THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES

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VCAA STUDY DESIGN 2018-2023

> **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.
- 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 calendar 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 2021 examination no reform before 2017 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.

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.

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:

- 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.

> **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 2021 examination no example before 2017 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 (comprehension) and have quick access to an accurate version of it in your memory (memorisation).

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 or whether you'll get some parts wrong.

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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 affects 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 'criminal 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 that 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.

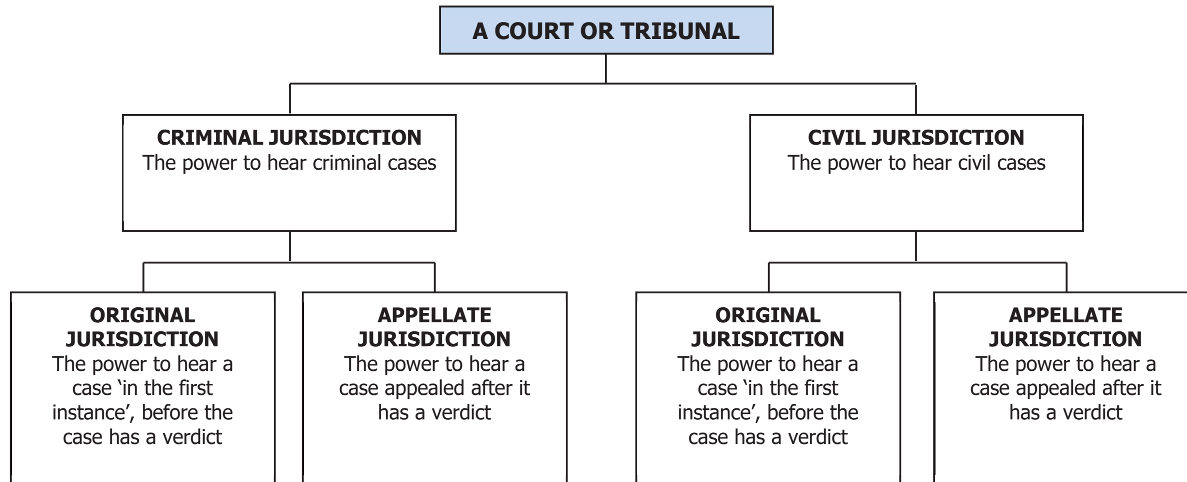
The power of courts and tribunals to hear civil matters is divided by how complex the case is: how much money is being asked for, or how complicated the law and/or evidence are. More complex matters are heard in higher courts.

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 generally hear cases relating to federal law, while state courts generally 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.

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.

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

Niamh's friend is driving her home one night when the car crashes into a streetlight. Niamh 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 of the Charter, 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.

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 sexual orientation. Whether someone is a woman or a man, homosexual, heterosexual or bisexual, can affect their treatment, their outcome, and their ability to achieve justice.

- Cultural and community background.

- Physical and cognitive/intellectual 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 intellectual 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.

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

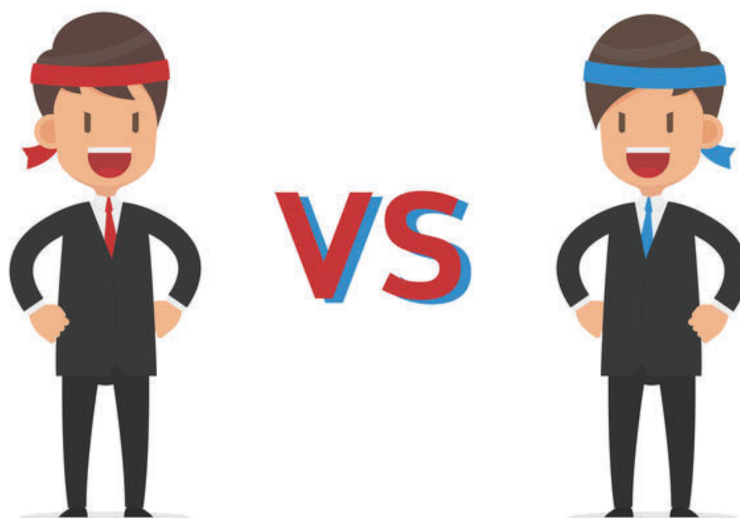
1. **Define the idea of 'fairness'.**
2. **Identify three things that have the ability to compromise fairness.**
3. **Outline two ways in which the legal system attempts to provide people with fairness in dispute resolution.**
4. **Define the idea of 'equality'.**
5. **Identify three things that have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



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. There is no limit to the fines or jail time a justice can give, except for the maximum penalty for the crime, prescribed in the legislation.
SERIOUS INDICTABLE OFFENCES **MINOR INDICTABLE OFFENCES**	Dealt with in the County Court before a County Court judge and a jury. There is no limit to the fines or jail time a judge can give, except for the maximum penalty for the crime, prescribed in the legislation.
INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY	Dealt with in the County Court before a County Court judge and a jury… UNLESS the accused 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.

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 upper limit 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 criminal 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. Jurors should disregard 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. 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.

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.

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 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 accused will have ***access*** to the evidence against them before they will be expected to defend themselves. It would not be ***fair*** to ask the accused to defend against claims they did not know the details of. 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 accused. The defending party can discover all evidence against them before they even start to decide what their defence is going to be.
The accused 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 someone if there was little to no evidence justifying it and they were sure to be found not guilty at the end.	**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.

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.		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 accused 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 accused 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 accused 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 the accused 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 accused.	**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.

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 bring forward any evidence of their own. This protects the rights of the accused and the fairness of trial because the accused is protected from the ordeal without proper grounds. 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 privileged.

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 bill of rights: the *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 indictable 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 indictable 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 flexible 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.

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 if required (with no guarantee of legal representation)
iv. That the accused have an accurate understanding of the proceedings

> **Exam tip:** There is no absolute 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*, 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.

The right to trial by jury

Definition
The right to trial by jury means that every accused 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. In 2020 the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) inserted an emergency provision into the *Criminal Procedure Act* to temporarily allow for trial by judge alone in trials for indictable offences, but it lasted for six months only – it was inserted with a clause repealing it six months after it commenced. No permanent change was made at this time.

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, contained in federal law, 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. Section 80 does not apply to any trials for state crimes held in state courts.

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*.

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. Children, for instance, are not eligible for alternative arrangements if they do not fall within one of these offence categories.

Alternative arrangements 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.

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 potential 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 class of 'protected witnesses' exists in addition to the above class of 'vulnerable' witnesses: 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, ss7, 8 and 9 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.

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.

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 judge – being responsible for findings of fact, in a jury trial the evidence	**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 Research survey of 1200 former jurors demonstrated that 55.4% of them

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.		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 those involved in an alleged sexual offence or family violence ensures that vulnerable 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. The OPP has no obligation to take the wishes of the victim into account, even though they do inform them. For instance, the OPP will inform the victim of any plea negotiations held with the accused, but can still proceed with a plea deal that the victim does not support. This gives the victim only superficial ***access.***

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 complex, and it is difficult for laypeople to understand matters well enough to come to sound decisions, and the fact that we have laws ensuring that all deliberations are kept secret provides no check on this. 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 potentially stop this, if the law permitted them to do it, so the lack of reasons is overall a positive.

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.

DETERMINING A CRIMINAL CASE

According to the Legal Australia-Wide Survey of 20,716 people, published in 2012 by the Law and Justice Foundation of NSW, 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 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 institutions that provide public information to improve the general awareness of legal rights in relation to criminal charges and prosecution, and that provide some free or subsidised legal representation -particularly in trials 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.

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. VLA sends its own lawyers to perform duty lawyer services, but also uses private practitioners and community legal centre lawyers, who all assist pro bono. In 2019-20, 9,819 duty lawyers services were delivered by private practitioners, and 11,423 were provided by community legal centre lawyers. VLA lawyers provided 68,659 duty lawyer services.

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, so 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. 79% of criminal law grants were assigned to private legal practitioners in this way in the 2019-20 financial year, totalling 35,784 grants. As of the 2019-20 Annual Report, VLA worked with over 295 private firms and 686 barristers across Victoria. In addition, 8,862 grants of legal assistance were given to clients being represented by an in-house VLA lawyer, and 688 to clients being represented by a community legal centre. Total grants in 2019-20 were 45,334.

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% to 25%. Special Covid-19 funding was allocated, and in 2019-20 the VLA had an underlying surplus of $4m because of the lockdown and case adjournments; however, in the Annual Report the VLA expressed concerns that this would result in significant shortfalls from 2021 onwards because of expenses merely being deferred and delayed cases building on top of new ones. The Covid-19 pandemic has also resulted in a greater percentage of Victorians being eligible for legal aid funding under the means test.
In the 2019-20 financial year, according to the Victoria Legal Aid Annual Report:

- 88,662 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. 123,153 requests were responded to through the Legal Help service, which includes telephone advice and online chats, and over 2.6 million sessions were logged on the VLA website.
    - 23% of these people were from culturally and linguistically diverse backgrounds.
    - 35% had no income (up from 29% in 2017-2018) and 46% were recipients of some form of government benefit.
    - 6,436 clients, or 7%, were experiencing or at risk of homelessness. This was an increase of 25% from 2014-2015.
    - 11% were younger than 19yo.
    - 25% disclosed having 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 2019-20 VLA Annual Report, 43 of the 48 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."

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. In 2019-20, generalist CLCs were the number one place for the 85,726 referrals that VLA made. 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% from the previous year – and 688 grants in the 2019-20 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 animal law legal advice service, and publishes the authoritative Fitzroy Legal Handbook, which is available for free online. The FLS publishes its legal information in six languages, including Arabic and Somali.

Villamanta Disability Rights Legal Service is an example of a specialist CLC. It is a state-based organisation that has been operating since 1990, and it advocates on behalf of the rights and interests of people with disability-related justice issues. It offers a free telephone service, as well as legal assistance, assistance with the National Disability Insurance Scheme, and limited appeals representation and casework.

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?**
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'.

STRENGTHS	INSTITUTION	WEAKNESSES
VLA funding to 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	**Community legal centres**	The funding allocated to CLCs and the resources available to them do not match the demand for their services or guarantee ***access***. 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.

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.		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, the legal system provides institutions to assist the accused: Victoria Legal Aid and community legal centres are two examples. Both focus on people who suffer some kind of social, economic or physical disadvantage or disability. VLA representation is prioritised for people who can pass a strict 'means' test and earn income below the poverty line, and specialist CLCs such as the Asylum Seeker Resource Centre focus on groups of people who face special obstacles when trying to obtain justice. This is a strength because it helps them target their resources to the most vulnerable, and assist people most at risk of unfair dispute resolution. 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 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. Both institutions try to compensate for this problem, though, by giving opportunities for broader assistance. Generalist CLCs 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.

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**

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.

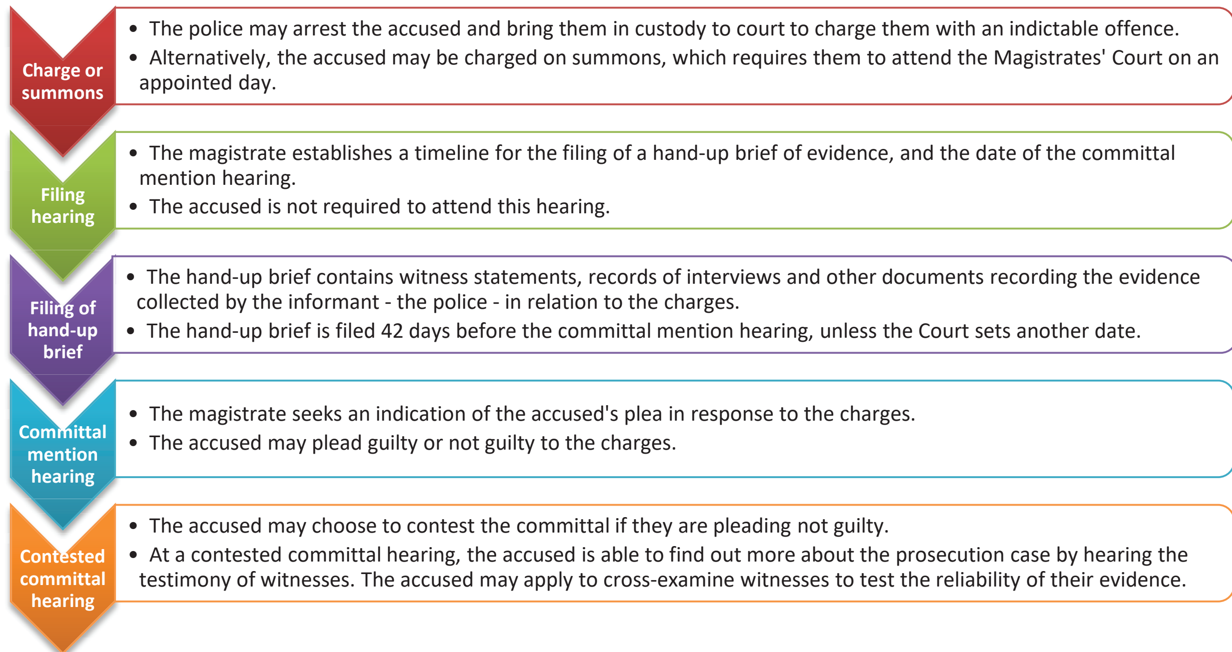
Definition

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 that 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, 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



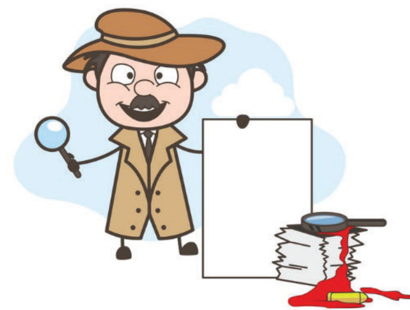
At the hearing, the defence will not present any of its evidence or disclose any of its witnesses. The committal hearing is purely for the prosecution to show its hand, to prove that a trial is justified, and to allow the defendant to prepare adequately for trial.

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 1,734 applications were made to cross-examine witnesses.

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 2018-19, the Magistrates' Court finalised 3,168 committal proceedings. In May 2017, the indicative time to trial in the County Court, from the committal, was nine months; and, in 2018-19, 82% of matters had a trial longer than a week. The OPP reported in 2018-19 that the average resolution time for an indictable offence was 19 months. In 2018-19, 77.6% of prosecutions ended in a guilty plea – 74% of those had a guilty plea by the end of the committal proceedings, and over 40% 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.

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, in order to commit it to trial.
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'.

STRENGTHS	WEAKNESSES
The hearing protects the criminal 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 2018-19, 74%% 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 accused'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 accused 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 accused 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 77.6% of indictable 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.

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.

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. The Act does not tell judges and magistrates how much to reduce the accused's sentence by, depending on the stage of trial at which they plead guilty; instead, judges and magistrates take the guilty plea into account as one of the factors weighed up in the "instinctive synthesis" of sentence calculation. The judge or magistrate must impose a less severe sentence, and must then 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 court 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. Arguments have been framed accordingly in the table below.

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 pleading 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

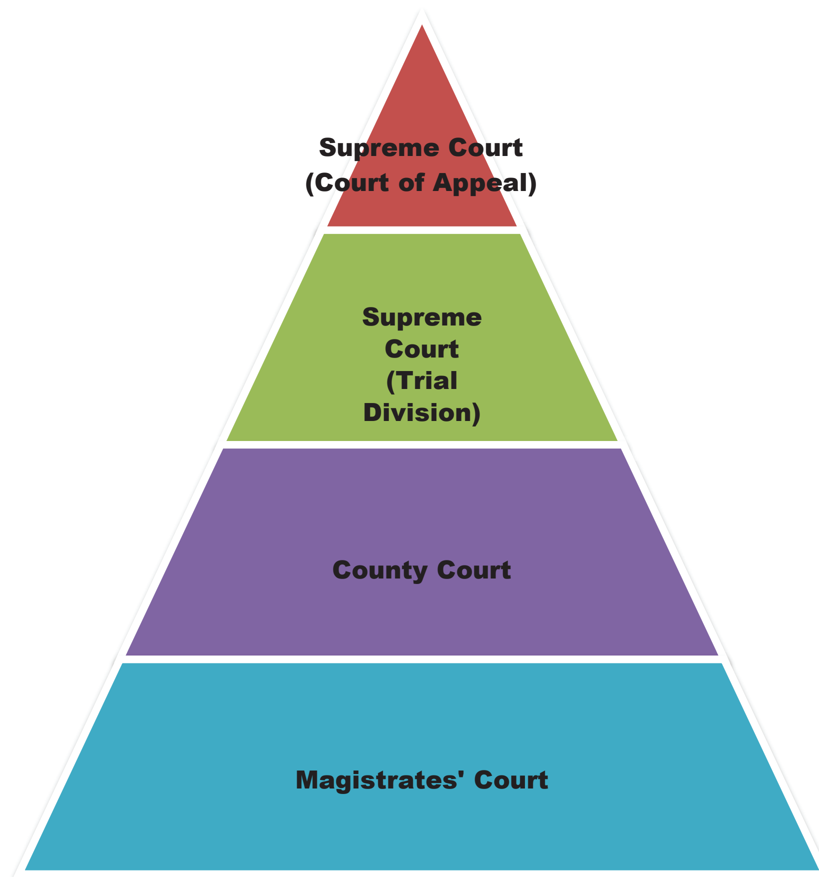
In October 2014 the Sentencing Advisory Council conducted research into sentence indications and sentencing discounts in the higher courts given during the period from 1 July 2009 until 30 June 2014. The report can be accessed on the Council's website at:
https://www.sentencingcouncil.vic.gov.au/publications/guilty-pleas-higher-courts-rates-timing-and-discounts

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.

RESOLVING THE CASE

Reasons for a court hierarchy

The same court hierarchy is used for both criminal and civil disputes in Victoria, because all courts of general jurisdiction in the state have both civil and criminal jurisdiction.



The lowest court, the Magistrates' Court conducts hearings rather than trials, presided over by a single magistrate. It never sits with a jury.

The intermediate court, the County Court, is the largest trial court in the state. It conducts criminal and civil trials, and may sit with a jury if one of the parties to a civil case requests it, or if the trial is for an indictable criminal offence.

The highest state court, the Supreme Court, is composed of two primary division: the Trial Division and the Court of Appeal. The Trial Division conducts trials before a single justice, and may sit with a civil jury if one of the parties to the case requests it, or if the trial is for an indictable criminal offence. The Court of Appeal only conducts hearings for appeals, both criminal and civil; it sits with three justices, and never sits with a jury.

The High Court is the highest court with state jurisdiction, but it is not a state court.

Exam tip: The alternative to a vertical court hierarchy is having a 'flat hierarchy' or a 'one court system'. In examinations students often argue that this would cause delays because one court could not possibly hear all the cases in the legal system, but this is a misunderstanding of the term. A single court system does *not* mean only having one court*room* and one judge: the number of judges and courtrooms overall is not reduced – the only difference is that they are *all on the same level* and equal to each other.

There are a number of reasons why the courts for criminal disputes are separated vertically into a hierarchy. These include the provision of appeals, and the ability for greater specialisation.

Specialisation

If a court has narrowed jurisdiction over a particular type of cases, it will hear similar types of cases on a daily basis and the presiding officers and other personnel can develop specialisation. Specialisation is expertise and focused knowledge in the relevant law and in the procedure for hearing those kinds of matters.

- The Magistrates' Court has more expertise in hearing criminal bail applications than the Supreme Court has.
- The County Court has more expertise than the Magistrates' Court in hearing trials for indictable offences and in managing and directing juries.

Appeals

If either party feels that an error has been made by the presiding officer in their case, they can use the hierarchy to send an appeal up to a higher court and query that error. This gives the opportunity for mistakes to be corrected, and for the legal reasoning and administration of justice by less experienced judges, magistrates and tribunal members to be scrutinised by more experienced officers in higher courts.

- Criminal appeals on alleged errors of law can be made from the Magistrates' Court to the Supreme Court (Trial Division). Criminal appeals on alleged errors of fact (such as the sentence handed down, or whether the evidence was sufficient to support the conviction) will be made to the County Court instead, because errors of fact are not as complex as errors of law.

Exam tip: Use the legal term 'leave' when talking about the permission that the highest courts such as the Court of Appeal and High Court need to give before any person is able to have their case heard there. No-one has a right to have their case heard by these higher courts.

REVIEW/APPLICATION QUESTIONS – The court hierarchy

1. **What is a 'court hierarchy'?**
2. **What is meant by the term 'flat court hierarchy' or 'one-court system'?**
3. **In one sentence each, define the two primary reasons for a criminal court hierarchy.**
4. **How does a court hierarchy allow the Magistrates' Court to develop specialisation?**
5. **How does a court hierarchy allow the Supreme Court to develop specialisation?**
6. **Why is specialisation a desirable feature of a court system?**
7. **Why is a hierarchy necessary for appeals to occur?**
8. **Outline the difference between an appeal and a rehearing or retrial.**
9. **Why would appeals not be possible in a flat hierarchy?**
10. **Why are appeals a desirable feature of a court system?**

Extension material:

The operation of precedent is *not* one of the reasons for a court hierarchy required by the Study Design. It is, however, a valid reason that uses knowledge from the Unit 3/4 course, and you may choose to use it.

The operation of precedent

The doctrine of precedent relies on the principle of *stare decisis*, which deems that courts should stand by previous decisions and uphold them. The court hierarchy supports the operation of precedent, because it allows legal principles developed in higher courts to sometimes be binding, and principles developed in lower courts to only be persuasive.

- A principle of law established by a case heard in the Supreme Court (Trial Division) will be binding on the County and Magistrates' Courts when the later cases involve similar material facts and questions of law.

- A principle of law established in the Supreme Court (Trial Division) can be reconsidered and possibly overturned by the Court of Appeal, as the Court of Appeal is higher in the higher.

Evaluation: Reasons for a court hierarchy

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		WEAKNESSES
The needs of parties can be more efficiently met by personnel, including registrars, judicial officers and support staff, who are familiar with the types of cases being brought. These efficiencies increase ***access*** for parties. If the law and procedure are understood in detail, they are more likely to be applied ***equally*** across every case of the same type.	**Specialisation**	The vertical hierarchy is constructed on the basis of very broad distinctions: the County Court jurisdiction is not materially different from the Supreme Court (Trial Division) jurisdiction, for instance. The ability to develop specialisation in courts of general jurisdiction is quite low in reality. Specialisation in law and procedure does not produce significant benefit when most of the differences between cases come in the form of differences in facts and evidence.
Parties have largely ***equal*** rights to appeal to decision (other than with the acquittal of a criminal accused), to ensure that both parties are satisfied that the rules of natural justice were followed, regardless of the outcome. The fact that appeals to more highly-ranked judges are possible can increase the perception of ***fairness*** and the level of confidence the public has in the system.	**Appeals**	In reality, there is not ***equal*** opportunity to appeal. In addition to the rules that exist limiting certain avenues of appeal, launching an appeal takes a lot of time and money, and requires a sophisticated knowledge of the law and rules. Not every party has ***access*** to these. The accused has more appeal rights than the prosecution does: the accused, for instance, can appeal a guilty verdict, while the prosecution cannot appeal a not guilty verdict. This does not achieve procedural ***equality***.
Magistrates and judges in lower courts can be guided by the understanding of the law handed down by panels of experienced judges in higher courts, which enhances the potential for ***fairness*** in the resolution of disputes. The application of both binding and persuasive precedent increases the efficiency of the resolution and therefore enhances ***access*** for the parties to the case as well as to the parties of other cases waiting for an available courtroom.	**The operation of precedent**	The vast majority of cases will not be heard by a court that can alter or set precedent in any way: close to 98% of matters will be finalised below the Supreme Court (based on 2018-19 ABS figures). This decreases the ***access*** the average person has to use of the court system in a way that has an effect on the common law, without them being willing and able to pursue an appeal higher up the hierarchy, at the cost of significant time and expense. Regardless of their place in the hierarchy, most courts are reluctant to disturb existing precedent, even if it is technically persuasive only.

REVIEW/APPLICATION QUESTIONS – Reasons for a court hierarchy: evaluation

Application exercise

In theory, the court hierarchy facilitates the doctrine of precedent because higher courts are given the power to set binding precedent for lower courts, and the judges and magistrates in those lower courts can be guided by the legal reasoning of superior judges when they are hearing like cases. In practice, though, precedent is evolved almost exclusively by the High Court, and rarely if ever altered by other courts in the hierarchy. Because of the way cases are loaded towards the bottom of the hierarchy, 98% of disputes will be resolved in a court that does not have the power to consider legal questions at all, and the High Court has made recent comments discouraging even the Supreme Court from setting precedent that is contrary to persuasive precedent argued before it. In theory, a hierarchy will result in a kind of dialogue between courts at different levels, with legal principles being refined as they progress up the hierarchy over time; in practice, it is less fluid than this.

a. **The above answer is a sample of an evaluation of a reason for a court hierarchy. Using this as a guide, evaluate each of the reasons for a court hierarchy in the section.**

Responsibilities of key personnel

Judge

General responsibility
The judge or magistrate has the responsibility to act as an independent umpire, overseeing proceedings impartially and applying the rules of evidence and procedure equally and fairly to ensure that neither party has the appearance of being favoured over the other. When sitting without a jury, the judge's primary task is to reach a verdict in the case.

> **Exam tip:** Ensure that you use the terms 'judge' and 'magistrate' correctly. The term 'judge' should be used for the presiding officer in the County Court and above, while the term 'magistrate' should be used for the presiding officer in the Magistrates' Court. They are not interchangeable words.

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

Detail on specific responsibilities

- In the pre-trial stage the judicial officer often meets with the parties to give directions and manage pre-trial procedures. In criminal pre-trial the judge will be instrumental in establishing a timeline for the trial and ensuring that pre-trial disclosures have been made according to schedule. Trials have more extensive pre-trial than hearings.

> **Exam tip:** Remember the difference between trials and hearings: trials are contested disputes where evidence is called and that may involve a jury. Hearings focus more on submissions made by the parties or counsel than on the examination of witnesses, and they never use a jury.

- In the trial stage the judicial officer focuses on ensuring that each party receives natural justice. They will interpret and apply the rules of evidence and procedure, listen to the submissions and evidence given by each party, and reach a final verdict in all matters where there is no jury.

- The judge must recuse themselves if they will be unable to remain impartial, or if there is a material risk of them failing to appear impartial. For example, in the case of *LAL v The Queen* [2011] VSCA 111 the judge was criticised for not recusing herself even though she was related to the victim of a similar crime, and there was therefore the risk of apprehended bias.

- If there is a jury, the judge will direct the jury and sum up the law and evidence on which the jury verdict should be based. The judge will have to carefully follow the law in relation to jury instruction: for instance, there are strict rules prohibiting them from giving a personal explanation of what 'beyond reasonable doubt' means.

- The judge must only direct the jury on matters that have been raised by the parties at trial, either expressly through legal argument or indirectly through the evidence presented – but they have no responsibility to direct the jury on matters that were not raised by the parties. This was established by the High Court in the case of *R v Getachew* [2012] HCA 10.

- If the accused is found guilty, the judge will be responsible for conducting the sentencing proceedings. They will determine which parts of victim impact statements are admissible, and they will receive sentencing submissions from both the prosecution and defence; they will also be responsible for calculating any sentence discounts, and weighing up mitigating factors and aggravating factors.

Jury

A jury is a group of women and men randomly selected from the community, outside the criminal justice system.

General responsibility
Each juror individually, as well as the jury as a whole, has the responsibility to listen impartially to the evidence and the judge's directions in order to decide questions of fact and to return a verdict of guilty or not guilty based on the standard of proof of 'beyond reasonable doubt'. Juries are responsible for giving the accused a trial by their peers.

Exam tip: The fact that a jury delivers a verdict *must* be included in any answer on the overall responsibility of the jury. Unless the question asks specifically for only a set number of specific responsibilities, it is too risky to leave it out of an overall 'responsibility' question in the examination.

Detail on specific responsibilities

Each individual juror must vote according to the verdict she or he has independently reached. If all jurors vote the same way it is called a 'unanimous verdict'; if all jurors *but one* vote the same way it is called a 'majority verdict'; and if the jury vote is split any other way it is called a 'hung jury' and there is an option for retrial.

Exam tip: Because the primary role of the jury is reaching a verdict by establishing the facts of the case, and because appeals involve neither verdicts nor witnesses establishing new facts, juries have NO responsibilities in appeals and are not used.

In addition to the primary responsibility of using the evidence and the law to reach a verdict, juror responsibilities include:

- Jurors must disclose known reasons that would prevent them acting impartially. Failure to inform the Juries Commissioner as soon as practicable is an offence, punishable by a fine.
- Jurors must elect a foreperson to coordinate jury discussions and deliberation.
- The foreperson of the jury has special responsibilities to conduct jury votes, to record and communicate any questions the jury wishes to ask of the judge, and to deliver the final verdict to the court.
- Jurors can only rely on the evidence introduced at trial in reaching a verdict. It is an offence to investigate any matter that is the subject of a trial, even just by conducting an Internet search. The *Juries Act 2000* criminalises this as a form of contempt of court, and it is punishable by a fine of up to 120 penalty units. In 2014, for instance, a man was charged for looking up the meaning of 'beyond reasonable doubt' on the Internet during deliberations.

- Each juror has the responsibility to listen carefully to the judge and to counsel, to try to understand the law in the area and the elements of the offence. In 1999 the New Zealand Law Commission published findings that showed "fundamental misunderstandings of the law at deliberation stage" in 73% of trials.
- Jurors must keep their deliberations secret. It is an offence to disclose any information such as opinions expressed, votes cast or arguments made in the course of reaching a verdict.

A more extensive list of juror responsibilities is provided in the *Juries Act 2000* (Vic).

Parties

General responsibility

Each party is responsible for preparing its own case before trial and presenting it in court according to the rules of evidence and procedure. Each party will be bound by the rules of court and the directions of the judge, but will otherwise be able to exercise a great deal of control over decisions regarding the conduct of the case.

Exam tip: Parties are usually represented by lawyers – both solicitors before trial and barristers at trial. The word 'party' usually refers to the legal entity of the prosecution, or the defendant – whether that legal entity is a self-represented person, an organisation or corporation or government department with its own counsel, or a person represented by a lawyer. If you want to signify one or other of these types of parties specifically, you will have to use a different word than just 'party' – for instance, accused person.

Detail on specific responsibilities

- The prosecution has the responsibility to decide whether to bring the matter to trial.
- The accused has the responsibility to decide whether to have legal representation or be self-represented.
- Each party has the responsibility to decide what evidence to present and what legal arguments to submit in order to argue or defend the case.
- The precedent set in the *Getachew* case in 2012 gives parties the clear responsibility to raise, through legal arguments and/or evidence, all matters they want the jury to take into account during deliberations, because the judge has no responsibility to direct the jury on anything not brought into trial by the parties.
- In criminal matters the prosecution has responsibilities above and beyond those of the defendant. The prosecution, for instance, is obliged to disclose *all* evidence to the defence, even if it is exculpatory and helps the defendant prove her or his evidence: the prosecution, however, cannot withhold evidence just because it helps the other side.
- Each party owes a primary responsibility to the court and to the principle of natural justice, over and above their own concerns and desire to achieve a favourable outcome. In the case of *Giannarelli v Wraith* [1988] HCA 52 Mason CJ said that "The duty to the court is paramount and must be performed"; self-represented accused parties will not be held to this standard as strictly as represented parties, but as a general principle this applies to all parties.

Legal practitioners

Because the rules of evidence and procedure are quite complex, because the judge does not actively manage the presentation of the accused's case, and because the accused have so much responsibility for understanding what law to argue, what evidence to lead and how to navigate the required procedure and timelines in the case, most people could not effectively defend charges against them without representation.

General responsibility

The responsibilities of legal practitioners will be largely the same as those of the parties explained above in terms of case preparation, presentation and duties to the court.

In terms of *being* the legal representative for those parties, however, legal practitioners have obligations to adequately advise their clients, to advocate for their clients' interests, to present the best case possible for their clients in court, and act on the client's instructions in any way that is compatible with the law, ethics, and the lawyer's duty to the court.

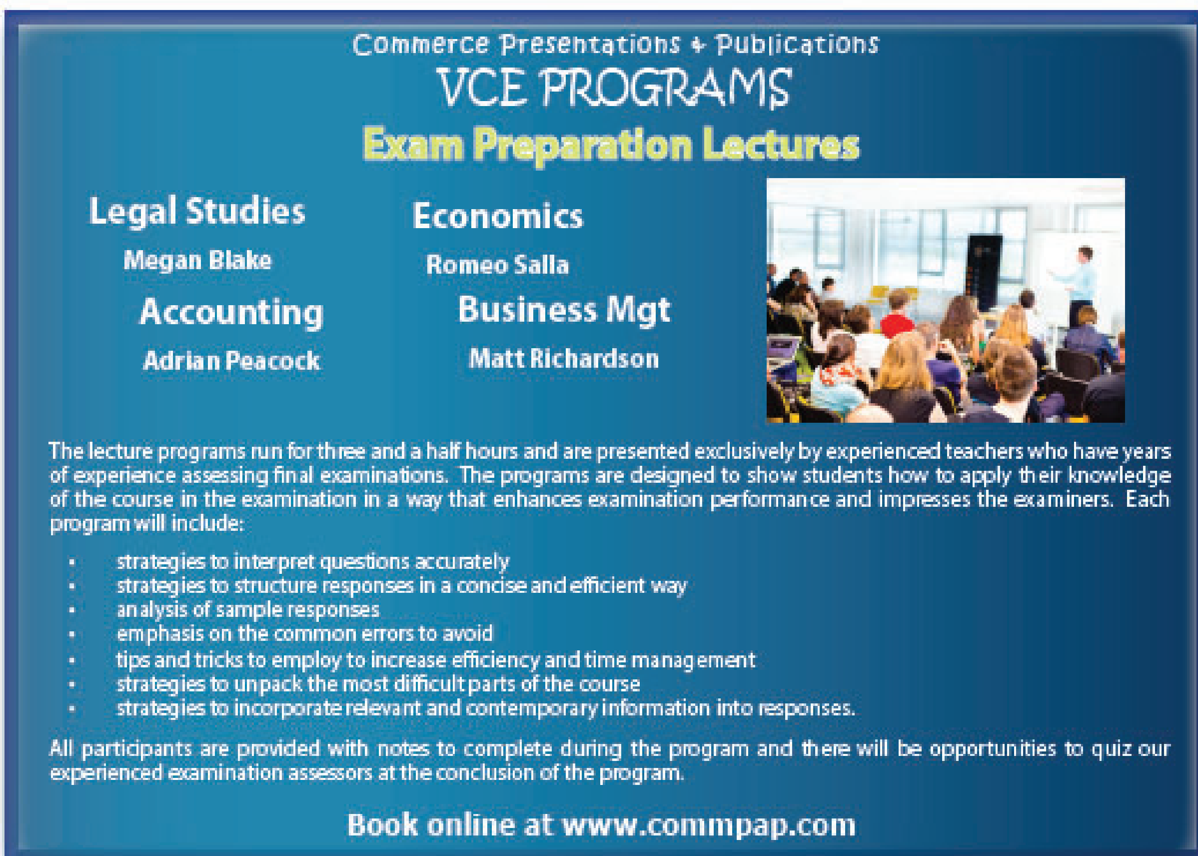
Detail on specific responsibilities

- A solicitor is the party's primary legal adviser, and it is the solicitor's responsibility (possibly with the assistance of other solicitors and/or legal assistants and paralegals) to understand the client's case, advise them of the relevant law, file the necessary paperwork with the court, and brief a barrister to appear at trial.
- A barrister is the legal representative who has the responsibility to speak on behalf of the client inside the courtroom: they are called 'counsel', and sit facing the judge's bench. Parties may be represented by more than one counsel – for instance, by a senior barrister plus a number of junior barristers.
- There are a range of ethical obligations held by every lawyer. Lawyers have a double duty: a duty to their clients, to give the client the most effective representation possible and to act on the client's instructions; but also a duty to the court, to act in the best interests of justice. The case of *Giannarelli v Wraith* [1988] HCA 52 confirmed that the advocate's duty to the court overrides her or his duty to the client to act on the client's instructions. Mason CJ said: "The performance by counsel of [her or his] paramount duty to the Court will require [her or him] to act in a variety of ways to the possible disadvantage of [her or his] client."
- Legal advocates have the responsibility to not mislead the court.
- Legal advocates have the responsibility to bring every irregularity in the resolution of the case to the court's immediate attention, and not to keep it secret in the hopes of using it later as a grounds of appeal. This was explicitly listed as one of counsel's ethical duties by Mason CJ in the case of *Giannarelli*.

- Counsel for the accused has a special responsibility to dissuade the accused from pursuing an unjust defence, and advise them to abandon a defence if it appears they were genuinely in the wrong.
- Prosecution lawyers have a special responsibility to only pursue charges that are supported by evidence and that have a material chance of success in prosecution.

REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel

1. **Identify two adjectives that could be used to describe the responsibilities of the judge in the criminal justice system of trial.**
2. **Outline two things that the judge will do as part of her or his role, and one thing that she or he is not allowed to do.**
3. **What is a 'jury'?**
4. **What do we mean by the terms 'peers' and 'laypeople'?**
5. **When will a criminal dispute be heard by jury?**
6. **Which courts in the Victorian hierarchy can conduct jury trials?**
7. **Will juries ever be called on to decide an appeal? Justify your answer.**
8. **Outline the main responsibilities of the jury in a criminal case.**
9. **Identify four specific things that the jury, or each individual juror, will have as part of its set of responsibilities.**
10. **How do the responsibilities of the judge change in a trial by jury?**
11. **Who or what is the 'foreperson' of the jury?**
12. **Explain the difference between a unanimous verdict and a majority verdict.**
13. **If neither a unanimous nor a majority verdict can be agreed upon, what will be the outcome of the case?**
14. **Identify two adjectives that could be used to describe the responsibilities of the parties.**
15. **Outline two things that the parties will have as part of their set of responsibilities.**
16. **Explain what is meant by the parties' 'paramount duty'.**
17. **Give three reasons why legal representation in vital in the criminal justice system of trial.**
18. **Outline two important responsibilities that the legal representative will have.**
19. **Explain the dual obligations legal representatives hold to their clients and to the court**



Evaluation: Responsibilities of key personnel

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		WEAKNESSES
The judge is responsible for being an impartial third party, who shows preference to neither side over the other, and who assists neither party in the presentation of its case. This ensures that the parties are treated ***equally*** and ***fairly***, and that natural justice is preserved. The case management powers of the judge can be used to promote a more efficient and effective resolution to the case, giving both parties better ***access*** and ensuring that neither party uses bad faith strategy designed to ***unfairly*** disadvantage its opposition.	**Judge**	The judge generally does not participate in the trial by calling witnesses, deciding which legal arguments and precedent to raise or presenting and arguing the interpretation of evidence – thus, their legal expertise cannot be used to benefit either party in the case or to actively search for the truth. Judges can only make decisions based on evidence and arguments put to them, and the outcome should be based on the best legal arguments rather than whom the court thinks is right. Judges have limited scope to use their own judgment.
Jurors have the responsibility to be unbiased, and the jury randomness assists this. Biases or prejudices shouldn't be able to carry the verdict, because a cross-section of society should mean that jurors with biases are balanced out by other jurors without those same biases. This enhances ***fairness***. Jurors have the responsibility to look at the case from the perspective of a layperson, and this benefits all parties. Jurors being 'regular' people requires that legal jargon be kept to a minimum. This makes their decision-making easier, stops lawyers and judges from even unintentionally overcomplicating the system, and allows parties and the viewing public to better understand the case as well, giving a wider range of people ***access***. Jurors have the responsibility to try as hard as possible to reach consensus in the jury room. The introduction of majority verdicts for most crimes minimises the possibility of retrials, while still achieving a great deal of confidence and consensus in the verdict.	**Jury**	Many potential jurors are excused, ineligible, disqualified or challenged. The pool of jurors is considerably smaller than the number sent the original questionnaire, and the same types of people are excluded every time. It is therefore difficult to argue that it is truly representative of a cross-sectioned mix of society. Many prejudices are common across different groups in society, so parties from minority groups in particular can fail to be treated as ***equals*** before the law. Some evidence or law may be too technical for untrained people and cannot be simplified – sometimes even judges struggle, and they've heard similar cases before with other expert witnesses. Jurors may not fully understand the complexities of law or evidence, so may make ***unfair*** decisions based on a mistake.
Parties are responsible for thoroughly reviewing their own cases and deciding which legal arguments and evidence will give them the best chance of success. This level of agency and decision-making ability gives them ***access***, and may encourage confidence in the ***fairness*** of the outcome. Parties are responsible for being experts in their own cases, and giving them control is therefore arguably the most effective and efficient way of deciding how their side should be argued.	**Parties**	Party control puts of a lot of responsibility and stress on individual parties, and most accused are not experienced in arguing at trial. This then increases party reliance on legal representation, which increases the costs of trial and reduces ***equality*** between parties if the prosecution has greater financial resources than the accused. Party control may cause delays – through inexperience, failure to select only the best arguments, or by the prosecution trying to force the accused into a plea deal, if those strategies are not curtailed by judicial case management. For example, in the WA case of *R v Le* [2018] WADC 57 the case was aborted because of prosecution non-disclosure; the judge's comments (at para 2) blamed this for creating a risk that the accused could not be afforded a fair trial.

Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give ***access*** to the accused with the need to serve justice and overall ***fairness*** in terms of the system. Experienced legal representatives are responsible for helping the accused to present their case in the best possible light. This gives the accused confidence in the system, and a better chance at a ***fair*** and just trial. The use of expert and experienced legal practitioners saves the courts time and money, because they know the correct way to prepare documents, the correct way to make legal submissions and elicit evidence from witnesses, and the best arguments to make to allow the court to home in on the significant issues. This efficiency increases overall ***access*** to the system because it allows the courts to operate more quickly.	**Legal practitioners**	'Justice' may belong to accused people who can afford the better legal representatives, rather than accused people on the basis of their innocence, and this decreases proper ***access*** to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. The 2019 trial of George Pell resulted in multiple appeals, for instance, all the way to the successful High Court appeal, and involved some of the most powerful and successful lawyers in Australia – Robert Richter is an acclaimed senior barrister, for instance. It is unlikely that many other accused persons would have the resources to do this, and would simply have had to accept the first finding of guilt. Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in plea negotiations because it is not always in the lawyer's best interests to register a guilty plea, or they may believe they can win a 'not guilty' verdict outright for their client; or the prosecution may reject a ***fair*** plea, or accept an inappropriate one, in order to get an easy 'win' on the board for their career and the department.

REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel: evaluation

Application exercise

A trial judge is an independent an impartial umpire, not connected to either party, separate from the government, and with no vested interest in the outcome of the case. This is part of natural justice, and works to ensure that the outcome of each case is based on the merits of the evidence and legal arguments, and not on personal connections or on benefits the judge will get from deciding in one party's favour. This hides the truth of human decision-making and judgment, though, as structural independence doesn't prevent bias or prejudice. Studies have demonstrated unconscious bias triggered by the placement of the accused in the courtroom, for instance – convictions are more likely if the accused is seated in a glass-enclosed dock than if they are seated next to their counsel. Judges are structurally independent, but they are still members of society, and are still subject to the same emotional associations. Fairness of outcome also relies on both parties having equal access to legal knowledge and evidence, and this is rarely the case. Especially when an individual is against a corporation or the government, the individual will generally have fewer financial resources, less time and less experience. The independence of the judge in these cases can protect this imbalance, because the judge will not intervene to correct it. At the very least, however, it is the perception of fairness that is being preserved, and it is important that the community perceives the system to be fair.

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**

b. **Using the answer above as a sample, write a paragraph analysis of each of the other categories of personnel.**

CRIMINAL CONSEQUENCES

A sanction is a legal consequence or penalty given to a person who has been convicted of one or more criminal offences, or who has plead guilty to one or more criminal offences. The sanction is decided on and ordered by the sentencing judge or magistrate.

Purposes of sanctions

Exam tip: A common error made in examinations is students defining a sanction as a criminal "punishment" – this is not true, or correct terminology. A sanction is a *consequence* of behaviour, and *one* of its aims may be to punish. But some sanctions do not aim to punish at all, which is why a neutral term such as 'legal consequence' should be used instead.

Section 5 of the *Sentencing Act 1991* (Vic) outlines the five purposes of criminal sanctions: these are the only purposes for which a sanction can be imposed. Each sanction available to the court varies in its ability to achieve these purposes, usually depending on the exact nature of the crime and the life circumstances of the offender. A sentencing judge or magistrate will carefully consider each sentencing option, and combinations of the different options, when deciding how best to achieve one or more of the purposes of sanctions. When handing down the sentence, the presiding officer will explain which of the aims of sanctions she or he has designed the sentencing to achieve, and why she or he thinks this is appropriate to the circumstances of the offender, the crime and the victim.

Exam tip: Circular definitions – or, when a word is defined by using the same word – are common in this topic, and prevent full marks being awarded. For example, the aim of 'punishment' is often defined as wanting to "punish" the offender; the aim of 'denunciation' is often defined as wanting to "denounce" the behaviour; and the aim of 'rehabilitation' is often defined as wanting to "rehabilitate" the offender.
You must define a term using a synonym – a term that means the same thing, but that uses different wording.

Rehabilitation

Definition
'Rehabilitation' means that it is in society's best interests that the offender *learns from their mistake* and changes their life and attitude so that they *don't want or need* to commit further crimes.

For example, if an offender realises the value of their family they may not want to risk going to jail in the future; or if a drug addict receives help for their substance problem they may not commit further crimes while under the influence.

Exam tip: Unlike deterrence, rehabilitation is a *positive* motivation. If people improve their lives and their mindsets, they will want to achieve good things with their lives and will not want to harm themselves and society by continuing to break the law. In other words, they no longer *want* to break the law.

***Substance abuse treatment in Victorian Corrections: Service mix and standards* (2003) Corrections Victoria**

The 2003 report found that two-thirds of all first-time offenders had a history of substance use that was directly related to their offending. This rose to 80% for men and 90% for women who were sentenced to a second or subsequent prison term.

Punishment

Definition
Punishment essentially means *hardship.* By breaking the law the offender has hurt another individual and/or society. The concept of 'retribution' means we often want to see the offender pay for this by suffering some *hardship* in return. The punishment or hardship should be equal to the crime and not be influenced by the media or public opinion.

For example, if an offender is distanced from their friends, family, hobbies and job, they will suffer hardship and may realise through this the harm they have done to others with their offending.

Deterrence

Definition
Deterrence is choosing not to commit crimes because you want to *avoid* a negative consequence that is attached to criminal behaviour.

Exam tip: Unlike rehabilitation, deterrence is a *negative* motivation. You should explain it in terms of why people might be discouraged from offending in situations they might otherwise want to.

Specific deterrence is where the offender themselves does not want to receive that consequence again, so they choose not to offend in the future so that they can avoid receiving another sanction.

General deterrence is where other members of society see the sanction given and, because they want to *avoid* receiving the same consequence, they choose not to commit the same crime. The theory is, if the sanction is severe enough, some potential offenders may think twice about committing the crime. This is called general deterrence because it is concerned with deterring the general public. Since October 2018, and the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic), if the offender is being sentenced for a serious Category 1 offence and the court is considering a CCO, the court must prioritise general deterrence and denunciation over all other purposes of sanctions.

Does imprisonment deter? A review of the evidence **(April, 2011) Sentencing Advisory Council**

The 2011 report found that: "The research demonstrates that increases in the severity of punishment […] have no corresponding effect upon reoffending."

Denunciation

Definition
'Denunciation' is when society, through the court, *expresses disapproval* of the criminal behaviour. Denouncing the offender's behaviour means sending a clear message that it is not acceptable or okay.

For example, even if the offender made a one-off poor choice, such as lying on one tax return after years of honest filings, or the court believes they do not need to be punished or rehabilitated, such as a loved one assisting unlawfully in the suicide of their partner, the offender may still receive a sanction because their behaviour may need to be denounced. Giving them no sanction would send the wrong message to society – that their behaviour was okay.

Since October 2018, and the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic), if the offender is being sentenced for a serious Category 1 offence and the court is considering a CCO, the court must prioritise general deterrence and denunciation over all other purposes of sanctions.

Protection

Definition
'Protection' refers to the safety of the community. If the sanction removes the offender from society or restricts their free behaviour in some way, it may make it *more difficult* for them to reoffend and harm people. This protects society.

For example, imprisonment is a popular sanction in the mind of the public because it makes people feel more secure and protected in their everyday lives.

R v Bilal Skaf **[2004] NSWCCA 37**

In the months leading up to the Sydney 2000 Olympics, a Sydney man called Bilal Skaf and a group of others committed a series of gang rapes. One victim was raped 44 times by 14 different men at three different locations over six hours. The trial judge, Justice Michael Finnane, sentenced one of the defendants, Bilal Skaf, to 55 years' imprisonment. This sanction aimed to denounce the behaviour, punish the offender, protect society and deter others. It did not aim to rehabilitate the offender.

The length of 55 years was considered long enough to condemn the behaviour and show extreme disapproval of it – this achieves denunciation. The length of 55 years and the nature of imprisonment – being taken away from friends and family and deprived of freedom – was considered significant enough hardship that it would achieve retribution for society: this achieves punishment. The fact that the offender would be removed from society achieved the aim of protection. The length of the sentence hopefully achieved the aim of specific deterrence, as the offender would likely not want to experience it again – especially at the age he would be when released. It also hopefully achieved the aim of general deterrence, as most other people would not want to be given the same punishment, so might be less likely to commit the same crime even if they otherwise wanted to (which is unpleasant to consider). The 55-year term was not directed towards rehabilitation, mainly because of the demonstrated attitude of the offender and lack of remorse, which made him seem not an ideal candidate for rehabilitation.

The sentence was reduced to 35 years on appeal in 2008. A further appeal in 2013 was refused.

Examples of sanctions

When sentencing offenders, judges have a range of sanctions available to them.

> **Exam tip:** When a sanction chosen in the examination is a common one – such as imprisonment or a fine – students often fail to define it.

Students should be able to do each of the following things, with each of the three types of sanctions named in the Study Design:

- Give its proper name.
- Outline what is involved with it.
- Identify two or more aims that are achieved by each sanction, and explain how and why those aims are achieved by that particular sanction.
- Identify one or more aims that are not achieved as successfully, and explain how and why those aims may not be achieved.

> **Exam tip:** A number of well-known sanctions such as home detention were removed in January 2012. These sanctions were replaced by a new option called a 'Community Corrections Order', which is explained below. You should not reference home detention or suspended sentences anymore. Suspended sentences also ceased operation on 1 September 2014, so are no longer valid.

Fines

Definition
Fines are monetary penalties imposed on the offender, where the offender pays a sum of money to the court fund. A court can impose a fine with or without recording a conviction.

Detail
Fines are calculated in 'penalty units', with one penalty unit being equal to $165.22 (from 1 July 2020 until 30 June 2021). For example, the on-the-spot fine for a natural person (not a company) selling a tobacco product to someone under the age of 18 is currently four penalty units. Every year the value of a penalty unit is increased by legislation. Level 1 (the most serious) offences cannot be punished by a fine. Other than that, fines are the most common penalties imposed.

Imprisonment for fine default

In October 2017 a Melbourne man, Peter Clark, paid the outstanding fines of a Noongar Indigenous woman in Western Australia after she was imprisoned for fine default. She had called the police over a family violence assault, and the police had run a background check on her: she owed approximately $3,900 from a 2012 incident involving an unregistered dog and could not pay the amount, so she was incarcerated at a rate of $250 deducted from her fines per day.

Clark said, "It struck a chord in me and I was incensed, so I decided to do something about it because I could." He called the prison to find out her name and said: "How many Noongar women with five children of her own, and six children that she looks after, who've been arrested in the last two days do you get?" Clark said the attendant replied: "Oh, we get seven or eight a day." Clark asked if they were all being locked up because of unpaid fines, and she said, "Yes, and they're mostly women."

In 2014 a Yamatji woman from WA, Ms Dhu, was arrested for fine default after calling the police for protection from domestic abuse; she died in custody a few days later of septicaemia and pneumonia from an infection in a broken rib.

Western Australian Attorney-General John Quigley reportedly agreed that the rate of Indigenous incarceration in the state was "scandalous" and said he intended to introduce amendments to the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) to reduce the number of people imprisoned for fine default. At the end of 2017, the Australian Law Reform Commission returned a report to the WA Government in which it recommended that imprisonment for unpaid fines be scrapped; the Government tabled this report in parliament in March 2018. In June 2020 the WA Parliament passed reforms to make imprisonment a last resort for fine defaults, and introducing new enforcement measures such as garnishing wages and Centrelink welfare benefits instead. Hardship provisions are included, including discretion in relation to mental illness, disability, domestic violence, and homelessness.

Community Corrections Orders

Definition

Community Corrections Orders, commonly called 'CCOs', are flexible orders involving sentences that are served mainly in the community but that may include up to three months imprisonment. In addition, a wide range of conditions can be imposed, including rehabilitation classes or counseling, unpaid community work or restricted movements. Each CCO must have at least one condition attached that relates to the risk and needs of the offender and the severity of the offence.

Detail

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

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

Other conditions are imposed on top of these. Conditions may include undertaking medical treatment or rehabilitation programmes, completing unpaid work up to a total of 600 hours, staying away from nominated places or areas, or paying a bond that is forfeited if the offender breaches the CCO.

In the Magistrates' Court, a CCO can be imposed for a maximum of two years for one offence, four years for two offences, and five years for three or more offences. In the Supreme and County Courts, a CCO can be imposed for up to five years in all circumstances.

CCOs cannot be imposed for certain serious offences, including murder and rape, committed on or after 20 March 2017. Since March 2017, the *Sentencing (Community Corrections Order) and Other Acts Amendment Act 2018* (Vic) classified certain serious offences as either Category 1 or Category 2. If an offender is sentenced for a Category 1 offence (such as murder, rape or large-scale drug trafficking), they must be given a term of imprisonment; if an offender is sentenced for a Category 2 offence (such as manslaughter, kidnapping or arson causing death) they may only be given a CCO or non-custodial sentence in certain circumstances listed in the Act.

CCOs came into effect in 2012 to replace Combined Custody and Treatment Orders, Home Detention, Intensive Corrections Orders and Community-Based Orders, all of which no longer exist.

***R v Klinkermann* [2013] VSC 65**

In 2013 Klinkermann was convicted of the attempted murder of his wife, Beryl, who had advanced Parkinson's and dementia, and could no longer communicate. Klinkermann gave Beryl, then 84, a sleeping pill, took several himself, and poisoned them both with carbon monoxide. They were discovered by a nurse and resuscitated.

Klinkermann was prevented from seeing his wife in palliative care, and was sentenced to an 18-month community corrections order. Justice Betty King said Klinkermann deserved "mercy," and that allowing a loved human being to live in pain was a "vexed question" that society would have to address. She said that the law protected human life at all cost, but that neither Klinkermann nor the community would benefit from him serving a jail term. She attached conditions including medical and mental health supervision to his order.

Imprisonment

Definition
Imprisonment is where an offender is detained in a state facility, known as a prison or jail, for a period of time set by the presiding officer and known as a 'sentence'. The offender loses her or his liberty.

Detail
Imprisonment is considered the most serious sanction that can be ordered in Australia, and is called the 'sentence of last resort': this means that it should only be given when all other sanction options are considered to be inadequate or inappropriate in the circumstances.

The *Sentencing Act* provides a scale of sentences, from Level 1 imprisonment (life imprisonment) down to Level 9 imprisonment (six months imprisonment). In the past, indefinite sentences have also been handed down by some state courts; in an indefinite sentence, the court is able to assess when it considers the offender safe for release. The offender is given no promise of release.

Otherwise, offenders will generally be given a 'head' sentence and a 'non-parole' sentence – also known as a ceiling and a floor. The top sentence is the maximum sentence they can be forced to serve, while the bottom sentence is the minimum time that must be served before the offender will be eligible for parole. Sentences for multiple offences heard at the one trial can also be given concurrently – meaning the offender serves multiple sentences at the same time – or cumulatively, meaning they serve them one after the other.

> ***R v Kevin John Carr* [1995] VSC 225**
>
> Carr was the first person in Victoria to be given an indefinite jail term. Once he had served his initial sentence he was not guaranteed release; instead, he had to apply for a review of the sentence at three-yearly intervals. He was convicted in 1995 of the rape of a 77-year-old woman at Spencer Street Station – over the previous 18 years he had received 57 other convictions, including jail terms for five separate instances of rape and sexual assault.
>
> At a review of his incarceration in 2009 he was refused release, and the chief judge of the County Court at the time, Michael Rozenes, said: "I am satisfied to a high degree of probability that he is still a serious danger to the community."

REVIEW/APPLICATION QUESTIONS – Criminal consequences

1. **Name the five aims of criminal sanctions.**
2. **Provide a definition of each aim of criminal sanctions, without using any of the words from your Q1 answer.**
3. **Describe three sanctions that could be given to an offender at the conclusion of a criminal trial. Provide one sentence of definition, and one sentence of additional detail.**

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Evaluation: Criminal consequences

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'. This has historically been a particular problem with sanctions: it is assumed, for instance, that imprisonment achieves punishment and deterrence, but often no reasons are given why; and students have failed to consider reasons why it may *not* achieve those things, too.

STRENGTHS	SANCTION	WEAKNESSES
Punishment: The offender suffers hardship by having to give money and receive nothing in return for it. Deterrence: The public can see that, if they commit the same crime, they will have to give up their money. This is general deterrence.	**Fines**	Protection: The offender isn't in any way removed from society or prevented from doing the harmful behaviour – as long as they can pay the fine for it. Punishment: Fines fail to create hardship for many wealthy offenders or corporations who do not materially miss the money paid in the fine. Some organisations, in particular, will save more money by offending than they will spend if they get caught; the same applies to many individuals who commit minor crimes such as traveling on public transport without a valid ticket.
Rehabilitation: The judge is able to select conditions that are most appropriate to the offender's circumstances and crime, with the aim of integrating them back into society successfully. Punishment: Conditions attached may include restrictions on movement and unpaid community work. The offender must give up some of their liberty, time and energy.	**Community Corrections Orders**	Protection: The restrictions on personal movement are much more flexible than imprisonment, and still allow the offender to live in society. They are still able to harm people. Denunciation: Because the outside public does not see a visible, external change in the offender's circumstances, they may feel that the offender's behaviour has not been publicly criticised enough.
Protection: The community is protected from further harm because the offender is removed from society. Punishment: The offender suffers the hardship of being separated from friends and family and losing their liberty.	**Imprisonment**	Deterrence: As of 30 June 2010, over half the prison population in Australia had been in prison before. Statistics collected by the Victorian Department of Justice show that 43.6% of prisoners released during 2016-17 returned to prison within two years (ie. by 2018-19). This data suggests that imprisonment does not achieve specific deterrence (or rehabilitation) – the number of offenders given CCOs over the same period who received another CCO within two years was 26.7%, by comparison. Rehabilitation: Programs in prisons are under-funded and many inmates choose not to participate. For those who do, however, the nett rehabilitative effect is still low, because the greatest risk for reoffending comes after release, when the offender faces limited employment and housing opportunities, and may be surrounded again by negative social influences. More than 85% of prisoners have not finished high school, and between 75-83% of prisoners were using unlawful drugs before going to prison.

REVIEW/APPLICATION QUESTIONS – Criminal consequences: evaluation

1. **For each of three sanctions, explain one aim of sanctions that is likely to be achieved, outlining *why* it is likely to be achieved.**
2. **For each of three sanctions, explain one aim of sanctions that is not likely to be achieved, outlining *why* it is not likely to be achieved.**
3. **Explain one of the purposes of sanctions and discuss which sanction most effectively achieves that purpose and why.**

Factors considered in sentencing

The law does not prescribe a fixed sanction or sentence for each crime, because the appropriate consequence will depend on a range of factors unique to each instance of criminal wrongdoing. Instead, legislation usually sets out a sentencing range, or a maximum sentence that can be given, and the individual judge or magistrate is able to use her or his discretion within that.

Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the range of factors that must be regarded by the court when sentencing an offender in Victoria. These include, but are not limited to, the following:

- The maximum penalty for the offence.
- Current sentencing practices.
- The nature and gravity of the offence.
- The impact of the offence on any victim of it.
- Whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which that happened or they indicated an intention to do so.
- The presence of any aggravating factor or mitigating factor concerning the offender or of any other relevant circumstances.
- Legislated 'standard sentences'. As of 1 February 2018, the courts must also take into account 'standard sentences': a numerical yardstick published by parliament for serious offences, where they prescribe what they believe to be the "middle of the range of seriousness" for that offence. As of the 14 offences prescribed by the end of 2020, the 'standard sentence' seems to be set at approximately 40% of the maximum penalty.
- Current sentencing practices for that offence – *except* for those offences where parliament has prescribed a 'standard sentence'. For those offences, courts may only look at sentencing practices dating back to when the standard sentence was set (therefore, no earlier than 1 February 2018).

In other words, the presiding officer tries to balance the specific facts of the offence with the circumstances of the offender, the victim, and the contemporary application of the law.

***The Queen v Brown* [2018] VSC 742 (29 November 2018)**

Brown was the first case in Victoria to sentence an offender under the standard sentence scheme. Justice Campion found that standard sentences were compatible with the existing 'instinctive synthesis' approach, but set precedent that Victorian Parliament's stated intention in passing the reform was irrelevant because it had not been written into the legislation.

The Parliament intended that standard sentences would increase the sentences given by judges, but Justice Campion found that "While sentences might rise as a consequence of courts considering the standard sentence as an additional sentencing factor, it is not an imperative to which I must have regard."

In Victoria, no factor attracts a set sentence increase or discount. For example, in South Australia, ss39-40 of the *Sentencing Act 2017* (SA) prescribe that a guilty plea entered within four weeks of a defendant's first court appearance attracts a sentence discount of up to 40%; the discount then decreases in increments, down to 10% for a guilty plea entered between arraignment and the commencement of trial. Victoria does not use this 'mathematical' approach. Instead, Victorian courts apply what is called an "instinctive synthesis" – meaning, they take all factors into account globally. The precedent for this is *Markarian v The Queen* (2005) 228 CLR 357:

> [T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

The four factors listed on the Study Design are the presence of aggravating factors, the presence of mitigating factors, the presence or absence of any guilty pleas, and the nature of any victim impact statements submitted.

Aggravating factors

Definition
An aggravating factor is a circumstance that increases the seriousness of the offender's act or the offender's culpability. The presence of aggravating factors may induce the judge or magistrate to impose a sanction at the upper end of the range for that offence.

Detail
Aggravating factors may include the following:

- The existence of pre-meditation, where the offender has deliberately pre-planned the crime.
- The use of a weapon, as opposed to a use of physical force.
- A particular and specific breach of trust by the offender in relation to the victim.

Sometimes an aggravating factor can be simply that the offender committed a crime while, at the same time, breaking a number of other laws.

Mitigating factors

Definition
A mitigating factor is a circumstance that diminishes, or in some way explains, the seriousness of the act or the offender's personal culpability. The presence of mitigating factors may induce the judge or magistrate to officially 'discount' the offender's sentence, or to impose a sanction at the lower end of the range for that offence.

Detail
Mitigating factors may include the following, for example:

- The age of the offender, being particularly elderly or particularly young.
- The offender being of previous good character.
- The offender showing remorse for their actions.

Exam tip: Answers should not talk about mitigating factors and aggravating factors as though it is impossible to have both of them operating at the same time. Most cases will involve both mitigating factors and aggravating factors.

'Good character' in child sex offence sentencing

The *Justice Legislation Amendment (Victims) Act 2018* (Vic) implemented a number of recommendations made in the Criminal Justice Report by the Royal Commission into Institutional Responses to Child Sexual Abuse. These included: "that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending."

In other words, if an offender gains access to a child *because* they are of good character and trusted in the community, and then abuses that child, their good character will *not* be allowed as a mitigating circumstance in their sentencing. The Attorney-General said: "Perpetrators who have used a position of power and trust, or their standing in the community, as part of the commission of these offences will no longer be able to use good character in the mitigation of sentences."

Guilty pleas

Definition
A guilty plea is where the offender pleads guilty to one or more charges, at any point before a verdict has been handed down for those charges. A guilty plea entered at an early stage of proceedings will induce the judge or magistrate to 'discount' the sentence, or impose a lower sanction within the range prescribed for that offence.

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

A guilty plea entered immediately before the verdict is handed down will not be treated the same as a guilty plea entered at a much earlier stage. This is because a late guilty plea saves less time, fewer resources and less stress than an early one, and it may indicate an offender pleading guilty to receive a discount and not because they had a genuine

good faith desire to take responsibility and reduce the negative impact of a trial. Evidence of genuine remorse is not required to receive a sentence discount, however.

The Court of Appeal provided what is currently the definitive statement on guilty pleas in the case of *DPP (Cth) v Thomas* [2016] VSCA 237.

> The law in Victoria has long been that for Commonwealth and State offences a sentencing judge must take into account a plea of guilty, regardless of whether or not it reflects or is accompanied by evidence of remorse or contrition.

Plea negotiations and sentence indications may be instrumental in obtaining a guilty plea before verdict.

Victim impact statements

Definition
A victim impact statement is a legal submission prepared by one or more primary or secondary victims to a crime, and given to the court during sentencing. It outlines to the court how the crime has affected that victim, and may also make requests of the judge or magistrate in relation to the sentencing of the offender. The presiding officer may take it into consideration when deciding the sanction.

Exam tip: Remember that victim impact statements are only taken into account *after* a finding of guilt or a guilty plea. They are relevant to sentencing – they are not evidence at trial.

Detail
Victim impact statements are permitted under Division 1A of the *Sentencing Act 1991*. They may be written or recorded, read out to the court by the victim, the prosecutor or a representative of the victim, or simply filed with the court and not read aloud. Supplementary material such as photographs, drawings and poems may also be included.

The content must relate to the physical, psychological, social and economic impacts of the crime on the victim, and the court may rule any part of the statement inadmissible if it fails to comply with the rules of evidence or is otherwise inadmissible. A primary victim – in other words, a victim who was directly injured or harmed by the offence – may prepare a victim impact statement, but statements may also be submitted by secondary victims. A secondary victim is someone related to a primary victim: for instance, a family member or close friend of a person injured or killed.

If no statement is made, the judge or magistrate will still consider the impact of the crime on the victim or victims; they will use evidence from the trial instead of a direct statement.

Rules of admissibility apply to victim impact statements, meaning that some parts of them may be inadmissible and not able to be taken into account by the sentencing judge or magistrate. In the past, this has resulted in sections of statements being declared inadmissible and 'redacted' in court, in front of the victims. In October 2018 the *Victims and Other Legislation Amendment Act 2018* (Vic) amended the law, allowing courts to receive VISs in their entirety, even if some parts are inadmissible, and allowing the court to ignore inadmissible or irrelevant parts of the VIS in sentencing without specifying which parts those are. Parties can still make submissions about admissibility, however.

REVIEW/APPLICATION QUESTIONS – Factors considered in sentencing

1. **How specific is legislation likely to be regarding the sanction or consequence that will be given in relation to each crime?**
2. **When deciding the precise sanction or sentence to hand down, judges and magistrates must have regard to a range of factors. Identify three of these, according to the *Sentencing Act 1991* (Vic).**
3. **Define 'aggravating factor'.**
4. **Define 'mitigating factor'.**
5. **Explain the similarities and differences between the concept of aggravating factors and the concept of mitigating factors.**
6. **Provide two examples of aggravating factors.**
7. **Provide two examples of mitigating factors.**
8. **Until what point in the trial can a guilty plea be entered?**
9. **What effect will a guilty plea have on sentencing?**
10. **Define 'sentence discount'.**
11. **Why is a distinction drawn between early guilty pleas and late ones?**

Application exercise: **Using your notes and the following guide on victim impact statements, prepared by the Victorian Department of Justice, answer the questions below.**
https://www.victimsofcrime.vic.gov.au/guide-to-victim-impact-statements-0

a.	**Provide a definition of 'victim impact statement' that focuses on using words other than 'victim', 'impact' and 'statement'.**
b.	**Who is permitted to give a victim impact statement to the court?**
c.	**Identify three pieces of information that a victim might choose to include in her or his statement.**
d.	**Provide one example of a matter that would likely be deemed inadmissible by a judge and not taken into consideration.**
e.	**What are some of the options for how a victim impact statement can be prepared and delivered?**

Evaluation: Factors considered in sentencing

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		WEAKNESSES
It is appropriate that the individual circumstances of the offender be taken into account when the most appropriate sentence is determined. Sanctions are offender-focused rather than victim-focused, so the history of the offender, the specific motivations they had when offending, the likelihood of them posing a threat to others in society and other relevant considerations should all influence the sentence that is given to them to make it more ***fair*** and appropriate. The best case scenario for society is if every offender reconsiders their actions and tries to make recompense for them. It is important, therefore, to take mitigating factors such as remorse and guilty pleas into account when determining the most appropriate sanction, because this rewards offenders for trying to make the situation better. The offender is rewarded for pleading guilty and taking responsibility for their actions and the ensuing trial, but is not punished for insisting on their right to the presumption of innocence by pleading not guilty. Pleading not guilty is not an aggravating factor, because an accused has a right to a ***fair*** trial.	**Aggravating and mitigating factors**	Allowing each individual judge and magistrate to take into account their own perception of aggravating and mitigating factors allows them to inject a significant amount of subjectivity into the decision. The sentences handed down may not be ***fair*** or ***equal*** across different offenders because of the differing ways in which the adjudicator interpreted their surrounding circumstances. Some factors have an impact on the final sentence that is mandated by legislation, even if it might be inappropriate in a given case. For instance, guilty pleas require a sentence discount to be given, even though one individual offender may not be pleading guilty out of a sincere remorse or wish to save the victim the pain of trial. Since guilty pleas are taken as mitigating factors regardless of whether there is remorse present, an accused party who insists on their innocence may feel as though they are being punished for asking for their right to a ***fair*** trial.
Any saving of emotional energy, time and money from what would otherwise be spent at a full trial is better than no saving. Defendants should all be encouraged to contribute to these savings, and should be rewarded when they do. The law takes into account the fact that early guilty pleas are more beneficial than late ones, and encourages judges and magistrates to reward them more meaningfully than late ones. Defendants are not encouraged to wait until the last minute.	**Guilty pleas**	The common law established in *Thomas* states clearly that early guilty pleas must be taken into account in terms of a sentencing discount *even if* there is no indication that the accused has genuine remorse for their actions. This rewards guilty pleas as tactical ploys to reduce the consequences that someone has to suffer for their wrongdoing, which can be thought to be a bad faith motivation. It is possible for a judge or magistrate to reward even a very late guilty plea with a sentencing discount, even though very little has been saved in terms of emotional energy, time or money. Since guilty pleas are taken as mitigating factors regardless of whether there is remorse present, an accused party who insists on their innocence may feel as though they are being punished for asking for their right to a ***fair*** trial. They may feel pressured into entering a guilty plea, even if they believe they are legally innocent, because they may feel threatened by the possibility of receiving a higher sentence.

The law has developed to be flexible in relation to the content and form of victim impact statements. They are not designed to be onerous or to add even more stress to the experience for the victim; instead, the victim is able to choose, with a significant amount of freedom, how they want to express themselves and what they want to say. This increases the victim's ***access***. The judge or magistrate is given the power to declare any part of a victim impact statement inadmissible if it contravenes the rules of evidence, or if the presiding officer fears it will otherwise unfairly prejudice the sentencing against the offender. These restrictions are in the interests of ***fairness***.	**Victim impact statements**	One of the unintended side-effects of victim impact statements is that they suggest that a crime against a victim is worse, and deserving of harsher punishment, if that victim is eloquent, able to appeal to the emotions of the court, and has money or social standing that was threatened by the crime. This unintentionally devalues the impact of crime on people who can't express themselves well, or have little money or social standing to be impacted. Allowing a victim impact statement to affect sentencing may be inappropriate, as the criminal law is focused on the wrongdoing rather than the effect of it – the effect of the wrongdoing is the focus of the civil law system. The 2018 reforms mean that victims are now allowed to read out their entire statement, including inadmissible sections, but now parties have no way of checking that the judge only took into account admissible parts, because the court no longer needs to disclose which parts were or were not relied on. This lack of transparency reduces ***access***, and also potentially diminishes ***fairness***. The victims also do not know which parts were deemed inadmissible and ignored.

REVIEW/APPLICATION QUESTIONS – Factors considered in sentencing: evaluation

Application exercise

Allowing the sentencing judge to take aggravating and mitigating factors into account can have unintended consequences: undesirable effects that were not intended when the law was adopted. Allowing aggravating and mitigating factors can permit a sophisticated offender or legal representative to 'play' the system and obtain a lower sentence for ticking procedural boxes – even if the crime was committed with malice and had a serious impact on the victim and society. Offenders can negotiate early guilty pleas that even avoid jail time, despite not having any remorse or sincere consideration for the experience of victims and witnesses. The leading precedent on mitigating factors instructs judges to reduce the sentence in response to a guilty plea "regardless of whether or not it reflects or is accompanied by evidence of remorse or contrition." Allowing mitigating factors was intended to take individual circumstances into account and encourage good attitudes and behaviours post-offence, but it can send the message that responsibility for crimes can be escaped by playing the game; taking into account aggravating factors was intended to create a more fair and appropriate sentencing system, but, for instance, making pre-meditation an aggravating factor sends the message that it's okay to kill if it's 'only' because you lack self-control when you're upset.

a. **The above answer is a sample of a discussion of unintended consequences: or, you could think of it as comparing the theory of how something should work with the practice of how it can work in real life. Using this as a sample, discuss the unintended consequences or real-life problems with taking victim impact statements into account when sentencing. To help you, below are the details of a podcast episode in which some of the unintended consequences of victim impact statements are discussed.**

Podcast: Undisclosed
Episode: *State v Jamar Huggins* **– Addendum 1 – Unintended Consequences**
Air date: 9 February 2017
Duration: 36 minutes 31 seconds

PROBLEMS AND REFORMS

Factors that affect the ability of the criminal justice system to achieve the principles of justice

There are a range of factors that can compromise the achievement of justice in the state criminal law system. The Study Design lists three of them:

- The costs of achieving justice and resolving criminal disputes.
- The time required to achieve justice and resolve criminal disputes.
- Cultural differences that can stand in the way of justice and complicate the resolution of criminal disputes.

Exam tip: Remember that the focus is on discussing the problem and *why* it is a problem. Be prepared to explain why the situation is undesirable, and how exactly it prevents fair, equal and appropriate use of the legal system by people in the community – and be specific about *which* people in the community, or what category of person.

Costs

Definition

Achieving justice and resolving a criminal dispute is a very expensive process. In order to defend themselves, an accused must usually obtain legal advice from a solicitor; pay for expert reports and expert evidence during the trial; hire a barrister to speak for them in court proceedings; fund their own transport, research, post and telephone costs, as well as pay for that of their lawyers; and often cope with time off work without pay. Sometimes an accused in a criminal case will be held on remand, which will exacerbate all of these.

Detail

In 2012 the then-federal attorney-general, George Brandis, said: "Unless you are a millionaire or a pauper [and therefore poor enough to qualify for some Legal Aid assistance], the cost of going to court to protect your rights is beyond you."

Specific factors that may contribute to the intimidating cost include the following:

- The labour-intensive nature of much legal work because of the growing complexity of the law.
- An adversarial system that encourages a "warrior mentality."
- An increasing move away from the standard use of scales of costs – scales of costs are set fees and hourly/daily rates that the courts believe should be charged by legal representatives, but lawyers can charge any amount above the scale that they choose.

Legal advice is gained through a solicitor in Victoria. A solicitor is the lawyer that meets with clients, provides legal advice, conducts research into the case, and files many of the necessary legal documents. Solicitors usually charge by the hour, split into smaller increments such as six minutes or 15 minutes. Solicitor fees vary wildly across the profession, but it is not uncommon for a junior solicitor to charge around $300ph, or a senior one to charge $500-$800ph. The Supreme Court Scale of Costs puts a solicitor's hourly rate at $402.00 as of the 2018-19 financial year (for attendance at court). In addition to their hourly fees, solicitors will also charge reimbursement for photocopying, making telephone calls, reading letters and emails, parking, transport, and other expenses – these are called 'disbursements'. For instance, the Law Institute of Victoria sets the baseline rate for sending an email formally acknowledging receipt of information (e.g. an email informing the client that documents are attached) at $34.70 per email (as of the 1 January 2019 Practitioner Remuneration Order).

Barristers are the lawyers engaged to present a case at trial. Senior counsel usually charge $8,000-$10,000 per day, and junior counsel charge around $3,000-$6,000 per day. The 2018 Supreme Court Scale of Costs lists a barrister's daily court rate at $8,421 for senior counsel and $5,614 for junior.

The principles of justice

- Fairness is compromised because good legal representation is out of reach for many accused, so they are unable to engage proper assistance for their defence or to give them legal advice.
- Equality is compromised because some members of the community will have access to better advice and a stronger defence than others.
- Access is compromised because inadequate legal advice and support means reduced meaningful engagement in the system.

Time

Definition

Delays can affect the ability of people to use the legal system because they may want closure and to get on with their lives. Criminal defendants can also be compelled to plead guilty because they are not financially or emotionally able to defend themselves over a long period of time, and long delays can impair the ability of witnesses to give accurate evidence, hampering both the prosecution and the defence in the presentation of their case.

At the same time, however, rushing parties into resolution may prevent them from being able to prepare their best case thoroughly and may mean they are not fully ready for trial. Since the trial in the 'adversary' system is one continuous event, it is not usually possible to postpone a trial until a later date if it appears some evidence has not been found or prepared thoroughly; similarly, if a party rests their case before they discover new evidence or legal arguments, it is usually not possible for them to reopen it.

Detail

In 2019 the Australian Productivity Commission, *Report on Government Services* published the average time taken in the 2017-18 financial year to resolve criminal matters through the Victorian courts in the first instance, from commencement to consequences post-verdict:

TIME	Supreme Court	County Court	Magistrates' Court
</= 6 months	0%	0%	74.7%
</= 12 months	69.5%	82.1%	90.7%
</= 24 months	92.7%	97.6%	0%

Victorian higher courts do compare favourably with other, similar, jurisdictions, however. For example, the *Report* also showed that 41.8% of NSW Supreme Court matters finalise within 12 months; as is shown in the table above, however, the number is 69.5% in the Victorian Supreme Court. In the NSW District Court (County Court level), 22.1% of matters finalise within 12 months; in the Victorian County Court the figure is 82.1%.

The concern with inappropriate delays is reflected in the oft-quoted statement from British politician, William Gladstone (1809-1898): "Justice delayed is justice denied." There are many reasons for criminal and civil delays, including criminal committal hearings, the increasing complexity in law and evidence, the requirement for oral examination of witnesses, and the time required for appeals.

- The busiest court in the state is the Magistrates' Court. According to the 2018-19 Annual Report, almost 200,000 new matters were commenced in 2018-19, and approximately 150,000 of those were criminal. Total listings for those criminal matters, including bail hearings, committal hearings, guilty pleas and other hearings, were 660,262. The Court finalised 80.9% of matters within six months, and finished the year with 4,251 matters that had been ongoing for more than 12 months.

- The increasing complexity of evidence, often brought about by enhanced technology being applied to evidence and investigation, creates longer trials. More evidence overall is presented, but complex evidence also takes longer to adduce: expert witnesses must usually be called, and the evidence must be explained piece-by-piece so that the judge and jury understands it.

- According to the Annual Report of the County Court, in 2018-19 a total of 5,393 criminal matters were commenced (including appeals), and 1,186 were committed to trial with a plea of not guilty. Of the 5,364 matters finalised, only 332 matters were finalised at trial with a verdict. Because in March 2019 committal proceedings were abolished for sexual offences involving children or complainants with a cognitive impairment, the County Court will now conduct pre-trial cross-examination of witnesses. The Annual Report states that "these reforms will increase the number of hearings in the Division and therefore impact on the Court's judicial resources and time."

- In the 2017-19 two-year Annual Report of the Supreme Court, the Court reported that it had 32% of matters pending longer than 12 months, and 14% of matters pending longer than 24 months.

- In the 2009-10 financial year Victoria had the largest backlog of criminal sentencing appeals of any state or territory in Australia – the Supreme Court peaked at over 650 appeals waiting to be heard, but in the 2009-10 year the Court had only heard 506 matters. To try to deal with this, in February 2011 the Court of Appeal implemented appeals reforms including reducing the number of sitting justices to two per case from three, and hiring another Judge of Appeal, taking the number from eleven to twelve. The Court also began managing appeals more closely, resulting in 80 cases being dropped for failure to comply with directions, and the Court permitted judges to begin deciding on the papers (ie without oral arguments) if leave to appeal should be granted. Pending criminal appeals decreased to 170 in the Court of Appeal in 2016-17, the median time to resolve appeals against conviction halved from 19.4 months in 2010-11 to 9.5 months in 2016-17, and the median time to resolve appeals against sentence more than halved from 12.5 months in 2010-11 to 5.5 months in 2016-17 (according to the first and second reports into sentencing appeals in Victoria, from the Sentencing Advisory Council).

The concern with the time taken to resolve disputes is not that any time is taken at all, or even that this time is sometimes long: it is important to invest time into resolution in order to achieve a fair outcome, arrived at as a result of evidence collected with integrity, and full and proper preparation. The primary concern is when the length of time required to resolve a dispute goes beyond what is reasonable or appropriate.

The principles of justice

- Fairness is compromised because delays of months or years in resolution have a significant impact on the life, and physical and mental health, of the accused, the victim and their families, and the quality of evidence degrades over time.
- Equality is compromised because delays will not impact on every accused the same way.
- Access is compromised because delays can encourage criminal defendants to plead guilty; the accused may also exhaust their funds before the end of the case, and lose their ability to properly defend themselves.

Cultural differences

Exam tip: In the Study Design, the problem of 'cultural differences' is listed specifically in relation to the criminal justice system. Cultural differences will also impact on the effectiveness of the civil justice system, but this is outside the required scope of the course.

Definition
The culture that surrounds you will influence how you see the world, what you expect of your government and justice systems, how you interact with others and expect them to treat you, and even how you define justice. Every place – a country, a suburb, or even a single organisation or family – will have a culture that is determined by what is average or most common, but also by how much diversity is found there.

The criminal justice system tries in a number of ways to accommodate difference. Despite this, it is still a system founded primarily on a culture of European and UK heritage, westernised education extending to a tertiary level, patriarchal structures, Judeo-Christian religious beliefs, and middle-class incomes. This means it is less compatible with people who do not share the same culture.

Detail
Problems resulting from cultural differences in the criminal justice system include a lack of diversity in judicial members, a discriminatory or inappropriate treatment of Indigenous defendants and victims, and opposition from members of the public who are resistant to changes based on cultural difference. Examples of this include the following:

- In 2008, researchers Kathy Mack and Sharyn Roach published the results of their eight-year study into Australian judges, conducted through the Magistrates Research Project and the Judicial Research Project run by Flinders University. The researchers paraphrased their findings: "To sum up, larger proportions of judges, compared with Australians generally, are male, older, have grown up in a large city, identify as Australian, have no religious affiliation, attended a private or Catholic school and are married/partnered."

- The Australian Human Rights Commission published a fact sheet on 'Human rights and Aboriginal and Torres Strait Islander peoples' in 2009, in which it summarised: "On a daily basis, Indigenous peoples live with the consequences of Australia's failure to protect their basic human rights, and continue to experience racial discrimination in many spheres of life. There are clear differences between the experiences of Indigenous and non-Indigenous people in Australia across all indicators of quality of life. Indigenous people generally experience lower standards of health, education, employment and housing. They are over-represented in the criminal justice system and the care and protection systems nationally compared to non-Indigenous people." The statement remains true.

- In a 2018 matter, a criminal trial was adjourned three times because an appropriate Portuguese interpreter could not be found. Eventually the case was dealt with summarily when they charges were reduced and the offender was released on a good behaviour bond.

Because culture is connected so strongly to identity, the public often resists changes based on cultural reasons – cultural changes in the legal system can make people feel like their identity is under attack, or the identity of their community or nation. This can make it difficult for the justice system to overcome cultural differences and problems associated with cultural differences.

The principles of justice

- Fairness is compromised when the structure of the justice system is inappropriate for entire sections of the community, and is inappropriate for their needs – or, at worst, when it increases their disadvantage.
- Equality is compromised when the structure of the criminal justice system, including features such as the rules applied in it and the values on which it is based, gives some people a better experience of justice than others.
- Access is compromised when rules, procedures, values and systems in the justice system prevent some people from using or understanding the system, or prevent some people from feeling respected, valued and comfortable.

Recent reforms

A reform to the criminal justice system involves a change to a system, process or rule. It doesn't include a change to a specific law, making a new behaviour unlawful or legalising an existing unlawful one. A reform to the legal system is something bigger: it relates to the way in which disputes are resolved, not the specific laws and behaviours on which the disputes are based.

> **Exam tip:** Avoid specific changes to individual laws. Try instead to ask what criminal procedures or dispute resolution body or institution is being changed by the reform – if you cannot identify an entire procedure or an entire institution, your reform is probably not part of the system of dispute resolution in a wider sense.

For a change to be 'recent', it must have been made within the last four calendar years. Each recent reform in this text will therefore state the year it ceases to be 'recent', to remove confusion. You should make sure you can do the same with any additional reforms you select from other resources.

> **Exam tip:** Reforms to the legal system were required knowledge on the previous Study Design, too. A common error in examinations was knowing the name of the reform, but not knowing any detail on how it was or would be implemented.

Criminal and civil justice systems

Disallowance of improper questions

The last year this reform will be considered recent is 2023.

Definition
In 2019 the changes made to s41 of the *Evidence Act 2008* (Vic) by the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) came into effect to disallow improper questions for all witnesses giving evidence. Prior to this change, the court was given discretion over whether it disallowed the question, and s41 only related to 'vulnerable' witnesses. The reform removes the court's discretion, making it mandatory that improper questions be disallowed, and it expands the rule to cover *all* witnesses.

Detail
In August 2016 the Victorian Law Reform Commission released its Victims Report into *The Role of Victims of Crime in the Criminal Trial Process*. Recommendation 18 said that Parliament should amend the law to disallow all questions that were misleading, confusing, harassing, intimidating, humiliating or repetitive, and submitted that there were *no* circumstances in which an improper question was appropriate. The Commission's report was limited to the criminal justice system, but the wording of the reform applies broadly to the civil justice system, as well.

The reform brings Victoria in line with the provisions already adopted in New South Wales, Tasmania and the Australian Capital Territory – since the Uniform Evidence Act was adopted across Australian in 2008, individual states and/or territories have made changes.

The amendment defines an 'improper question' as any question that:

a) *is misleading or confusing; or*
b) *is unduly annoying, harassing intimidating, offensive, oppressive, humiliating or oppressive; or*
c) *is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or*
d) *has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).*

The court has a duty to intervene even if no party objects to the question, but if the witnesses chooses to answer the question, their answer is admissible even if the question is not. The Australian Law Reform Commission noted that this means the reform doesn't open up a new avenue of appeal for accused persons (in their *Final Report into the Uniform Evidence Law*).

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
The previous rule, applying only to 'vulnerable' witnesses, had been cited with approval by judges. Spigelman CJ said in *R v TA* (2003) 57 NSWLR 444: "Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of the accused. That role is perfectly consistent with the requirements of a ***fair*** trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance." The reform merely expands this protection. Witnesses cannot accidentally open up new appeal avenues by answering the question before it has been disallowed, or because they feel they want to give an answer. If a question is improper, then it shouldn't be allowed for any witness. The reform achieves ***equality*** across witnesses and ***fairness*** for witnesses who aren't considered 'vulnerable'. Canadian judge the Hon Donna Hackett spoke in support of these kinds of rules, saying that "If judicial impartiality means that judges should ignore ***equality*** issues unless counsel raise them, then 'judicial impartiality' will be a barrier to the protection and enforcement of ***equality*** rights." ('Finding and following "the road less traveled": judicial neutrality and the protection and enforcement of equality rights in criminal trial courts' (1998) 10(1) *Canadian Journal of Women and the Law*)	Concerns have been raised that the duty on the court to disallow questions even if no party has objected to it requires the judge to lose her or his impartiality and 'enter the contest' of the trial, impairing the accused's right to a ***fair*** trial. Some of the ways in which a question could be deemed 'improper' require the court to make a subjective judgment – such as the tone used in asking the question. Different judges could make different judgments, resulting in ***inequality*** across cases. A witness may give an answer in response that is unfairly prejudicial against the accused, but because the Act says that the witness's answer is admissible it may prove more difficult for an accused to appeal on the basis of their answer, thereby reducing their ***access***.

Criminal justice system

Abolition of committal hearings in some matters

The last year this reform will be considered recent is 2023.

Definition
In March 2019 the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) came into effect, abolishing committal hearings for cognitively impaired complainants and child complainants in sexual offence matters.

Detail

The Amendment Act added s100(f) to the *Criminal Procedure Act 2009* (Vic): "A committal hearing is not to be held in a committal proceeding to which section 123 applies." Section 123 relates to sexual offences where the complainant is a child or has a cognitive impairment.

Committal proceedings will continue as normal insofar as the hand-up brief will be served on the accused, and the accused will gain access to copies of all crime reports, witness interview notes and transcripts, and all audio and/or visual material, for instance. There will also be a filing hearing, where a timetable will be set for the prosecution to disclose material and evidence to the accused; and a committal mention will be held, which is a preliminary hearing where the accused can dispute evidence and make a submission on whether the evidence is of sufficient weight to support a conviction on the charges. But no committal will be held beyond this, and therefore no permission to examine witnesses at committal stage will ever be given.

Note that this section only applies if the complainant is still a child when the *proceedings* commence – it is not dated from the time of the offence.

Section 123 was also reformed to prohibit cross-examination of these complainants in *any* proceeding in the Magistrates' Court, including if the matter is listed for summary resolution at a hearing.

Evaluation

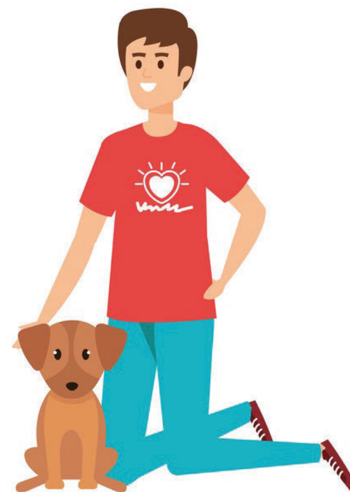
ARGUMENTS IN FAVOUR	CONCERNS
Victorian Attorney-General Martin Pakula said during his second reading speech: "The Bill amends the CPA to move committal hearing cross-examination to the trial court. This will enable the trial court to conduct more case management of these matters and make more efficient use of resources, given that trial counsel will be able to identify and narrow the issues in dispute. This improved process will assist in reducing delay and allowing complainants to devote themselves to recovery. However, it will not limit an accused person's ability to cross-examine witnesses on relevant matters." (21 June 2018) So, a ***fair*** trial for the accused but also less traumatic ***access*** for the complainants.	Rather than time being saved, the burden will merely be shifted to the higher courts, which are more intimidating and cost more time and resources. Determinations at committal will not be able to be made properly in all cases if the complainant themselves cannot be heard from or asked clarifying questions. The accused could be ***unfairly*** committed for trial.

Support dogs for victims and witnesses

The last year this reform will be considered recent is 2023.

Definition
In January 2018 the Victorian Office of Public Prosecutions reported positive results from its 12-week support-dog trial as an alternative arrangement for witnesses who are considered 'vulnerable'. It announced that it would be continuing the programme – two dogs are now available for approved witnesses, five days a week as of 2019.

Detail
Alternative arrangements can be made under Part 8.2 of the *Criminal Procedure Act 2009* (Vic) for witnesses in matters involving sexual offences, family violence, sexual exposure, or public behaviour that is obscene or threatening.



If a support dog is approved, it can work with victims and witnesses in any situation where the person is not able to be viewed by the jury, including pre-trial, sentencing and police interview stages as well as trial. If witnesses are giving evidence from a remote location at the OPP offices, for instance, they can choose to have the dog with them off-camera. Support dogs can also attend case conferences, and can wait with witnesses before they give evidence.

Solicitor for Public Prosecutions John Cain explains that the criminal justice system can be particularly difficult and daunting for some witnesses: "Most people don't encounter the criminal justice system in their life, but for complainants of sexual assault that one time can be very traumatic. At the extreme level people are upset, crying, very anxious, fidgety; they can't sit in the one place for long and they are overwhelmed by the whole process."

There were two support dogs working with the OPP as of the end of 2019. They had been trained over 18-24 months to recognise signs of distress and anxiety in humans, and to offer comfort by doing things such as lying on a witness' feet, licking their hands or resting their heads in the witness' lap. The original support dog Coop had been known to lick the tears off a victim's face.

Support dogs are used in the United States; this is the first time the programme has been tried in Australia.

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
One witness said that the first time she gave evidence she was so overwhelmed she couldn't focus on the questions, but the second time she sat with Coop and "The moment Coop came running in she went to me and it felt more special than anyone else there because Coop was there just for me." When she began to get anxious she patted Coop: "it pulled me out of the situation so I was able to focus on the facts and not the emotions." Coop's trainer, Tessa Stow, says: "She gives a sense of kindness, normalcy in a place which is repeating a trauma most clients do not want to relive." The dogs are kept out of sight of the jury to maintain the integrity of the trial, and to avoid prejudicing jurors. For instance, in the remote witness facility, the dog lies on a mat next to the witness, out of view of the camera. Witnesses even reported taking their shoes off so they could feel the dog at their feet. During the pilot, one complainant informed the OPP that she could not bring herself to give evidence in court and was going to pull out. She changed her mind and came in to give evidence once she was told that Coop would be there, and that she would stay with her for the duration. Victorian Attorney-General Martin Pakula argues that using support dogs increases efficiency and causes witnesses to take fewer breaks: "It means that the process can be done more quickly and it means that witnesses are in a better frame of mind […] they do help to make the process less stressful for witnesses."	It is possible that the presence of the dogs could split the attention of the witness, and draw their attention away from the remote video camera and therefore the jury. The witness's actions in interacting with the dog could be visible to the jury, even if the dog themselves is not. Because dogs are living creatures, it is difficult to scale the programme up to satisfy the needs of a greater number of witnesses. Maintaining trained animals is more resource-intensive than supplying screens or videolinks, for instance. Currently, the support dog programme is relying partly on profits from dog merchandise – this is not a reliable stream of funding, and is unpredictable over time.

Recommended reforms

Recommended reforms must also apply to the systems and processes for dispute resolution, not simply to individual laws – this is the same as you encountered in the 'Recent reforms' topic above.

For a change to be 'recommended', it must have been publicly advised by an organisation or individual somehow connected to the legal system: for instance, by the Victorian Law Reform Commission, a member of parliament, a human rights organisation, or a current or former judge. Each recommended reform in this text will state the source of the recommendation. It is not enough if the reform is merely something you have thought of, even if it is a valid change.

Exam tip: For each recommended reform, make sure you note down at least one person or institution, connected to the legal system, that recommended it. This is very easy to find online, if the resource you were using did not give you this information.

Criminal and civil justice systems

Juror eligibility

This reform was recommended by the 2010 Victorian Government, under Attorney General Rob Hulls.

Definition

The 2010 amendment bill to the *Juries Act 2000* (Vic) was an attempt to increase jury eligibility by approximately 28,000 people (according to then-attorney general Rob Hulls' second reading speech), by reducing the occupational groups that are ineligible for service, and by halving the waiting period of ineligibility after a person leaves their job or retires. It should be reintroduced and passed.

Detail
The Bill passed the Legislative Assembly easily, but was not considered quickly enough in the Legislative Council and it lapsed as a result. It was never voted down or rejected by Parliament. It, for instance, made administrative staff and human resources staff working for a law firm eligible, because they are not involved in the actual legal work of the firm; it also reduced the waiting period from ten years to five years for a judge, lawyer, or other ineligible person who has left their job.

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
Parties would be given a ***fairer*** trial because the jury would be more truly representative of a cross-section of the community. A wider variety of views and backgrounds would be reflected in the verdict. The verdict given by the jury could be more reliable, and less likely to be ***unfair*** and flawed, if people with legal experience and knowledge were on the jury.	If the jury is improperly influenced by the views of jurors with recent employment in the legal system the defendant may not be given a ***fair*** trial. Some people currently excluded may genuinely not be able to perform the task of a juror, and may therefore create an ***unfair*** trial.

Videolink evidence

This reform was recommended in 2013 by a team of researchers from universities across Australia.

Definition
In May 2013 the report of a study into the quality of court videolinks was released by a team of experts from universities such as the University of Melbourne, the University of Technology in Sydney, and the University of Canberra. It was called 'Gateways to justice'. The report made a number of recommendations to improve the quality of videolink evidence.

Detail
The team analysed the design of rooms used by witnesses, experts and defendants to give their video evidence, as well as what happened in the court to introduce the video evidence and what happened immediately after it. The researchers found that many courts use videolinks with poor lighting, poor camera angles and technical glitches, and that this significantly affected the justice outcomes. Currently most videolinks are set up in cramped rooms with no natural light and a camera on a moveable trolley; the team recommended that spaces be more private and comfortable, and that attention be paid to the framing of the witness so that they looked in the court like they were being treated with respect and that there was nothing distracting from their evidence.

In 2018-19 the Victorian Government began rolling out an upgrade to audio-visual technology in Supreme Court courtrooms, and provide 148 videoconferencing units to Victorian courts. The selective rollout of improved facilities is scheduled to be completed by June 2021.

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
Poor quality videolinks have been shown to significantly impair the ***fairness*** of the trial, because they prevent judges and juries from paying full attention to the evidence being given, and sometimes subtly work to undermine the credibility of the witness. Fixing this would immediately contribute to increased ***fairness***, and ***equality*** across different cases using videolinks.	Videolinks are being used more and more frequently in courts, particularly since the 2020 Covid-19 lockdowns – so much so, that judges no longer need to give directions to juries, telling them to consider videolink and audiolink evidence with the same respect and weight as in-person evidence. It will be very difficult to ensure that every videolink is conducted in optimum and consistent conditions.

Criminal justice system

Intermediaries programme

This reform was recommended in 2016 by the Victorian Law Reform Commission, and then supported by the 2018 Victorian Government.

Definition
On 1 July 2018 the Victorian Government launched the pilot intermediaries programme. Intermediaries are communication specialists who help vulnerable witnesses to give their best evidence. Eligible witnesses include both child complainants and complainants with a cognitive impairment, in sexual offence matters and homicide matters.

Detail
The intermediary can assist by performing some of the following functions: assessing the witness's communication style and any specific assistance required; describing the communication needs of the witness to the investigating police officer, legal practitioners, and judicial officers, so the witness can participate in the judicial process; making recommendations to the person questioning the witness and the judicial officer in the case on how to frame a question to get the most reliable answer; and writing court reports on the witness's communication needs and practical strategies to meet and manage those needs.

The intermediary is not there to give advice or advocate for the witness, and is not a support person, an expert witness, a counsellor or an interpreter. They are instructed to never express an opinion on the truth or reliability on anything the witness says, to avoid entering into discussions, and to never give advice.

In 2016 the Victorian Law Reform Commission ('VLRC') tabled its report *The Role of Victims of Crime in the Criminal Trial Process*, in which it recommended 51 actions to minimise trauma to victims caused by their participation in the criminal justice system. Recommendation 30 was the establishment of an intermediary programme, based on the Witness Intermediary Scheme in England and Wales. In August 2017 the Royal Commission into Institutional Responses to Child Sexual Abuse recommended a similar scheme.

The pilot runs until 30 June 2020. As of the end of 2020, no announcement had been made regarding the continuation or evaluation of the pilot.

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
The Government has stated that the programme is aimed at increasing "***access*** to justice" for witnesses who might be considered at risk or vulnerable, and helping them to provide their best evidence. The Government has stated that the programme aims to decrease the trauma experienced by certain classes of witness, increasing their ***access*** to the system.	The intermediary should not diminish the ***fairness*** of the proceedings, as they are instructed never to give their opinion or their own evidence, and not to act as a counsellor or advocate for the witness. The criteria for eligibility may be too narrow. If a witness is a child, or has a cognitive impairment, it is unclear why they do not require the help of an intermediary just because the case isn't a homicide offence or sexual offence.

Removal of committal hearings

This reform was recommended by the 2018 Office of Public Prosecutions, and in 2020 by the Victorian Law Reform Commission.

Definition
In October 2018 the Victorian Office of Public Prosecutions published a policy paper, proposing that committal hearings be replaced with a more complete hand-up brief being provided to the accused, and more active case management by the OPP to determine the charges that should proceed to trial or summary hearing (if the offence can be heard summarily). In 2020 the VLRC essentially agreed with this proposal, and recommended that the test for committals be

abolished, and that the committal hearings should be replaced by an "issues" hearing in the Magistrates' Court (except for matters within the exclusive jurisdiction of the Supreme Court, which should be filed directly with the Supreme Court).

Detail

Background data

- In 2018 contested committals were abolished in NSW. Prior to this, around 1% of matters were discharged at committal. In Victoria, around 2% of matters were discharged at committal between 2008 and 2018 (according to figures from the OPP).
- In 2017-18, nineteen direct indictments were filed by the OPP.
- The OPP has published its own position paper, arguing that committals should be replaced with OPP case management.
- In 2012 the Baillieu state Liberal Government consulted with the courts, the Director of Public Prosecutions and Victoria Legal Aid regarding what then-attorney general Robert Clark called the "unnecessary examination of cases" at committal, and the associated costs and delays.

OPP proposal

The OPP proposed that the committal process be replaced in part by an Issues Hearing followed by a Case Management Hearing. At the Issues Hearing, the court would ensure that the prosecution case was properly disclosed, and the parties could engage in plea negotiations. The Issues Hearing would be conducted 'without prejudice'. Following this, a Case Management hearing would be held, where plea negotiation would occur, the prosecution would confirm that only charges with a reasonable degree of success were being pursued, and the accused could cross-examine selected witnesses if the magistrate gave leave. It would not be left to the magistrate to determine whether sufficient evidence existed to commit the matter to trial, however.

VLRC inquiry

On 24 October 2018 the Victorian Law Reform Commission was given a referral to review and report on the Victorian committal system. The Commission was asked to "recommend any legislative, procedural or administrative changes to Victoria's committal procedure that could reduce trauma experienced by victims and witnesses, improve efficiency in the criminal justice system and ensure fair trial rights." The Commission was asked to consider whether Victoria should "maintain, abolish, replace or reform the present committal system", ways of improving early disclosure in indictable matters, whether and how witnesses ought to be examined before trial, and best practice for supporting victims among other topics.

The VLRC was given three reform objectives: reducing trauma experienced by victims and witnesses; improving efficiency; and protecting the right to a fair trial. The Commission reported back in 2020, with the recommendation that an issues hearing replace the current committal hearing. The magistrate would not apply a test to the evidence, but would instead exercise case management powers and write up a statement of issues to inform the higher courts of any matters that arose. As in the OPP's proposal, more responsibility would rest with the prosecution to disclose relevant evidence to the accused in a timely manner, and choose to discontinue cases with weak evidence.

The Magistrates' Court is in favour of retaining committals, noting in its submission to the VLRC how the 2007-08 Annual Report of the Tasmanian Director of Public Prosecutions and a 2006 speech by Chief Judge Antoinette Kennedy ('Getting Serious about the Causes of Delay and Expense in Criminal Justice') both said that removing committals in the two states did not deliver greater efficiency: instead, "all that was achieved was to transfer delays from the magistrates' court to the higher court." In the year following the abolition of committals in Tasmania, for instance, the number of accused persons committed for trial in the Supreme Court increased from 501 to 683 – this was largely because the number of people who normally entered plea bargaining as a result of seeing evidence against them at the committal were no longer doing this.

The WA case of *R v Le* [2018] WADC 57 also supported the observation that the loss of an independent judicial officer forcing disclosure of evidence was significant, because "Experience in other jurisdictions where committals have been abolished shows that no matter the legislative requirements for disclosure, the lack of it is a major cause of trial delay and length"; and "What police investigators consider as relevant or coming within the terms of a disclosure request is too often capable of interpretation." The case of *Le* needed to be aborted because of lack of disclosure, after a 10-week trial swelled to over seven months.

Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
Removing committals would save the accused money in representation, giving them better ***access*** to justice at trial stage because more funds would remain for trial representation. Removing committals would give other matters increased ***access*** to justice because it would decrease court backlog overall – mainly in the Magistrates' Court. In 2012 chief crown prosecutor Gavin Silbert said committals were abused by solicitors who wanted to delay court proceedings for illegitimate reasons, and said there should at the very least be tighter restrictions on the cross-examination of witnesses at committals: "It's either that or they should be abolished. The system is definitely being abused and costing a lot of public money."	Removing the committal stage could actually increase costs and delays at higher levels. Any delays in the County or Supreme Courts are also more impactful and expensive than in the Magistrates'. This would reduce ***access*** not only for the accused, but also for parties in other delayed cases. In its 2019 submission to the VLRC, the Magistrates' Court said that the OPP proposal to conduct case management hearings to weed out its own weak cases seemed ineffective, because it ought to do this in-house at an earlier stage: "The Court notes that this is a puzzling proposal as one would expect that charges without a reasonable prospect of conviction would not be pursued by the Crown in any event." The experience of Western Australia and Tasmania shows that removing committals decreases the effectiveness of evidence disclosure by the prosecution to the accused, reducing the ***fairness*** of their trial and decreasing ***access*** by introducing delays.

REVIEW/APPLICATION QUESTIONS – Problems and reforms

1. **Give a definition of 'costs' as a possible barrier to justice.**
2. **Provide two specific examples of costs acting as a barrier to justice.**
3. **Give a definition of 'time' as a possible barrier to justice.**
4. **Provide two specific examples of time acting as a barrier to justice.**
5. **Give a definition of 'cultural differences' as a possible barrier to justice.**
6. **Provide two specific examples of cultural differences acting as a barrier to justice.**
7. **Outline two problems faced by individuals using the legal system through the courts.**
8. **Outline two problems encountered by individuals when using criminal pre-trial procedures.**
9. **Outline two problems faced by individuals when involved in a trial.**
10. **Outline two recent changes to the criminal justice system that helped to improve the achievement of justice, and explain how they achieved that.**
11. **Outline two recommended changes to the criminal justice system that would help to improve the achievement of justice, and explain how they might achieve that.**
12. **Explain how one problem faced by individuals when using the legal system limits the effectiveness of the system, and outline one recent change that has attempted to overcome the problem you have identified**.
   a. **Show how this recent change achieves one or more of the principles of justice.**
13. **Explain how one other problem faced by individuals when using the legal system limits the effectiveness of the system, and outline one recommended future change that could overcome that problem.**
   a. **Show how this recommended change would achieve one or more of the principles of justice.**