THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES

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VCAA STUDY DESIGN 2018-2022

Exam Tip: You should consider how the different parts of the course relate to each other. VCAA can, and does, combine content from different Areas of Study in its exam questions, so the Study Design should be read as one document – not as four completely independent topics.
For example, in 2019 the exam asked: "Discuss the extent to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion." (10 marks) This corresponded to the Key Knowledge dot-point 'express rights' in Unit 4 AOS 1, but extended also to the role of the High Court, referendum, pressures on parliament, the principle of representative government and beyond, as the student chose.

UNIT 3 – RIGHTS AND JUSTICE

Unit 3 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 3 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 3.

Unit 3 examines the Victorian justice system, and the way in which both criminal and civil disputes progress through a range of dispute resolution and support services in the system. The effectiveness of the criminal and civil justice systems is analysed, and both recent and suggested changes to the system are examined.

Area of Study 1: The Victorian criminal justice system

AOS 1 (or 'Outcome 1') makes up 50% of Unit 3. The Outcome summary from the Study Design reads:

> The Victorian criminal justice system is used to determine whether an accused person is guilty beyond reasonable doubt of an offence for which they are charged, and to impose sanctions where guilt has been found or pleaded. The system involves a range of institutions including courts (the Magistrates' Court, County Court and Supreme Court) and others available to assist an accused. In this area of study students explore the criminal justice system, its range of personnel and institutions and the various means it uses to determine a criminal case. Students investigate the rights of the accused and of victims, and explore the purposes and types of sanctions and sentencing considerations. Students consider factors that affect the ability of the criminal justice system to achieve the principles of justice. They examine recent reforms from the past four years and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the criminal justice system to actual and/or hypothetical scenarios.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Key Concepts

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian criminal justice system, including:
  - the distinction between summary and indictable offences
  - the burden of proof
  - the standard of proof
  - the presumption of innocence
- The rights of the accused, including
  - the right to be tried without unreasonable delay
  - the right to a fair hearing
  - the right to trial by jury
- The rights of victims, including:
  - the right to give evidence as a vulnerable witness
  - the right to be informed about the proceedings
  - and the right to be informed of the likely release date of the accused

Determining a criminal case

- The role of institutions available to assist an accused, including Victoria Legal Aid ('VLA') and Victorian community legal centres.
- The purposes of committal proceedings.
- The role, purposes and appropriateness of plea negotiations and sentence indications, in determining criminal cases.

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- The reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals.
- The responsibilities of key personnel in a criminal trial, including the judge, jury, parties, and legal practitioners.
- The purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection.
- Examples of sanctions: fines, community corrections orders and imprisonment, and their specific purposes.
- Factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

Reforms

- Factors that affect the ability of the criminal justice system to achieve the principles of justice, including in relation to costs, time and cultural differences.
- Recent and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice.

> **Exam tip:** The Study Design defines 'recent' as within the previous four years. Therefore, if the Study Design specifies 'recent' in relation to reforms that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2020 examination no reform before 2016 should be used as a 'recent reform'.

Pay special attention to the fact that some of the Key Knowledge points imply Key Skills. For instance, the word 'appropriateness' is *evaluative* in nature, and requires arguments to be made that are similar to strengths and weaknesses.

Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points.

> **Exam tip:** It is safer to apply higher-order skills broadly in your examination preparation. In other words, assume *more* content will need to be analysed and discussed rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic on the Study Design.

'Higher-order' evaluative skills such as discussing and analysing are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- The range of means used to determine a criminal case.
- The responsibilities of key personnel in a criminal trial.
- The ability of criminal sanctions to achieve their purposes.
- Recent reforms and recommended reforms to the criminal justice system.
- The ability of the criminal justice system to achieve the principles of justice.

The 'higher-order' application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

> **Exam tip**: The task word 'synthesise' is new on the current Study Design. Essentially, it means 'to combine'. Very often, a question will provide information in the form of a real or hypothetical fact scenario; 'synthesising' this with theory content would, for instance, involve combining the theory with the practice, and commenting on the way in which the theory of the legal system might apply to the facts given. Alternatively, a question may ask you to combine information you know about one legal body with information you know about another legal body, and give an opinion on the ways in which they are the same or different, why one is less effective than the other or more effective.

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Area of Study 2: The Victorian civil justice system

AOS 2 (or 'Outcome 2') makes up the other 50% of Unit 3. The Outcome summary from the Study Design reads:

> The Victorian civil justice system aims to restore a wronged party to the position they were originally in before the breach of civil law occurred. The system involves a range of institutions to resolve a civil dispute, including courts (the Magistrates' Court, County Court and Supreme Court), complaints bodies and tribunals. In this area of study students consider the factors relevant to commencing a civil claim, examine the institutions and methods used to resolve a civil dispute and explore the purposes and types of remedies. Students consider factors that affect the ability of the civil justice system to achieve the principles of justice. They examine recent reforms from the past four years and recommended reforms to enhance the ability of the civil justice system

to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the civil justice system to actual and/or hypothetical scenarios.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Key concepts

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian civil justice system, including:
  - the burden of proof
  - the standard of proof
  - representative proceedings

Resolving a civil dispute

- Factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.
- The purposes and appropriateness of Consumer Affairs Victoria ('CAV') and the Victorian Civil and Administrative Tribunal ('VCAT') in resolving civil disputes.
- The purposes of civil pre-trial procedures.
- The reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals.
- The responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners.
- Judicial powers of case management, including the power to order mediation and give directions.
- The methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness.
- The purposes of remedies.
- Damages and injunctions, and their specific purposes.

Reforms

- Factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility.
- Recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.

Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The purposes of civil pre-trial procedures.

'Higher-order' evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- Factors to consider when initiating a civil claim.
- The appropriateness of institutions and methods used to resolve a civil dispute.
- The responsibilities of key personnel in a civil trial.
- The ability of remedies to achieve their purposes.
- Recent reforms and recommended reforms to the civil justice system.
- The ability of the civil justice system to achieve the principles of justice.

The 'higher-order' application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

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UNIT 4 – THE PEOPLE AND THE LAW

Unit 4 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 4 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 4.

Unit 4 examines the role played by both parliament and the courts in law-making, the interaction between them as law-makers, and the role played by the Australian Constitution in relation to the law-making of both institutions. The effectiveness of parliament and the courts as law-makers is analysed, as well as the influence of the Constitution, and students study the ability of the people to have an impact on all three.

Area of Study 1: The people and the Australian Constitution

AOS 1 (or 'Outcome 1') makes up 40% of Unit 4. The Outcome summary from the Study Design reads:

> The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. In this area of study students examine the relationship between the Australian people and the Australian Constitution and the ways in which the Australian Constitution acts as a check on parliament in law-making. Students investigate the involvement of the Australian people in the referendum process and the role of the High Court in acting as the guardian of the Australian Constitution.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

- The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making.
- The division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers.
- The significance of section 109 of the Australian Constitution.
- The means by which the Australian Constitution acts as a check on parliament in law-making, including:
  - The bicameral structure of the Commonwealth parliament
  - The separation of the legislative, executive and judicial powers
  - The express protection of rights
  - The role of the High Court in interpreting the Australian Constitution
  - The requirement for a double majority in a referendum
- The significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution.
- The significance of one referendum in which the Australian people have protected or changed the Australian Constitution.
- The significance of one High Court case which has had an impact on the division of constitutional law-making powers.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The constitutional law-making powers of the state and federal parliaments.

'Higher-order' evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- The significance of section 109 of the Australian Constitution.
- The ways in which the Australian Constitution acts as a check on parliament in law-making.
- The ability of the Australian people to protect or change the Australian Constitution.
- The significance of High Court cases involving the interpretation of the Australian Constitution.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

The 'higher-order' application skill of comparing two or more topics of content to find similarities and differences is listed explicitly for the following Kew Knowledge point:

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- The constitutional law-making powers of the state and federal parliaments.

The 'higher-order' application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

Area of Study 2: The people, the parliament, and the courts

AOS 2 (or 'Outcome 2') makes up the other 60% of Unit 4. The Outcome summary from the Study Design reads:

> Parliament is the supreme law-making body, and courts have a complementary role to parliament in making laws. Courts can make laws through the doctrine of precedent and through statutory interpretation when determining cases. In this area of study students investigate factors that affect the ability of parliament and courts to make law. They examine the relationship between parliament and courts in law-making and consider the capacity of both institutions to respond to the need for law reform. In exploring the influences on law reform, students draw on examples of individuals and the media, as well as examples from the past four years of law reform bodies recommending legislative change.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Parliament and courts

- Factors that affect the ability of parliament to make law, including:
  - The roles of the houses of parliament
  - The representative nature of parliament
  - Political pressures
  - Restrictions on the law-making powers of parliament
- The roles of the Victorian courts and the High Court in law-making.
- The reasons for, and effects of, statutory interpretation.
- Factors that affect the ability of courts to make law, including:
  - The doctrine of precedent
  - Judicial conservatism
  - Judicial activism
  - Costs and time in bringing a case to court
  - The requirement for standing
- Features of the relationship between courts and parliament in law-making, including:
  - The supremacy of parliament
  - The ability of courts to influence parliament
  - The interpretation of statutes by courts
  - The codification of common law
  - The abrogation of common law

Law reform

- Reasons for law reform.
- The ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts.
- The role of the media, including social media, in law reform.
- The role of the Victorian Law Reform Commission and its ability to influence law reform.
- One recent example of the Victorian Law Reform Commission recommending law reform.
- The role of one parliamentary committee or one Royal Commission, and its ability to influence law reform.
- One recent example of a recommendation for law reform by one parliamentary committee or one Royal Commission.
- The ability of parliament and the courts to respond to the need for law reform.

Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law-reform.
- The ability of law reform bodies to influence a change in the law – for this content point, VCAA specifies that only "recent" examples of recommendations from the previous four years may be used.

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> **Exam tip:** If the Study Design specifies 'recent' in relation to examples that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2020 examination no example before 2016 should be used as a 'recent example'.

'Higher-order' evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- Factors that affect the ability of parliament and the courts to make laws.
- Features of the relationship between parliament and courts.
- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law reform.
- The ability of law reform bodies to influence a change in the law.
- The ability of parliament and the courts to respond to the need for law reform.

The 'higher-order' application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

REVIEW/APPLICATION QUESTIONS – Advice

The Review/Application questions are different from the sample examination questions scattered throughout this Study Guide, because they are focused on basic content comprehension and memorisation more than on examination strategy or the active processing of material. Before you can apply knowledge, elaborate on it and actively process it, you first need to comprehend it and have quick access to an accurate version of it in your memory.

a. If you want to work on COMPREHENSION, use your notes and the relevant topics in this Study Guide to help you answer Review/Application questions. Try to answer questions using different wording from the notes, because this will work on comprehension: do you understand the material well enough to explain it differently?

b. If you want to work on MEMORISATION, *do not* use your notes or this Study Guide. Answer everything from memory, and then check your accuracy against your notes and this Guide after you have finished. Testing your closed-book memory has been shown to have some of the best benefits when it is done as soon as possible after learning the material – don't worry about whether it is 'too soon' to test yourself.

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UNIT 3 – RIGHTS AND JUSTICE

INTRODUCTION TO DISPUTE RESOLUTION IN AUSTRALIA

Criminal law regulates human behaviour insofar as it affects society as a whole, whereas civil law regulates human behaviour insofar as it relates to the private relationships between individuals. The difference between criminal and civil law is required knowledge for understanding the Unit 3 split between Area of Study 1, 'The Victorian criminal justice system', and Area of Study 2, 'The Victorian civil justice system'.

Criminal law

Criminal law regulates the relationship between individuals and the state. The state sets out standards of behaviour that everyone is expected to follow for the protection and benefit of the whole community, and anyone who breaks these rules can be prosecuted by the police or the Office of Public Prosecutions, on behalf of the whole community.

The person accused of the crime is called the 'accused', but they can also be referred to as the 'defendant'. The person bringing the action is called the 'prosecution' or the 'prosecutor'.

> **Exam tip:** It is important to always use the correct terminology when talking about criminal cases. Words such as 'crime', 'charged', 'guilty', 'accused' and 'prosecution' all denote criminal law and criminal disputes.

Criminal cases begin with the commission of a crime. Once a crime has been reported to the police the police will begin an investigation, and once a suspect has been found and charged she or he will appear in court.

Civil law

Civil law regulates the relationship between individuals and other individuals – remember that, legally, companies count as individuals, as does the government when it is being sued or launching a private action itself.

The state sets out expectations of conduct for the way in which individuals treat each other, with the aim of protecting each individual from another individual unlawfully infringing her, his or its rights. Anyone who feels their rights have been unlawfully infringed can take a civil action against the individual who did it: they can *sue* them. The legal matter will be one individual against the other individual.

The individual bringing the action is called the 'plaintiff', and the individual who is being taken to court is called the 'defendant' – this word is seen in both civil and criminal cases. The word 'accused' is never used for civil cases, though.

> **Exam tip:** It is equally important to use the correct terminology when talking about civil cases. Words such as 'tort', 'civil wrong', 'sued', 'liable', 'remedy' and 'plaintiff' all denote civil law and civil disputes. Some language, such as 'rights' or 'defendant', apply to both civil and criminal law. In every exam, students mix up criminal cases and civil cases, and write answers using the wrong terminology. This has prevented students from achieving full marks.

The power of courts and tribunals to hear civil matters is divided by how complex the case is: how much money is being asked for, or how complicated the law and/or evidence are. More complex matters are heard in higher courts.

Resolution of disputes

The most common means of resolving disputes has traditionally been through the court system. Courts operate on a federal level as well as in each state. Federal courts hear cases relating to federal law, while state courts hear cases relating to state law.

Courts resolve disputes according to their jurisdiction. The 'jurisdiction' of an official body is the authority it has to use the power of government: for a body like parliament, this will be the authority to make laws; for a body like a court or tribunal, this will be the authority to hear cases and give out criminal sanctions (such as prison terms) or civil remedies or orders (such as monetary damages). Which court or tribunal a party goes to will depend on the type of law covering the area, and how serious their case is.

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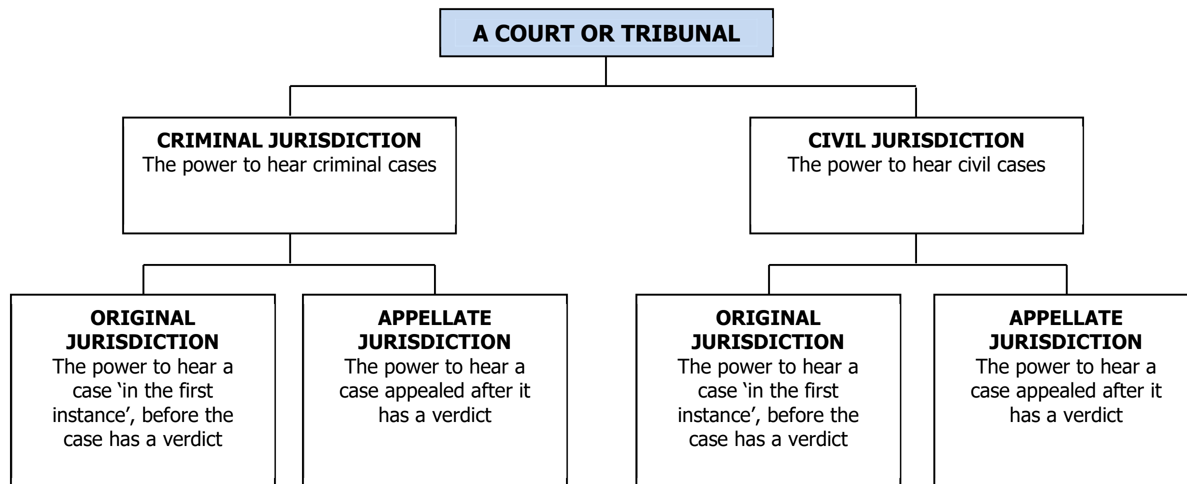
A court or tribunal may have original criminal jurisdiction; original civil jurisdiction; appellate criminal jurisdiction; and/or appellate civil jurisdiction.



Where relevant, the ability of the individual to take her, his or its own action outside the official dispute resolution bodies will also be studied. For instance, individuals may try to resolve civil disputes without going to any court or official government tribunal.

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REVIEW/APPLICATION QUESTIONS – Introduction to dispute resolution

1. **Outline three differences between criminal and civil law.**
2. **Distinguish between the original and appellate jurisdictions of a court.**
3. **Would a retrial be conducted in the original jurisdiction or the appellate jurisdiction of a court? Explain.**

Application exercise

Norman's friend is driving him home one night when the car crashes into a streetlight. Norman sues his friend for $210,000 to compensate him for injury caused as a result of the accident.
a. **Would this case be a criminal or civil case?**
b. **Which courts might have the jurisdiction to hear this case?**
c. **Draw up a list of dispute resolution terminology you might use when discussing this case.**
d. **Draw up a list of terminology you would need to avoid when discussing this case.**

AOS1: THE VICTORIAN CRIMINAL JUSTICE SYSTEM

THE PRINCIPLES OF JUSTICE

Aspects of the principles of justice are protected in the Australian Constitution, the common law developed by the courts over time, and statutory rules such as the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Section 24, for instance, specifies that "[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public" except in certain circumstances. There are more sections that apply only to criminal law and criminal proceedings than sections that also apply to civil law.

Fairness

Definition

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

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

Exam Tip: You must be careful never to define a term by using the same word.
For example, never define a fair hearing by saying merely that it must be fair, or that it must involve fairness. You have to say what fairness *means*.

Detail

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of people in the state to fairness in the legal system in a range of ways. For example, s24 of the Charter protects the rights of all parties "to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;" and states that "[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires."

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

- Because of the presumption of innocence, all criminal defendants are considered innocent until they have been proved guilty. This approach is fairer than adopting an approach where a person is presumed guilty and punished until they prove their innocence.

- A person who believes an error was made in their hearing has the right to appeal – or, at the very least, to apply for leave to appeal (for instance, to the High Court of Australia or the Victorian Court of Appeal). This helps to check that mistakes are not made and that a fair outcome has been reached, based on an appropriate understanding of the evidence and law.

Exam tip: 'Fairness' does overlap in part with the next two principles: equality and access. It may therefore come in handy as the broadest of the three principles of justice.

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Equality

Definition

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

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

'Equality' can be interpreted narrowly as formal or procedural equality, or broadly, as substantive or 'outcome-driven' equality. Procedural equality focuses on all people being treated the same, regardless of whether that treatment produces equal outcomes; substantive equality focuses on treatment being differentiated according to the needs of the person, in the hopes of achieving more equal outcomes.

Detail

The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to substantive equality in the legal system in a range of ways. For example, s8 of the Charter provides that "[e]very person has the right to recognition as a person before the law," and that "[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination."

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

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

- Sex and gender. Whether someone is a woman, a man or a non-binary sex can affect their treatment, their outcome, and their ability to achieve justice.

- Cultural and community background.

- Physical and mental abilities and disabilities.

Some examples of ways in which we attempt to ensure equality include:

- Various forms of disadvantage are recognised, and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality. For instance, a range of mental disabilities and psychological disorders are supported in criminal proceedings through the Assessment and Referral List in the Magistrates' Court, and free interpreters are provided during police questioning and Magistrates' Court criminal proceedings.

- Judicial proceedings are governed by strict rules of procedure that are consistently applied to both parties equally. For instance, evidence can be tested through cross-examination of witnesses, ensuring that all evidence is reliable. Each party is given an equal opportunity to test the evidence tendered through the witnesses called by the other side.

Access

Definition

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

'Access' is made up of knowledge, choice and action: knowledge of the options available, a meaningful ability to choose from among those options, and the power to act on those choices.

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Detail

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

For example, s25 of the Charter protects the rights of the accused in a criminal case to "be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands;" to have "adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her;" to "have the free assistance of an interpreter if he or she cannot understand or speak English;" to be "tried without unreasonable delay;" and "to have legal aid provided if the interests of justice require it," amongst other things.

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

- Knowledge, experience and training. Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it, will affect their ability to meaningfully access justice.

- Money. Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can't afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.

Some ways in which we attempt to ensure access to justice include:

- The court hierarchy allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction. Parties therefore have access to experts in the area under dispute, and can more quickly and cheaply go to lower courts for less serious matters. A court hierarchy also allows for administrative convenience, as parties know which court deals with which type of dispute and do not have to complete forms and pay fees that are not relevant to them.

- The first Neighbourhood Justice Centre ('NJC') was opened in the City of Yarra in 2007. The NJC aims to improve the justice system by addressing social disadvantage and improving access to justice services. It combines support

services such as drug counselling and childcare with community initiatives, and mixes the legal system with the local community. The NJC focuses on early intervention, and involves the locals in finding solutions to their social problems.

REVIEW/APPLICATION QUESTIONS – The principles of justice

1. **Define the idea of 'fairness'.**
2. **Identify three things that have the ability to compromise fairness.**
3. **Outline two ways in which the legal system attempts to provide people with fairness in dispute resolution.**
4. **Define the idea of 'equality'.**
5. **Identify three things that have the ability to compromise equality.**
6. **Outline two ways in which the legal system attempts to provide people with equality in dispute resolution.**
7. **Define the idea of 'access'.**
8. **Identify three things that have the ability to compromise access.**
9. **Outline two ways in which the legal system attempts to provide people with access in dispute resolution.**

KEY CONCEPTS IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

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

In criminal cases the individual is prosecuted by a representative of the government. Because this naturally involves a power imbalance in legal expertise and resources, there are a range of criminal rules and procedures that try to guard against any unfairness resulting for the accused person. In civil disputes, the government is treated as a legal individual, and is therefore on the same footing as any other party.

The key concepts that follow are specific to trials and hearings conducted in courts; they are not applied in the same way, or at all, outside courts and outside trials and hearings.

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The distinction between summary and indictable offences

Definition
Criminal offences are classified as either summary or indictable, depending on their seriousness, and whether or not they will be tried before a jury. A summary offence is less serious and does not require a jury; an indictable offence is more serious, and does require a jury (if tried as an indictable offence in Victoria).

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

THE MOST SERIOUS INDICTABLE OFFENCES	Dealt with in the Supreme Court (Trial Division) before a Supreme Court justice and a jury.
SERIOUS INDICTABLE OFFENCES	Dealt with in the County Court before a County Court judge and a jury.
MINOR INDICTABLE OFFENCES	
INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY	Dealt with in the County Court before a County Court judge and a jury… UNLESS the defendant chooses to have it heard in the Magistrates' Court *as though it were* a summary offence.
SUMMARY OFFENCES	Dealt with in the Magistrates' Court before a magistrate alone – there is NO jury at any time. There is a limit to the fines and jail time a magistrate can give. Some summary offences can be resolved without a court hearing. Instead, a fine or infringement notice is issued by the police; if the accused person pays the fine, the matter is taken to be resolved.

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Indictable offences are heard in the County Court and the Supreme Court (Trial Division), which are the higher two of the three state courts. Under the current jurisdiction of the County and Supreme Courts, they can both give out unlimited sanctions – the act of parliament that provides for the offence will therefore state the range of consequences the courts can give for that particular offence. Indictable offences are prosecuted by the Office of Public Prosecutions, and are heard by a single judge or justice sitting with a jury: the judge or justice administers the law, and the jury decides the facts and reaches a verdict. The court proceedings used in indictable offences are called 'trials'.

Some indictable offences can be heard summarily – that is, dealt with in the Magistrates' Court without a jury. Generally, they are offences where the maximum term of imprisonment a guilty party could receive in the County Court is 10 years or where a fine of no more than 1200 penalty units could be given.

Exam tip: The value of a penalty unit changes every year on 1 July. It goes up to take account of inflation. Legislation refers to penalty units rather than exact dollars so that the amounts don't rapidly go out-of-date. In the exam you can refer to penalty units, or you can calculate the dollar amount for that year.

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

Every year since 2013 between 28-31 per cent of indictable matters have been finalised summarily after committal.

The burden of proof

Definition
The burden of proof is the responsibility borne by the party bringing the case to prove the claims made with evidence. In a criminal hearing or trial, the burden will be on the prosecution to bring evidence to prove the allegations it has made against the accused.

This proof must be brought before the accused has a responsibility to defend herself or himself.

Detail
The defendant should not bear any part of the burden – in other words, they should not need to prove that they are innocent, and they should not need to prove an alternative version of events if they disagree with the version put forward by the prosecution.

If the evidence is evenly balanced, and doesn't persuasively point to either one party or the other, the effect of the legal burden being on the prosecution means that the accused should win by default.

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

- In 2005 offences relating to the trafficking of drugs were added to the Commonwealth *Criminal Code.* For instance, when the defendant is in possession of a 'trafficable' quantity of a controlled drug, they will be presumed without evidence to have the intention to traffic, or the intention to cultivate or manufacture for a commercial purpose. The onus will then be placed on the defendant to prove they did not.

But a reversal of the burden of proof is considered a denial of fairness and natural justice.

The standard of proof

Definition
The standard of proof is the quality or weight of evidence that must be led by the party with the burden of proof in order for them to discharge that burden. In a criminal hearing or trial, the standard of proof is the quality of evidence required for the prosecution to demonstrate that the accused is guilty of the charges.

The precise criminal standard is 'beyond reasonable doubt', meaning that it must be beyond reasonable doubt that the accused is legally and criminally responsible for the offence.

Detail
It is generally accepted that the high standard of proof in criminal trials lessens the risk of wrongful convictions, and this is an important principle in the justice system.

Current Australian interpretation by courts defines 'beyond reasonable doubt' as a phrase that each juror should understand for themselves, and that disregards only those doubts that are fanciful or unreal.

The prosecution must prove *all* the elements of the offence beyond reasonable doubt, and must also *disprove* all defences beyond reasonable doubt, as long as those defences have been raised as issues in the trial or hearing.

The presumption of innocence

Definition
The presumption of innocence is the assumption that the party against whom allegations are being made is innocent of all allegations unless, and until, the party bringing the case shows a sufficient weight of evidence to the contrary.

Detail
The presumption of innocence is protected by s25 of the Victorian Charter of Rights and Responsibilities. Because of the presumption of innocence, the accused does not have the responsibility to prove that she or he is innocent, or even likely or probably innocent. The defendant does not need to prove anything – except that the prosecution has not discharged its burden of proof.

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Procedures and rules in the criminal justice system that protect the presumption of innocence include:

- Once she or he has been charged with an indictable offence, an accused person will be brought before the Magistrates' Court for a bail hearing. Bail is the ability of the charged person to return home, and return to relatively normal life until the conclusion of the dispute or bail is revoked, because it is recognised that the accused is still innocent under the law.

- A committal hearing is a hearing before the Magistrates' Court in which the prosecution will have to demonstrate that they have enough evidence against the accused to support a conviction in a higher court.

REVIEW/APPLICATION QUESTIONS – Key concepts in the criminal justice system	
1.	**Outline the difference between a summary offence and an indictable offence.**
2.	**Explain what it means to say that an indictable offence can be heard summarily.**
a.	**What would be two advantages of having an indictable offence heard summarily?**
3.	**Which court will a relevant indictable offence be heard in if the accused chooses *not* to have it heard summarily, and which court will a relevant indictable offence be heard in if the accused *does* choose to have it heard summarily?**
4.	**Give a definition of the term 'burden of proof'.**
5.	**Who has the burden of proof in criminal trials?**
6.	**Give a definition of the term 'standard of proof'.**
7.	**What is the standard of proof in criminal trials?**
8.	**Which party is protected by the presumption of innocence?**
9.	**When is the presumption of innocence overturned?**
10.	**Provide two examples of ways in which the legal system tries to protect the presumption of innocence.**

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Extension material:

Rules of evidence and procedure

Rules of evidence and procedure are not required content in the Study Design, but they provide an important framework for the resolution of criminal disputes.

Definition
Rules of evidence determine what evidence is admissible and allowed to be used in court as proof, and what evidence is inadmissible and not allowed. Rules of procedure are the rules dictating how a trial or hearing is run, and what happens in what order.

Detail
Evidence must be relevant, reliable and legally-obtained, or else there is a risk that the trial will not be fair. It must also have more probative value than prejudicial value: in other words, the evidence must prove more about the case than it prejudices the court against the defendant. Procedure must be organised to allow both parties' versions of the case to come out effectively, and to ensure that neither party can dominate argument to the exclusion of the other.

Rules of evidence and procedure are complex and applied strictly to ensure that parties are on equal footing and that neither party can gain an unfair advantage.

For example:

- Hearsay evidence is evidence that a witness is not giving first-hand: in other words, the evidence relates to something that the witness does not have personal, first-hand knowledge of. Because of this, hearsay evidence will generally be inadmissible.

- Witnesses are only allowed to respond to the questions asked of them by either party or the judge – court procedure does not permit them to make uninterrupted narrative statements like stories. This allows the parties to control the evidence they want to come before the court, and the order in which they want those pieces of evidence to come out. Each witness led by one party will then be opened up to cross-examination by the other party.

Evaluation: Key concepts in the criminal justice system

Exam tip: There are a number of very good reasons to always match strengths and weaknesses together in groups – rather than keeping them in two separate lists, or matching every single strength against one weakness to create pairs.
Groups of 'features' make the points easier to remember, easier to structure in an answer, and it also prepares for the range of 'evaluate'-style questions that can be asked. For example, if the examination asks you to "evaluate" one strength, it is asking you to explain the strength and then to examine the flip-side of it, one or more corresponding weaknesses, before coming to a conclusion. The opposite also holds true for evaluating a weakness.

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS	KEY CONCEPTS	WEAKNESSES
Minor offences are not sent to a court with complex, lengthy and expensive procedures. The Magistrates' Court has simplified procedures and forms, and the filing fees for different actions are lower. This all helps reduce legal expenses for representation, and increase ***access*** to justice. Court time and resources are allocated more effectively, which makes the system operate with increased efficiency and specialisation. Courts that employ more personnel dedicated to time-intensive tasks and with specialised knowledge can dedicate those to more serious cases, ensuring they receive ***fairness*** and due process.	**Summary and indictable offences**	The accused will sometimes have the ability to elect a summary hearing for a minor indictable offence, but this decision may be made on the basis of costs and resources and not what would deliver the greatest degree of ***fairness***. Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases ***access***. For example, the average timeframe for resolution through the Magistrate's Court is 6-12 months; through the Supreme Court (Trial Division) it is 12-36 months.
The prosecution or plaintiff will be discouraged from bringing unsubstantiated charges because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a trial is part of ***fairness***. The prosecution will be discouraged from bringing unsubstantiated charges because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a prosecution is part of ***fairness***.	**The burden of proof**	The party that has already been injured (represented by the state in a criminal case), bears the burden of starting the trial and leading all of the evidence first. If they cannot do this adequately, the case is dismissed. The party that might be in the wrong, the defendant, is protected, which is ***unfair***. In terms of evidence and legal arguments, ***equality*** is not achieved between the parties because the benefit is given to the defendant. The defending party can discover all evidence against them before they even start to decide what their defence is going to be.
The defendant cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the ***fairness*** of the trial, because it would be ***unfair*** to prosecute or sue someone if there was little	**The standard of proof**	Juries may interpret the standard of proof differently in each case. This means there is not truly one consistent standard applied to all trials and it is difficult to argue that the standard is strict and objective, and that every defendant is ***equal*** in the trial process.

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to no evidence justifying it and they were sure to be found not guilty or not liable at the end. Criminal cases have serious consequences attached to them, and they are also subject to a very high standard of proof: beyond reasonable doubt. This is only ***fair***, because a person's freedom may be on the line. Civil cases have a standard of proof that is appropriate to their consequences.		For example, studies from the United Kingdom, New Zealand, Queensland and New South Wales all show consistently that jurors have difficulty with the concept of 'beyond reasonable doubt' and fail to apply it consistently or interpret it in the same way. This makes defendants in different cases ***unequal*** to each other in terms of how they are treated, and does not give them the same ***access*** to justice.
The presumption of innocence is upheld by procedures such as bail. This protects human rights and ***fairness*** by not punishing someone before they have been found guilty. It also allows the defendant to prepare adequately for their case and earn money in the months or years before trial, which gives them greater ***access*** to justice and increases the ***equality*** between them and the prosecution. The defendant will never be asked to defend themselves against something they have not been fully informed of and already proved guilty of. This knowledge and protection gives them greater ***access*** to justice.	**The presumption of innocence**	In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. This decreases ***fairness*** because they can be brought back to trial even though they were presumed innocent the first time *and* found not guilty; it also decreases ***access*** to justice with the second trial because their finances will be depleted, and they are more likely to be assumed guilty if they are charged multiple times. Procedures such as holding suspects on remand ***unfairly*** deny the defendant the right to the presumption of innocence, and jeopardises their ***access*** to justice because they are much less able to prepare for their defence and cannot earn money in the meantime.
The rules apply ***equally*** to both parties so one party is not advantaged at the expense of the other. The strict rules for the admissibility and inadmissibility of evidence ensure a ***fair*** hearing because all evidence must be relevant, reliable and legally-obtained. Greater ***equality*** is achieved in the courtroom because evidence must have more probative than prejudicial value, so it is less likely to trigger prejudices against the defendant.	**Rules of evidence and procedure**	Witnesses are only allowed to respond to the questions asked and cannot elaborate – this may result in some important evidence not being brought before the court, and reduce the ***fairness*** of the hearing. Complex rules can be manipulated by experienced parties, and are confusing for inexperienced parties and the jury. Parties do not have ***equal access*** to justice when one understands the rules and the other does not.

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REVIEW/APPLICATION QUESTIONS – Key concepts in the criminal justice system: evaluation

Application exercise

The burden of proof discourages the prosecution from bringing a flimsy case to trial, because they will bear the onus of bringing sufficient proof to demonstrate the validity of their claims before the accused will be required to say anything or bring forward any evidence of their own. This protects the rights of the accused and the fairness of trial because the defendant is protected from the ordeal without proper grounds for it being shown. The downside is that the state, protecting the rights of victims, bears the responsibility of proving the case, and the party that is potentially in the wrong receives significantly more protection. This also decreases equality in the proceedings, because we consciously protect the accused over the complaining party, the prosecution. Ultimately, the burden of proof is unfairly weighted against the achievement of justice, and both sides should be examined simultaneously.

a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key concepts in the section.

RIGHTS OF STAKEHOLDERS IN A CRIMINAL CASE

Rights of the accused

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

For instance:

> *Section 21 – Right to liberty and security of the person*
> *(5) A person who is arrested or detained on a criminal charge –*
> *(a) must be promptly brought before a court: and*
> *(b) has the right to be brought to trial without unreasonable delay; and*
> *(c) must be released if paragraph (a) or (b) is not complied with.*
>
> *Section 24 – Fair hearing*
> *(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

The right to be tried without unreasonable delay

Definition
The right to be tried without unreasonable delay means criminal trials should be held as quickly as possible after the events that give rise to the charges. The concept of 'as quickly as possible' rests on the idea that the need to be properly prepared for legal proceedings – which will take time – must be balanced against the need to see justice be done and to gain closure. This is why the right is to be tried without *unreasonable* delay, and not without any delay at all.

Detail
There are a number of reasons why this is important in protecting the rights of the accused:

- Awaiting trial is a period of great uncertainty for the accused, particularly if there is a prospect of a custodial sentence should the trial result in a conviction. Avoiding lengthy delays in bringing a matter to trial reduces the uncertainty that the accused person faces, and may also minimise legal costs and other expenses.

- People accused of the most serious indictable offences are generally held on remand to await their trial. A delayed trial may result in the accused being held in custody for longer.

Examples of ways in which the criminal justice system tries to avoid unreasonable delay include:

- All criminal matters in Victoria commence with a committal hearing in the Magistrates' Court, usually between three and six months after charging. At this hearing, the magistrate hears the prosecution's evidence and decides whether the evidence is sufficient to support a conviction by a jury at trial.

- All criminal cases are listed for a directions hearing within 24 hours of the completion of the committal hearing in the Magistrates' Court. At this post-committal directions hearing, counsel for the prosecution and the defence are expected to advise the court of the anticipated issues at the trial, an estimate for the hearing time of the trial, and identify any problems that might prevent a trial proceeding quickly. The court will set a trial date, or arrange for case management if necessary.

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

Factors that the court may consider include the complexity of the case against the accused, the amount of evidence to be collected by the prosecutors, the number of witnesses to be called to give evidence, and the risk that the accused will not return to trial if they are released on bail.

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The right to a fair hearing

Definition
The elements making up the right to a fair hearing include:

i. That a competent and independent arbiter be in charge of the hearing
ii. That the hearing be conducted impartially
iii. That the accused have adequate legal representation (with no guarantee of legal representation)
iv. That the accused have an accurate understanding of the proceedings

Exam tip: There is no right to legal representation, or to receive legal advice. Saying this is a common error.

Detail
The arbiter is the judicial officer – a judge or magistrate – who oversees the hearing. Although judicial officers are appointed by the attorney-general, acting on behalf of the government, they are still independent of government. Judicial officers must also be confident in their administration of justice, so that parties to court proceedings have confidence that their criminal matter has been determined by an arbiter who understands the law and criminal procedure. Judicial officers are therefore generally chosen from lawyers admitted to the Victorian Bar.

The public must have confidence in the actual impartiality of the judicial officer presiding over the trial. This means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. Equally as important as avoiding actual bias is the principle that the judicial officer must avoid any *perception* of bias.

The right to a fair hearing includes the right to adequate legal representation. This means that an accused person has a qualified legal representative to argue their case in court, *if* they could not get a fair trial without it. In the *Charter of Rights and Responsibilities 2006*, the importance of legal representation is outlined in s25: a person charged with a criminal offence is entitled "to have legal aid provided if the interests of justice require it."

Other factors that may ensure a fair hearing include the free assistance of an interpreter if the accused is not fluent in English, and free assistance and access to specialised communication tools and technology if the accused has difficulties in communication. These support services may be necessary to ensure that the accused understands the proceedings and is enabled to participate in her or his own defence – they are not available in every case, however, and this is a weakness in the legal system.

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The right to trial by jury

Definition
The right to trial by jury means that every defendant in a criminal trial for an indictable offence has the right to trial by her or his peers to ensure that the judgment of the community is given, and that the power of the government is kept in check.

Detail
A jury is used for trials of indictable offences where the accused has pleaded not guilty. A criminal jury is made up of 12 members of the community, randomly selected from the electoral roll. The jury's function is to listen to the evidence presented against the accused at trial, follow the directions of the trial judge on the relevant law, determine the relevant facts, and reach a verdict of either guilty beyond reasonable doubt, or not guilty if there are reasonable doubts.

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

Commonwealth trials

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

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

The s80 right to trial by jury extends to indictable offences only, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences, and therefore which offences are tried by jury.

Rights of victims

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

Some of the principles contained in the *Victims Charter Act* are then implemented in other legislation, such as the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic).

The right to give evidence as a vulnerable witness

Definition

Part 8.2 of the *Criminal Procedure Act 2009* gives courts the power to order alternative arrangements for the giving of evidence by witnesses in matters involving sexual offences, family violence, sexual exposure, or obscene and threatening public behaviour.

Detail

Section 41 of the *Evidence Act 2008* used to define a class of witness called 'vulnerable witnesses'. These were witnesses who were under 18 years of age, living with a cognitive impairment or intellectual disability, or possessed any other condition or characteristic that the court considered made that witness 'vulnerable'.

In 2018 this section was removed from the legislation.

Instead, we now focus on Part 8.2 of the *Criminal Procedure Act*, which gives judges the power to make alternative arrangements for some witnesses if they fall into a group thought to be specially at risk – or, thought to be especially *vulnerable*. The removal of the 'vulnerable witnesses' section of the *Evidence Act* doesn't mean that the concept of vulnerable witnesses can't be discussed, therefore.

Part 8.2 of the *Criminal Procedure Act*, particularly s360, gives the court the power to "direct that alternative arrangements be made for the giving of evidence by a witness" in certain types of cases. These cases are the following:

- Sexual offences
- Family violence
- Sexual exposure
- Public behaviour that is obscene or threatening

These categories *replace* the old categories of vulnerable witnesses. The old categories should not be used.

Alternative arrangements then include the following:

- Allowing the witness to give evidence to the court via closed circuit television from another venue.
- Using screens to obstruct the direct line of vision between the accused and the witness.
- Allowing the witness to have a support person beside her or him while giving evidence.
- Directing that the legal representatives remove their legal robes and question the witness in normal professional attire.

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If the hearing or trial is for a sexual offence or assault, ss 366 and 367 of the Act give witnesses with a cognitive impairment, or who are under 18 years of age *at the commencement of trial*, additional arrangements: these witnesses are permitted to give evidence through an audio or audiovisual recording so that it can be done once, and the recording can be played for all hearings after that. Leave must also be given by the court for these witnesses to be cross-examined – opposing counsel cannot cross-examine as of right.

If the witness is the complainant in a sexual offence charge, the court *must* make alternative arrangements for their testimony, unless the complainant is aware of these rights and waives them. The exact arrangements are detailed from s363 in the *Criminal Procedure Act,* and include giving evidence in a place outside the courtroom.

The *Evidence Act* used to disallow improper questions being asked of vulnerable witnesses, but now that has been extended to cover *all* witnesses. The *Evidence Act* defines improper questions as questions that:

- Are misleading or confusing;
- Are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- Are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- Have no basis other than stereotype or bigotry.

Even though the term 'vulnerable witness' was removed, the slightly different class of 'protected witnesses' is still in statute: the court may declare anyone a protected witness if they are giving evidence in a case for a sexual offence or family violence, and it prevents the accused from being able to cross-examine them in person. The rules regarding a protected witness are contained in Part 8.2 of the *Criminal Procedure Act.*

The right to be informed about the proceedings

In the criminal justice system, the victim of a crime is not a party to the criminal proceedings. There is a risk that, by being relegated to the position of a witness in the criminal justice process, the victim may feel marginalised. For this reason, s7 of the *Victims Charter Act 2006* places obligations on investigatory agencies, prosecuting agencies and victims' service agencies to provide "clear, timely and consistent information" to any person "adversely affected" by crime.

Definition
Section 9 of the *Victims Charter Act* provides that prosecutors must provide the victim with relevant information about the charges laid and the prosecution of the accused, to fulfil a general right of the victim to be informed about the proceedings.

Detail
Prosecutors must give the victim timely information, "as soon as is reasonably practicable," regarding:

- Applications for bail made by the accused, the outcome of those applications and any conditions imposed.
- The offences with which the accused is ultimately charged.
- Reasons why the accused was not charged with a particular offence.
- The hearing of the charges.
- The outcome of criminal proceedings, including the sentence.
- Any appeals, and their outcomes.

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

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Richmond football photo case

A photograph of a topless woman wearing a Richmond Tigers premiership medal was distributed online and via text messages, without the woman's consent or knowledge. This is in breach of laws against publishing intimate images of another person without their permission, and is a form of sexual harassment and abuse.

In October 2017 the victim asked police to drop the investigation and stop pursuing a prosecution. Her lawyers at Maurice Blackburn said: "Our client maintains that her trust and privacy has been breached by the unauthorised distribution of the photo [but] her welfare is our main priority, as is restoring her privacy, so we do not wish to cause her any more distress by commenting further." Victoria Police said that case had been closed: "At the request of the complainant the investigation into the circulation of intimate images has ceased."

Police can choose to pursue charges without the consent of the victim, but in this instance the police decided not to.

The right to be informed of the likely release date of the accused

If the accused is convicted of a criminal offence, she or he may be sentenced to a term of imprisonment. If this is the case, additional rights are given to the victims of the crime.

Definition
Section 17 of the *Victims Charter Act* enables the victim to be included on a register kept for victims of a criminal act of violence in Victoria. If a victim chooses to be registered, they will be provided with information concerning the offender such as the length of their sentence and the likely date of their release from imprisonment. Any victim has the right to be informed of the likely release date of the accused if they are on the Victims Register.

Detail
Once a victim has been informed of the likely release date, they may also make a submission to the Adult Parole Board about the effect of the offender's potential release on them as the victim of the offender's crime. The Board must consider this submission when determining whether to place the offender on parole and release them from prison before their top (maximum) sentence has been served.

Victorian Law Reform Commission review

In August 2016, the Victorian Law Reform Commission ('VLRC') tabled in Parliament its 'Report on the Role of Victims of Crime in the Criminal Trial Process'. The VLRC supported the current legal position – that victims are participants in the criminal trial process, but are not parties to proceedings – and recommended that this continue.

The VLRC made a number of additional recommendations for legislative amendments to protect and enhance the role of victims in criminal trials, including to provide a definition of protected victims in the *Criminal Procedure Act 2006* to enable fair witness testimony: the definition recommended was any witness who is "likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence." This has not been implemented.

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REVIEW/APPLICATION QUESTIONS – Rights of parties to a criminal case

1. **What rights are protected by ss21 and 24 of the Victorian Charter?**
2. **How might you define 'unreasonable delay'?**
3. **Provide two examples of ways in which the criminal justice system tries to avoid delay.**
4. **Identify a number of factors that might contribute to the 'fairness' of a hearing.**
5. **Provide two examples of ways in which the criminal justice system tries to provide a fair hearing.**
6. **What is meant by a 'jury'?**
7. **For what category of criminal matters is a jury used?**
8. **What legislation provides for trial by jury for Victorians?**
9. **What piece of legislation outlines many of the rights of victims in criminal trials?**
10. **Define what is meant by a 'vulnerable witness' who can receive alternative arrangements.**
11. **Identify three ways in which the judge might amend normal court procedure to protect a vulnerable witness.**
12. **Provide two examples of matters that a prosecutor must inform the victim in the proceedings of.**
13. **What formal role in the proceedings does the victim play?**
14. **If the offender is sentenced to a term of imprisonment, what additional right does the victim in the case gain?**
15. **What steps does the victim need to take to receive these additional rights?**
16. **What role is the victim permitted to play with regard to the offender receiving parole?**
17. **What general position in relation to the role of victims did the Victorian Law Reform Commission take in its 2016 report?**

Evaluation: Rights of stakeholders in a criminal case

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS	RIGHTS	WEAKNESSES
The courts have been given the power to oversee case management to help ensure that unreasonable delays in proceedings do not occur. Courts have been given the power to help guarantee this right and give parties ***access*** to it. Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude. This improves ***access*** for people accused of a criminal offence.	**The right to be tried without unreasonable delay**	If cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. This can be a weakness, which impacts the ***fairness*** of a trial for the accused. As per the *Barbaro* precedent, what is classed as an unreasonable' delay is determined on a case-by-case basis. This makes it very difficult for accused parties to challenge the length of time their case has taken, and makes it hard for them to enforce their right.
Courts are constituted to ensure that judges are expert and impartial. This ensures ***fairness*** in criminal proceedings for all people. The rules of evidence and procedure ensure that only evidence that is relevant is introduced in a criminal trial. For example, evidence of prior convictions is not admissible as evidence of the offence. This contributes to ***fairness*** by ensuring that the accused is tried impartially.	**The right to a fair hearing**	A person with greater ***access*** to resources to pay for expert legal defence may have a better outcome than a person whose resources are constrained. This may lead to a disparity in the outcomes achieved by an accused with unlimited resources, compared with an accused who suffers socio-economic disadvantage, which undermines ***fairness*** and ***equality*** in the justice system. Many biases are structural and unconscious: people are not deliberately prejudiced much of the time, but they have been influenced by unspoken social prejudices and the systems they work in unconsciously favour some groups over others. It isn't possible to eliminate bias from the administration of justice.
Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures ***fairness*** in the adjudication of a criminal trial. The jury limits the role of the state in the accused's trial. The charges and prosecution are brought by the police and the Office of Public Prosecutions, which are both part of the Executive branch of government. The jury, being drawn randomly from the community, provides an objective assessment of the evidence collected and presented against the accused independent of the state. The jury judges the accused from the perspective of the common person. This provides greater ***equality*** between the parties because it minimises the power of the state. Juries spread the burden of decision-making. Instead of one person – the	**The right to trial by jury**	For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective ***access*** for an accused person to sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions. Juries do not have to give reasons for their verdicts, so there is no way to ensure that their decision-making is free from bias. If juries do not act impartially in reaching a verdict, this reduces the ***fairness*** of the criminal justice system. Juries are, by definition, composed of people who do not work in the criminal justice system. This means that their knowledge of the procedures, law and terminology is low, and these gaps and errors in understanding could unfairly influence the verdict they deliver. They also differ in their application of the standard of proof. For example, a 2008 NSW Bureau of Crime Statistics and

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judge – being responsible for findings of fact, in a jury trial the evidence must be assessed as being beyond reasonable doubt by a group of people cooperating to reach a verdict. Since the verdict must be unanimous for the most serious indictable offences, or by majority for less serious indictable offences, the jury's determination of the facts and verdict is more likely to be correct, providing greater protection of the rights of the accused.		Research survey of 1200 former jurors demonstrated that 55.4% of them believed the standard meant they needed to be "sure", while 10.1% of them believed the standard meant only that guilt was "pretty likely."
Accommodating the special needs of witnesses such as children and those involved in an alleged sexual offence ensures that such people have appropriate ***access*** to give evidence in court. It ensures they are treated ***fairly*** by legal procedures such as cross-examination. Court processes and facilities that support particularly vulnerable or at risk victims help to protect them from being re-traumatised by this process, or traumatised on top of the harm that has already been caused to them by the criminal offence.	**The right to give evidence as a vulnerable witness**	Providing some witnesses with different conditions in which to give evidence may prejudice a jury in their assessment of the credibility of all witness testimony at trial. A jury may be biased by sympathy in favour of accepting the evidence of a vulnerable witness, or they may develop prejudices against their reliability. These circumstances may impact the ***fairness*** of a trial unless carefully managed by the presiding judge. Recommendations made in 2016 by the VLRC to, in its opinion, improve the protection of vulnerable witnesses, have not been implemented. For instance, the recommended definition of 'protected witnesses' was not adopted.
The obligation to inform victims about proceedings ensures that the prosecution considers the role of victims in a criminal trial. This enhances ***access*** for victims to criminal legal procedures, even though they are not technically parties. Parties at risk of emotional harm from seeing the perpetrator in public or living nearby to them are better protected and supported by the criminal justice system if they are given this information.	**The right to be informed about the proceedings and the likely release date of the accused**	This right may unfairly intrude on the convicted person's right to privacy after they have served the sanction imposed by the court. This may compromise their right to ***equal*** treatment under the law.

REVIEW/APPLICATION QUESTIONS – Rights of stakeholders in a criminal case: evaluation

Juries are not required to give reasons for their verdicts, so there is no way of knowing whether the outcome was based on bias, or on a misunderstanding of the law, evidence or procedure. The legal system is very complex, and it is extremely difficult for inexperienced laypeople to understand matters well enough to come to sound decisions; the fact that we have laws ensuring that all deliberations are kept secret provides no check on this, though. The benefit of this is that increased finality is brought to each case, because appeal courts are reluctant to overturn a jury's findings without having any clear grounds on which to do it; juries are also given the freedom to consider matters of common sense and empathy in their deliberations, without fear of being criticised for trespassing into 'non-legal' matters. Providing written reasons for their verdicts would not necessarily stop this, though, if the law permitted them to do it, so the lack of reasons is overall a negative.

a. The above answer is a sample of an evaluation of a weakness. Using this as a guide, evaluate one weakness of each of the rights of parties covered in the section.

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DETERMINING A CRIMINAL CASE

According to the Legal Australia-Wide Survey of 20,716 people, published in 2012, half of all Australians will experience at least one legal problem in any given year. Criminal problems are the second-highest frequency after consumer law problems. Most of these people will not obtain assistance from a lawyer, though; 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 them.

Criminal pre-trial

The criminal pre-trial processes start from the point at which the police have identified a suspect in relation to a criminal wrongdoing, and last until the first day of trial or the start of a hearing in the Magistrates' Court.

Institutions to assist the accused

There are some public institutions that provide public information to improve the general awareness of legal rights in relation to criminal charges and prosecution, and that even have the capacity to provide some free or subsidised legal representation in a trial for an indictable offence.

Victoria Legal Aid

Definition
Victoria Legal Aid ('VLA') is an independent statutory authority established under the *Legal Aid Act 1978* (Vic). Its role is to support improved access to justice in Victoria and to provide limited representation services and advice. The organisation is funded by Commonwealth and Victorian governments, but it operates independently of government.

Detail
The 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 possible.
- Manage resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state.
- Provide improved access to justice and legal remedies to the Victorian community.
- Pursue innovative means of providing legal aid, directed at minimising the need for individual legal services in the community.

'Legal aid', as it is commonly called, is the provision of legal advice and information to people involved in a criminal matter who are unable to pay for their own legal representation. Each state and territory has its own legal aid commission that provides legal assistance, information and advice, and lawyers to represent those who are attending court but cannot afford legal representation and will fulfil the agency's criteria. People who can afford part of their own defence but not all of it may also receive grants of money to help them obtain legal representation.

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Duty lawyers

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 if they are otherwise unrepresented. A 'duty lawyer' is a lawyer who works for the VLA rather than any individual client, and is rostered on for the day at the courthouse to assist anyone who needs help and meets the criteria for advice and basic assistance.

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 her or his own lawyer, the duty lawyer will contact the lawyer to let them know that their client is in custody. Duty lawyers can also assist with smaller matters such as guilty pleas, requests for adjournments and the provision of printed legal information. In addition to the Magistrates' Court, duty lawyers are also stationed in courts including the Children's Court.

Grants for legal representation

Where a person needs court representation for their criminal matter, they must apply for a grant of legal assistance. The VLA does not have unlimited funds, therefore applicants must meet strict eligibility criteria.

Firstly, VLA will consider what the case is about, the likely benefit of representation to the accused person, and whether legal assistance will be of benefit to the public. Collectively, these considerations are known as the 'merit' test, and

they see whether the case has the kind of merit that the VLA is designed to fund. Secondly, VLA grants are subject to a means test: if a claimant earns above a specified amount and/or has significant assets, 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. 76 per cent of criminal law grants were assigned to private legal practitioners in this way in the 2018-2019 financial year, totalling 34,478 grants. As of the 2018-2019 Annual Report, VLA worked with over 290 private firms and 1,894 barristers across Victoria. In addition, 10,031 grants of legal assistance were given to clients being represented by an in-house VLA lawyer, and 671 to clients being represented by a community legal centre.

Service provision

VLA services are funded jointly by the Victorian and Commonwealth governments. These services are susceptible to government funding cuts: from 1997 to 2017, Commonwealth contributions to the VLA budget fell from 50 per cent to 25 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; and
- 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.

In the 2018-2019 financial year, according to the Victoria Legal Aid Annual Report:

- 100,061 individual clients received some form of legal advice or representation where a client-lawyer relationship was formed – this does not include people who received only legal information, or who accessed assistance through the website or telephone helpline. 128,708 calls were answered plus 7,758 online chats, and over 2.5 million sessions were logged on the VLA website.
  - 25% of these people were from culturally and linguistically diverse backgrounds.
  - 32% had no income (up from 29% in 2017-2018) and 47% were recipients of some form of government benefit.
  - 7% were experiencing homelessness. This was an increase of 25% from 2014-2015.
  - 18% were younger than 19yo (up from 12% in 2017-2018).
  - 25% had a disability or mental illness.

In the Report, the VLA noted that they were seeing "steady increases" in the level of disadvantage experienced by their clients.

Community legal centres

Definition

Community legal centres ('CLCs') are independent community organisations that provide free advice, casework and legal education to their communities. As of the 2018-2019 VLA Annual Report, 35 of the 53 CLCs located in metropolitan Melbourne and around Victoria received government funding through Victoria Legal Aid. The VLA defines CLCs as "independent, self-managed entities providing free legal services to defined communities."

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Detail

Victoria Legal Aid refers clients to CLCs where they can provide more appropriate assistance; the CLCs may then, in turn, refer clients to Victoria Legal Aid for assistance if that is the more suitable body. CLCs may also assist defendants with their applications to Victoria Legal Aid for funding and representation.

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 to CLCs – an increase of 30 per cent from the previous year – and 671 grants in the 2018-2019 financial year.

Fitzroy Legal Service ('FLS') is an example of a generalist CLC. It 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 that operates every weeknight. Volunteer lawyers provide legal advice on criminal matters, are available in person or through the national telephone interpretation service. It has a range of specialist service, including a family law clinic and an LGBTIQ legal advice service, and publishes the authoritative Fitzroy Legal Handbook, which is available for free

online. The Animal Law Institute is an example of a specialist CLC. It is a national organisation, and advocates on behalf of the rights and interests of animals in the legal system.

REVIEW/APPLICATION QUESTIONS – Institutions to assist the accused

1. **What kind of body is Victoria Legal Aid?**
2. **Provide a one-sentence explanation of the role that the VLA plays in the Victorian legal system.**
3. **Identify two of the VLA's specific objectives, according to the legislation that establishes it.**
4. **The VLA provides both duty lawyers and legal representation. Explain the difference between these two services.**
5. **What is a community legal centre ('CLC')?**
6. **How does a CLC differ from Victoria Legal Aid, and what is the connection between them?**
7. **Explain the difference between a generalist CLC and a specialist CLC.**
8. **What role do CLCs play in the Victorian justice system?**

Evaluation: Institutions to assist the accused

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

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STRENGTHS	INSTITUTION	WEAKNESSES
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. This allows them ***access*** to choice and expert assistance, and their case being better presented helps to achieve a ***fair*** hearing. VLA's focus on people who suffer social and cultural disadvantage enables them to specialise in understanding the issues facing many accused parties who need a service like the VLA.	**Victoria Legal Aid**	The capping of VLA representation funding may place restrictions on the scope of an accused person's defence. Even if a defendant qualifies for financial assistance, they may not be able to defend themselves fully because doing so may exceed the funding cap put on their case. VLA services are vulnerable to each state and federal government's desire to fund legal services, because the VLA does not have private streams of revenue and does not charge its clients for the services it provides. If a government decides to cut funding, the effectiveness of all the services provided by the VLA will be compromised, reducing ***access*** across the board.
CLCs provide free legal services at community-based locations, according to the needs of their clients. They are highly responsive to the community, use volunteer lawyers and paralegals from the local area, and are usually governed by a volunteer board of directors taken in least at part from the surrounding community. CLCs are able to service a large number of clients because almost all CLCs provide basic advice and administrative assistance at regular free drop-in sessions; some CLCs have sessions once or twice a week, while others hold them daily on weekdays. At each session, up to a dozen volunteer lawyers can be rostered on to see clients, providing ***equality*** to all people in the catchment area.	**Community legal centres**	The funding allocated to CLCs and the resources available to them do not match the demand for their services. Many people wait for over an hour at every drop-in session to speak to a lawyer, and some are turned away because there are not enough volunteer lawyers to see everyone. Drop-in sessions are the primary way in which CLCs provide legal advice to clients, but this is not the same as actual representation. The CLC budget for actual representation is very small, and only a few clients will be able to have official representation at any one time. True ***access*** to justice is not achieved if inexperienced people have to present their own cases in court.

REVIEW/APPLICATION QUESTIONS – Institutions to assist the accused: evaluation

Application exercise

In order to assist fairness in the resolution of criminal disputes, the legal system provides a range of institutions to assist the accused in their defence against criminal charges: Victoria Legal Aid and community legal centres are two examples of bodies. Both of them focus on people who suffer some kind of social, economic or physical disadvantage or disability. VLA representation, for instance, is prioritised for people who can pass a strict 'means' test and therefore earn income that is well below the poverty line, and specialist CLCs such as the Asylum Seeker Resource Centre exist in order to focus on groups of people who face special obstacles when trying to obtain justice. This is a strength of the institutions because it helps them target their resources to the most vulnerable, and assist people most at risk of unfair dispute resolution processes and outcomes. Unfortunately, the shortfalls in funding that both of them suffer means that this assistance is inadequate for even the targeted groups – and people outside those groups are benefited little. It is possible, for instance, for a person to earn income at or below the poverty line, and to fail to obtain funded legal assistance from the VLA – they may receive partial funding, but the thousands required for them to pay is still too much for anyone suffering that poverty. Both institutions do try to compensate for this problem, though, by giving opportunities for broader assistance. Generalist CLCs exist, and conduct weekly or daily advice sessions where anyone living in the catchment area can attend for legal information and basic advice; the VLA also provides services such as duty lawyers, so that anyone attending court that day can receive support if their matter falls within an appropriate field. In this way, institutions try to provide both targeted and general assistance.

a. **The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:**

- **strengths**
- **weaknesses**
- **introductory or topic sentences**
- **concluding or summary sentences**
- **examples**
- **segues or linking sentences**

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Committal proceedings

Once bail has been granted or denied, the next stage in pre-trial is the committal proceeding. This is a procedure to determine if the case against the accused is strong enough to justify taking them to trial.

Exam tip: The full committal proceedings are more extensive than just the mention hearing that occurs in the Magistrates' Court; however, this hearing is generally treated as the centrepiece of the proceedings.

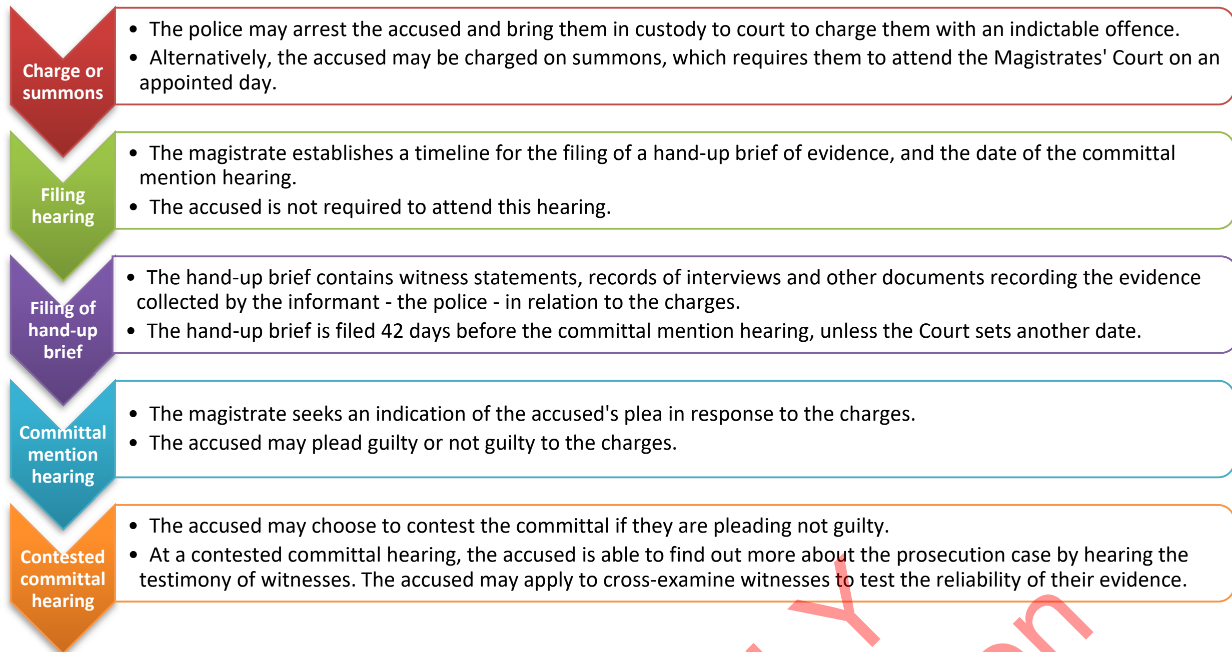
Definition

The individual steps in the committal proceedings form a stage in criminal pre-trial that is used to determine if the prosecution has enough evidence to support a conviction in a higher court, before a properly-instructed jury.

Proceedings are composed mainly of the filing of the evidentiary hand-up brief, and a committal hearing, which is held in the Magistrates' Court for all matters going to the County or Supreme Courts in which the accused is pleading not guilty.

Exam tip: The test that used to be applied to the committal proceedings is the *prima facie* test. This asked whether there was enough evidence 'at first glance' to support a conviction. This test was thought to be too easy for the prosecution to pass, though, so it was replaced with the 'sufficient evidence to support a conviction before a properly instructed jury' test in order to better weed out weak cases. The *prima facie* test should no longer be used.

Detail



At the hearing, the defence will not present any of its evidence or disclose any of its witnesses. The committal hearing is purely for the prosecution to show its hand, to prove that a trial is justified, and to allow the defendant to prepare adequately for trial.

There are two types of committal hearing:

- A hearing conducted on the **hand-up brief**. The hand-up brief is a collection of all the prosecution's evidence in documentary form – in other words, written witness statements and photographs, etc. Forty-two days before the hearing the accused should be presented with the hand-up brief, and a copy is also provided to the magistrate. The magistrate will review the evidence, hear arguments on the day, and determine if the case will proceed to trial.

- A **contested committal hearing**. This is held if the accused wishes to question witnesses in the hand-up brief – in other words, if they wish to 'contest' the evidence in person, in oral form. They will notify the court at least five days prior to the hearing date, and a kind of mini-trial will occur with the magistrate deciding if the case will proceed. According to the data provided to the VLRC by the Magistrates' Court in April 2019, in 2017-2018, out of 3,426 committal proceedings, a total of 1734 applications were made to cross-examine witnesses.

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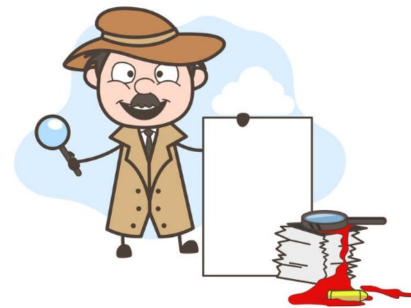
In both types of hearing the magistrate is asked to determine whether a strong enough case against the accused exists. This means the magistrate believes there is enough evidence to support a conviction in a jury trial. If sufficient evidence does not exist, the magistrate will dismiss the case because it is likely to be a waste of time and resources, and an unnecessary strain on the defendant and witnesses. Since 2013, no more than 1.6 per cent of cases have been dismissed as a result of the committal hearing.



- The Director of Public Prosecutions ('DPP') has the power to ignore the magistrate's findings. If the magistrate decides that there is insufficient evidence to support a conviction at trial and dismisses the charge, the DPP may choose to go to trial anyway. This is called a 'direct indictment'. It happened 19 times in 2017-2018.

- The accused may choose to skip the committal hearing and go directly to trial. This is called a 'direct presentment' and is uncommon.

Purposes of committal proceedings

The primary purpose of the committal proceedings is to see whether the prosecution has sufficient evidence to support a conviction of the defendant before a properly-instructed jury.

Additional purposes are listed in s97 of the *Criminal Procedure Act* 2009. They include informing the accused of the case against them, improving the efficiency of the dispute resolution, and ensuring the timely collection of evidence.

Informing the accused of the case against them

Committal proceedings give the accused access to all evidence collected by the police that inculpates them and supports the prosecution of the charges, *plus* that tends to exculpate the accused – the prosecution has a legal duty to disclose evidence that both works for their case and works against it.

Exam tip: The word 'exculpate' is a legal term meaning to prove that someone is innocent. It is the opposite of 'inculpate'.

By understanding the strength of the evidence, the accused can make an informed decision about whether to plead guilty or not guilty. 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.

Once the accused is informed of the case against them through the committal, they can also begin to prepare their defence. The accused does not need to prepare a global defence or prove their absolute innocence: they only need to defend the evidence against them and raise reasonable doubt.

- For example, in the *DPP v Ashman* committal heard 6 August 2019, the case resolved in a plea of guilty to manslaughter after only one witness had been heard. Leave had been given to cross-examine sixteen witnesses including one child, but all fifteen of the remaining witnesses were spared giving evidence once the first witness clarified a vital issue and triggered the guilty plea.

Improving the efficiency of dispute resolution

In 2017-2018, the Magistrates' Court finalised 2,384 committal proceedings. In May 2017, the indicative time to trial in the County Court, from the committal, was nine months. In the Supreme Court Trial Division 88 per cent of criminal cases were resolved within 12 months. In 2017-2018, 80.4 per cent of prosecutions ended in a guilty plea – almost 80 per cent of those had a guilty plea by the end of the committal proceedings, and 45.8 per cent of them had the guilty plea entered *at* committal.

Committal proceedings are 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 of the evidence against them, 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.

If weak cases are prevented from going to trial, the efficiency of other cases waiting on the courts' dockets will also be improved, because they will not be delayed for a case that is unlikely to succeed.

- In the 2008 committal of *DPP v Corcoris* the charges involved a multi-million dollar fraud against the Commonwealth, and 278 lever arch folders of evidence were submitted. After two days of evidence at the committal the DPP withdrew all charges and replaced them with a single count of filing an incorrect tax return – the matter was dealt with summarily. The Magistrates' Court commented that "It would be pure speculation how long this trial would have taken in the County Court, much less the cost to the system." (2019 submission to the VLRC in response to its Committals Issues Paper)

Ensuring the timely collection of evidence

The timeframe of the committal proceedings encourages the prosecution to collect evidence and bring it to court in a timely manner. This ensures a speedy preparation of the prosecution's case, while evidence is fresh and reliable; it reduces delays for the accused; and it ensures that witness testimony is accurate. These benefits contribute to a fair hearing for the accused.

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For instance, s126 of the *Criminal Procedure Act* specifies that a committal mention hearing must be held within six months of charges being filed, unless the interests of justice prevent it. This time is shorter for sexual offences: it is three months.

- The Magistrates' Court 2019 submission to the Victorian Law Reform Commission's inquiry on committals disclosed that the standard period for service of the hand-up brief is 6 weeks, but that some evidence takes longer to be produced: DNA and forensic evidence in sex offence matters usually take 10 weeks, some laboratory evidence can take 5-8 months depending on complexity, autopsies take 12-20 weeks, drug analysis takes 4 months, and e-crime analyses (for Internet and computer files) take two years, for instance. States such as Western Australia and Tasmania that have abolished committals, however, have noticed delays at the trial stage in higher courts because of evidence that was no longer disclosed at an early stage.

REVIEW/APPLICATION QUESTIONS – Committal proceedings

1. For what types of offences will a committal hearing be held?
2. What court conducts the committal hearing?
3. Which party or parties present evidence in a committal?
4. Give a definition of the type of case the magistrate is looking for.
a. Using this definition, explain what a 'committal hearing' is.
5. What are the main purposes of holding a committal before trial?
6. What is a hand-up brief?
7. Outline the difference between using the hand-up brief and holding a contested committal hearing.

Evaluation: Committal proceedings

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

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STRENGTHS	WEAKNESSES
The hearing protects the defendant's right to be presumed innocent, by forcing the prosecution to prove they have sufficient evidence to justify trial. The hearing enables the defendant to prepare properly for trial by allowing them to see the evidence against them. This levels the playing field a little – which is necessary, as it is one individual against the state – and it gives the two parties a slightly better outcome-based ***equality***. 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 allocate their resources more efficiently, and only focus on those matters that will be relevant to raising a reasonable doubt.	The DPP has the power to override the magistrate's findings, and push a case to trial even if the magistrate dismisses it at the committal. This undermines the role, authority and independence of the magistrate and the committal. The committal does not promote a ***fair*** and ***equal*** hearing, as the accused does not need to show any of their evidence: they therefore receive an advantage. In practice, the committal test is too easy to pass: since 2013, no more than 1.6% of matters have been dismissed by the magistrate for having insufficient evidence. The check on ***fair*** prosecution that is meant to be happening in a committal does not seem to be happening – or else the OPP is so reliably prepared with strong evidence that committals are a waste of time and resources. In 2017-2018, approximately 64% of indictable charges were resolved by a guilty plea by the end of the committal. This suggests that committals are becoming increasingly redundant.

REVIEW/APPLICATION QUESTIONS – Committal proceedings: evaluation

Application exercise

For each of the following arguments, work out whether it is a positive point or a negative point. If it is a positive point, find a negative point to balance against it, and say whether the positive aspect is entirely outweighed or only partly outweighed; if it is a negative point, find a positive one to balance against it, and say whether the negative aspect is entirely outweighed or only partly outweighed.

a. **Committal hearings protect the defendant's right to be presumed innocent because they force the prosecution to prove it has sufficient evidence to justify taking the accused person to trial.**
b. **Committal proceedings allow the court to filter cases by dismissing any charge that has insufficient evidence in support of it; this saves higher courts from wasting their time on criminal matters that are unlikely to succeed.**
c. **Committal proceedings put the prosecution at an unfair disadvantage in relation to the accused, because the prosecution has to entirely show its hand early in proceedings. The accused is then able to tailor her or his defence to that evidence, and focus on beating the charges rather than arguing the truth of the dispute.**

Guilty pleas

It is not required that a person accused of a crime go to court and have the evidence against them presented before an independent judge or magistrate. This will only happen if the defendant pleads not guilty to one or more of the charges. If, on the other hand, the accused wants to plead guilty to all of the charges, the dispute will avoid a trial or hearing and will proceed directly to sentencing. This is undesirable if the accused is genuinely innocent of the charges, but desirable if they are not.

Purposes of facilitating guilty pleas

Guilty pleas are necessary for the effective, economic and efficient conduct of prosecutions, as outlined in the Department of Public Prosecution's ('DPP') *Policy on Resolution* (2014). In general, a plea of guilty to a charge for an indictable offence relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them; a guilty plea also provides certainty of outcome and saves the community the cost of trials. Plea negotiations and sentence indications are two procedures to support this choice.

The purposes to be achieved by providing procedures for plea negotiations and sentence indications include:

- Giving the accused more complete information about the progress of their dispute and the choices available to them. This empowers them to make better-informed decisions about a proceeding that is likely to have a significant impact on their life.

- Encouraging guilty defendants to plead guilty and save the time and resources required to complete a contested criminal dispute. Hearings and trial consume huge amounts of time, money and emotional energy, and a range of stakeholders benefit if unnecessary hearings and trials are avoided or cut short – the accused and the Office of Public Prosecutions, and also the witnesses, the courts, parties to other disputes and the tax-paying public.

- Encouraging guilty parties to take responsibility for their wrongdoings rather than to deny responsibility and hope to be found not guilty. Encouraging guilty people to fight charges not only favours defendants wealthy enough to conduct a rigorous defence over months or years, it also supports an attitude in society that denying wrongdoing is preferable to owning our behaviour.

As of the end of the 2018-2019 financial year, a record 81% of criminal matters were resolved through a guilty plea.

Plea negotiations

Definition
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 verdict being handed down in their hearing or trial. A plea negotiation may involve discussion about the appropriate charges, the reliability and relevance of any evidence in the case, and the likely sentencing consequences if the accused pleads guilty.

Exam tip: Plea negotiations do not determine the sentence – only the judge or magistrate can determine the sentence. The prosecutor is also not allowed to ask for a particular length of imprisonment. But plea negotiations may involve conversations about likely or possible sentences, given the charges.

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Detail

The DPP *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; and
- whether the accused will give evidence for the prosecution after pleading guilty, taking into consideration the likely 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.

If the prosecuting solicitor decides that a guilty plea is desirable in all the circumstances, she or he may initiate plea negotiations and even offer inducements to the accused such as reduced charges. Plea negotiations may involve the prosecution and defence counsel discussing and negotiating a number of issues, including:

- Which charges against the accused are appropriate to have resolved by a guilty plea, on the available evidence.
- The likely sentence that would apply to a guilty plea, and submissions that the prosecution would be prepared to make to the court regarding sentencing.
- Any assistance the accused may be prepared 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 existing charges for charges on a lesser offence.

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Sentence indications

Definition

Sentence indications tell the accused whether they will receive a custodial sentence or a non-custodial sentence if they decide to plead guilty at that point in time. In the Magistrates' Court the exact type of non-custodial sentence will also be disclosed.

Detail

Sentence indications have been available in Victoria since 2008, and the current regime is contained in the *Criminal Procedure Act 2009* (Vic). Part 5.6 provides the regime to be followed in the County and Supreme Courts, and Part 3.3 provides the one to be followed in the Magistrates' Court. The two procedures are roughly similar, except the lower court regime is broader.

In the higher courts, the accused can only apply for a sentence indication if the prosecution agrees. If the judge then agrees to that request, she or he will be given a summary of the facts that both parties agree on, plus any additional relevant material. The judge will then let the accused know whether, if they changed their plea to guilty at that point, they would be given an immediate custodial sentence and be sent to jail straight away – or whether their sanction would be non-custodial. This is generally only allowed to happen once per trial.

In the Magistrates' Court regime, the magistrate is allowed to give the accused more information: in addition to whether or not they would receive an immediate custodial sentence, the magistrate can also tell the accused the specific non-custodial sentence that the court would be likely to impose. For instance, a community corrections order or a fine.

The sentence indications should include a sentencing discount. Amendments to the *Sentencing Act 1991* (Vic) that commenced in March 2008 require judges and magistrates to provide a specified sentencing discount if the accused pleads guilty. In other words, the Act tells judges and magistrates how much to reduce the accused's sentence by, depending on the stage of trial at which they plead guilty. The judge or magistrate must impose a less severe sentence, and must tell the offender what they would have received had they persisted with a 'not guilty' plea.

REVIEW/APPLICATION QUESTIONS – Facilitating guilty pleas

1. **What is a 'guilty plea'?**
2. **Identify two benefits that the criminal justice system believes guilty pleas give to the wider community.**
3. **Identify two benefits that the criminal justice system believes guilty pleas give to the parties to the trial or witnesses/victims.**
4. **Provide a one-sentence definition of 'plea negotiations'.**
5. **Explain the similarities and differences between a guilty plea and civil pre-trial negotiations.**
6. **Identify three matters that the prosecutor must take into account when deciding whether to enter into plea negotiations with the accused.**
7. **Is the prosecutor required to accept a guilty plea? Give reasons for your answer.**
8. **Are sentence indications given for guilty pleas, not guilty pleas, or both? Explain.**
9. **Outline the purpose of providing sentence indications.**
10. **Identify the differences in procedure between providing sentence indications in the Magistrates' Court and in the higher courts.**
11. **What is meant by a 'sentencing discount'?**

Evaluation: Facilitating guilty pleas

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

Note also that evaluative questions can be asked in a few different ways in this topic: you could be asked to discuss the effectiveness or merit of facilitating guilty pleas, but you could also be asked to discuss whether they are appropriate and desirable in a particular case, or in cases in general.

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STRENGTHS		WEAKNESSES
Plea negotiations help the accused to understand the case against them. They may give the accused a sense of control in their situation, enabling them to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence. ➢ If the accused feels empowered by this information, the plea negotiation may be appropriate. ➢ If the accused feels pressured into pleadings guilty by this information, the plea negotiation may not be appropriate. Witnesses and victims benefit by not having to appear and give evidence under cross-examination at a contested trial. ➢ If the witnesses do not want to give evidence, the plea negotiation may be appropriate. ➢ If the witnesses do want to give evidence, the plea negotiation may not be appropriate. Plea negotiations and sentence discounts encourage the accused to take responsibility for her or his choices and actions. ➢ If the accused engages in negotiations in good faith or out of remorse, the plea negotiation may be appropriate. ➢ If the accused engages in negotiations in bad faith, or out of a strategic desire to take advantage of the system to escape responsibility, the plea negotiation may not be appropriate.	**Plea negotiations**	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. It may be thought inappropriate to resolve criminal matters in relative secret. ➢ If the victim does not want the details being made public, or there is little public interest in the case, the plea negotiation may be appropriate. ➢ If there is public interest in seeing justice be done in the case, the plea negotiation may not be appropriate. 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. ➢ If the prosecution has negotiated a fair set of charges and recommendations given the details and evidence in the case, the plea negotiation may be appropriate. ➢ If the victim or public feel the prosecution has given too much weight to factors such as offender cooperation, and that the offender has been given too lenient a deal, the plea negotiation may not be appropriate.

Sentence indications help the accused to understand the case against them. They may give the accused a sense of control in their situation, enabling them to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence. ➢ If the accused feels empowered by this information, the sentence indication may be appropriate. ➢ If the accused feels pressured into pleadings guilty by this information, the sentence indication may not be appropriate. Sentence indications can only be given once, which means that the accused cannot exploit them to keep getting 'updates' on how successfully they are defending themselves at each stage of the trial. ➢ If the accused is sincerely considering changing their plea to guilty, one opportunity to receive a sentence indication ought to be enough and the sentence indication may be appropriate. ➢ If the accused does not understand the process for some reason and uses their one opportunity in a way that prejudices them later in the trial, the sentence indication may not be appropriate.	**Sentence indications**	In the higher courts, the prosecution may oppose the provision of 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 one. ➢ If the accused is sincerely changing their plea to guilty, the fact that their request can be refused may not be appropriate and they should receive a sentence indication. ➢ If the prosecution or court believes the accused is not sincerely considering changing their plea, and the rejection of the indication would cause more delays and cost, rejecting the request may be appropriate and an indication itself may not be. Sentence indications can induce a defendant with a legitimate defence to plead guilty, even when they ought not to in fairness and truth, because a lower sentence is offered to them in a situation where they might be struggling to afford a defence. ➢ If the accused feels empowered by this information, the sentence indication may be appropriate. ➢ If the accused feels pressured into pleadings guilty by this information, the sentence indication may not be appropriate.

REVIEW/APPLICATION QUESTIONS – Facilitating guilty pleas: evaluation

Application exercise

In October 2014 the Sentencing Advisory Council conducted research into sentence indications and sentencing discounts in the higher courts given during the period from 1 July 2009 until 30 June 2014. The report can be accessed on the Council's website at:
https://www.sentencingcouncil.vic.gov.au/publications/guilty-pleas-higher-courts-rates-timing-and-discounts

Using evidence from this report and the strengths and weaknesses of facilitating guilty pleas, write a submission to the Victorian Government either in favour of the current regime or against it.

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