the best advocates may have a different experience of the justice system than a person being represented by Legal Aid.</li> </ul>

Sanctions		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>Because each of the aims must be balanced, this ensures that a sentence is just.</li> <li>The five aims balance the community's need for just punishment, denunciation and protection against the general interest in rehabilitating an offender's criminal conduct and deterring future crimes from occurring.</li> <li>CCOs can be combined with fines or imprisonment, to ensure that rehabilitation programs are tailored to the offender's needs.</li> </ul>	Sentences must incorporate each of the purposes aims of criminal sanctions.	<ul style="list-style-type: none"> <li>The current rates of recidivism in Victoria – 44 per cent return to prison within two years – suggest that rehabilitation and deterrence may not be operating effectively.</li> <li>Rehabilitation services in prison are generally less effective than those available in the community. Imprisonment may therefore be less effective than a CCO to achieve some purposes of criminal sanctions.</li> </ul>

Sentencing factors		
Strengths	Feature	Weaknesses
<ul style="list-style-type: none"> <li>A just sentence that satisfies the general public, victims and gives the offender some prospect for rehabilitation is more likely to be achieved by the integration of sentencing factors.</li> </ul>	Judges consider a range of factors in sentencing an offender	<ul style="list-style-type: none"> <li>The variety of considerations a sentencing judge or magistrate must undertake creates doubt for the general public and for a convicted offender that a just punishment has been imposed.</li> <li>Appeals against sentence make up the majority of the Court of Appeal's caseload – over 80 per cent of cases are appeals against sentence.</li> </ul>

## Multiple choice review questions

### 1. Victoria Legal Aid is

- a) A group of people elected to represent the views of the community
- b) An independent statutory authority that provide free legal advice and support to the community
- c) A group of people who all share the same ideology
- d) An independent community organisation that provides free advice, casework and legal education through strong local community connections

### 2. Which of the following statements is not true?

- a) The purpose of committal proceedings is to rehabilitate an offender within the community
- b) Committal proceedings refers to the process by which a magistrate determines whether there is evidence of sufficient weight to support a conviction in a higher court
- c) Committal proceedings include the filing hearing, the hand-up brief, the committal mention hearing and the committal hearing
- d) The main purpose of committal proceedings is to determine whether there is sufficient evidence to support a conviction for an offence in a higher court

### 3. Plea negotiations are an important step in the criminal process because they

- a) Can be used to explain how the crime has affected the victim
- b) Determine whether there is sufficient evidence to support a conviction for an offence in a higher court
- c) Rehabilitate and punish the offender, deter the offender and others from committing the offence, denounce the offender and the offence, and protect society
- d) Help the accused to understand the case against them, and consider the merits of pleading guilty

### 4. Sentence indications refer to the process

- a) By which a magistrate determines whether there is evidence of sufficient weight to support a conviction in a higher court
- b) For passing new legislation through parliament
- c) Permitting a court to provide a defendant with a statement indicating the sentence that is likely to be imposed if the defendant pleads guilty at that stage of the proceedings
- d) By which courts interpret and apply the words in legislation made by parliament

### 5. The main reasons for a Victorian court hierarchy in determining criminal cases include

- a) Specialisation, a system of appeals, administrative convenience and the doctrine of precedent
- b) Justice, fairness, equality and access
- c) The right to be tried without unreasonable delay, the right to a fair hearing and the right to trial by jury
- d) The intention of legislation not being clear, the wording of legislation can be ambiguous or unclear, sometimes the meaning of words may have changed over time

### 6. The party in a criminal trial that must oversee proceedings impartially and without the perception of having any bias is

- a) The prosecution
- b) The jury
- c) The judge
- d) A solicitor

### 7. One responsibility of the jury is to

- a) Test the credibility and reliability of witness evidence introduced by the other party through cross-examination
- b) Prepare and present their own case
- c) Ensure that the parties follow rules of evidence and procedure so that the trial is fair
- d) Listen attentively and objectively to the evidence without any bias

### 8. The purposes of sanctions include

- a) Specialisation, a system of appeals, administrative convenience and the doctrine of precedent
- b) Rehabilitation and punishment of the offender, deterrence of the offender and others from committing the offence, denunciation of the offender and the offence, and protection of society
- c) Reflecting society's values, enforceable, clear and understandable, known, and stable
- d) fines, community correction orders and imprisonment

### 9. A community corrections order refers to

- a) A monetary penalty paid by an offender
- b) A flexible order issued to offenders by courts that allows a sentence to be served in the community
- c) The act of restraining the personal liberty of an offender by removing them from the community for a period of time
- d) A statement prepared by a victim of an offence explaining how the crime has affected him or her

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**10. Which of the following is not an aggravating factor?**

- a) premeditation
- b) use of a weapon
- c) a breach of trust by the offender towards the victim
- d) the previous good character of the offender

**Chapter 2 summary**

1. A significant number of people will experience difficulties in resolving any legal issue that they may have, because they are unaware of their legal rights, or because they lack the time and resources needed to enforce their legal rights. This can be the case for anyone who is accused of committing a crime.
2. One institution that is available to assist an accused is Victoria Legal Aid (VLA). VLA is an independent statutory authority that provide free legal advice and support to the community, including information, referral, advice and legal representation services. Legal Aid's duty lawyers can provide legal advice, and make applications for bail if necessary. Where a person needs court representation for their criminal matter, they must apply for a grant of legal assistance. VLA does not have unlimited funds, therefore grants must meet eligibility criteria.
3. Another institution that is available to assist an accused is Victorian community legal centres (CLCs). CLCs are independent community organisations that provide free advice, casework and legal education through their strong local community connections, with a particular focus on the disadvantaged and people with special needs. There are two types of community legal centres: generalist CLCs and specialist CLCs. Generalist community legal centres provide general legal services to people in their local geographical area whereas specialist community legal centres focus on particular groups of people or areas of the law. Victoria Legal Aid funds the operations of many CLCs. VLA refers clients to CLCs where they can provide more appropriate assistance; and the CLCs in turn may refer clients to VLA for assistance with their legal issue.
4. Committal proceedings refers to the process by which a magistrate determines whether there is evidence of sufficient weight to support a conviction in a higher court. These proceedings include the filing hearing, the hand-up brief, the committal mention hearing and the committal hearing. Committal proceedings are held before a Magistrates' Court. The magistrate will hear evidence from the prosecution which is recorded and can be used at the trial. This evidence is generally presented in writing by a hand-up brief containing sworn witness statements and other documents. Witnesses may be summoned to court to give oral testimony and may be cross-examined by the defence to determine their credibility. After reviewing the evidence the magistrate must determine if there is sufficient evidence to justify the defendant being committed for trial. If there is insufficient evidence, the magistrate may discharge the accused person. This does not amount to an acquittal: it is still open for the prosecution to obtain further evidence and bring subsequent committal proceedings, or proceed direct to trial in the future. If the accused is ordered to stand trial, she or he will be asked to enter a plea: either 'guilty', or 'not guilty'. If the accused pleads guilty, there is no need for a trial – the matter will continue straight to sentencing. If the accused pleads not guilty, the matter will be referred to the appropriate court and a trial date will be set.
5. The main purpose of committal proceedings is to determine whether, in the case of more serious criminal offences, a prima facie case exists. A case is said to be prima facie when there is sufficient evidence to support a conviction for the offence in the County Court or the Supreme Court. Committal proceedings also inform the accused of the case against them (by understanding the strength of the evidence, the accused can then determine how strong the prosecution's case is and make a decision about whether to plead guilty or not guilty), improve the efficiency of the courts (weak cases with no prospect of conviction are eliminated at the committal stage without going to trial, a magistrate may simplify a case by scrutinising multiple charges carefully and dismissing any that have insufficient evidence to support a conviction at trial, a case that is discontinued and the accused discharged allows new charges to be brought to court if better evidence emerges), and ensure timely collection of evidence (contributing to a fair hearing for the accused as she or he is able to hear or read the evidence against them, allowing them to adequately prepare and present a case).
6. Committal proceedings are important because they ensure that most trials are held in a timely manner. While some aspects of committals, such as cross-examination of witnesses, can delay the commencement of a trial, committals provide compensatory benefits to the criminal process by adequately informing the accused, enabling them to plead guilty at an early stage, and eliminating weak cases from the higher courts.
7. A plea negotiation is a private negotiation between the accused and the prosecution that may take place at any time between the time when the accused is charged, and the completion of a criminal trial. A plea negotiation may involve discussion about the appropriate charges against the accused, the reliability and relevance of any evidence in the case, and the likely sentencing consequences if the accused pleads guilty.
8. During plea negotiations, the accused will decide whether to plead guilty, and what charges to plead guilty to. Plea negotiations involve the prosecution and defence counsel discussing and negotiating about a number of issues. These may include: which charges against the accused are appropriate on the available evidence; the likely sentence that would apply for a guilty plea and submissions that the prosecution would be prepared to make on sentence; any assistance the accused may be prepared and is able to give as a witness for other criminal prosecutions and the value of that assistance to other prosecution cases; whether the prosecution is prepared to reduce or substitute any charges for a lesser offence.

9. Plea negotiations are an important step in the criminal process, as they help the accused to understand the case against them, and consider the merits of pleading guilty. They may give the accused a sense of control in their situation, enabling the accused to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence.
10. The role of plea negotiations has been criticised in the media, by academics, and by the general community. Plea negotiations take place privately between the prosecution and the accused which results in a lack of transparency. The Director of Public Prosecutions does not publicise reasons for varying charges which can lead to community concern that the accused has been let off, and that the accused has not been convicted of an appropriate offence. For this reason, the Office of Public Prosecutions (OPP) has adopted the procedure of consulting with both the victim of any crime, and the informant (the witness providing evidence) prior to resolving a plea of guilty with an accused. The prosecutor should take into account the views of the victim and the informant when negotiating a plea with the accused, and must inform them if the matter is resolved by a guilty plea.
11. The purpose of sentence indications is to provide an accused person with information about the likely sentence they will face if they decide to plead guilty.
12. There are benefits in entering an early guilty plea and these increase the earlier that the accused pleads guilty to a criminal offence. The accused person benefits because they are entitled to a greater discount from the sentence they would otherwise have received, and also benefit by reducing their legal costs in defending the charge. The courts benefit because time and resources are freed for other contested matters. Public institutions such as the OPP benefit, by reducing the amount of time and the expense of preparing a prosecution. Witnesses and victims benefit by not having to appear and give evidence under cross-examination at a contested trial.
13. In the County Court and the Supreme Court, a sentence indication may be given at any stage of the proceeding. However, it may only be given once, unless the prosecutor agrees otherwise. The court will indicate to the accused whether it would be likely or not to impose a term of imprisonment that commences immediately, if the accused pleads guilty. The court will give a sentence indication only if the accused applies for it, and only if the prosecution agrees. A court may refuse to give a sentence indication. Once the court has given a sentence indication to an accused person, and they then plead guilty, the court must not subsequently impose a sentence of imprisonment that commences immediately. In the Magistrates Court, a magistrate may at any stage of proceedings give an indication that the court would be likely to impose a sentence of imprisonment commencing immediately, if the accused pleads guilty. In addition, the magistrate may indicate whether they are likely to impose a specified type of sentence. If the accused subsequently pleads guilty at the first possible opportunity, the court is not able to impose a more severe type of sentence than that indicated.
14. A potential risk of sentence indications is that by focusing on speed and efficiency in processing the accused's criminal charges, there may be a loss of procedural fairness to the accused. This may result in the case against the accused not being considered in detail by the court. In particular, this can impact on accused persons who lack adequate legal representation. On the other hand, it is important that the accused is tried without reasonable delay. For the accused, having charges processed expeditiously means that they avoid the accumulation of legal fees to defend their case, reduce the amount of time they may spend being held on remand awaiting their trial, and reduce the period of uncertainty (and the associated distress of this) in awaiting an outcome of their case. For victims and witnesses, an early guilty plea means that the uncertainty and anticipation which may accompany the prospect of having to give evidence at a contested trial will be substantially reduced. This can enable victims and witnesses to move on from a criminal incident more readily. In the higher courts, the prosecution may oppose a sentence indication if they consider that there is insufficient evidence for the court to rely on. Even if the prosecution agrees to a sentence indication, any of the courts may refuse to give a sentence indication. The OPP is obliged to take account of the needs of victims and keep victims informed of proceedings.
15. In our legal system, courts are arranged in a hierarchy according to their jurisdiction (the power to hear and determine cases, which includes trials at first instance and appeals from earlier decisions).
16. The Victorian court hierarchy consists of the Magistrates' Court, the County Court and the Supreme Court (Trial Division and Court of Appeal). While the High Court of Australia is in a different hierarchy of Federal Courts, it does have jurisdiction to hear appeals from the Victorian court hierarchy.
17. One reason for a court hierarchy is specialisation. Because each court has its own jurisdiction, they hear similar types of cases on a daily basis. This means that they can develop expertise in the relevant law and in the procedure for hearing matters. This also means that judicial officers and court staff have experience in understanding the underlying causes of particular crimes, or may have a particular empathy with witnesses and victims who may need to give evidence in particular crimes. This allows the courts to provide specific services for the benefit of all people participating in a criminal case.
18. The court hierarchy also allows for the decision of a lower court to be reviewed on appeal by a higher court. A person who has been convicted of a criminal offence may appeal their conviction if they can establish that there has been a mistake in the interpretation of evidence, there has been a mistake in the application of the relevant law or there has been a mistake in sentencing. Likewise, the prosecution may appeal a mistake in law or sentence. Judges in higher courts generally have greater experience and expertise in relevant areas of law. Appeals also allow for the rigorous review of lower court decisions.
19. Arranging the courts in a hierarchy contributes to the efficiency of the courts by making their administration more effective. Matters can be allocated to an appropriate court according to the seriousness and complexity of each case.

By doing so, cases listed for hearing can proceed as quickly as possible and unreasonable delays in the trial of a criminal offence can be avoided.

20. The court hierarchy also allows for the doctrine of precedent to function effectively. The court hierarchy enables judges to determine which precedents are binding, and which are merely persuasive. A precedent made by a higher court is binding and therefore must be followed by a lower court in the same hierarchy hearing a case involving similar facts.
21. In a criminal trial, the most important responsibility for a judge is to act as an independent umpire. They must oversee proceedings impartially and without the perception of having any bias towards either party. In a trial, the judge may ask questions to clarify any aspect of the evidence, but in general the judge must allow the parties to a criminal trial to introduce evidence and make submissions without interference. If a party is unrepresented by legal counsel at trial, the judge must ensure that they are not disadvantaged.
22. The judge must ensure that the parties follow rules of evidence and procedure so that the trial is fair. For example, the judge may need to rule whether evidence is inadmissible (evidence that is inadmissible includes hearsay evidence, irrelevant evidence, evidence obtained illegally and evidence of prior convictions). The judge needs to consider whether the prosecution's evidence is capable of supporting a verdict of guilty beyond reasonable doubt. The judge must also balance the accused's need for rigorous cross-examination against the public interest in protecting witnesses from harassment or intimidation from question by counsel in court. The judge can, for example, allow for testimony by closed circuit television, permit a witness to be accompanied by a support person, or place screens in the court so that a witness is not required to make direct eye contact with the accused. A judge can also disallow any questions that are not relevant to the case.
23. At the conclusion of the trial, the judge will provide directions to the jury. Trial judges do this in order to assist them reach fair and just verdicts. In the Magistrates' Court, the magistrate must determine a verdict of guilty or not guilty at the conclusion of the trial. It is the responsibility of the judge to impose an appropriate sanction when a person has been convicted of a criminal offence, either by pleading guilty or having been proven guilty at the conclusion of a trial.
24. Jury trials are held only for the most serious indictable offences in the County Court and Supreme Court, where the accused pleads not guilty. A jury of 12 members is responsible for determining the facts of the case. In doing so, the jury performs an important role in representing a cross-section of the community: ensuring that the accused is judged by their peers.
25. The responsibilities of individual jurors in a criminal trial include choosing a foreperson to represent the jury and deliver the verdict to the court, listening attentively and objectively to the evidence without any bias, following the directions of the judge regarding the relevant law and its application to key evidence, deliberating on the evidence and reaching a verdict of 'not guilty' or 'guilty' beyond reasonable doubt.
26. When a jury deliberates to consider its verdict, the foreperson chairs jury discussions and ensures that every juror has the opportunity to express their view. The jury may vote regularly and progressively to determine whether they are able to reach a verdict. The three conclusions that a jury may reach are unanimous verdict (where all twelve jurors agree that the accused is 'guilty' or 'not guilty' of each charge in the indictment), majority verdict (if the jury has deliberated for six hours and has been unable to reach a unanimous verdict, the court will accept a majority verdict - that eleven jurors agree that the accused is 'guilty', or 'not guilty', of each charge in the indictment) or a hung jury (if the number of jurors voting 'guilty' or 'not guilty' is between two and ten, the votes are split, and the jury is unable to reach a verdict. If the jury remains unable to reach a verdict, the trial is aborted).
27. Jurors in a criminal trial have a number of legal responsibilities. They must disclose known reasons that would prevent them acting impartially. For example, a person must disclose if they are disqualified from being a juror (by reason of having a serious criminal record) or if they are ineligible to be a juror (because their profession is associated with the criminal justice system). Jurors must also keep their deliberations secret. Furthermore, jurors can only rely on the evidence introduced at trial in reaching a verdict.
28. In a criminal trial, the most important responsibility that the parties have is preparing and presenting their own cases. The prosecution will need to decide what evidence to present, and what legal arguments to submit in order to prove that the accused is guilty beyond reasonable doubt. The accused must decide whether to have legal representation or to be self-represented (this may be affected by access to legal aid), whether to plead guilty or not guilty to charges, and what evidence to present, and what legal arguments to submit in order to defend a case.
29. In a criminal trial, the parties may be represented by a legal practitioner to present their case to the judge and jury. A solicitor is a member of the legal profession who is a party's primary legal adviser – they are responsible for understanding the client's case, advising them of the relevant law, and preparing a brief for the barrister (also known as counsel). A barrister (also known as counsel) is a specifically trained legal practitioner who specialises in presenting a case to the court – they will conduct court appearances, present the party's case, argue points of law and evidence while examining witnesses.
30. Before the trial, a key responsibility of the solicitor is to prepare the witness statements their client will seek to rely on in evidence. At trial, it is the responsibility of the barrister to vigorously test the credibility and reliability of witness evidence introduced by the opposing team through cross-examination. For the defence, counsel's key objective in cross-examining prosecution witnesses is to introduce doubt in the minds of the jury that their evidence establishes that guilt of the accused to the required standard – beyond reasonable doubt.

31. Legal practitioners have professional obligations that include duties to the Supreme Court and ethics, as well as duties to their clients. Legal practitioner should not mislead the court, should not cast unjustifiable aspersions on any party or witness, should not withhold documents or case precedents from the other party which may detract from a client's case, and should raise any irregularity that occurs at trial so that it may be remedied (rather than staying quiet in order to use the incident as a ground for appeal).
32. A sanction is a legal penalty given to a person who has been convicted of a criminal offence. The purposes of sanctions include rehabilitation (a sanction should attempt to change the offender from a criminal into a law-abiding member of society), punishment (by punishing the offender for their crime, society obtains revenge against the offender for the harm they have done - which is preferable to individual victims seeking retribution personally), deterrence (a sanction will specifically discourage the offender from committing the offence again (specific deterrence) and should also generally discourage other people from committing similar offences (general deterrence)), denunciation (public disapproval of the offender, expressed by the court, demonstrates the community's view that the offender's role in committing the crime is not acceptable), protection (the community may need to be protected from future offending by the convicted person - this is most likely to be achieved by a term of imprisonment).
33. A fine is a monetary penalty paid by an offender. A court can impose a fine either with or without recording a conviction. The penalty for any offence is stated in the legislation outlining the offence, and is expressed as a number of penalty units. The purpose of a fine is to punish the offender, although the extent of the punishment depends on the amount of the fine. A large fine may operate to provide specific and general deterrence for future similar offences. A large fine may reinforce the court's denunciation of an offender's conduct. A fine has little value in rehabilitating an offender, or providing community protection.
34. A community correction order (CCO) is a flexible order issued to offenders by courts and served in the community. These court orders have at least one condition attached and may only be made for less serious indictable offences (for example, not murder, rape and drug trafficking). The conditions of a CCO will differ according to the offence and the offender's particular circumstances, but may require the offender to: undertake medical treatment or rehabilitation programs for drug or alcohol abuse; avoid licensed premises that serve alcohol; complete unpaid community work up to a total of 600 hours; be supervised, monitored and managed by a corrections worker; avoid association with specified people, such as co-offenders; live at, or avoid living at, a specified address; avoid particular nominated places; comply with a curfew for between 2 and 12 hours each day; be monitored and reviewed by the court to ensure compliance with the order; pay a bond that must be surrendered if the offender fails to comply with any condition imposed.
35. Every CCO will have four standard terms that extend for the duration of the order. In every case, an offender: must not reoffend for the duration of the order, must not leave Victoria without permission, must regularly report to a community corrections centre, and must comply with written directions from the Department of Justice. A CCO may be ordered in addition to a fine or a term of imprisonment of up to one year. An offender who breaches a term or condition of a CCO may be re-sentenced for their offence, and receive an additional sentence of three months imprisonment for their breach.
36. One purpose of CCOs is to rehabilitate an offender within the community (rehabilitation is more likely to be effective and successful for an offender in the community as they are able to remain connected with their support networks, continue their employment, and have access to more diverse treatment programs that address the reasons for their criminal conduct). CCOs provide a range of methods for punishing an offender (the mandatory terms will impact on an offender's liberty - if an offender breaches any condition of their CCO they are likely to face a term of imprisonment for this offence, and the range of conditions available to accompany the order place obligations and limitations on the offender that will cause them to alter their behaviour.). A CCO will deter an offender by addressing the reasons for their offending. Non-compliance with the CCO risks being sent to prison. A CCO denounces the offender by placing restrictions on their liberty, and obligations on them to complete programs ordered by the court to address their criminal behaviour. The community is somewhat protected from future offending, because the offender's freedom of movement is constrained by the terms of the order. The community is further protected because conditions aim to achieve rehabilitation by addressing criminal behaviour. CCOs can be an effective sanction for serious criminal conduct when combined with short terms of imprisonment.
37. Imprisonment removes an offender's liberty by denying them the right to live in the community for a period of time, depending on the severity of the offence committed. The Sentencing Act 1991 outlines the penalty scale for imprisonment. The penalty scale has nine levels, ranging from Level 9 (six months' imprisonment) to Level 1 (life imprisonment).
38. Imprisonment rehabilitates an offender by providing programs and educational opportunities during their imprisonment. It punishes the offender by depriving them of their liberty. It denounces the offender and the crime, as being sent to prison is considered shameful. It provides deterrence, both specific and general, because the offender and other community members will seek to avoid conduct that may result in a future prison sentence. A prison term protects the community from continued criminal conduct, by removing the offender from participation in public life for the term of their sentence.
39. The effectiveness of prison-based rehabilitation programs may be judged by the rate of recidivism. Statistics suggest that rehabilitation programs in prison do not adequately address the needs of prisoners once they are paroled into the community, or that there are inadequate services to support their reintegration into community life without engaging in criminal conduct.
40. A concurrent sentence refers to an offender serving two or more terms of imprisonment at the same time. A cumulative sentence involves two or more terms of imprisonment being added together. Serious offenders include serious sexual offenders, serious arson offenders, serious drug offenders, and serious violent offenders. When a serious offender is



sentenced to imprisonment for more than one offence, the jail terms must be served cumulatively (one after the other), unless the court directs otherwise. A court may impose an indefinite sentence (a sentence of imprisonment with no set end date) on an offender convicted of a serious offence (such as a sex crime, murder or manslaughter). When ordered by the court, the offender will serve their full sentence and then the court will assess whether or not the offender should return to the community. Release will only be granted when the court finds that the offender is no longer a serious danger to the community.

41. In determining on an appropriate sentence to be imposed on the offender, a court must consider a number of factors. Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors that must be regarded by the court when sentencing an offender in Victoria, which include the maximum penalty for the offence; current sentencing practices; the nature and gravity of the offence; the offender's culpability (blameworthiness) and degree of responsibility for the offence; whether the offence was motivated (wholly or partly) by hatred or prejudice for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; the impact of the offence on any victim of the offence; the personal circumstances of any victim of the offence; any injury, loss, or damage resulting directly from the offence; whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; the offender's previous character; the presence of any aggravating factor or mitigating factor concerning the offender or of any other relevant circumstances.
42. When weighing up the nature and gravity of the offence committed by the offender, a court might consider the intention of the offender and the consequences of the offence, the use of weapons, any breach of trust, the offender's history of offending, the offender's response to previous court orders and/ or alcohol or drug addiction.
43. An aggravating factor is any fact or circumstance that increases the seriousness of the offence or the offender's culpability. This may possibly result in the offender receiving a harsher sentence. There are several factors that can aggravate a sentence, including premeditation (pre-planning the crime), committing the crime as part of a group against an outnumbered victim, use of a weapon, a breach of trust by the offender towards the victim, and the cruelty of the crime.
44. A mitigating factor is any fact or circumstance that reduces the seriousness of the offence or the offender's culpability. This may mean that the sentencing judge will discount the offender's sentence to take account of the mitigating factor. There are several factors that can mitigate a sentence, including the age of the offender, the background of the offender, the previous good character of the offender, the remorse shown by the offender for the crime, and whether imprisonment would be particularly hard on the offender.
45. A sentencing judge must take into account a plea of guilty. Pleading guilty to an offence provides the benefit of sparing the community the expense of a contested trial and equally spares witnesses and victims the experience of such a trial. As the avoidance of a contested trial in order to obtain a conviction is a benefit to the community, substantial incentives are provided to an accused person to plead guilty to the charges against them. Section 5(2) of the *Sentencing Act 1991* requires the sentencing judge or magistrate to take into account any guilty plea by the convicted person, and the stage of proceedings when they make that plea.
46. If the accused pleaded guilty at the committal mention the prosecutor at the plea should submit that the accused pleaded guilty at the earliest opportunity. If the accused indicated an intention to plead guilty after the committal the prosecutor at the plea should submit that the accused did not plead guilty at the earliest possible opportunity. If the accused indicated an intention to plead guilty after the trial had been listed the prosecutor at the plea should submit that the reduction of the sentence should reflect the late plea of guilty.
47. A specified sentence discount specifies the reduction in sentence that an offender receives for pleading guilty.
48. A Victim Impact Statement is prepared by a victim of an offence and presented to a court at the time of sentencing, explaining how the crime has affected the victim. The purpose of a Victim Impact Statement is to assist the sentencing judge or magistrate in determining an appropriate sentence for the offender.
49. A Victim Impact Statement must be in writing, accompanied by a statutory declaration, and filed prior to sentencing. It must focus on the impact of the crime on the victim. The court may rule any part of the statement inadmissible if it does not comply with the rules of evidence, or is in other ways inappropriate. The statement may address the physical, emotional, financial or social impacts of a crime on the victim ( a person directly affected by the offender's conduct, or a relative of a person who was injured or killed by the offender's conduct). The person making the statement may request that the statement be read aloud in court. The statement can include additional material such as a poem, drawing or photo, and substantiating material such as medical report.
50. Any Victim Impact Statement will be considered by the relevant court at the plea hearing. The judge or magistrate will include the statement in determining the appropriate sentence, and may refer to it in their published reasons.