Chapter 2
Determining a Criminal Case

2.1 The role of institutions available to assist an accused

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

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

Victoria Legal Aid

Core definition

Victoria Legal Aid (VLA) is an independent statutory authority established under *the Legal Aid Act 1978* (Vic), funded by state and Commonwealth governments to provide legal aid to Victorians who cannot afford their own lawyer. 'Legal aid' is defined broadly as legal education, information, advice, and representation.

Detail

The organisation is funded by government but operates independently of government. VLA's objectives, outlined in s4 of the *Legal Aid Act 1978*, are to:

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

> ***From the Victoria Legal Aid website, 'What We Do':***
>
> Victoria Legal Aid helps people with their legal problems.
>
> We provide free legal information and education to all Victorians, with a focus on prevention and early resolution of legal problems. We prioritise more intensive legal services such as legal advice and representation for people who meet eligibility criteria, based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We also conduct strategic litigation to change policies and processes and remedy legal problems for individuals and the broader community.

VLA duty lawyers for criminal proceedings

Every person who is arrested, taken into custody and charged with a criminal offence has free access to a Legal Aid duty lawyer at the Magistrates' Court. All criminal offences commence in the Magistrates' Court, and Legal Aid has lawyers stationed at the courts to support accused people.

The priority of the duty lawyers is to provide legal assistance to people in custody who have been brought to court for the first time on a charge. The duty lawyer will provide legal advice, and make an application for bail if necessary. If the accused has their own lawyer, the duty lawyer will contact them to advise that their client is in custody. The VLA Duty Lawyer Guidelines of 2016 state that every person in custody is eligible for advice, and that no means, or income, test will be applied.

Duty lawyers can give in-court advocacy for uncontested hearings if the accused falls into a priority group or is facing a

"significant charge." Priority groups include people experiencing homelessness or who have an intellectual disability, and significant charges include criminal damage and possessing a prohibited weapon.

A 2017 study into VLA duty lawyer services reported a magistrate as saying, "I'm aware that some of the duty lawyers are under enormous pressure and have to stretch. They have an enormous caseload to get through each day. I sense that they're not adequately resourced. I sense there aren't enough of them." ('In Summary: Evaluation of Victoria Legal Aid's Summary Crime Program', Law and Justice Foundation of NSW, June 2017)

Grants for legal representation

Where a person needs ongoing representation for their criminal matter, they must apply for a grant of legal assistance. VLA does not have unlimited funds, and grants must meet eligibility criteria. VLA will consider what the case is about, the merits of the case, and the claimant's financial situation. VLA is able to fund most criminal matters, but they reject claims based on the merits of the accused's case and the accused's financial means.

- Firstly, VLA will assess the merits of the case. VLA will look at things such as whether the accused's defence or appeal has reasonable prospects of success, whether it would be in the interests of justice to fund the case, whether the case has any broader public benefit, and what the alternatives would be for the accused if they did not fund it.
- Secondly, VLA will test the financial ability of the accused to pay for part or all of their own representation, using the 'means test'. Children and people who are before court relating to a mental impairment supervision order are not means tested, but anyone else must show that they earn less than $360pw and have relevant assets worth less than $1095 to qualify for full funding (figures as of 2020). This test is difficult to pass, given that the poverty line in Australia is $457pw (as of 2020). The means test ensures that the limited amount in the Legal Aid Fund is allocated to people who cannot otherwise afford legal representation, and a cap is placed on each grant.

A person who is eligible for a grant of legal assistance can be represented by a VLA lawyer, or by a private lawyer who has been appointed to the VLA criminal practice panel. 76 per cent of criminal law grants were assigned to private legal practitioners in this way in the 2018-19 financial year, totaling 34,478 grants. VLA works with over 290 private firms and 1,895 barristers across Australia. In the same period, 10,031 grants of legal assistance were given to clients being represented by an in-house VLA lawyer, and 671 were given to clients being represented by a community legal centre. According to its Annual Report, in 2017-18 VLA spent $31.8m on grants of aid for indictable matters, and $2.2m on grants of aid for committals.

Having a mix of public and private practitioners providing legal aid representation provides a variety of choice for clients who are reliant on public funding. It also ensures that the quality of publicly funded legal advice is commensurate with that of the legal advice accessible to other accused people who have the means to pay for their own defence. This helps to ensure that there is no disparity in the quality of advocacy or the expertise provided to accused people who need legal aid.

VLA services are funded jointly by the Victorian and Commonwealth governments. These services are susceptible to government funding cuts. From 1997 to 2017, Commonwealth contributions to the VLA budget fell from 50 per cent to 25 per cent. In 2013, Legal Aid faced a funding shortfall of $13 million dollars, and introduced a range of strategies to address this, which included:

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

As discussed in Chapter 1, the case of *R v Chaouk* [2013] revealed the inadequacy of funding a solicitor for only two half-days in a trial for an indictable offence. VLA now considers funding needs on a case-by-case basis, to leave fewer accused persons without adequate advice time.

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

EXTENSION: Family Violence and Cross-Examination Scheme

From September 2019, s102N of the *Family Law Act 1975* has prevented any person accused or found guilty of family violence from personally cross-examining their complainant. The cross-examination may only be done by a legal representative.

In May 2019 the Family Court and the VLA announced a government-funded scheme to provide cross-examination counsel for any person who cannot afford to fund private representation. The funding is not subject to the same means and merit tests, but is limited to the cross-examination. The Commonwealth Government committed $7 million over three years to fund the scheme.

The Family Court's announcement in 2019 read: "This will remove the fear of being directly cross-examined by their perpetrator as a factor in a woman's decision whether to settle a matter, and encourage women who have experienced family violence to pursue their legal entitlements. The provision of legal assistance will also support the expeditious resolution of family law matters, assisting women to recover from abusive relationships and obtain economic security for themselves and their children sooner."

Other services

In addition to providing duty lawyers and grants of assistance, VLA also assists accused persons by:

- Distributing free publications and pamphlets in a range of languages.
- Running a telephone hotline.
- Providing legal information on its website, and hosting a free online Legal Help Chat.
- Conducting strategic litigation, such as assisting the 2019-20 class action against the federal government's Robodebt program.
- Making submissions to government, parliamentary committees and law reform bodies.

Snapshot of accused people who benefit from VLA services

In the 2018-19 financial year, VLA noted that 100,061 individual clients received some form of legal advice or representation where a client-lawyer relationship was formed – this does not include people who received only legal information, or who accessed assistance through the website or telephone helpline. 128,708 calls were answered plus 7,758 online chats, and over 2.5 million sessions were logged on the VLA website. Of those receving advice:

- 25 per cent of these people were from culturally and linguistically diverse backgrounds.
- 32 per cent had no income (up from 29 per cent in 2017-2018) and 47 per cent were recipients of some form of government benefit.
- 7 per cent were experiencing homelessness. This was an increase of 25 per cent from 2014-2015.
- 18 per cent were younger than 19yo (up from 12 per cent in 2017-2018).
- 25 per cent had a disability or mental illness.

Victorian community legal centres

Core definition

Community legal centres (or CLCs) are independent community organisations that provide free advice, casework and legal education to their communities. Victoria Legal Aid defines CLCs as "independent, self-managed entities providing free legal services to defined communities."

Detail

CLCs assist members of the community with criminal matters in a range of ways, including:

- Holding drop-in advice services, where clients in the CLC's community can attend without an appointment to meet with a volunteer or staff lawyer. One of the largest CLCs in Victoria, Fitzroy Legal Service, holds a free drop-in clinic every weeknight, for example, and fortnightly on Saturdays.
- Running telephone advice lines. For example, Fitzroy Legal Service holds the Prison Law Advice Line every Friday for prisoners in Victorian prisons, and their families and advocates. The Advice Line consults on matters including prison conditions, solitary confinement, parole, and sentence calculations.
- Producing publications and pamphlets to help members of the community learn about the law and court procedure.

Fitzroy Legal Service has published The Law Handbook since 1977 and it is updated annually by over 80 legal experts; it is available to purchase in paper form, and is used by many lawyers and other CLCs, but it is also free to download from their website.

- Instructing pro bono lawyers who are willing to work without fee, and coordinating those legal efforts with social workers, counsellors and others. For example, Homeless Law, run through Justice Connect, works with a range of pro bono lawyers to provide legal advice and representation to people experiencing, or at risk of, homelessness, but also coordinates that work with social work and health work. The 'Under One Roof' program began in 2015 when a Homeless Law lawyer was placed at Launch Housing in St Kilda, and in 2018 it was recognised by the Law Council of Australia's Justice Report as a best-practice model.

Victoria Legal Aid funds the operations of 35 of the 56 CLCs located around Victoria (as of the 2018-19 VLA Annual Report), but some CLCs are privately funded and entirely independent of government. The Asylum Seeker Resource Centre, for instance does not accept government funding because it also takes on an advocacy role and actively works to change government policy and influence legislation. Like VLA, community legal centres also are vulnerable to funding cuts. In April 2017, a nationwide campaign caused the Commonwealth government to announce that it had reversed proposed funding cuts to the community legal sector that had been proposed for the 2017-18 budget. In 2020 both state and federal government committed additional funding to help CLCs manage the increased demand for frontline legal services caused by the Covid-19 pandemic – in May the Federation of CLCs announced that the CLC sector would be receiving an extra $14.194 million over two years.

The VLA and CLCs have a reciprocal relationship: Victoria Legal Aid refers clients to CLCs when they can provide more appropriate assistance; and CLCs in turn may refer clients to Victoria Legal Aid for assistance, or apply to VLA on behalf of the client for a grant to provide legal advice and representation. In 2018-19, VLA made 671 grants to CLCs to provide clients with advocacy and representation.

Activity 2a: Evaluation of the ability of Victoria Legal Aid to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on Victoria Legal Aid back to the three principles of justice that were explained in Chapter 1. Remember that the three principles of justice are fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of Victoria Legal Aid to achieve the principles of justice.**
2. **Evaluate the ability of Victoria Legal Aid to achieve one principle of justice.**

STRENGTHS	WEAKNESSES
Duty lawyers ensure that every person belonging to a vulnerable group, and every person facing significant charges, has the opportunity to access expert legal information and advice before entering the courtroom. Public funding for legal assistance helps protect the criminal proceeding rights contained in the Victims Charter, and the right to a fair trial. Natural justice can only be achieved if the outcome can be based on a full examination of the evidence and informed choices made by the accused. Having the accused represented by a trained lawyer helps the court operate more efficiently and ensures the best legal arguments are put forward to base the outcome and any appeals on. The court cannot support any arguments or evidence that aren't put before it. Legal representation helps achieve equality between the parties, because the prosecution will always be represented by trained, experienced lawyers. VLA treats members of the public who come from marginalised or vulnerable groups as priority clients. This targets assistance to the most disadvantaged groups, and helps VLA develop specialised knowledge in matters affecting those vulnerable groups. VLA publishes its legal information materials in over 20 different languages. This increases access to legal knowledge for non-English speakers in the community. The mix of private and public legal practitioners helps the accused access to choice regarding which lawyer has the best experience to help with their particular legal problem. VLA also has the ability to take on cases in-house if the matter is of public significance and functions as advocacy work for the community.	VLA relies on the Legal Aid Fund, and it cannot supplement this with private funding arrangements. When state or federal governments reduce funding, or change laws relating to police, bail and crime, VLA's work is vulnerable to being under-funded and more people lose access. VLA acknowledges that there is a gap between people who qualify for full legal assistance and people who can afford to engage their own legal representatives: the means test requires that an accused person be $100pw below the poverty line. The capping of VLA representation may place restrictions on the scope of an accused person's defence. An accused person may be more likely to plead guilty if they do not have an adequate defence for their case, or if VLA will only agree to fund a guilty plea (based on the merits test and the reasonable prospects of success). Around 81per cent of criminal matters are resolved by guilty pleas in the County Court and Supreme Court each year (as of 2017-18).

Generalist vs specialist CLCs

There are two types of community legal centres: generalist CLCs and specialist CLCs. Generalist CLCs provide general legal services to people in their local geographical area, whereas specialist CLCs focus on particular groups of people or areas of the law.

For example, generalist CLCs include Broadmeadows Community Legal Service, Monash Oakleigh Legal Service, and the Peninsula Community Legal Centre. Specialist CLCs include JobWatch Inc, the Consumer Action Law Centre, and the Tenants Union of Victoria. The name of the service often indicates whether it is generalist or specialist: generalist centres are usually named after the geographic region, whereas specialist services are named after the client group or area of law.

CASE EXAMPLE: a generalist CLC

Fitzroy Legal Service (FLS) was established in 1972, to provide free legal advice to all comers in what was then the poorest suburb in Melbourne. It operates a free, drop-in legal advice service which operates every weeknight. Volunteer lawyers are able to provide legal advice on criminal matters, with interpreters available. If the FLS is unable to provide advice on a particular matter, it will refer the client to an appropriate organisation. It has a range of specialist services, including a family law clinic, an animal law clinic, an employment law clinic, and an LGBTIQ legal advice service. In 2018-19, Fitzroy Legal Service provided 4,966 legal advices, and 1,523 duty lawyer services. One example related to a client with a history of homelessness, substance abuse and ill-managed schizophrenia who first engaged with FLS through the Drug Outreach Program. He was subsequently arrested for a serious violent assault committed in a dissociative psychotic state. The Drug Outreach Lawyer and Senior Criminal Lawyer collaborated on the preparation of a defence of mental impairment, with a view to the client being removed from the prison system and placed on a therapeutic supervision order that assures proper medication, treatment and housing.

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

CASE EXAMPLE: a specialist CLC

First Step Legal was established in 2008 as a health-justice branch of the community organisation First Step, a community non-profit organisation located in St Kilda that works to assist people in overcoming their dependence on drugs or alcohol. It is a community legal centre that provides legal support to clients facing criminal charges by integrating these justice services into the healthcare setting, and making the lawyer part of a "triangular therapeutic model of care" with the client and health workers.

First Step Legal offers legal assistance on a pro bono basis to clients actively engaged in treatment at First Step, but it receives no ongoing funding from the Victorian or Commonwealth governments. Instead, it is mostly funded through private donations from individuals, families and foundations. In 2020 it was part-funded through a grant from the Victorian Department of Justice and Regulation.

Review questions 2.1

Study tip

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

1. Describe the main ways in which Victoria Legal Aid provides legal assistance.
2. Outline the considerations that Victoria Legal Aid will take into account when deciding who is eligible for a grant of legal assistance.
3. Explain the role of a Victoria Legal Aid duty lawyer.
4. Describe the legal assistance offered by community legal centres.
5. Using examples, distinguish between generalist community legal centres and specialist community legal centres.
6. Explain the difference between Victoria Legal Aid and Victorian community legal centres.

Activity 2b: Evaluation of the ability of community legal centres to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on community legal centres back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of community legal centres to achieve the principles of justice.**
2. **Evaluate the ability of community legal centres to achieve one principle of justice.**

STRENGTHS	WEAKNESSES
Criminal representation in specialist CLCs is targeted to support accused people with special needs, and is integrated with other programs. This supports the ability of clients to meaningfully access the system. For example, at First Step Legal the lawyer is part of the "triangular therapeutic model of care" with the client and health worker. CLCs work with some of the most marginalised and disadvantaged people, who are almost the most likely to become involved in the criminal justice system. This provides greater equity across population groups suffering differing levels of advantage and disadvantage. For example, the Law and Advocacy Centre for Women is the only legal service in Victoria focused on addressing the underlying causes of women offending: these are poverty, family violence, and substance abuse. Since the state bail changes in 2017 and 2018, Victoria is the only jurisdiction in Australia to have seen an increase in female prisoners, and most of these are women held on remand – 13 per cent of whom are Aboriginal. CLC legal assistance is tailored to the needs of the local community because CLCs are community-run. Generalist CLCs are located in council areas, and are staffed and managed by lawyers, students and board members who live or work locally. CLCs are able to service a large number of clients because almost all CLCs provide basic advice and administrative assistance at regular free drop-in sessions; some CLCs have sessions once or twice a week, while others hold them daily on weekdays. At each session, up to a dozen volunteer lawyers can be rostered on to see clients, providing equality to all people in the catchment area. For example, Fitzroy Legal Service holds eleven free drop-in advice services per fortnight. CLCs can tailor the level of support they provide to the needs of the client and the seriousness of the dispute. CLCs have website resources and free pamphlets available, as well as general legal information provided over the telephone. In addition, they also have the option of using either private funding or VLA grants to act on behalf of clients facing serious charges.	The funding allocated to CLCs and the resources available to them do not match the demand for their services. Many people wait for over an hour at every drop-in session to speak to a lawyer, and some are turned away because there are not enough volunteer lawyers to see everyone. Drop-in sessions are the primary way in which CLCs provide legal advice to clients, but this is not the same as actual representation. The CLC budget for actual representation is very small, and only a few clients will be able to have official representation at any one time. True access to justice is not achieved if inexperienced people have to present their own cases in court. For example, CLCs cannot use VLA grants to fund any client who does not meet the restrictive VLA funding guidelines. Funding for everyday operations also does not cover most staffing of CLCs: CLCs rely on volunteer lawyers, paralegals and non-legal assistance to deliver their services. Because most clients are spoken to or seen by volunteer lawyers, CLC lawyers are frequently not specialists in the area of law concerning their clients. For example, at a drop-in service, clients could be concerned with indictable charges, neighbourhood disputes, family law problems or summary offence tickets such as parking fines. Legal volunteers must work outside their primary area most of the time. Funding and policy limitations restrict the total number of CLCs operating in Victoria, and some smaller CLCs have combined to form larger centres that cover wider areas – for example, Darebin Community Legal Centre merged with Fitzroy Legal Service in 2019. This makes the physical location further away for most people to access, and it prevents the CLC from being as closely integrated with its local community. For example, the catchment area of Inner Melbourne Community Legal covers 105,000 residents, and one fifth of all government and community housing residents in the state. The rate of unemployment in their catchment area of six suburbs is 13 per cent, twice the state and national averages.

2.2 Committal proceedings

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

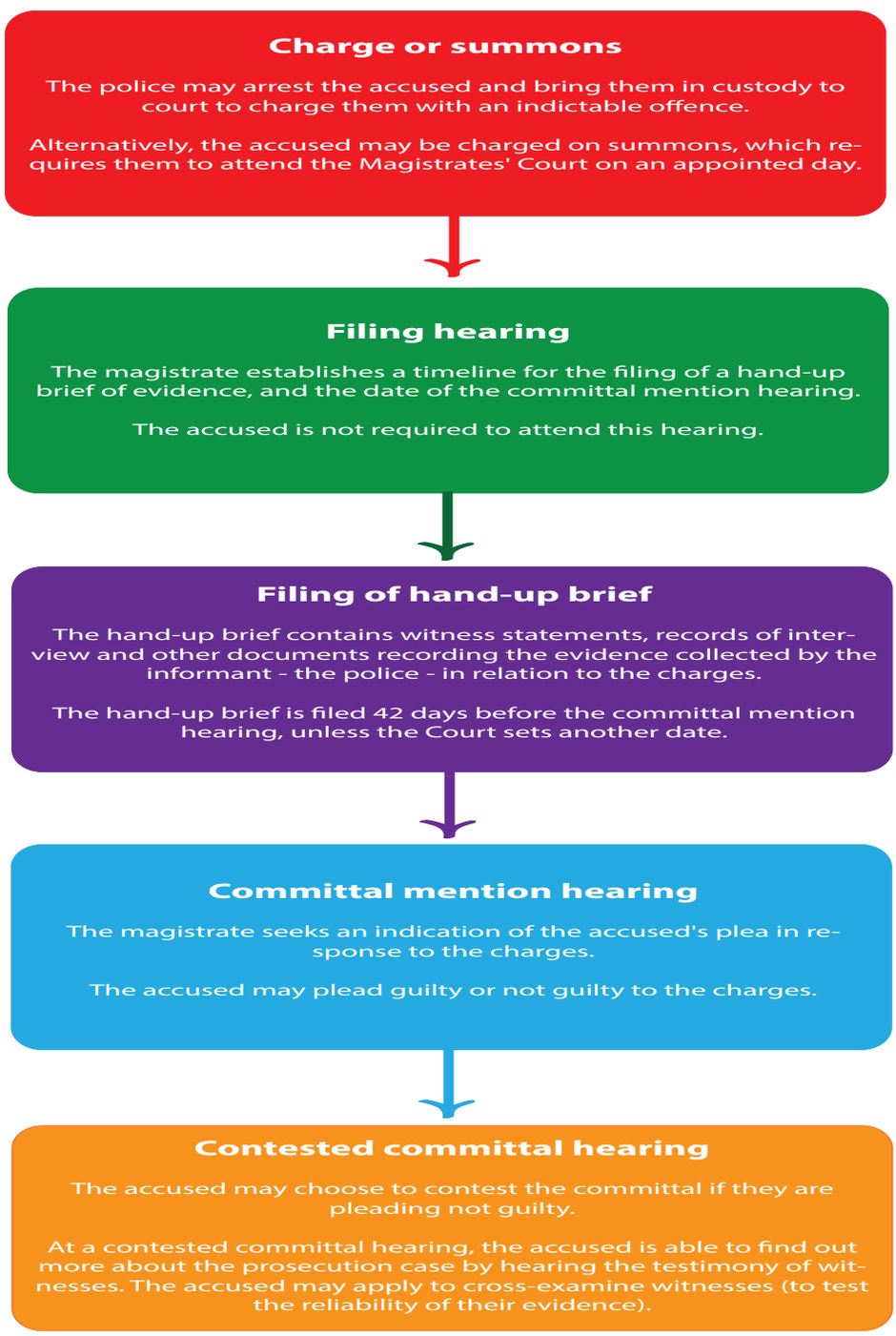
Core definition

Committal proceedings are proceedings held in the Magistrates' Court for all disputes involving indictable charges, to determine whether there is sufficient evidence to support a conviction in a higher court.

Detail

These proceedings are summarised in Figure 2.1.

Figure 2.1
Summary of committal proceedings



Elements of the process

During committal proceedings the prosecution must present all available evidence against the accused in support of the charges. The magistrate reviews the available evidence, and decides whether a strong enough prosecution case exists. A case is strong enough when there is sufficient evidence to support a conviction of the accused by a properly instructed jury at trial.

Written evidence is generally presented in a hand-up brief containing sworn witness statements. If the accused requests a contested committal mention hearing, witnesses may be summoned to court to give oral testimony. They may be cross-examined by the defence to determine their credibility.

Committal proceedings should be conducted within a short time of the accused being charged with an indictable offence. In general, this means within six months of charges being laid.

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

If the accused is charged with a minor indictable offence that is able to be heard summarily, the committal proceedings are where they can request that the matter be heard in the Magistrates' Court instead.

Purposes of committal proceedings

The main purpose of committal proceedings is to determine whether the evidence held by the Office of Public Prosecutions is of sufficient weight to support a conviction in a higher court.

***Criminal Procedure Act 2009* (Vic)**

Section 97 – Purposes of a committal proceeding
The purposes of a committal proceeding are —
- (a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- (b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;
- (c) to determine how the accused proposes to plead to the charge;
- (d) to ensure a fair trial, if the matter proceeds to trial, by —
  - (i) ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;
  - (ii) enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
  - (iii) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
  - (iv) enabling the accused to adequately prepare and present a case;
  - (v) enabling the issues in contention to be adequately defined.

The previous test was the *prima facie* test – meaning, whether the evidence was sufficient at first glance to justify trial. But in 1986 the Advisory Committee on Committal Proceedings recommended the adoption of the slightly higher test that we have now (pp14-15 of the *Report on Committal Proceedings*). Instead of focusing on trial, the focus of the current test is on conviction. The Committee argued that the prima facie test did not filter out enough weak cases, and that magistrates ought to be able to base their decisions on the *credibility* of the witnesses and not just the existence of them. The current test began operation on 1 April 1987, and seemed to increase discharges: in 1984, 3.7 per cent of accused were discharged, while in 1989-90 it was 11 per cent. Between 2008 and 2018 this figure dropped to 2 per cent, however (according to figures published by the OPP).

Section 97 also lists a range of other purposes. A selection of these should be explained in more detail and include the following:

Informs the accused of the case against them

Committal proceedings give the accused access to all evidence collected by the police in their investigation, both exculpatory of the accused and inculpatory. This includes witness statements and exhibits. By understanding the strength of the evidence, the accused can then determine how strong the prosecution's case is and make a decision about whether to plead guilty or not guilty.

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. If they proceed to trial, they gain the advantage of having to only prepare a defence for the evidence against them – they do not need to prepare a global defence.

Improves the efficiency of the justice system

If, at a committal hearing, the magistrate finds there is insufficient evidence to support a conviction at trial, the case will be discontinued and the accused discharged. The discharge of weak cases promotes greater efficiency in the County and Supreme Courts, as cases with no prospect of conviction are eliminated at the committal stage without going to trial.

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

Ensures the timely collection of evidence

Another purpose of committal proceedings is to require the prosecution to assess evidence of an offence and present it to the court at an early stage in the criminal proceedings. This ensures a speedy preparation of the prosecution's case, while evidence is fresh and reliable. This reduces delays for the accused, and it also ensures that witness testimony is accurate and that witnesses can be meaningfully cross-examined on relatively fresh memories.

CASE EXAMPLE: DPP v Jakobsson [2017] VCC 688

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

Review questions 2.2

1. Define 'committal proceedings'.
2. Outline the steps involved in committal proceedings.
3. Explain the committal hearing specifically as one step in the broader committal proceedings.
4. Explain the primary aim of committal proceedings.
5. Outline some of the secondary purposes of committal proceedings.
6. Identify ways in which committal proceedings have been reformed in recent years.

EXTENSION: Evolution of the committal process

Following a government review in 2012, in 2014, the Victorian Parliament amended the Criminal Procedure Act 2009 to allow magistrates to regulate the cross-examination of witnesses in committal hearings. The accused may apply for leave to cross-examine witnesses at committal, and identify the issue to be examined, the relevance of the issue to the case, and the reason why cross-examination of the witness is justified. If the Magistrates' Court grants leave to cross-examine, the Court will identify each issue on which the witness may be questioned. This reform aimed to reduce the most time-consuming aspect of committal hearings.

Also in 2014, the Supreme Court of Victoria's Practice Note No 6 required a Post-Committal Directions Hearing to be held within 24 hours of the completion of committal proceedings in the Magistrates' Court. This expedited the time taken to commence the trial, which in 2014 was a median period of 8.8 months.

In 2018, the Justice Legislation Miscellaneous Amendment Act abolished committal hearings for all sexual offence matters involving a complainant who is a child or a person with cognitive impairment at the time of the proceedings. Committal proceedings are held on the papers, but no hearing is conducted, and the complainant gives pre-recorded evidence at trial.

Also in 2018, the NSW Parliament abolished the contested committal process – prior to this, only around 1 per cent of matters were discharged at the committal stage. In Victoria, around 2 per cent of matters were discharged between 2008 and 2018, according to figures provided by the Office of Public Prosecutions. An inquiry into the committal process was then referred to the Victorian Law Reform Commission in 2018. The first item on the terms of reference was "whether Victoria should maintain, abolish, replace or reform the present committal system." In March 2020 the VLRC recommended that the committal hearing be abolished in its current form, and that the accused be given the burden to challenge the prosecution if they think there should be no "reasonable" chance of conviction

Activity 2c: Evaluation of the ability of committtal proceedings to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on committal proceedings back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of committal proceedings to achieve the principles of justice.**
2. **Evaluate the ability of committal proceedings to achieve one principle of justice.**

STRENGTHS	WEAKNESSES
Committal proceedings are commenced within 3-6 months after the accused has been charged. This imposes a discipline on the prosecution and the police to gather evidence in a timely manner. Regardless of the number of matters that are actually dismissed for a lack of evidence, the very requirement that a case must be made out acts as a filtering system that discourages the OPP from commencing weak cases. For example, in 2002 at the 2nd International Criminal Law Congress, Justice Lee of the NSW Supreme Court said that the mere fact of the prosecution's case being subject to a test was itself a significant factor inhibiting "baseless" committals. The committal system has been reformed over time to improve its efficacy. For example, the *prima facie* test was removed in 1987 because it did not allow the magistrate to take into account the credibility of any prosecution witness – 'at first glance' did not accommodate possible problems under cross-examination. The current test is more rigorous, and tripled the number of cases dismissed at committal in the three years following the reform. In its 2019 submission to the VLRC committals inquiry, Victoria Legal Aid argued that committals often facilitate early resolution by ensuring that the accused has sufficient information to allow them to make an informed decision about whether to enter a guilty plea prior to trial. This can reduce the number of matters going to trial, which saves court costs and reduces backlogs overall. For example, according to the OPP's 2018-18 Annual Report, 79.4 per cent of guilty pleas achieved that year were achieved through the committal stage. In March 2019, the *Prasad* direction was found by the High Court to be contrary to law. The Prasad direction was a rule that allowed a judge to give the jury the option to acquit immediately if the prosecution's case was too weak, without hearing the rest of the case. Without the Prasad direction, the committal is one of the last protections against prosecuting weak cases. Key issues are identified at committal. This ensures that only matters in dispute proceed to argument at trial. Anything on which the parties agree can be settled at committal. This reduces the time and cost of trial. In the experience of Tasmania, Western Australia and the Northern Territory, which removed committals, sending all matters directly to higher courts has resulted in 'bottlenecks' and delays. In its 2019 submission to the VLRC's committals inquiry, Victoria Legal Aid reported that lawyers in these jurisdictions also found that police were not disclosing evidence to the prosecutor early in the process, and that many trial commenced without the accused knowing the full case against them.	Committal proceedings are an additional step in crimi-nal procedure that delay resolution. For example, the 2018 committal hearing for the prosecution of Cardinal George Pell for historic child sex offences lasted for four weeks. Because of the high number of matters that are set-tled with a guilty plea at the committal stage, or re-turned to the Magistrates' Court to be heard summari-ly, it is important that the accused have competent legal representation. This extends the time for which the accused must fund legal representation. There is no right to legal representation at the pre-trial committal stage under the common law principle established in *Dietrich v The Queen* (1992). This may result in inadequate representation for the accused at an important stage where evidence is being explored and challenged. For example, in *Fuller & Cummings v DPP (Cth)* (1994) 68 ALJR 611, the High Court rejected the argument that the Dietrich fair trial rights applied to committals. The accused is not required to present evidence for their defence, while the prosecution must disclose its full case. This creates a disparity in knowledge be-tween the parties, and can result in the prosecution being surprised at trial and unprepared to examine defence arguments. Not all classes of witnesses are exempt from oral ex-amination at a committal. If a witness is examined at a contested committal and then again at trial, this in-creases the trauma of the experience. The high rate of guilty pleas entered following a com-mittal can be demoralising for victims and witnesses who saw sometimes multiple charges being tested at the committal, and who may also have experienced personal hardship being examined and cross-examined at a committal hearing. In its 2019 Issues Paper into the committals inquiry, the VLRC noted that applications to cross-examine witnesses at committal were granted 90.5 per cent of the time. Committals are generally not conducted on the hand-up brief if the defence wishes to examine prosecution witnesses, even though reducing this was the purpose of the 2014 reform.

2.3 Plea negotiations and sentence indications in determining criminal cases

Background: the role of the prosecutor

The Office of Public Prosecutions (OPP) is responsible for preparing and presenting prosecutions against people charged with serious crimes. Minor crimes are prosecuted in the Magistrates' Court by the police. The OPP is led by the Director of Public Prosecutions (DPP). Victoria was the first Australian jurisdiction to establish a DPP in 1983. The current DPP is Kerri Judd QC – she was appointed in March 2018, and is the first woman appointed to the position in Victoria.

The DPP's functions and powers are outlined in the *Public Prosecutions Act 2009* (Vic). Section 24 provides that the DPP must have regard to "the need to conduct prosecutions in an effective, economic and efficient manner." One way this is done is by facilitating early guilty pleas on one or more charges. A guilty plea is when the accused asks that the court enter them legally as admitting guilt to one or more charges. Any charge the accused pleads guilty to will go directly to sentencing and will not need to be proven at trial.

The importance of guilty pleas from the perspective of the OPP is outlined in the *Office's Policy on Resolution* (2014). They are necessary for the effective, economic and efficient conduct of prosecutions, and provide two potential benefits to the community:

- They relieve victims and witnesses of the burden of having to give evidence and suffer continued trauma.
- They provide certainty of outcome and save the community the cost of trials, which have no guaranteed outcome.

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

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

The prosecutor also needs to consider whether the charges the accused is facing both before and after the guilty plea are "appropriate." This means considering whether the charges:

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

The role of plea negotiations

Core 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 in the trial. A plea negotiation may involve discussion about the appropriate charges against the accused, the reliability and relevance of any evidence in the case, and the likely sentencing consequences if the accused pleads guilty to any or all charges.

Detail

In deciding whether to plead guilty, and what charges to plead guilty to, the accused may need to have several discussions with the prosecution. These discussions are called plea negotiations.

Plea negotiations are not done with the judge, and they are not negotiations on the sentence. Instead, they are offers by the accused to plead guilty to one or more charges in return for a compromise by the prosecution. Sometimes the prosecution will drop some of the charges, and reduce the number the accused is being prosecuted for; sometimes the prosecution will withdraw more serious charges such as murder, and replace them with lesser charges such as manslaughter; sometimes the prosecution will alter the summary of facts in the case and remove facts that would count later as aggravating factors in sentencing – for instance, they may remove mention of the accused having a weapon.

CASE EXAMPLE: *Zirilli v The Queen* [2014] HCA 2

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

Zirilli appealed his sentence to the High Court of Australia, arguing that Justice King's refusal to hear submissions from the prosecution on the appropriate sentence range was procedurally unfair. A majority of the Court decided that the sentencing judge was not required to listen to prosecution submissions on sentencing range. In this case, while Zirilli claimed that the prosecution accepted that he had expressed remorse for his crimes, Justice King found in sentencing that Zirilli was not remorseful. Any submission that the prosecution may have made on an appropriate sentence would therefore have relied on the false premise that Zirilli was remorseful. The High Court made the following observations of plea negotiations.

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

Plea negotiations may involve the prosecution and defence counsel discussing and negotiating about a number of issues, including:

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

Any plea agreed to by the parties will have to be approved by the court in order for it to be entered into the record and resolve the dispute. The judge or magistrate has the power to reject plea deals.

In the 2017-18 Annual Report of the County and Supreme Courts, a record-high conviction rate of 91.8 per cent for indictable offences was reported – 80.4 per cent of offenders entered guilty pleas before trial, and only 11 per cent were found guilty at trial. In 2018-19 the percentage of guilty pleas fell to 77.6 per cent of matters.

The 2017-18 Annual Report for the Office of Public Prosecutions wrote that: "OPP solicitors assess each matter as early as possible for a potential guilty plea to appropriate charges that reflect the accused's criminality, based on what can be proven beyond reasonable doubt, and that allows for a sentence that adequately reflects the criminality. […] As well as achieving fair and just outcomes in an efficient way, guilty pleas may relieve victims and witnesses of the burden of giving evidence at a trial, and provide certainty of outcome."

Reasons for guilty pleas

In 2007 the Sentencing Advisory Council interviewed twenty-four offenders who had been sentenced to terms of imprisonment. All participants had been represented by legal practitioners – around half had received assistance from Victoria Legal Aid.

The current and former offenders were asked to score ten factors in terms of how greatly they affected their plea, and the timing of that plea. The results, ranked from most influential to least influential, are summarised in Table 2.1.

Table 2.1: Factors affecting plea			
FACTOR	**VERY IMPORTANT**	**A LITTLE IMPORTANT**	**NOT IMPORTANT**
To have the chance of a shorter sentence	22	1	1
To do what is best for my family	21	2	1
To get it all over and done with	21	2	1
Advice from my lawyer	17	5	3
Advice from family, friends, counsellor	16	5	3
To avoid a long court case	15	6	2
Didn't want to rush my decision	10	4	7
To wait until I had done some rehabilitation	7	4	10
To do what was best for the victim	6	5	8
To wait as long as possible before deciding	3	4	16

One case was classed as a 'victimless' crime, and one respondent noted that giving a low priority to the victim's interests did not mean they had no remorse.

It should be noted that these responses were given before the law on sentencing was changed in 2008: in 2008, s6AAA was inserted into the *Sentencing Act 1991* (Vic) to compel courts to give a specified sentence discount for guilty pleas in their sentencing orders. This increased transparency of the benefit has contributed to higher rates of guilty pleas (they rose from 64.1 per cent in 2006-07 to 81 per cent in 2017-18, according to figures taken from the DPP Annual Reports) and may have changed the factors contributing to plea decisions.

Activity 2d: Borce Ristevski case study

DPP v Ristevski [2019] VSC 253

In June 2016, Karen Ristevski went missing: in July, her husband Borce became the main suspect. Karen's body was found in February 2017 and, despite a lack of forensic evidence tying Borce to her remains, Borce was charged with her murder. In September 2018, after being committed to stand trial on the murder charge, he offered to plead guilty to manslaughter if the OPP reduced the charges, but the offer was rejected on the basis that Borce refused to give any information on how or why he killed his wife. The Office felt that this indicated insufficient cooperation and remorse.

In March 2019, as the murder trial was about to begin, the trial judge ruled that certain aspects of Borce's post-offence conduct could not be used by the prosecution as evidence of an intention to kill. Without this evidence, the OPP accepted Borce's original plea offer, and on 27 March 2019 the charge of murder was withdrawn and Borce formally plead guilty to manslaughter in the Victorian Supreme Court. In April 2019 he was sentenced to nine years' jail, with a non-parole period of six years. The maximum term of imprisonment for manslaughter was 20 years, while for murder it was life.

The prosecution appealed this sentence, and in December 2019 the Court of Appeal increased Borce's sentence to 13 years, with a non-parole period of 10 years. The two-justice majority judgment found that Borce did not simply maintain his right to silence – he took active steps to avoid his crime being discovered. While the Court could only sentence Borce for manslaughter, not murder, their Honours found that Borce had not shown "one scintilla" of remorse, and it could not therefore be taken into account as a mitigating factor, despite his guilty plea, and he had disclosed no details of the killing.

Questions/tasks

1. **Who initiated the first plea negotiations in September 2018 and was a plea deal reached at this time?**
2. **What was the significance of the trial judge's ruling in March 2019, and how did this lead to the plea deal?**
3. **To what extent did plea negotiations facilitate a fair resolution to this criminal dispute?**

Activity 2e: Evaluation of the ability of plea negotiations to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on plea negotiations back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of plea negotiations to achieve the principles of justice.**
2. **Evaluate the ability of plea negotiations to achieve one principle of justice.**

STRENGTHS	WEAKNESSES
Plea negotiations help the accused understand the case against them and consider their realistic chances of success. This supports the right of the accused to a fair trial. Plea negotiations are necessary for the courts to have the time and resources to resolve all disputes. In 2017-18 over 80 per cent of accused plead guilty before trial; without plea negotiations, court backlog would be up to four times longer without significant funding increases. For example, in 2014 the OPP reported that a plea hearing of one day saved the higher courts seven days of trial time; the County Court estimated that one day of plea hearing saved closer to 10 days. Plea deals reached as a result of negotiations protect already traumatised victims and witnesses from suffering further distress by having to give evidence at trial and be cross-examined. Recent changes to witness examination – such as allowing vulnerable witnesses to give evidence from remote locations – acknowledges the stress and difficulty of giving evidence at trial. From 2008, any Victorian court sentencing an offender following a guilty plea must give a specified sentence discount in their sentencing. Other plea deals include amendments made to the agreed facts, which affects the aggravating and mitigating factors the court is allowed to take into account in sentencing. These benefits all encourage a guilty accused to take responsibility for their behaviour. A guilty plea can make the victim and wider public feel that remorse has been shown for the wrongdoing and the effects of the crime. This can lead to greater satisfaction with the outcome. Plea deals save court time and money, meaning they can be allocated to higher priority cases that involve more contesting of the evidence. For example, in 2014 the OPP estimated in a speech to the 14th International Criminal Law Congress that a 5 per cent increase in guilty pleas saved at least 175 trial days in the higher courts. At approximately $20,000 per day in court, a 5 per cent increase is a saving of $3.5 million.	Plea negotiations can result in guilty pleas that hide relevant circumstances of the wrongdoing from the court. Amended statements of fact can be agreed upon, and any facts that relate to charges dropped during negotiations cannot be presented in sentencing. The OPP policy in favour of plea deals can encourage over-charging of an accused with additional offences, so that prosecutors have bargaining chips in negotiations – some charges can be dropped. The 2018 study into plea negotiations by legal academics Dr Asher Flynn and Prof Arie Freiberg found that 50 per cent of all charges were dropped. Plea negotiations take place in private and the discussions are confidential. This removes the access the public has to the case, along with that of stakeholders such as witnesses. 'Justice' is increasingly being done behind closed doors. Sentence discounts can equal up to 40 per cent of the sentence, and can pressure even an innocent accused to plead guilty. If an accused is unrepresented, they will be at a significant disadvantage and may receive greater punishment. For example, the High Court judgment in *Cameron v The Queen* (2002) 76 ALJR 382 raised the possibility of future precedent being set on sentence discounts: they could be seen as discriminating against those accused who assert their right to a trial by pleading not guilty. The majority conceded: "The distinction between allowing a reduction for a plea of guilty and not penalising a person for not pleading guilty is not without its subtleties." (384) Sentence discounts and dropped charges can increase public dissatisfaction with the consequences faced by the offender, and can lead the victim to feel that justice has not been served. Remorse is assumed to be present in many guilty pleas, but is not required for a plea deal and a sentence discount will be given even in the absence of remorse. For example, in *R v Thomson* (2000) 115 A Crim R 104 the NSW Court of Appeal held that "The benefits to the criminal justice system as a whole, which flow from a plea of guilty, particularly an early plea of guilty, are not related to the circumstances of the offence or the conduct of the offender." (131)

The role of sentence indications

Core definition

Sentence indications are provided to the accused, on request, by the judge or magistrate, to inform the accused whether or not the court would impose a sentence of imprisonment if the accused entered a guilty plea immediately.

Detail

The procedure for giving a sentence indication is outlined in ss207-209 of the *Criminal Procedure Act 2009* (Vic) for the County and Supreme Courts, and ss60-61 of the Act for the Magistrates' Court.

PART 3.3 – SUMMARY HEARING

SECT 60
Court may give sentence indication
(1) At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates' Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused —
(a) a sentence of imprisonment that commences immediately; or
(b) a sentence of a specified type.

PART 5.6 – SENTENCE INDICATION
SECT 207
Court may give sentence indication
At any time after the indictment is filed, the court may indicate that, if the accused pleads guilty to the charge on the indictment at that time or another charge, the court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately.

SECT 208
Application for sentence indication
(1) A sentence indication under section 207 —
(a) may be given only on the application of the accused; and
(b) may be given only once during the proceeding, unless the prosecutor otherwise consents.
(2) An application under subsection (1)(a) may be made only with the consent of the prosecutor.
(3) If an application under subsection (1)(a) is made in respect of a charge that is not on the indictment, the accused must specify the charge in the application.
(4) The court may refuse to give a sentence indication under section 207.

- The accused may request a sentence indication, but the court will only consider it if the prosecution agrees. A magistrate has slightly more discretion, in that they can choose to give an indication without the accused requesting it (s60 of the *Criminal Procedure Act*).
- Before the sentence indication hearing, the defence must file an application with the court that outlines the charges the accused would in theory plead guilty to; the facts and evidence that the defence seeks to rely upon; and any mitigating factors the defence could prove at a sentencing plea hearing. The prosecution must file an application that gives a summary of the agreed facts, the accused's criminal record, and a statement on whether the prosecution plans to submit that the court should impose an immediate custodial sentence.
- The court may still refuse to provide a sentence indication – for instance, if the court considers that it does not have enough information on the impact of the offence on any victim (s208(5) of the *Criminal Procedure Act*).
- An indication can only be given once. If the accused receives an indication and continues to plead not guilty, the trial judge must be replaced unless both parties agree (s209(2) of the *Criminal Procedure Act*). In practice, this means that sentence indications are only given before the start of trial in indictable offences, as discharging a jury and commencing trial again with a different judge would be too much of a burden.

An indication *does* not tell the accused the sentence they are likely to receive. An indication for an indictable offence tells the accused whether a guilty plea at that point would result in an immediate custodial sentence – imprisonment – or a non-custodial sentence. It does not tell the accused how long the imprisonment would be for; or does it tell the accused what the alternative sanction will be if the court rejects a custodial sentence. In the Magistrates' Court, the magistrate will give the accused this second piece of information: what type of sanction they will receive if not imprisonment.

Outcome of a sentence indication

If the accused chooses to plead guilty after receiving the indication, a date will be set for the sentencing plea hearing. The court will not be permitted to contradict their indication at this point – in other words, if they indicated that a non-custodial sentence would be given, they cannot change their mind and give a term of imprisonment.

If the accused chooses to continue pleading not guilty, a new magistrate or judge will be allocated to the dispute (unless all parties agree otherwise), and the hearing or trial will be scheduled to continue another day. The original sentence indication will not be binding on the new magistrate or judge.

Activity 2f: Case studies on sentence indications

Case study 1

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

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

Case study 2

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

The defendant had significant prior convictions and was sentenced to an immediately servable period of imprisonment.

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

Questions/tasks

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

Activity 2g: Evaluation of the ability of sentence indications to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on plea negotiations back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of sentence indications to achieve the principles of justice.**
2. **Evaluate the ability of sentence indications to achieve one principle of justice.**

STRENGTHS	WEAKNESSES
The right to be tried without unreasonable delay is contained in s25 of the Victorian Charter, and providing sentence indications can speed up the resolution of the case through a guilty plea. For example, in its 2007 report into sentence indications, the Sentencing Advisory Council reported that the scheme operating in the Magistrates' Court since 1993 led consistently to a higher rate of guilty pleas. An accused person is given more information and opportunity to plead guilty and reduce costs such as time held on remand and legal representation fees, and the risk of a higher sentence if they are found guilty at trial. If the accused pleads guilty as the result of an indication, victims and witnesses may benefit from having faster closure and a guaranteed guilty result. Also, from being spared the trauma of having to give evidence at trial. If an indication results in a guilty plea, the courts are spared the administration and expense of a contested trial or hearing. This also allows other cases to be heard more quickly.	There may be a loss of procedural fairness to the accused because the case against them has not been considered by the court at the time of the indication. For indictable offences, courts will generally only consider indications in pre-trial hearings. There may be a loss of access for witnesses and victims, because binding indications are given before their evidence has been heard and tested. It is questionable how big the gains are of the indication scheme, in terms of attaining guilty pleas. For example, in the Sentencing Advisory Council's 2010 review of the scheme, only two indications had been given in the Supreme Court. In the same review, it was found that the indication scheme had "helped to resolve less than one per cent of the 2231 cases finalised during the review period." Rejected indications can cause further delays and expense. If an accused continues to plead not guilty, a new magistrate or trial judge must be allocated to the case and a new court date must be scheduled. Otherwise, the accused may suffer prejudice because the judicial officers know they requested a sentence indication – it may make them look guilty. The amount of information that the court can give the accused is very limited. No indication is given as to the length of the sentence; or, for indictable offences, what type of sentence will be given if a non-custodial one is indicated. It is questionable how big the gains are of the indication scheme, in terms of contributing to faster and more efficient resolution. For example, in its 2007 report into sentence indications, the Sentencing Advisory Council reported that the scheme would be "unlikely to have a significant impact on the timing of defendants' plea decisions in the Supreme Court." They recommended against implementing a scheme there. In its 2010 review of the scheme, it found that sentence indications and related adjournments had resulted in delayed resolution in 22 of 25 cases. All problems relating to guilty pleas apply to the sentence indication scheme: they suggest that an accused enforcing their presumption of innocence and right to a trial is acting improperly; and they pressure accused persons into pleading guilty by highlighting the consequences of going to trial – such as no sentence discount. Victims and witnesses may also feel that the accused has unfairly benefited. For example, in 2007 the Scrutiny of Acts and Regulations Committee found that sentence indications breached s25(2)(k) of the Victorian Charter, because people must "not be compelled […] to confess guilt."

Review questions 2.3

1. Explain what a plea negotiation is, and how a plea negotiation differs from a plea deal.
2. Describe what occurs during plea negotiations.
3. Outline the purposes of plea negotiations in determining criminal cases.
4. Provide an overview of criticisms of the role played by plea negotiations.
5. Make a list of factors from a dispute that might make it more appropriate to be resolved through plea negotiations, and a list of factors that might make it less appropriate to be resolved through plea negotiations.
6. Define the term 'sentence indications'.
7. Outline the purposes of sentence indications in determining criminal cases.
8. Describe the procedures for sentence indications.
9. Outline the benefits for the accused and for the criminal justice system of entering an early guilty plea.
10. Make a list of factors from a dispute that might make it more appropriate to receive a sentence indication, and a list of factors that might make it less appropriate to receive a sentence indication.

2.4 The court hierarchy in determining criminal cases

A hierarchy ranks something from lowest to highest, according to status or authority. In our legal system, courts are arranged in a hierarchy according to their **jurisdiction**.

Core definition

A court hierarchy is a vertical arrangement of the courts from highest to lowest, based on the jurisdiction of that court and its power to hear cases and order sanctions.

Detail

A court's jurisdiction is the power to hear and determine cases, which includes trials at first instance and appeals from earlier decisions. The jurisdiction of a court is outlined primarily in the legislation that establishes that court. The relevant legislation is Victoria is given in the table below.

Table 2.2: Courts and their legislation

COURT	GOVERNING ACT(S)
Magistrates' Court	*Magistrates' Court Act 1989* (Vic)
County Court	*County Court Act 1958* (Vic)
Supreme Court and Court of Appeal	*Supreme Court Act 1986* (Vic) & *Constitution Act 1975* (Vic)

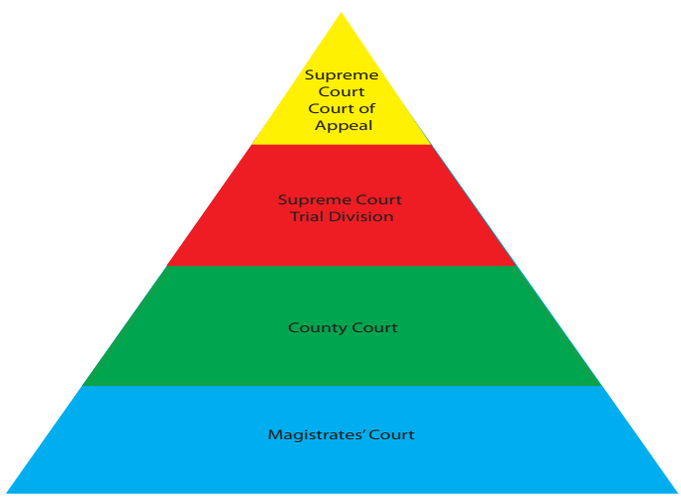
In addition, other specific legislation confers on each court jurisdiction for particular procedures. For example, the jurisdiction to hear committal proceedings and other criminal pre-trial procedures is conferred on the Magistrates' Court by the *Criminal Procedure Act 2009*.

The Victorian Criminal Court Hierarchy

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

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

Figure 2.2
Victorian Criminal Court Hierarchy



Reasons for a court hierarchy

The following reasons, specialisation and appeals, are given in the Study Design in relation to criminal disputes. Administrative convenience and appeals are then given in relation to civil disputes. Once all three have been studied, any reason can be used for either criminal or civil disputes.

In addition, the concept of precedent is studied in Unit 4, and is relevant here as an additional reason for a court hierarchy. Information has been given on precedent in this section, because of that.

Specialisation

Core definition

Specialisation is the ability of courts to develop expertise and dedicated knowledge in the areas of law that fall within their jurisdiction, and disputes that they hear on a regular basis. Specialisation exists in the knowledge and experience of judicial officers and court personnel.

Detail

Each court has its own jurisdiction to hear particular types of cases. Because they hear similar types of cases on a daily basis, the courts can develop expertise in the relevant law and in the procedure for hearing matters. This means that judicial officers and court staff have experience in understanding the common factual issues in particular crimes, or may have a specific understanding of legal questions in those cases or the challenges faced by victims and witnesses. This allows the courts to provide specific services for the benefit of all people participating in a criminal case.

Example

For example, the Magistrates' Court has jurisdiction to hear summary offences, and evidence is often submitted by written summary. There are fewer complex factual disputes to resolve. Magistrates are therefore not as familiar with the laws governing expert witness testimony and conflict between experts, because they do not need to be. They are also less familiar with the body of common law on constructing intent for murder, because they do not conduct trials for murder.

By contrast, the Supreme Court hears the most serious indictable offences such as homicide and drug trafficking offences. Court personnel and judicial officers therefore have a deeper understanding of the laws governing forensic or expert evidence. Supreme Court justices are also more intimately familiar with the jurisprudence governing intent in murder, and the difference between murder and manslaughter based on the *mens rea*.

Appeals

Core definition

A vertical hierarchy enables a system of appeals to operate, as either party can file a request with a higher court for the more experienced and powerful judicial officers in that court to review a possible error made in the original hearing. The greater jurisdiction of higher courts over lower courts gives the judicial officers the authority to substitute their judgment for that of the original court.

Detail

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

- there has been a mistake in the interpretation of evidence or determination of the facts
- there has been a mistake in the interpretation or application of the relevant law
- there has been a mistake in sentencing

Likewise, the prosecution may appeal a mistake in law or sentence, but only when the accused was convicted: the prosecution cannot appeal an acquittal. In cases where a conviction results from a jury verdict, the appeal must establish that the jury was misdirected by the trial judge in summing up, or that the jury verdict was unsafe because it could not reasonably be based on the facts of the case as presented at trial. This last type of appeal is incredibly difficult to make out: the test, according to the High Court, is whether the appeal court "thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty." (per *M v The Queen* (1994) 181 CLR 487 at 493)

Activity 2h: Appealing a jury verdict

Rapovski v The Queen **[2017] VSCA 175**

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

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

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

The Court of Appeal reviewed the transcript of all the witness testimony from the trial, and dismissed Rapovski's appeal. The judges concluded that it was open to the jury on the evidence to be satisfied beyond reasonable doubt that Rapovski was the shooter in the incident. Justice Priest observed that "The jury had the advantage — as I have said, an advantage not enjoyed by this Court — of seeing and hearing the crucial witnesses give their evidence."

Pell v The Queen **[2020] HCA 12**

In 2018 Catholic cardinal George Pell was found guilty at a jury trial of historic child sex offences from 1996. A jury of 14 members sat on the five-week trial, and ballots were drawn to reduce the number to 12 for deliberations. After deliberating for almost five days, the jury returned unanimous verdicts of guilty on all charges. Pell was sentenced to six years jail for the crimes by County Court chief judge Peter Kidd.

In August 2019 two out of three judges of the Court of Appeal dismissed Pell's appeal against the verdict. They asked the question of whether the jurors "must have" held a reasonable doubt as to Pell's guilt on the evidence, and decided that this standard had not been met. In November 2019 Pell appealed this decision to the High Court, arguing that it reversed the burden of proof and forced him, the accused, to prove that a verdict of guilty was impossible for the jury – instead, it should be the role of the prosecution to meet the standard of proof.

In April 2020 the High Court unanimously quashed Pell's conviction and overturned the jury verdict in the original trial. The High Court said that the Court of Appeal had failed to consider the question of "whether there remained a reasonable possibility that the offending had not taken place." This "reasonable possibility" would be reasonable doubt. Its judgment concluded: "the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt." (39)

Questions/tasks

1. **What was the jury's finding in each of the original trials, Rapovski and Pell?**
2. **On what basis did Rapovski appeal?**
3. **On what basis did Pell appeal?**
4. **What was the outcome of Rapovski's appeal, and what reasons were given?**
5. **What was the outcome of Pell's two appeals, and what reasons were given in each case?**
6. **How do the cases involving Rapovski and Pell illustrate the role of higher courts in hearing appeals?**

Judges in higher courts generally have greater experience and expertise in difficult questions of review and scrutiny. Their review of a decision on appeal takes advantage of this judicial expertise, and enables rigorous scrutiny of lower court decisions, which are processed much more quickly in the courtroom. This provides reassurance for participants in criminal proceedings that the outcome of their case is legally sound, and ensures that convictions and sentences are fair and just.

Appeals are not the same as retrials. Appeals are conducted using the appellate jurisdiction of a court, not the original jurisdiction. They also do not involve the appeal court hearing the evidence a second time and calling witnesses to appear a second time. Instead, appeals simply hear arguments about why a mistake may have been made in the original trial or hearing.

Judicial College of Victoria analysis

According to JCV analysis, in 2019-20 the Court of Appeal upheld the following criminal appeals:

- 25 appeals against conviction
- 50 appeals against sentence
- One appeal against both conviction and sentence
- One appeal concerning the granting of bail
- Four appeals concerning pre-trial matters

This total number of successful appeals comes from 2393 criminal matters finalised across the County and Supreme Courts in 2018-19, because appeals tend to occur 12-18 months after the initial trial.

Seven of the appeals against conviction were upheld on the basis of jury error, and eleven were upheld because of an error made by the judge – these included making prohibited comments, making a wrong decision regarding the admissibility of evidence, and failing to properly control cross-examination according to the *Evidence Act 2008* s38.

The only systemic pattern identified by the JCV in the successful appeals was "excessive zeal" on the part of the prosecution, making errors such as failing to disclose evidence or over-charging the accused.

Example

For example, appeals on questions of law from a conviction in the Magistrates' Court are heard in the Trial Division of the Supreme Court, so that a justice of a superior court can scrutinise the understanding and application of the law by the magistrate. Magistrates can hear 80-90 matters a day (as reported in 2018 by the ABC, in interview with Magistrate Pauline Spencer), and are not authorised to set new precedent or deviate from the accepted meaning of the law. The Supreme Court is a superior court of record that can spend more time examining the legal question; the justice can then set precedent on the meaning of the law if it is unclear or if an existing precedent set by the Supreme Court needs to be changed.

A three-justice panel in the Court of Appeal then hears all appeals on questions of law from the County Court and the Trial Division of the Supreme Court. Finally, the parties to a criminal proceeding may take an appeal from a decision of the Court of Appeal to the High Court of Australia, if that court grants leave – permission to appeal.

Activity 2i: A mistake in sentencing?

Stocks v The Queen [2017] VSCA 137

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

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

Questions/tasks

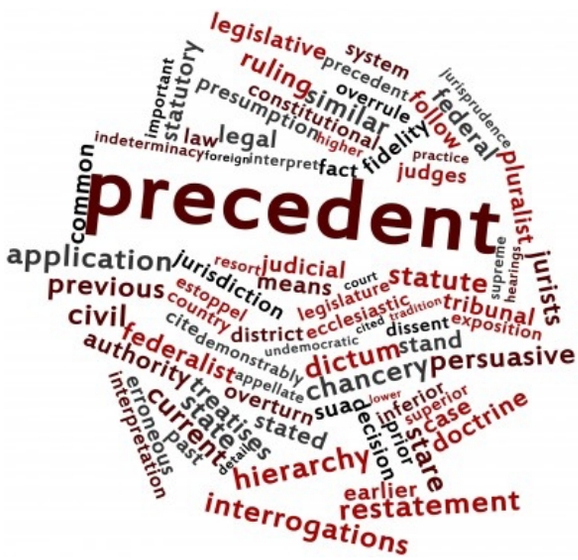
1. **What was the outcome of Stocks's original trial?**
2. **Could Stocks appeal the outcome of his trial, or only his sentence?**
3. **What was Stocks sentence?**
4. **Outline why Stocks appealed to the Court of Appeal.**
5. **Explain the Court of Appeal's decision.**

Doctrine of precedent

Background

The **doctrine of precedent** is the way in which courts are able to make law. They make 'common law', which is judge-made law in the gaps left by statute law and set on the meaning of statute law. When superior courts hear cases, the way that the court interprets and applies the law sets an example – or precedent – for the future; people in society have to follow it as law, and other courts will have to follow it, too, unless they are higher up in the hierarchy.

The doctrine of precedent relies on the principle of ***stare decisis***, which means that courts should stand by the legal principles of previous decisions. This concept is studied in more depth in Unit 4.



Core definition

The court hierarchy enables judges to determine which precedents are binding in their cases, and which are merely persuasive. This is because the legal principles decided by judges will only have to be followed in similar cases by courts with less authority than them according to the hierarchy: courts higher in the same hierarchy can choose to change those legal principles, precedent, if they wish.

Detail

The part of the court's judgment that contains the legal principle is called the ***ratio decidendi***. The *ratio* is the legal reason behind the outcome of the case. This is the part of the judgment that sets precedent and that can be 'binding' on other courts. A binding precedent is a legal principle or definition of statute that must be used and applied in the new case.

Only superior courts of record can make binding legal principles: this is the Supreme Court and above.

Example

For example, the *ratio decidendi* of a Supreme Court (Trial Division) judgment would bind the Magistrates' Court in a case of similar fact, but would be merely persuasive on the Supreme Court (Court of Appeal). All trial courts in Victoria must follow precedents set in the Court of Appeal, because it is the highest state court in the hierarchy. Decisions of the High Court of Australia are then binding on all the Victorian courts, as well as all the courts of the remaining states and territories.

Review questions 2.4

1. Explain what a court hierarchy is.
2. Briefly outline the order of courts in the Victorian court hierarchy.
3. Define 'specialisation' as a reason for a court hierarchy.
4. Using examples, explain why specialisation is an important reason for the court hierarchy.
5. Define 'appeals' as a reason for a court hierarchy.
6. Outline the grounds on which a court's decision can be appealed.
7. Explain the difference between an appeal and a retrial.
8. Explain the benefits of a system of appeals.
9. Using examples, explain how a court hierarchy allows for a system of appeals to operate.
10. What is precedent?
11. Define 'precedent' as a reason for a court hierarchy.
12. Using examples, explain the doctrine of precedent as a reason for having a court hierarchy.

2.5 The responsibilities of key personnel in a criminal trial

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

In order for the accused's trial to proceed fairly, the co-operation of key personnel participating in a criminal trial is required. These personnel include the judge, jury, parties, and legal practitioners.

Study tip: *Each of the following responsibilities, for all four categories of participant, may be broken up into a number of smaller, very specific ones. Students should feel free to do this – particularly for questions with low mark values that require less detail.*

The responsibilities of the judge

Core responsibility

The most important responsibility for a judge is to act as an **independent and unbiased umpire** in the conduct of a criminal trial. They must oversee proceedings impartially and without the perception of having any bias towards either party. The appearance of impartiality is just as important as actual impartiality, because it protects public confidence in the justice system.

Judges as impartial decision-makers in the pursuit of justice

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

Activity 2j: Perception of bias

***LAL v The Queen* [2011] VSCA 111**

LAL was convicted of sexual assault of a child under the age of 16 and sentenced to a term of imprisonment. After the trial, LAL became aware that the trial judge had a child who had experienced a similar sexual assault at a similar age. LAL appealed his conviction to the Court of Appeal, arguing that the trial judge had an apprehended bias that affected the fairness of his trial. An 'apprehended' bias means that the judge had the appearance or possibility of bias; LAL did not try to prove factual, actual bias.

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

Questions/tasks

1. **What was LAL convicted of?**
2. **Explain the grounds on which LAL appealed his conviction.**
3. **What did the Court of Appeal need to consider?**
4. **Outline the Court of Appeal's decision.**
5. **Use the case of LAL to illustrate the responsibility of a judge to be an impartial and unbiased umpire.**

Other responsibilities

Conducting the trial

The judge may ask questions to clarify any aspect of the evidence, but in general the judge must allow the parties in a criminal trial to introduce evidence and make submissions without interference. The High Court judgment in *R v Cesan & Rivadavia* [2008] HCA 52 ruled that minor lapses in the judge's attention do not constitute a miscarriage of justice, but that a trial will miscarry if the judge gives the appearance of substantially failing to supervise the trial process or pay attention to the evidence and submissions of the parties.

If a party is unrepresented by legal counsel at trial, the judge must ensure that this does not disadvantage them. A self-represented accused is not entitled to any special advantages, but the court must provide enough information to the accused to counteract the disadvantage they face in conducting proceedings without legal representation. This was first decided by the High Court in *MacPherson v R* (1981) 147 CLR 512. In this case, the Court drew a distinction between "telling the players how to play and telling them the rules of the game."

The Judicial College of *Victoria Criminal Proceedings Manual* provides a list of the types of things a judge may need to explain to an unrepresented accused. This list includes explaining the elements of the offence, the conduct and purpose of different types of hearings, and the proper way to formulate questions for witnesses – although the judge may not tell the accused what the wording of any particular question should be.

Interpreting and applying the rules of evidence and procedure

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

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

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

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

In cases such as *R v White & Piggin* [2003] VSCA 174 the Supreme Court ruled that a judge can choose not to strictly apply the rules of evidence and procedure to an unrepresented accused, even though the same rules will continue to be strictly applied against the Crown prosecution.

Managing cross-examination

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

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

Cross-examination can, therefore, be harrowing for a witness. This is particularly the case for witnesses who are children, or who are the victims of personal injury or sex crimes. An important responsibility for the judge is to balance the accused's need for rigorous cross-examination against the public interest in protecting witnesses from harassment or intimidation from question by counsel in court. The judge should therefore ensure that a witness is as comfortable as possible and disallow any questions that are not relevant to the case. The judge is empowered to make arrangements that will reduce the stress to a witness of giving evidence, such as allowing for testimony by closed circuit television, permitting a witness to be accompanied by a support person, or placing screens in the court so that a witness is not required to make direct eye contact with the accused. These provisions have been studied in relation to vulnerable witnesses earlier in Unit 3.

Concluding the trial

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

Provisions in the *Jury Directions Act*

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

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

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

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

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

Imposing sanctions

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

When sentencing, the judge must consider a number of different factors, which are explored further later in this Area of Study. If the accused pleads guilty or is found guilty of one or more offences, the judge will set a date for a sentencing hearing. The prosecution will supply the court with the statement of facts regarding the offending, submissions on sentencing matters such as non-parole periods; any orders, such as alcohol exclusion, requested in addition to sentence, and victim impact statements. The defence will supply the court with any expert reports or documents they wish to submit for sentencing consideration, and a list of a witnesses they wish to call. The judge will then manage the sentencing hearing, and hear submissions from both parties and victim impact statements before deciding on the sentence or non-custodial sanction.

CASE EXAMPLE: *DPP v Ristevski* [2019] VSC 253

In 2019 Borce Ristevski plead guilty to the manslaughter of his wife, Karen, in 2016. In April 2019 Justice Christopher Beale of the Victorian Supreme Court spent 45 minutes summarising the facts of the case and explaining the reasons behind his sentence. Six victim impact statements had been considered by the judge, as well as a character reference provided by Ristevski and Karen's daughter, Sarah.

"Although, by your plea of guilty to manslaughter, you have finally accepted responsibility for killing Karen, you have not revealed how or why you killed your wife. You may have turned off the road of deceit but you have not taken the high road of full and frank disclosure consistent with true remorse. This explains in large part why the discount for your plea of guilty will be less than you might otherwise expect. […] Your counsel submitted that I must not allow your post offence conduct to overwhelm or dominate the sentencing exercise. I accept that submission but it is still fair to say that your disposal and concealment of Karen's body and the many lies you have told, worst of all to your daughter, constitute a circumstance of significant aggravation, as the cases on post offence conduct recognise."

Justice Beale attempted to determine whether the killing was at the higher range of manslaughter in terms of seriousness, or at the lower range. This decision was to help him decide the length of the sentence, as offences tend to carry 'ranges' in the legislation and courts can use their discretion to choose a specific sentence within that range.

> *"That practice of trying to work out whether a particular manslaughter is a low, mid or upper range example of the offence obviously informed the prosecution and defence submissions in this case, and some of the discussion during the plea hearing, even though it is an approach that has been deprecated by our Court of Appeal in more recent times."*

Justice Beale sentenced Ristevski to nine years' imprisonment with a non-parole period of six years. This was later increased on appeal.

Activity 2k: Evaluation of the ability of the responsibilities of the judge to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on the responsibilities of the judge back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of the responsibilities of the judge to achieve the principles of justice.**
2. **Evaluate the ability of one responsibility of the judge to achieve the principles of justice.**

STRENGTHS	WEAKNESSES
Judicial impartiality relates to actual impartiality, but also to the appearance of impartiality. Precedent such that as that set in the 2011 case of LAL recognise that even apprehended bias on the part of a judicial officer damages the confidence that the parties and the public have in the criminal justice system. Actual judicial impartiality, and independence of the parties as well as the government, allow both the accused and prosecution an equal chance to present their cases before the court. One of the judge's responsibilities is to balance procedural equality with substantive equality or equity, by adjusting some rules and procedures to 'level the playing field'. For instance, the High Court precedent set in *MacPherson* permits judges to inform the accused of "the rules of the game" so they have equal access to natural justice. The judge is given significant powers to manage trial features such as cross-examination, to ensure that reliable evidence is elicited while at the same time protecting the witnesses and the efficiency of the trial process. For example, in 2017 the *Criminal Procedure Act 2009* was amended to allow trial judge to order that expert evidence from both sides to be given either consecutively (one after the other), or concurrently (with both experts on the stand at the same time). The judge can bring the different elements of the trial together for the jury in their summation. Witnesses give evidence one by one, but the judge can help the jury identify the inconsistencies and agreements. The judge can also receive questions from the jury and clarify issues they have understanding the law. This helps to achieve a more reliable verdict. The judge has access to evidence at sentencing that was not admissible at trial. This helps the judge form a more complete picture of the offender and victims, and ensure that the sentence takes personal factors into account and is appropriate to the specifics of the case and not just the law of the offence.	Judges cannot entirely divorce their society and humanity from their professional judgment: they are trained to be impartial, but complete impartiality is impossible. For example, 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: "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 background of a judge affects their perspective. Judges may gain greater consistency across matters in which they are not bound by precedent – such as sentencing – only within their own court area. Accused persons from different areas of the state have been found to have been treated unequally. For example, in 2018 researchers from Deakin University and Swinburne University found a "concerning" level of inconsistency in sentences across Victoria. Dr Clare Farmer said, "The most striking results were the imprisonment rates for driving offenders, with Ballarat three times higher than Portland, double the rate in Melbourne, and more than 50 per cent higher than Sale. […]If consistency is the badge of fairness and fairness is a cornerstone of justice, Victoria's legal system may be falling short." 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. For example, the High Court ruled in the 1981 *MacPherson* case that judges had an obligation to tell the accused only the "rules of the game," and not actually "how to play." 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, and are reliant on the parties and legal representatives.

The responsibilities of the jury

Background

Study tip: *In criminal matters, a jury can have more than 12 people. When a criminal trial is expected to last for a long time, up to 15 people may be selected to the jury. According to the* Juries Act 2000 *(Vic), if there are more than 12 jurors remaining when the jury retires to consider its verdict, a ballot must be held to reduce the jury to 12.* The Juries Act *also states that a criminal trial cannot continue with less than 10 jurors.*

A jury is a panel of women and men chosen randomly from the community. Every person on the electoral roll for the House of Representatives is eligible to be sent a jury questionnaire, and any eligible person may be selected to sit on a trial. Not every person sent a notice will be eligible for service:

- Any person who has broken a serious rule of democratic society will be disqualified for duty. For instance, any person who has been convicted of an indictable offence in the past, and was sentenced to a term of imprisonment of three years or more will be disqualified.
- Any person who is unable to properly perform the task of juror because they are too closely connected to the administration of the justice system or is deemed unable to understand the evidence at trial will be ineligible for duty. For instance, any person who cannot speak English fluently, or any person who is a currently practising lawyer, will be ineligible.
- Any person who is able to give a permissible reason may be excused from duty. For instance, any person who can demonstrate ill health may be excused from service by the Juries Commissioner.

Jury trials are held only for all indictable offences in the County Court and Supreme Court, where the accused pleads not

guilty. In the Supreme Court, jury trials accounted for around half of the 86 criminal matters finalised in 2014-15, with the others resolving in a guilty plea prior to empanelment. In the County Court, jury trials accounted for around one fifth of the 2,236 criminal matters finalised in the same period. Given that the Magistrates' Court finalised over 275,000 criminal matters that year, it can be seen that jury trials represent under 2 per cent of all criminal cases in Victoria.

A jury of 12 is usually empaneled, but up to 15 jurors can be empaneled if the trial is expected to be longer or there is a chance that once a jury has been empaneled, the jurors will choose a foreperson to coordinate their discussions and votes, and to pass messages to the judge. This is when the jury's trial responsibilities begin.

Any excess jurors who remain at the end of trial, above the standard 12, will be balloted out and will not participate in deliberations. A trial can continue with as few as 10 jurors, but any less than that and there will be a mistrial.

Core responsibility

The most important responsibility for a jury in a trial for an indictable offence is to deliberate and try to reach a verdict of guilty or not guilty. The standard of proof used by each individual juror is whether they are personally satisfied beyond reasonable doubt that the prosecution has proved guilt for each of the charges in the indictment.

Bartho v R (1978) 19 ALR 418

Jurors must not ask themselves which of the two cases, prosecution or defence, they believe is correct; and they must not consider their verdict as deciding either guilt or innocence. The verdict options of 'guilty' and 'not guilty' mean that the jury should acquit even if they are convinced that the accused is probably guilty, but have not been satisfied beyond reasonable doubt by the prosecution's evidence. As Stephen J said in *Bartho*, the option 'not guilty' includes both innocence and "the intermediate position to which a jury may come if not satisfied of either guilt or innocence."

The verdict must be based on the facts of the case, as determined from the evidence, and the relevant law as explained by the submissions of the parties and the judge. At the close of the trial, the jury will retire to deliberate. Each individual juror will cast a vote for their preferred verdict, and if the jurors are sufficiently in agreement the foreperson will notify the judge that a verdict has been reached.

The requirements for reaching a verdict are outlined in s46 of the *Juries Act 2000* (Vic):

- **Unanimous verdict** – All twelve jurors agree that the accused is 'guilty', or 'not guilty', of each charge in the indictment. Some charges such as murder require a unanimous verdict.
- **Majority verdict** – The court may accept a verdict that all but one of the jurors agrees to. If the jury has deliberated for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial. This means that eleven of the twelve jurors agree that the accused is 'guilty' or 'not guilty'.
- **Hung jury** – The jury is unable to reach either a unanimous or a majority a verdict on a charge. If, after continued deliberation, the jury remains unable to reach a legal panel verdict, the trial is aborted. The prosecution has the option of seeking a retrial. Hung juries occur in 3-8 per cent of Australian trials, according to a 2000 study.

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

The possible jury verdicts in criminal trials are summarised in Table 2.3 below.

Table 2.3: Jury verdicts in criminal trials

VERDICT	GUILTY	NOT GUILTY	HUNG JURY
Unanimous verdict	12 guilty / 0 not guilty 11 guilty / 0 not guilty 10 guilty / 0 not guilty	12 not guilty / 0 guilty 11 not guilty / 0 guilty 10 not guilty / 0 guilty	Any other number For example: 11 guilty / 1 not guilty 9 not guilty / 2 guilty
Majority verdict	11 guilty / 1 not guilty 10 guilty / 1 not guilty 9 guilty / 1 not guilty	11 not guilty / 1 guilty 10 not guilty / 1 guilty 9 not guilty / 1 guilty	Any other number For example: 10 guilty / 2 not guilty 9 not guilty / 2 guilty

Jurors must keep their deliberations secret. It is an offence under s78 of the Juries Act to disclose any information such as opinions expressed, votes cast, or arguments made in the course of reaching a verdict. In addition, it is an offence under s77 to publish the identity of any juror. The maximum sanction for these offences is five years imprisonment.

From the 2017-18 County Court and Supreme Court Annual Report, juries return verdicts of guilty in 6 out of 10 cases.

Other responsibilities

Representing the community

The jury represents a cross-section of the community, ensuring that the accused is judged by their peers rather than by more powerful members of the government and judiciary. In 1922 Lord Atkin said, "It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful." (*Ford v Blurton* (1922) 38 TLR 801 at 805)

Representation of the community is achieved by empaneling a random selection of jurors from the electoral roll, and by ensuring that anyone actively involved in the administration of the criminal justice system is ineligible for service.

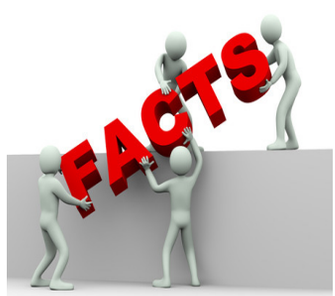
Categories of ineligibility

Categories of ineligibility are given in Schedule 2 of the *Juries Act 2000* (Vic) and include any person who is, or has been within the last 10 years:

- a judge or magistrate
- an Australian lawyer admitted to practice
- a police officer
- a bail justice
- a member of the Victorian parliament
- an employee of an Australian lawyer, in a capacity connected with their legal practice

Juries are also given more freedom to represent community values and contemporary judgments than judges are, because they never give reasons for their verdict. As long as a verdict is reasonably open on the facts of the case, juries can apply the perspective and judgment of the 'common person', and even deliver a perverse verdict that contradicts the law in the area if they believe the law to be unfair. In the Constitutional Commission's *Australian Judicial System Advisory Committee*, Report 22 (May, 1987) the Commission speculated that the high rate of acquittals in jury trials could be due at least in part to perverse verdicts.

Determining the facts



Jurors have the responsibility to listen attentively to the evidence and judge it without bias. Once they have heard all of the evidence presented by both sides, they have the responsibility to deliberate on it in order to decide what the true facts of the case are. For instance, the evidence of two witnesses may indicate that the accused was speeding, or was following the victim; the evidence of other witnesses may disagree. The jury will need to decide whether the alleged fact is true.

Jurors may take notes during trial to help them to remember all of the evidence, and may also ask the judge if they can look again at evidence or exhibits that were tendered during trial, or at transcripts of the trial. The judge will assist the jury with remembering and organising the evidence by summing up the trial after both parties have closed their cases, but it is important that the jury not rely on the judge for decisions regarding the truthfulness of particular witnesses or the best way to resolve inconsistencies or gaps in the evidence.

CASE EXAMPLE: *R v Ali* (1981) 6 A Crim R 161

"I cannot stress too strongly that the decision in this case on all questions of fact, the inferences to be drawn from the facts and the ultimate verdict to be returned, is yours and yours alone; and so much is that so that if in the course of summing up I appear to indicate that I have a view of the facts...you are bound to disregard that apparent indication, because you have one function and I have another. You do not intrude into mine and I do not intrude into yours."
Street CJ

From the 2017-18 County Court and Supreme Court Annual Report, juries spend an average of 7 hours per trial in deliberations.

Relying only on materials presented at trial

Section 78A of *the Juries Act 2000* (Vic) creates an offence of any juror making inquiries about a matter relating to the trial. This puts the responsibility on jurors of taking only evidence and arguments from the trial itself into account when deciding the facts and reaching a verdict. The maximum penalty for breaking this law is 120 penalty units: this equates to $19, 826.40 in 2020-21 penalty units.

The Act provides examples of activities that would be in breach:

- Consulting with another person – for instance, asking a doctor friend about the meaning of medical evidence.
- Conducting research by any means – for instance, performing an Internet search or using Google Maps to view the crime location.
- Viewing or inspecting a place or object that is relevant to the trial – for instance, personally visiting the location.
- Conducting an experiment – for instance, attempting to purchase the same kind of rope used, and attempting to tie the same kind of knot.
- Requesting another person to make an inquiry – for instance, asking anyone outside the trial to do any of the above.

It is vital that jurors respect this responsibility, because failing to do so would mean that the verdict would be based on potentially unreliable evidence, and evidence that had not been tested by both sides. A juror cannot know, for example, whether a streetlight has perhaps changed in the location since the alleged wrongdoing; or whether the medical information they have researched has interpreted the data correctly. A mistrial was declared in Victoria in 2012, for instance, because a juror independently researched the meaning of the phrase 'beyond reasonable doubt'. (cited in Dr Jacqueline Horan, *Juries in the 21st Century*, Federation Press, 2012)

Activity 2l: Evaluation of the ability of the responsibilities of the jury to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on the responsibilities of the jury back to the three principles of justice : fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of the responsibilities of the jury to achieve the principles of justice.**
2. **Evaluate the ability of one responsibility of the jury to achieve the principles of justice.**

STRENGTHS	WEAKNESSES
The jury giving the accused a trial by their peers can protect the accused from the power of the state. The government investigates the crime, prosecutes the suspect, and appoints the judges that hear the case. The layperson jury protects democracy and the rights of the individual against the government. The presence of the jury can ensure that legal arguments and procedures are able to be understood by the accused, because the judge and legal representatives may be more careful to speak in a way that the non-legal members of the jury can understand. This makes the trial more accessible to the accused and to the public gallery. By spreading the burden of reaching a verdict across 12 shoulders, the jury system creates the best opportunity to catch errors and to balance prejudices. Such a high level of agreement must be had in the verdict – either unanimous or all jurors but one – that the accused and public are likely to have more confidence in it. Many people have faith in the verdict of an independent jury. For example, in the first six months of the 2020 Covid-19 lockdown, only two applications were made for judge-only trials, with all other accused persons choosing to have their trials delayed.	Jurors must perform a complex task, but without experience in the law, in assessing evidence, or in court procedure. For example, in 1984 then-chief commissioner of the Victoria Police, Mick Miller, described the jury as "Twelve strangers, pressed into service, ignorant of the rules of evidence, unfamiliar with court procedure, inexperienced in the cut and thrust of cross-examination, mesmerised by the eloquence of counsel and over-awed by the whole experience, are required to reach unanimous agreement on complicated matters of fact." Jurors must make decisions based on a narrow and incomplete version of the case. The rules of evidence and procedure, and the choices made by the parties, remove a great deal of potentially relevant information from the trial. Jury verdicts are difficult to challenge on appeal because no reasons are given. This limits the accountability of the jury. Jurors themselves have given concerning accounts of jury duty, where the process of reaching the verdict did not seem to be based on the law and an objective assessment of the evidence. For example, in *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (2004), Ivan Vodanovich summarises a range of published comments by jurors: "Lola used tarot cards to help her decide. Frank felt the law was wrong. […] Arthur who never made notes, and took the odd nap in court, had somehow managed to form an opinion and Mary just felt sorry for the accused." Many jurors do not understand the rule against performing outside research. In 2013 a mistrial was declared in the murder trial of Steve Constantinou after a juror slept through the judge's directions on not conducting any outside research. Jurors may not be able to act as peers of the accused or as representatives of a cross-section of society because of the range of people disqualified, ineligible or excused, and because the parties can challenge the empanelment of three jurors each, without giving the court any reasons. For example, in 2018, women were more than twice as likely to be challenged and struck off as men. 69.5 per cent of potential jurors struck off during empanelment were women. This number is higher for sexual offence cases (57.9 per cent of jurors are male, even though only 49 per cent of jurors called for duty are male).

Responsibilities of the parties

Core responsibility

The parties to a criminal charge are responsible for preparing and presenting their own cases and versions of the facts. This is known as 'party control', and is one of the key elements of an adversarial trial: a trial in which the two parties compete against each other to win the case.

For example, the OPP will work with the police to investigate the dispute and gather evidence that is relevant to the prosecution. The prosecutor will need to decide what evidence to present, and what legal arguments to submit in order to prove that the accused is guilty beyond reasonable doubt.

Study tip: *Criminal cases in the Magistrates' Court are usually prosecuted by a police officer. Criminal cases in the higher courts are usually prosecuted by the OPP.*

The defence will review the prosecution's evidence, and decide on their own version of the facts and evidence to lead in defence. No accused person can be compelled to give evidence at their own trial, and s41 of the *Jury Directions Act 2015* (Vic) allows defence counsel to request that the judge direct the jury on the fact that refusing to give evidence is not an admission of guilt and cannot be used as evidence against the accused. This is one example of the decisions that will need to be made by the accused and defence team when deciding on a trial strategy. From the 2017-18 County Court and Supreme Court Annual Report, only 27 per cent of accused persons give evidence.

Activity 2m: Not giving evidence!

R v Getachew [2012] HCA 10

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

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

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

Questions/tasks

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

Other responsibilities

Participating in plea negotiations

At any time before the verdict is handed down in the trial, the parties can negotiate privately outside court to reach a plea agreement.

The prosecution will be responsible for making offers such as reducing the number or severity of charges, or amending the statement of facts that the court will rely on during sentencing. The prosecution will also be responsible for consulting with any victims in the case regarding intended plea deals. The defence will be responsible for negotiating with the OPP on the conditions of any guilty plea, researching potential benefits to guilty pleas such as sentence discounts, and deciding ultimately whether to enter a plea of guilty – including when, and to which charges.

Making submissions regarding sentence

If the accused pleads guilty to any charge, or is found guilty on any charge, a sentencing plea hearing will be scheduled for a later date, to conclude the trial. Both parties will be responsible for preparing submissions and evidence to put before the court to influence the sentence given to the offender.

According to the Sentencing Advisory Council's *A Quick Guide to Sentencing*, sentencing submissions may include any of the following:

- The facts of the case
- The offender's criminal history
- Relevant sentencing principles, such as aggravating and mitigating factors
- The type of sentence the offender deserves, such as imprisonment or a community corrections order
- Any reparations the offender has made since the wrongdoing or guilty verdict
- Examples of sentences in similar cases, in order to achieve 'parity' across cases

As confirmed in *Matthews v The Queen* (2014) 44 VR 280, the prosecution also has the responsibility to advise the court of any matters that might benefit the offender, such as remorse they have expressed or post-offence conduct such as counselling. The Crown is not allowed to act as an adversary at sentencing, and push for a heavy sentence that is unfair.

In *Barbaro v The Queen* [2014] HCA 2, the High Court also differentiated between the prosecution's responsibilities and the defence's responsibilities when making submissions regarding sentence. The prosecution is only allowed to make submissions on the type of sentence to be given (for example, imprisonment or fine), but not on the range or duration of that sentence. A plurality of the Court established precedent that it is "neither the role nor the duty of the prosecution to proffer some statement of the specific result [that] should be reached." The defence is permitted to make submissions on the sentencing range, however: for instance, on the number of years that a prison term should last for, or the dollar value of an appropriate fine.

Deciding on grounds for an appeal

Parties are responsible for deciding whether to appeal an element of the trial to a higher court for review. In order to appeal, a party must identify a specific error they believe was made in the trial court: this error can be one of fact or one of law.

- The prosecution is limited to deciding appeals in the event of a guilty verdict or plea, because findings of 'not guilty' cannot be appealed. The prosecution is therefore responsible mostly for finding arguments that sentencing was "manifestly inadequate" and asking the appeal court to increase the sentence.
- The defence is unlikely to appeal a 'not guilty' finding, but may appeal a guilty verdict on more bases than the prosecution. A plea of guilty cannot be appealed, but the sentencing following a guilty plea can be appealed if the defence believes that an error led to the sentence being "manifestly excessive." Alternatively, if the dispute was resolved with a verdict at trial, the defence will be responsible for deciding whether there are grounds to argue that the trial itself was unfair. For example, if inadmissible evidence was allowed, or if the trial judge misinterpreted the law.

The Court of Appeal and the High Court both require 'leave' to be sought for appeals: 'leave' means permission. Parties will therefore be responsible for making applications for leave to appeal to these courts – these applications may be rejected, if the court does not believe the grounds they are applying for are strong enough.

Activity 2n: Evaluation of the ability of the responsibilities of the parties to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on the responsibilities of the jury back to the three principles of justice : fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of the responsibilities of the parties to achieve the principles of justice.**
2. **Evaluate the ability of one responsibility of the parties to achieve the principles of justice.**

STRENGTHS	WEAKNESSES
A high level of party control may lead parties to feeling more satisfied with the outcome of the case, because they have had the opportunity to select their best evidence and rigorously test the evidence led by the other side. Parties are not powerless in the hands of the court for resolution: plea negotiations allow the parties to make many decisions regarding the severity of the charges, whether to enter a guilty plea, and at what point to do this. This allows the parties to exercise control over the duration and resolution of the dispute. The Crown has the responsibility to include the victim at each stage, ensuring that important stakeholders are given access even though they are not parties.For example, the OPP must consult with the victim regarding plea negotiations with the accused, and the Crown must tender victim impact statements during sentencing. In order to equalise the power between the government and the individual accused, the prosecution has the responsibility to share more information with the accused than the accused has to in return, and the responsibility to act as a fair advocate rather than an adversary. For example, in sentencing, precedent prohibits the prosecution from seeking a sentence that is too harsh and out of line with sentencing principles such as proportionality and current sentencing trends. Parties are given opportunities to test the processes of the court and to argue errors they believe might have been made in either the trial or sentencing. This increases the perception of fairness, because avenues of appeal are open until either both parties are satisfied or the full bench of the High Court has heard the grounds for the final appeal and either accepted them or rejected them.	Party control disadvantages the accused and benefits the Crown. The accused is usually a single individual, and may be self-represented; the Crown is represented by the OPP, which hires experienced prosecutors and is led by an expert Director. It also has the resources of the police at its disposal. Party control may lengthen the duration of trial, because the parties are making decisions from within the adversary system: the adversary system discourages cooperation and making admissions, because it creates one winner and one loser. Parties, particularly the accused, may make strategic decisions rather than efficient or cooperative ones. Parties are given unequal responsibilities at points in the resolution, producing a situation of inequality. For example, the prosecution is not allowed to suggest a sentencing range to the court, but the defence is. The prosecution is also not permitted to submit any unsworn evidence to the court in sentencing, whereas the defence is. This gives the defence an advantage. The prosecution has a responsibility to fully disclose all relevant evidence, whether it is good or bad for the prosecution case, but the defence does not have a corresponding obligation. For example, the defence has no responsibility to disclose its evidence or the details of its defence before trial. The defence also has no obligation to disclose unfavourable facts at sentencing, such as evidence of bad character or prior convictions – the prosecution has an obligation to inform the court if it has evidence the offender is of good character, however.

Responsibilities of legal practitioners

Background

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

Core responsibility

The core responsibilities of legal practitioners is split between the advising solicitor taking a greater role in preparing the case, and the barrister then taking a greater role in presenting it in court.

Preparing the case

Before the trial, a key responsibility of the solicitor is to prepare the witness statements their client will seek to rely on in evidence. A witness statement is a written record of the evidence that a witness is able to give to the court. Witnesses cannot be coached by the advising solicitor, and taught what answers to give; nor can they be encouraged to tell a version of their evidence that they do not believe to be true.

Guidelines: interviewing witnesses

In relation to interviewing witnesses, the Law Institute of Victoria Ethics Guidelines says that a solicitor should act fairly and honestly in interviewing witnesses and, in particular, should ensure that there is no attempt to manipulate the witness's evidence.

Documentary evidence and exhibits will also be collected and prepared, and the solicitor will put together a file of their research into the cases. This file is called a 'brief', and it will be given to the barrister that the solicitor engages to present the case at trial. This is why we say that a barrister is 'briefed' on a case.

The advising solicitor will also be responsible for researching the law – both statutory law and precedent – that is relevant to the facts, and advising the accused on appropriate defences and the likelihood of them being found not guilty.

Presenting the case

At trial, only a barrister or the accused themselves is permitted to make arguments and question witnesses. It is the responsibility of the instructing solicitor to provide advice, research and support. The legal practitioners will therefore be responsible for deciding what witnesses to call and what questions to ask them; what questions to ask of witnesses for the opposing side under cross-examination; what objections to make to arguments and evidence led by the other side; and what submissions to make to the court in the opening and closing addresses.

It is the barrister's responsibility to vigorously test the credibility and reliability of witness evidence introduced by the opposing side. This submission of evidence is done through examination-in-chief, and the testing is done through cross-examination. Examination-in-chief involves a legal practitioner asking questions of a witness they have called to support their side; while cross-examination involves questioning the witnesses called by the opposing side, often minutely, about the evidence contained in their witness statements and that they have just given under their own examination-in-chief. For the defence, counsel's key objective in cross-examining prosecution witnesses is to introduce doubt in the minds of the jury that their evidence establishes that guilt of the accused to the required standard: beyond reasonable doubt. Questioning witnesses is the primary way in which evidence emerges at trial, because the rules of evidence and procedure privilege oral evidence. It is very difficult to question witnesses effectively, and there are many ways in which evidence can be given in a way that is inadmissible.

Having each side represented at trial by an experienced barrister and instructing solicitor was held to be so important by the Victorian Supreme Court in *R v Chaouk* [2013] VSC 48 that Justice Lasry held that an absence of representation triggered the court's inherent jurisdiction to prevent an unfair trial. The trial in *Chaouk* was adjourned, because the accused was inadequately represented: this is called a 'stay of proceedings'.

CASE EXAMPLE: *R v Chaouk [2013]* VSC 48

Matwali Chaouk was charged with attempted murder and three counts of reckless endangerment of life, after he allegedly fired gunshots into a motor vehicle carrying the victims. A three-week trial was scheduled to commence in February 2013, when it came to light that the accused's barrister would only be assisted by a Victoria Legal Aid-funded solicitor for two half-days of trial. The barrister submitted to the Court that this created an unfair trial, because of the importance of the responsibilities of legal practitioners.

Lasry J enumerated the responsibilities of a solicitor at trial. These included:

- "The briefing of counsel, by then armed with a thorough knowledge of the case and an understanding as how a trial could or should be conducted."
- "Making enquiries, often urgently, during the trial and for the purpose of cross-examining, about the evidence that a witness will give or has given."
- "Consulting with counsel on how to most effectively cross examine prosecution witnesses."
- "Whether particular items of evidence should be challenged as inadmissible."
- "Consulting with counsel on the presentation of counsel's final address to the jury."

Lasry J determined that the absence of a solicitor would "substabtially increase the likelihood of errors being made or important matters being overlooked by counsel." A stay of proceedings was ordered.

Other responsibilities

Duty to the court

Legal practitioners are engaged to act on behalf of their clients, but they are also sworn officers of the courts under the *Legal Practice Act 1996* (Vic). They therefore have special obligations to the court.

The *Legal Practice Act* specifically states that a legal practitioner has professional obligations that include duties to the Supreme Court and ethics, and that these supersede their duties to their clients if there is ever a conflict. In the High Court case of *Gianarelli v Wraith* (1988) 165 CLR 543, Chief Justice Mason considered that a legal practitioner's duty to the court is in the public interest of dispensing justice, and overrides the duty owed to their client.

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

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

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

Legal practitioners for the prosecution have a special responsibility in this regard. Lawyers for the Crown must try to assist the jury to discover the whole truth, and must try to ensure that the trial is fair: the common law established in *R v Puddick* (1865) 176 ER 662, that lawyers for the Crown must not "seek a conviction at all costs," is still applied – for instance, by the Victorian Court of Appeal in *Bugeja & Johnson v R* [2010] VSCA 321, when the prosecutor used his closing address to ask the jury to draw a negative inference about the guilt of the accused from the fact that defence counsel had *failed* to ask a witness a particular question under examination. Per *Smith v The Queen* [2018] VSCA 139, a prosecutor also has a responsibility to avoid all rhetorical questions that might suggest to the jury a reversed burden of proof: for instance, "Has the accused even proved who the driver was, if it was not them?" *instead of* "Who could the driver have been, if not the accused?"

The special role of prosecuting counsel as "ministers for justice" means that a prosecutor who pursues a trial without a reasonable belief in the guilt of the accused may commit the tort of malicious prosecution.

Review questions 2.5

1. Outline the core responsibility of a judge.
2. Explain some of the responsibilities of the judge in ensuring that the trial is conducted smoothly.
3. Explain the responsibility of the judge in interpreting and applying the rules of evidence and procedure.
4. Explain the responsibilities of the judge specifically in relation to protecting witnesses during cross-examination.
5. What are the judge's "directions" to the jury?
6. What does the judge need from the parties in order to fulfil their responsibilities regarding sentencing?
7. How do sentencing "ranges" give the judge special responsibilities to determine sentence?
8. Find two case precedents that illustrate the responsibilities of the judge.
9. Outline the core responsibility of the jury in a criminal trial.
10. Differentiate between the different types of verdict that a jury might return.
11. Identify two types of people who are not permitted to sit on a jury, and explain why they are thought to be unable to properly fulfil the core responsibility.
12. Identify the responsibilities of individual jurors while hearing a criminal trial.
13. Explain what happens when a jury retires to consider its verdict.
14. Identify the responsibilities of individual jurors after hearing a criminal trial, during deliberations.
15. Who in a criminal trial is responsible for deciding the law, and who is responsible for deciding the facts?
16. What kinds of things are jurors permitted to do in order to help them fulfil their responsibility?
17. Outline the restrictions placed on jurors by s78A of the Juries Act 2000 (Vic).
18. Give two examples of behaviours that would breach s78A of the Act.
19. Explain why s78A is an important responsibility for jurors to follow.
20. Find two case precedents that illustrate the responsibilities of the jury.
21. Define 'party control' as it relates to the Victorian criminal justice system.
22. Explain the core responsibilities of each of the prosecution and defence parties in a criminal trial.
23. Identify decisions that each party will need to make during the course of plea negotiations.
24. Why might the responsibility to consider plea negotiations benefit each party in a criminal case?
25. Outline the kinds of things that the parties must submit to the court to fulfil their sentencing responsibilities.

26. Differentiate between the responsibilities of the prosecution in sentencing submissions and the responsibilities of the defence.
27. How is an appeal different from a rehearing or a retrial?
28. Outline the grounds on which a party might apply for an appeal.
29. Do parties have the right to have their full appeal heard in the Court of Appeal and High Court?
30. Find two case precedents that illustrate the responsibilities of the parties.
31. Distinguish between a solicitor and a barrister.
32. Outline the responsibilities of a solicitor in preparing for a criminal trial.
33. Outline the responsibilities of a barrister in presenting a criminal trial.
34. How will a solicitor be of help to the barrister during a criminal trial.
35. Explain the responsibilities that legal practitioners have to the court, over and above their responsibilities to their client.
36. Find two case precedents that illustrate the responsibilities of legal practitioners.

Activity 2o: Evaluation of the ability of the responsibilities of legal practitioners to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on the responsibilities of legal practitioners back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of the responsibilities of legal practitioners to achieve the principles of justice.**
2. **Evaluate the ability of one responsibility of legal practitioners to achieve the principles of justice.**

STRENGTHS	WEAKNESSES
It is the opinion of people familiar with the criminal justice system that the responsibilities involved in running a case effectively cannot be performed by an inexperienced or untrained person, or even by too few legal practitioners – for instance, a barrister acting without an instructing solicitor. For example, the Law Institute of Victoria criticised the attempt by the OPP to appeal the precedent established in *Chaouk*, saying "Inadequate representation results in miscarriages of justice. It results in the interruption of trials. It has the capacity to completely disrupt the administration of criminal justice." Qualified and experienced legal practitioners can level the playing field across accused persons of different backgrounds, ages, classes and levels of education. Lawyers are more equal in their access to the court that individual parties. For example, in *The Truth Hurts* (2020) barrister Andrew Boe writes that "Criminal justice systems are not designed to seek the truth. In places like Australia, court proceedings remain an adversarial blood sport at times distorted by smoke and mirrors or failed by individual shortcomings. […] Simply put, the most vulnerable among us are unfairly exposed to unjust outcomes." A lack of legal representation slows down a trial, and adds to the responsibilities of the judge. For example, a sentencing court has special duties when dealing with an unrepresented accused, because no lawyer is there to discharge their responsibilities. The sentencing judge must ask the defence about their good character, lack of previous offences and any other potentially mitigating factors if the offender does not submit them to the court, expressly to investigate whether there is the basis for a more "merciful" sentence – this precedent was established in *Bridges v Police* [2017] SASC 35. Because the legal practitioners are not personally involved in the case, they are better able to make strategic, objective decisions regarding the evidence and law than an accused or victim. The experience and training of legal practitioners assists the court with the administration of justice. For example, in their 2008 research into barrister funding by VLA, Pricewaterhouse Coopers found that "the more adequately prepared and experienced a barrister the higher the likelihood that they will bring forth defence evidence and the perspective necessary to resolve cases fairly. This assists the judiciary in making better quality decisions."	Legal representation is extremely expensive, and this gives wealthy accused persons and the prosecution advantages over parties with average or low income. For example, according to the ABS, in November 2019 the average full-time weekly earnings in Australia was $1658.70. Criminal solicitors in Victoria range from $100-800 per hour (average $350ph), and criminal barristers engaged privately cost from $5000 per day to $25,000 per day. Lawyers themselves can be influenced by personal biases and agendas that can impair their ability to analyse the strengths of the case and make strategic decisions to help expose the truth. For example, in 2019 Melbourne criminal defence barrister John Desmond was interviewed by The Age. He argued in favour of challenging jurors on the basis of stereotype, and expressed a prejudiced view of complainants in sexual offence cases: "There's nothing better than having a good grandmother on a jury. She knows what little missy gets up to and how she behaves." Inexperienced, under-resourced and under-prepared counsel have caused both unnecessary adjournments and aborted trials. In 2008 Pricewaterhouse Coopers found that the direct cost of an aborted trial in the Supreme Court was an average of $47,572 for a week of prosecution and defence time, jury time, witness time and victim costs. The burden on individual counsel is too great. Finding the truth is less a collaborative process that can be refined and corrected over time, and more a single-event contest in which winning or losing can come down to whether a single barrister asked a witness the right or wrong question, or made one particular legal argument in their closing. For example, in *R v Bajic* [2005] VSCA 158 the accused successfully appealed his convictions for sexual offences because the prosecution barrister repeatedly asked him "Why would she lie?" under cross-examination, regarding the complainant. The Court of Appeal determined that this gave the jury the impression that the defence was arguing a conspiracy to lie on the part of the complainants, and that this was a misrepresentation of the defence's position.

2.6 The purposes of sanctions

Core definition

A **sanction** is a legal penalty given to a person who has been convicted of a criminal offence. The sanction is decided on and ordered by the sentencing judge or magistrate.

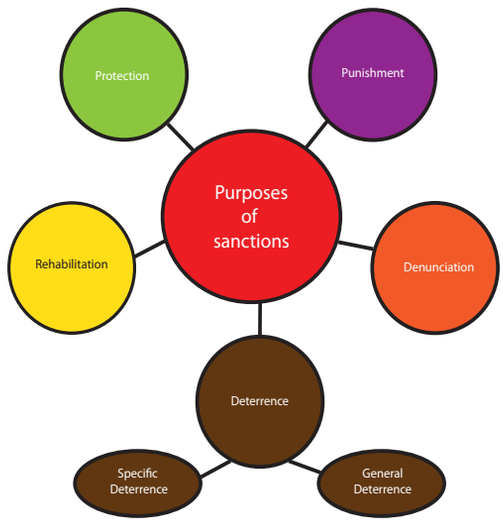
Purposes of sanctions

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, especially once the facts of each case have been taken into account. A sentencing judge or magistrate will carefully consider each sentencing option, and combinations of different sentences, to apply to the individual facts of the offender in the case and the crime that they committed and achieve the purposes of sanctions.

The sentencing judge or magistrate will use their sentencing remarks to explain to the offender which purposes they are focused on achieving, and why and how they believe the sentence they have chosen is suitable. These sentencing remarks are sometimes livestreamed for the public; other times they are published on the court website.

Figure 2.3



Study tip: *Circular definitions – or, when a word is defined by using the same word – are common in this topic. 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; etc. When defining a term, students should use a synonym: a term that means the same thing, but that uses different wording.*

Rehabilitation

Core 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.

> **_R v Pogson_ [2012] NSWCCA 225**
>
> *[R]ehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen.*

Elaboration

Often, criminal behaviour is a result of factors that are more complex than an offender simply *wanting* to commit crimes, or not caring about moral behaviour or other people in the community. Criminal behaviour is often the result of drug and alcohol addiction; childhood trauma and neglect; poverty; or insecure life and work environments. Sometimes criminal behaviour is the result of negative social influences, selfishness, or valuing money more highly than other human beings. Regardless, the reason *why* the crime occurred will be vital in knowing how best to change the offender's own attitude towards the behaviour and their likelihood of committing the wrongdoing again.

> **Why Mandatory Sentencing Fails**
>
> *Tania Wolff, manager of First Step Legal, a specialist pro bono criminal law community legal centre inside an addiction and mental health centre in St Kilda, Victoria, published an article in the Law Institute Journal on the problems with mandatory sentencing. [01 February 2018]*
>
> Mandatory sentencing for re-offenders and standard sentencing come from the premise that imprisonment of offenders will result in a safer community. This is not the case. […] Our prison population, perhaps contrary to public perception, is predominantly made up of the poor and disadvantaged. Add to that the addicted, the mentally ill and the cognitively impaired. Prison is not a rehabilitative environment […].
>
> The Victorian Ombudsman's report into prisons in 2015 provided the following sobering statistics about our prison population:
> - 75 per cent of male prisoners and 83 per cent of female prisoners report illicit drug use before going to prison
> - 40 per cent of prisoners have a mental health condition
> - 42 per cent of male prisoners and 33 per cent of female prisoners had a cognitive disability
> - 35 per cent of prisoners were homeless before their arrest
> - More than 50 per cent of prisoners were unemployed
> - More than 85 per cent of prisoners had not finished high school.

'Recidivism' is the rate at which people reoffend. A person who serves a sentence and then offends again after that, whether committing the same offence or a different one, is called a recidivist. Statistics collected by the Victorian Department of Justice show that 43.6 per cent of prisoners released during 2016-2017 returned to prison within two years (ie. by 2018-2019).

Punishment

Core definition

Punishment 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, as punishment.

Elaboration

By punishing the offender for their crime, society obtains revenge against the offender for the harm they have done. Although this seems primitive, unless the state takes action, individual victims of crime or their communities may seek retribution personally, which would reduce law and order.

The punitive value of a sanction should be appropriate to the crime, and be just in all the circumstances. "Over-punishment" becomes vengeance, and is not appropriate in a just and democratic society. The sentencing principle of proportionality means that the overall hardship caused to the offender must be proportionate – roughly equivalent to – the gravity or seriousness of their offending behaviour. Section 5(1) of the *Sentencing Act 1991* (Vic) qualifies the amount of punishment that can be given to an offender:

> *(a) to punish the offender to an extent and in a manner which is just in all of the circumstances.*

Deterrence

Core definition

Specific deterrence is where the offender themselves does not want to receive that consequence again, so they are discouraged from offending again in the future, to 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 are discouraged from committing the same crime. The theory is, if the sanction is severe enough, some potential offenders may think twice about committing the offence. This is called general deterrence because it is concerned with deterring the general public.

Elaboration

Unlike rehabilitation, deterrence is a negative motivation. Deterrence is choosing not to commit crimes because you want to avoid a *negative* consequence that is attached to criminal behaviour.

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

Does imprisonment deter? A review of the evidence

The 2011 report by the Sentencing Advisory Council defines deterrence as "the prevention of crime through the fear of a threatened – or the experience of an actual – criminal sanction." It found that "The research demonstrates that increases in the severity of punishment […] have no corresponding effect upon reoffending."

The report says: "Deterrence theory is based upon the classical economic theory of rational choice, which assumes that people weigh up the costs and benefits of a particular course of action whenever they make a decision. Deterrence theory relies on the assumption that offenders have knowledge of the threat of a criminal sanction and then make a rational choice whether or not to offend based upon consideration of that knowledge.

Rational choice theory, however, does not adequately account for a large number of offenders who may be considered 'irrational'. Examples of such irrationality can vary in severity – there are those who are not criminally responsible due to mental impairment, those who are drug affected or intoxicated and those who simply act in a way that is contrary to their own best interests. Research shows that the majority of offenders entering the Victorian criminal justice system have a history of substance use that is directly related to their offending.

[…] The evidence from empirical studies of deterrence suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence."

Denunciation

Core 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.

Elaboration

Denunciation may be an appropriate purpose even when the offender poses no threat to the community, and has no specific difficulties or behaviours that need to be rehabilitated.

For example, in 2013, a 56-year-old man from Kew in Melbourne was sentenced to 18 months' imprisonment for assisting with his chronically ill wife's suicide, before assisted dying had been legalised. Justice Coldrey sentenced him, saying, "Since the law continues to regard what you did as an offence, the denunciation of it and the deterrence of others remain elements of any sentence to be imposed."

Activity 2p: Motorbike rider sentenced to imprisonment

DPP v Jakobbson [2017] VCC 688)

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

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

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

Questions/tasks

1. **Explain why Campton J focused on denunciation in the case of Jakobbson.**

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

Protection

Core 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.

Elaboration

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

Courts have in the past preferred purposes such as protection to purposes such as punishment, because protection serves a positive social function. Section 6D of the *Sentencing Act 1991* states that, when sentencing an offender for one of a number of serious offences, the court "must regard the protection of the community from the offender as the principal purpose," and "may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances."

CASE EXAMPLE: *Channon v R [1978] FCA 16*

Channon was found guilty of arson, and the trial judge sentenced him partly on the basis of evidence of a "deep-seated psychiatric problem," and made psychiatric treatment a requirement of the term of imprisonment. The offender appealed his sentence. The appeal was successful, as the Federal Court found that the trial judge lacked proper evidence on which to make the order for treatment.

In its findings, the Court stressed the importance of protection:

"The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose."

The Court determined that the imprisonment ordered by the trial judge was in excess of what was needed for the protection of the community.

Activity 2q: Culpable driver sentenced to imprisonment

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

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

At the time of the culpable driving offence, Dunkley-Price was unlicensed, having been suspended from driving due to a speeding offence.

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

Questions/tasks

1. **Explain why Pullen J focused on protection and deterrence in the case of Dunkley-Price.**
2. **Comment on the relationship between protection and specific deterrence.**

Review questions 2.6

1. Define the term 'sanction'.
2. Identify the five purposes of sanctions.
3. In what piece of legislation are the purposes of sanctions contained?
4. Give a synonym for 'rehabilitation' as a purpose of criminal sanctions.
5. Provide two examples of life factors that could contribute to an offender's criminal behaviour, and that they could seek rehabilitation for.
6. Define 'recidivism'.
7. Provide one piece of data to suggest that rehabilitation is not always effective or possible.
8. Give a synonym for 'punishment' as a purpose of criminal sanctions.
9. What is the difference between punishment and retribution?
10. What is the difference between just or fair punishment and vengeance?
11. Explain how punishment is linked with the sentencing principle of proportionality.
12. Give a synonym for 'deterrence' as a purpose of criminal sanctions.
13. Differentiate between specific deterrence and general deterrence.
14. Explain the difference between deterrence and rehabilitation.

15. What impact did the Justice Legislation Miscellaneous Amendment Act 2018 (Vic) have on the weight given to deterrence in the calculation of a sentence?
16. Provide one piece of data to suggest that deterrence is not always effective or possible.
17. Give a synonym for 'denunciation' as a purpose of criminal sanctions.
18. Explain how denunciation may be appropriate, even if the offender poses no threat to society and is unlikely to ever commit an offence again in the future.
19. What impact did the Justice Legislation Miscellaneous Amendment Act 2018 (Vic) have on the weight given to denunciation in the calculation of a sentence?
20. Give a synonym for 'protection' as a purpose of criminal sanctions.
21. Explain how protection is a "purposive" aim.
22. Can the courts order a sanction that is greater than what is needed to protect society? Refer to the case of *Channon v R* [1978] in your answer.

2.7 Types of sanctions

The Study Design lists fines, community correction orders (CCOs) and imprisonment as types or examples of sanctions that can be ordered by a court.

Section 5(3) of the *Sentencing Act 1991* relates the sanctions themselves to the purposes of sanctions discussed above, by limiting a court's sentencing options to only those sanctions that are necessary to achieve the purposes the court wants to achieve in the case before them.

***Sentencing Act 1991* (Vic)**

Section 5(3) […] a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

This is known as the principle of 'parsimony'. Parsimony means preferring restraint or frugality, or being economical. Parsimony is also called the principle of economy: less is more.

Fines

Core definition

A fine imposes a monetary penalty on an offender, paid to the court fund or the government revenue fund of non-taxation income. Fines are not paid to the victim.

Detail

Fines are the most common penalty imposed for any offence. Roughly 55-60 per cent of all offences are sentenced with a fine in Victoria, mostly by the Magistrates' Court. If an offender fails to pay a fine they can be arrested, and may be ordered by the court to perform unpaid community work or serve a prison sentence of up to 24 months in lieu of payment. Between 2010 and 2018, three hundred Victorians served time in prison for failing to pay fines, with the longest sentence being 429 days. As of February 2020, there were approximately 8,000 breached imprisonment-in-lieu orders in place – these are all people who risk incarceration for non-payment of fines and who have warrants out for their arrest.

Court-imposed fines are different from infringement notice fines: infringement notice fines are pre-determined amounts issued by Victoria Police and other government agencies, whereas court-imposed fines are flexible amounts determined by judges and magistrates in courts, set within the scope determined by legislation for that offence. In 2017-18, 2.98 million of the 5.4 million fines given in Victoria were issued by Victoria Police.

The penalty for any offence is stated in the legislation outlining the offence, and is expressed as a number of 'penalty units'. An example of this can be seen below, in the sentence applicable to the offence of failing to attend for jury duty. The value of a penalty unit is set annually by the Department of Treasury and Finance, and updated on 1 July each year. This saves Parliament from having to amend each act separately to keep fines in line with inflation. The value of a penalty unit in Victoria from 1 July 2020 to 30 June 2021 was $165.22. The maximum fine for failing to attend for jury service is therefore $4956.60 in 2020-21.

***Juries Act 2000* (Vic)**

Section 71. Failing to attend for jury service

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

Penalty: 30 penalty units or imprisonment for 3 months.

A court can impose a fine either with or without recording a conviction. A conviction is a formal record of the fact that an offender is guilty of an offence, and is added to the person's criminal history. This criminal history can be accessed by outside parties such as potential employers in some situations. Fines may also be combined with other sentences such as periods of imprisonment or CCOs.

Section 52(1) of the *Sentencing Act 1991* states that a court must take into account the financial circumstances of the offender, and the nature of the burden that payment of the fine will impose on the offender, when calculating the amount of the fine. This is partly because of the principle of parsimony: a large fine given to a person who would struggle to pay a small fine may constitute excessive punishment.

Parliament also takes this into account when legislating to set the appropriate fine range for each offence. For example, a corporation that terminates or threatens to terminate the employment of a person who is absent from work due to jury service may face a fine under s76 of the *Juries Act* of 600 penalty units (or $99,132 in the 2020-21 financial year). The penalty for individuals committing the same offence is 120 units or 12 months' imprisonment.

A Fines Report Advisory Board was established in 2019 to investigate problems in the fines system. It received many public and stakeholder submissions and was due to report back to the state Attorney-General in March 2020, but the Covid-19 pandemic and lockdown delayed the reporting.

Discussion

AIMS OF SANCTIONS	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST
REHABILITATION	A fine can be imposed without recording a conviction. The 2012 study of N Ascani into *Labelling Theory and the Effects of Sanctioning* found that a strong feeling of "stigmatisation" increased the likelihood of future criminal behaviour. Fines do not carry a strong stigma of an individual being a 'criminal'. Offenders are given another chance, especially when no conviction is recorded. Section 52(1) of the *Sentencing Act 1991,* the principle of parsimony and existing precedent direct that a court should take into account an offender's capacity to pay when determining the amount of a fine. This reflects research from 2009 published in the Annual Review of Clinical Psychology that excessively punitive consequences make recidivism more likely and act as a barrier to rehabilitation.	Payment of a fine involves the offender in no activity that asks them to reflect on the reasons for their offending, or to improve their emotional regulation, mental health, or any of the above. Evidence suggests that people involved in the criminal justice system come from a small number of postcodes within each city, have higher levels of financial disadvantage, and higher levels of unemployment and home-lessness than the average person. Fines increase debt, and make each of these factors more difficult to address.
PUNISHMENT	Fines are an immediate consequence for wrongdoing, and are easily understood by most people in the community. They can therefore act as an effective 'slap on the wrist' for offences, scaled according to the approximate seriousness of the harmful act. Most people understand the value of money and feel immediate hardship when it is taken from them. Even though fines are legally considered to be less serious than CCOs, a 1988 study across five countries found that the public consistently ranked a fine of even $40 (worth approximately $90 in 2020) as being more serious than court orders involving good behaviour conditions or community work.	Fines have an unequal impact on different offenders. For example, in 2004 Dr Clive Hamilton submitted to The Australia Institute research that flat or consistent fines were "grossly unfair" because "a particular quantum of fine is bound to impose much more pain on a low-income earner." Fines will usually involve no deprivation of freedom or liberty. The hardship they impose is relatively small, and may not satisfy the desire for retribution from the community. Australian precedent has determined that it is acceptable to impose a fine that someone other than the offender will pay: this imposes no hardship on the offender and therefore does not punish them. If the value of a fine to the offender is less than the value of their wrongdoing, the fine may feel to the offender like they are paying for the ability to ignore the law than like hardship. For instance, some people would prefer to pay a fine for not purchasing a public transport ticket than to pay each time for a ticket.

DETERRENCE	Many fines are scaled according to whether the offender is a corporation or a natural person, or are able to be scaled by the court based on the financial circumstances of the offender. For example, the maximum fine the Magistrates' Court can impose on a natural person is 500 penalty units, but 2500 on a corporate body. This attempts to calibrate the fine to an amount that is meaningful for the offender to lose. Australian and UK research from the last 50 years has found a more significant deterrent effect resulting from fines than from almost any other standard sentencing option: for example, in *DPP v Fucile and Tran* [2013] VSCA 312, Weinberg JA defended the decision of the trial judge to sanction two Crown Casino security guards with fines for assault and false imprisonment, saying that "his Honour, vastly experienced in criminal matters, no doubt had in mind the substantial body of research which suggests that a fine can, in appropriate cases, be an extremely effective deterrent."	A series of Australian studies from 1999 to 2005 have found that, on average, 49 per cent of people who commit crime do it to pay off debt. This creates a risk that the offender will commit more crime in order to service the fine, and not be specifically deterred be-cause they feel they have no other option except face imprisonment. If a fine is easy to pay for a particular offend-er, or is worth the value of the wrongdoing to the offender, they will have little incentive to avoid that criminal conduct in the future. A 2018 paper in the Crime Justice Journal ar-gued that "People are led to regard fines in much the same light as they do other routine costs of living." In *Jetopay Pty Ltd v Dix* (1994) 76 A Crim R 427, the Court expressed con-cern that low fines became merely a "tax on illegal conduct." Fines incurred by individuals rather than cor-porations are largely invisible to the general population, which means that general deter-rence is unable to be achieved. In 2010 the Chief Justice of Victoria, the Hon Marilyn Warren, said in her speech to the Melbourne Press Club that "deterrence within the com-munity will not be achieved unless knowledge of the sentences is conveyed to the commu-nity." The Court of Appeal has found that fines larg-er than the offender can ever pay have no specific deterrent effect, and are dispropor-tionate if given for only general deterrent value: Weinberg JA found this recently in Jopar v The Queen [2013] VSCA 83 in relation to a destitute offender receiving a fine for 'people smuggling' that was designed to deter others in his home country.
DENUNCIATION	The law adjusts the value of a fine in order for it to have roughly the same denunciation impact as a term of imprisonment. Generally, if an offence is punishable by imprisonment (other than Level 1 or Level 2 offences) it can be punished instead by a maximum fine that is 10 times the number of penalty units more than the maximum number of months of imprisonment (s109(3) Sentencing Act 1991). The public understands the value of money more than the value of supervision and court orders such as CCOs. In 1978 a study found that members of the public believed a $250 fine (worth approximately $1000 in 2020) was more severe than a six month CCO-equivalent with the threat of imprisonment for non-compliance.	Denunciation will not be achieved if the community is unaware of the imposition of the sentence. Fines paid by individuals rarely make the news and there is no physical change for the community to observe, such as the offender physically being detained in jail or performing unpaid work. Fines are largely invisible. This lack of 'spectacle' is why fines are so seldom given by higher courts for violent or sexual offences. Fines are the most common sanction, so they lose their ability to meaningfully denounce because they do not seem serious when so many people have experienced them.
PROTECTION	Because fines do not remove an offender from the community or monitor their behav-iour, protection will mainly be achieved by fines to the extent that they succeed in de-terring potential offenders from committing wrongdoings in the first place.	Fines do not remove an offender from the community or (by themselves) involve super-vision orders that monitor an offender's be-haviour. The payment of money to the state does not incapacitate an offender or control them to prevent further wrongdoing.

Community correction orders

Core definition

A **community correction order (CCO)** is defined by s36 of the *Sentencing Act 1991* (Vic) as a "community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender." It is a court order that allows the offender to be released into the community, and that contains a range of terms and conditions.

Terms and conditions

Every CCO has seven compulsory terms that extend for the duration of the order, listed in s45 of the Sentencing Act 1991. In every case, an offender:

- must not commit any offence punishable by imprisonment for the duration of the order
- must report to a community corrections centre within two days of the order starting
- must not leave Victoria without permission from the Department of Justice and Community Safety
- must regularly report to the Department and receive visits from Department staff
- must inform the Department if they change address or employment
- must comply with written directions from the Department
- must comply with any obligations contained in CCO regulations

In addition to these terms, each CCO must have at least one condition attached. These conditions may require the offender to do things like the following:

- undertake medical treatment or rehabilitation programs for drug or alcohol abuse or dependency (s48D)
- avoid licensed premises that serve alcohol and locations hosting major events (s48J)
- complete unpaid community work up to a total of 600 hours (s48C)
- avoid association with specified people, such as co-offenders (s48F)
- live at, or avoid living at, a specified address (s48G)
- avoid particular nominated places (s48H)
- comply with a curfew for between 2 and 12 hours each day (s48I)
- pay a bond that must be surrendered if the offender fails to comply with any condition imposed (s48JA)

The most common condition attached in all cases is unpaid community work. A study into the first five years of the CCO regime, conducted by the Sentencing Advisory Council, found that 77 per cent of all CCOs involved community work, and that this figure was similar regardless of what offence the CCO was ordered for.

The *Sentencing Act 1991* links several aims of sanctions with their relevant conditions. For instance, s48C of the Act says that "The purpose for attaching an unpaid community work condition is to adequately punish the offender in the community."

Detail

A CCO is regarded as a mid-range sentence, more serious than a fine but less serious than a term of imprisonment. CCOs can be ordered by any of the Magistrates', County or Supreme Courts, for any offence punishable by at least five penalty units (s37 of the *Sentencing Act*), when the offender consents to the order being made. They cannot be ordered for the most serious offences, Category 1 and Category 2, such as murder, rape and drug trafficking.

A court *must* not impose a sentence of imprisonment if the purpose of purposes of the sentence could be achieved with a CCO with one or more of the following conditions attached: non-association, residence restrictions, location restrictions, curfews, and/or alcohol exclusions.

In the Magistrates' Court, a CCO can be imposed for a maximum of two years for one offence, four years for two offences, or five years for three or more offences. In the Supreme and County Courts, a CCO can be imposed for up to five years. No CCO may last for longer than the maximum jail term that could be ordered for that offence.

A CCO may be ordered *in addition* to a fine or a term of imprisonment of up to one year. The exception to this is CCOs given for serious arson offences, in which case there is no time cap on the length of the custodial sentence. Where a CCO is imposed in addition to a term of imprisonment, the CCO commences when the offender finishes their jail sentence; or, if the offender is released on parole, at the end of the parole period. An offender who breaches a term or condition of their CCO may be re-sentenced for the offence under s83AD of the *Sentencing Act 1991*, and receive an additional sentence of three months' imprisonment as penalty for their breach.

Extract from Victoria Legal Aid Annual Report 2015–16

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

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

EXTENSION: Guideline judgment on CCOs

In December 2014 the Court of Appeal handed down its first guideline judgment on CCOs: a judgment that specifically and deliberately gives advice to courts on how to apply the law.

In Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen [2014] VSCA 342, the Court of Appeal said that CCOs were not designed only for lower-range offences; instead, they were designed to be available in serious matters where the offender was at risk of receiving a custodial sentence. The Court said that the introduction of CCOs made imprisonment more effectively the sentence of last resort. The Court said that judges needed to ask themselves:
Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there are any feature of the offence, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?

The Court discussed the question of whether a CCO was to be preferred over a term of imprisonment, saying:
The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence […] In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her.
The Court noted that the severity of the conditions attached would depend on the case, and that different offenders would find different offences more or less severe, depending on their personal circumstances. For example, a condition prohibiting an offender from attending any venue that served alcohol would be experienced more severely by an offender who worked in hospitality and socialised in bars and pubs than it would be by an offender who rarely drank, and who did not work or socialise inside licensed venues.

The Court also addressed the aims of sanctions in turn, and discussed the extent to which each was achieved in general by the new (as of 2012) CCO sentencing order:

PURPOSE	COURT OF APPEAL'S COMMENTS
Rehabilitation	"A CCO demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places."
Punishment	"Both the period of the CCO, and the conditions attached, bear upon the extent of the punishment inflicted. In the particular case, the punitive effect will be determined by the extent, and duration, of the curtailment of the offender's freedoms. […] A CCO is also intrinsically punitive and, depending on the length of the order and the nature and extent of the conditions imposed, is capable of being highly punitive."
Deterrence – specific	"There are several reasons why, in our view, a CCO can very effectively serve the purpose of specific deterrence. First, because it will be a real punishment, it should deter repeat offending. Secondly, there is the mandatory condition attached to every CCO, prohibiting the commission of an offence punishable by imprisonment."
Deterrence – general	"The effectiveness of an individual sentence as a deterrent depends on two things: (a) the degree to which the sentence is, and will be perceived by the relevant section of the community to be, punitive in nature; and (b) the extent to which the fact of the sentence, and its punitive character, is communicated to those whom it is intended to deter. […] As we have explained, a CCO is intrinsically punitive and is capable — depending on the length of the order and the nature and extent of the conditions imposed — of being highly punitive. It follows that, as a matter of principle, a CCO can operate to deter others."
Denunciation	"[E]ven in cases of objectively grave criminal conduct, the court may conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment […] if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending."
Protection	"[T]he focus of the conditions attached to the CCO will be to minimise the risk of re-offending — by ensuring appropriate treatment to address the causes of the offending and/or by prohibiting the offender from visiting places or associating with persons which might lead to criminal activity. In this way, the purpose of protecting the community […] can be well served by a CCO."

Discussion the extent to which CCOs address the purposes of sanctions.

AIMS OF SANCTIONS	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST
REHABILITATION	CCO requires that an offender take personal responsibility for their progress and the fulfilment of their conditions, because there is no externally-controlled schedule or routine like in prison. A CCO cannot even be imposed by the court unless the offender consents to it (s37(c) of the Sentencing Act 1991). Many CCO conditions require that an offender undertake programs that are targeted to the reasons for their offending. CCOs usually require a pre-sentence report to be received by the court, detailing relevant information about the offender such as their medical and psychological state, their educational and employment history, and recommendations for specific programs. In the second reading speech when the CCO was proposed, the state attorney-general argued that a CCO was a way for the courts to "intervene in the lives of offenders." The original purpose of a CCO is therefore to modify the everyday behaviours and choices of offenders. As per the guideline judgment in Boulton, if defence counsel seeks a CCO, they must make specific submissions to the court on the conditions that should be attached. This forces the accused and her or his counsel to clearly articulate "the offender's particular needs, and the causes of the offending, and which will promote the necessary changes in the offender's life to reduce the risk of reoffending."	Payment of a fine involves the offender in no activity that asks them to reflect on the reasons for their offending, or to improve their emotional regulation, mental health, or any of the above. Evidence suggests that people involved in the criminal justice system come from a small number of postcodes within each city, have higher levels of financial disadvantage, and higher levels of unemployment and home-lessness th Many offenders are either unwilling or unable to complete the conditions on their CCOs. In 2017, the audit of CCO compliance by the Victorian Auditor-General's Office found that Victoria's rate of compliance was only 66.5 per cent – the second-lowest of any Australian jurisdiction. 85 per cent of offenders in 2015-16 had alcohol or drug programs attached, but this increased waiting times to an average of 20 business days and 40 per cent of serious risk offenders on the priority list waited more than three months for a pre-assessment screening. Some treatments also require offenders to make a gap payment, which many are unwilling or unable to do. Courts are increasingly giving orders of imprisonment with CCOs, which introduces any problems faced by custodial sentences. For instance, between 2013 and 2016, according to the Victorian Auditor-General, the number of CCO imprisonment orders increased by 400 per cent. The data on CCOs suggests that they are effective in reducing recidivism, but the numbers have not been adjusted to reflect the fact that CCOs are given to a lower-risk cohort in general. According to the Department of Justice and Regulation, 24.9 per cent of offenders on CCOs reoffended within two years, compared with 53.7 per cent of people released from prison. As of 30 June 2016, however, 60.4 per cent of offenders on CCOs were first-time offenders an the average person. Fines in-crease debt, and make each of these factors more difficult to address.
PUNISHMENT	Terms and conditions, such as the inability to move freely or to commit to scores of hours of unpaid community work, have the ability to curtail the offender's freedoms. Section 48C(2) of the *Sentencing Act 1991* expressly states that unpaid community work is provided for to punish the offender.	The Court in *Boulton* noted that the flexibility of a CCO could make it difficult for a court to accurately calculate the punitive effect of the conditions. Conditions can vary significantly across CCOs, and the same condition can be more or less onerous for an individual offender, depending on whether it demands a radical change in behaviour or a sacrifice. Punishment often stands in conflict with the aim of rehabilitation, in that a harsh punishment can have a criminogenic effect that is the opposite of rehabilitation. To the extent that conditions are designed to help and support offenders, they are unlikely to carry full punitive value.
DETERRENCE	The mandatory term of non-commission of an indictable offence during the term of the CCO should specifically deter, because otherwise the offender is liable to be sent to prison. The punitive value of the CCO's terms and conditions is thought by the courts to have a specific deterrence effect on the offender. Since the 2014 guideline judgment of Boulton, the seriousness of CCOs as sentencing options have been more widely publicised, to achieve a general deterrent effect.	An offender's risk of reoffending is meant to be assessed as part of their CCO, but the 2017 audit by the Victorian Auditor-General's Office found that only 55 per cent of risk assessments were being completed on time. The deterrence needs of many offenders is not known effectively. Research suggests that people in the community think of CCOs as 'soft' sanctions because most conditions take away neither freedom nor money. This may be reflected in a lack of specific deterrence: the Sentencing Advisory Council found in 2017 that 35 per cent of all offenders given CCOs in 2012-13 committed at least one imprisonable offence while serving their CCO
DENUNCIATION	Since the 2014 guideline judgment of *Boulton*, the seriousness of CCOs as sentencing options have been more widely publicised, to encourage the community to regard them as serious signs of dissatisfaction with an offender's behaviour. Terms of imprisonment and fines can be coupled with a CCO, in order to increase the total perceived weight of the sanction. Some terms and conditions are visible to the public, and are obvious signs that the offender is being required to atone for their actions. For instance, over three-quarters of offenders must attend a place for community work, for up to 20 hours a week.	There is evidence suggesting that the public does not regard community-based sentences as serious condemnation. In 1978 a study found that members of the public believed a $250 fine (worth approximately $1000 in 2020) was more severe than a six month CCO-equivalent with the threat of imprisonment for non-compliance.

PROTECTION	Protection through a CCO is designed to be achieved primarily through the rehabilitative and specific deterrence functions. If these are effective, the offender will be less likely to keep offending. Some conditions are designed to minimise the offender's exposure to environments and social contacts that encourage continued offending. For instance, the offender can be ordered to stay away from licensed venues, if alcohol is a typical factor in their offending. Curfews can also be ordered for up to 12 hours a day.	A CCO can be given with supervision conditions, but most are not. There is therefore no direct protection for the community, because the offender is relied on to self-manage. The Sentencing Advisory Council found in 2017 that 35 per cent of all offenders given CCOs in 2012-13 committed at least one imprisonable offence while serving their CCO – the 2,705 offenders who contravened their CCO by further offending committed 15,941 proven imprisonable offences between them.

Imprisonment

Core definition

Imprisonment removes an offender's liberty by sentencing them to a term of imprisonment held in state custody in a jail.

Detail

The *Sentencing Act 1991* outlines the penalty scale for imprisonment. The penalty scale has nine levels, ranging from Level 9 (six months imprisonment) to Level 1 (life imprisonment). Because these levels refer to the amount of time the offender will spend in custody, imprisonment is called a 'custodial sentence'. The Magistrates' Court may only impose a maximum of two years for a single offence and five years for two or more offences, and the Supreme Court is the only court that can impose Level 1, life imprisonment.

In Victoria, there are eleven publicly operated prisons, three privately operated prisons, and one transition centre. The Judy Lazarus Transition Centre offers five five-person self-contained units to provide up to 25 prisoners at a time with a minimum-security pathway back into society when they are nearing the end of their sentence. According to the Corrections Victoria, the department that manages prisons, the size of Victoria's prison population increased by 86.2 per cent between 2009 and 2019: on 30 June 2019, Victoria's prison population reached 8,101 – by way of contrast, there were 12,813 offenders on CCOs.

Imprisonment is called the 'sanction of last resort', because it must only be ordered if the court believes that the aims of criminal sanctions cannot be achieved by any of the other sentencing options. Section 5(4) of the *Sentencing Act 1991* states that a custodial sentence may not be imposed unless "the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender."

In the sentencing guideline judgment in *Boulton*, the Court of Appeal described imprisonment as focused primarily on retribution for the community and social effect:

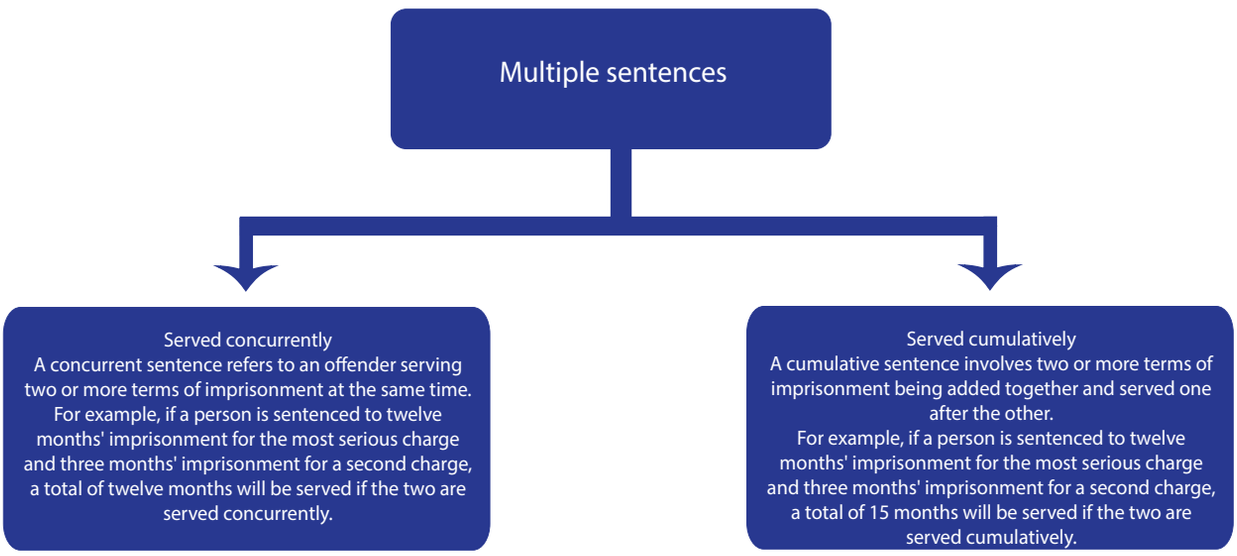
> *Given the adverse features of imprisonment to which we have referred, the conclusion that imprisonment is the only appropriate punishment amounts to a conclusion that the retributive and deterrent purposes of punishment must take precedence. Put another way, it is a conclusion that the offender's 'just deserts' for the offence in question require imprisonment, even though the court is well aware that the time spent in prison is likely to be unproductive, or counter-productive, for the offender and hence for the community.*

According to the Sentencing Advisory Council, 43.3 per cent of prisoners in Victoria released during 2016-17 returned to prison by the end of the two years to 2018-19, and a further 11.6 per cent re-offended and were placed on a CCO.

Calculating the duration of sentences

Multiple sentences ordered for more than one offence can be served either concurrently or cumulatively, as described in Figure 2.4 below:

Figure 2.4



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

An indefinite sentence refers to a sentence of imprisonment with no set end date. Under s18A of the *Sentencing Act 1991*, a court may impose an indefinite sentence on any offender, other than a young person, who is convicted of a serious offence (such as rape, murder or manslaughter). When ordered by the court, the offender will serve their full sentence and then the court will assess whether or not the offender should return to the community. Release will only be granted when the court finds that the offender is no longer a serious danger to the community. An offender serving an indefinite sentence is not eligible to be released on parole, and no non-parole period will be set.

Discussion

The 2015 parliamentary report into the Victorian prison system by the Ombudsman found broadly that data exists to show which approaches to imprisonment are effective, but that the system suffers from a lack of funding for these approaches, a lack of access to them, and a lack of coordination of them.

> *While there are many reasons people reoffend and return to prison, it is evident that insufficient access to rehabilitation and reintegration programs has a significant bearing on the likelihood of returning.*
>
> *Although there is some good practice across the justice system in diversion, rehabilitation and reintegration, these are often uncoordinated, as well as demographically, geographically and financially constrained. A whole-of-government approach is needed to shift the focus: to reduce offending and recidivism and to promote the rehabilitation of offenders. This requires a common intent and set of shared objectives across justice agencies, health, education and housing, and stronger links to community service organisations.*
>
> *Reducing imprisonment rates will inevitably require an increase in funding for a number of years, until the results of new measures are realised. However, over time there should be substantial savings for the Victorian community, both financially and in terms of community safety.*
>
> Victorian Ombudsman,
> *Investigation into the rehabilitation and reintegration of prisoners in Victoria,*
> September 2015

AIMS OF SANCTIONS	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST
REHABILITATION	There are a range of rehabilitation programs targeted to different needs, including sexual offending, cognitive skills and community re-integration. For instance, nearly half (47 per cent according to a 2011 review by the Aus-tralian Institute of Criminology) of all prison-ers are in custody for crimes of violence. Vic-torian prisons therefore have a high intensity Violent Offender Program that involves test-ing before and after, and program evaluation. Over the last twenty years the prison system has adopted a range of recommendations for better case management and program deliv-ery. For instance, in its 2015 parliamentary report, the Ombudsman found that Victorian prisons would be rolling out compulsory edu-cation assessments from 2016, in response to 6 per cent of male prisoners and 14 per cent of female prisoners not having completed high school. As of 2020, 36 per cent of pris-oners were part of an education program. Dedicated units within prisons have proven ability to respond to targeted needs and re-duce recidivism. For instance, the 35-bed youth unit at Port Phillip Prison for first-time male prisoners has successfully reduced the expected recidivism rate. Victorian prisons are adopting transition, pre-release and post-release programs. 10.4 per cent of prisoners discharged from Victoria's only dedicated transition facility returned to jail within two years, compared with 44 per cent of all prisoners.	A major audit of Victoria's prison system in 1999 found that incidents including self-mutilations and suicide attempts, assaults on other prisoners, and positive drug tests exceeded the benchmarks for "acceptable" levels by up to 91 per cent. This is not an environment conducive to positive growth. Prisons have inadequate rehabilitation and transition programs. A 2020 audit of Victoria's new rehabilitation-focused prison, Ravenhall, found that prisoners were not being consistently assessed for their post-release needs or given access to programs. In 2015 the Ombudsman found a problem across all prisons that many prisoners seeking programs could not get access to them, and two-thirds of serious violent offenders had not been assessed for programs. More than 40 per cent of Victoria's prison population will return to prison within two years of release. The single transition facility has only 25 beds, and only 20 per cent of prisoners receive post-release support through Corrections Victoria. The 2015 report into Victorian prisons by the Ombudsman found that 93 per cent of prisoners did not complete high school, most were unemployed at the time of offending, and 76 per cent had a history of substance abuse. 40 per cent of female prisoners were homeless upon release from prison, and the average female prisoner had been the victim of abuse before their imprisonment. The children of prisoners were six times more likely to themselves go to prison. Prison cannot rehabilitate these larger social problems.
PUNISHMENT	In *Boulton*, the Court of Appeal described imprisonment as having a "narrow punitive purpose (and effect)." Punishment of the of-fender is considered the primary purpose for prison sentences being given by courts.	Many of the aspects of punishment are dehumanising. For instance, the common requirements for prisoners to be strip-searched after visitors leave, and the hours spent locked in their cells. During the Covid-19 lockdown in 2020, the ABC reported Victorian prisoners spending up to 22 hours each day in their cells. The justice system recognises that there is a conflict between achieving the hardship of punishment and achieving long-term benefit for society. In *Boulton*, the Court of Appeal said that "imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release."
DETERRENCE	The Sentencing Advisory Council, in its 2011 study into the deterrent effect of imprisonment, said that the effectiveness of prison as a deterrent had an "intuitive appeal" and that people associated it with a logical negative consequence for wrongdoing. General deterrence is most effective in relation to crimes where the participants are making active choices to commit wrongdoing, such as commercial crimes: "Those who run businesses, legitimate or illegitimate, are constantly guided in deciding whether to take particular commercial courses by their assessments of the economic and other risks and costs involved." (*R v Perrier* [No 2] [1991] VR 717) In *Winch v The Queen* [2010] VSCA 141 the Court of Appeal said that general deterrence will be most effective when sentencing is made public knowledge (for instance, through the media) and is communicated to those most likely to commit the same crimes. The punitive value of prisons is so high, given the loss of freedom, employment and relationships that the offender suffers, the incentive to avoid criminal behaviour in the future is strong.	The Sentencing Advisory Council, in its 2011 study into the deterrent effect of imprisonment, said that we think imprisonment should deter because it is undesirable, but the evidence does not prove that it deters significantly in reality. In its 2012 study into protection of the community through prison 'incapacitation', the Sentencing Advisory Council found that specific deterrence decreased the more that imprisonment rates increased, and that imprisonment could have the criminogenic influence of actually increasing future crime. Reasons include evidence that prison is a 'learning environment' for crime, that imprisonment reinforces criminal identity, and that prison cuts positive social ties and employment. There is little evidence that the possibility of imprisonment has a general deterrent effect on the community, particularly given the circumstances in which crimes occur and the common personality characteristics and drug dependencies associated with offending. For instance, a 2012 NSW study found that increases in the length of imprisonment had no short-term or long-term impact on crime rates, and recommended that governments focus on increasing the threat of detection and arrest instead.

DENUNCIATION	The community identifies prison as the sanction of last resort, and associates sentences of imprisonment with the most severe condemnation available to the justice system.	If imprisonment is considered the 'default' sanction, it loses its ability to denounce effectively. Instead, imprisonment is regarded as the norm, and any lesser sentence is thought to be 'soft on crime'. Most sentences of imprisonment are not high-profile enough to have any significant effect on the public's opinion of the wrongdoing. Denunciation encourages an attitude in society of condemnation rather than understanding and forgiveness. This may not be in the best long-term interests of society, particularly when dealing with vulnerable populations such as youth offenders or offenders with mental health problems.
PROTECTION	A prison term protects the community from continued criminal conduct by removing the offender from participation in public life for the term of their sentence. To the extent that prison provides rehabilitation opportunities, long-term protection of the community will be achieved.	In over 99 per cent of cases, prison is temporary and the offender will be released. Unless rehabilitation and deterrence are achieved, the community will not be protected long term. In *R v Philpot* [2015] ACTSC 96, Murrell CJ sentenced the offender to 19 months' imprisonment for accessing child pornography. Murrell determined that the sentence should be served in the community as a CCO rather than in custody, though, because a community sentence would better allow the offender to continue treatment: "I find that the community will be best protected if the offender continues with the rehabilitation that he is currently undergoing." Prison audits have shown that assaults between prisoners and against prison guards regularly exceeded "acceptable" limits. Prison is not effective at protecting the people living and working inside it, if there is an environment of violence.

Activity 2r: What sanction might be applicable?

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

Case	Fine	Community corrections order	Imprisonment	Purpose/s
Georgia is a learner driver, 16 years old, and has been convicted of culpable driving.				
Tony has been found guilty of criminal damage. He is 36 years old, with a drug dependency, and this is his fifth offence.				
Jasmine has pleaded guilty to fraud offences. She is a wealthy owner of several companies.				
Eamon was found guilty of intentionally causing injury. He lost his temper at a soccer match and got into a fight.				
Jodie has pleaded guilty to trafficking the drug ice. She is 27 years old and had been recruited by a former boyfriend who was abusing her.				
A jury has found Abdi guilty of murder. He assisted with the death of a friend suffering from depression, and did not follow the assisted dying laws.				

Review questions 2.7

1. Explain what a fine is.
2. Describe how penalty units work.
3. Justify the purposes of sanctions that you think fines best achieve.
4. Explain what a community correction order is.
5. Identify some of the standard terms that every community correction order will have.
6. Outline a selection of conditions that may be attached to a community correction order.
7. What may happen if an offender breaches a term or condition of a community correction order?
8. Justify the purposes of sanctions that you think community correction orders best achieve.
9. Explain what imprisonment is.
10. Explain the difference between serving sentences cumulatively and serving them concurrently.
11. Justify the purposes of sanctions that you think are best achieved by imprisonment.
12. Critically examine how effective imprisonment is in achieving the purpose of rehabilitation, giving reasons for your answer.

2.8 Factors considered in sentencing

When determining an appropriate sentence, a court must consider a number of factors. Most offences do not have fixed mandatory sentences that will be given to each offender, regardless of the facts of the case, as each criminal act and offender will have a different set of circumstances and these should be taken into account when deciding a fair sentence. 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:

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

Study tip: *You should practise weighing up different features of each case and different purposes achieved by sanctions, because courts apply an "instinctive synthesis" approach rather than a mathematical one. In* R v Ivan Leonard Storey *[1996] VSC 75, the majority (Winneke P, Brooking and Hayne JJA, and Southwell AJA) stated that, "Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single 'right' answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the 'instinctive synthesis' which takes account of the various purposes for which sentences are imposed – just punishment, deterrence, rehabilitation, denunciation, protection of the community – and which pays due regard to principles of totality, parity, parsimony and the like."*

The purposes of these factors are to establish whether the particular instance of the offence before the court is a more serious example of that crime, or is a less serious example. Another word for seriousness in this context is 'gravity'.

CASE EXAMPLE: *Director of Public Prosecutions v Ristevski* [2019] VSCA 287

In June 2016, Karen Ristevski went missing. In March 2019, as the murder trial was about to begin, the charge of murder was withdrawn and Borce formally plead guilty to manslaughter in the Victorian Supreme Court. In April 2019 he was sentenced to nine years' jail, with a non-parole period of six years. The maximum term of imprisonment for manslaughter was 20 years, while for murder it was life.

In his sentencing remarks, Beale J said: "Because there is a spectrum of seriousness for manslaughter, like any other offence, it has been common for sentencing judges over many years to try and determine, if possible, where the manslaughter in question falls on that spectrum of seriousness. […] The prosecution submitted that this was an upper range example of the offence of manslaughter, notwithstanding the complete absence of information as to how you killed your wife.

In written submissions, your counsel submitted that, because of a lack of information,[16] I could not place your offence anywhere on the spectrum of seriousness for manslaughter. […] In oral submissions, your counsel arguably shifted his positon, suggesting yours was a mid-range example of manslaughter."

Beale determined that the offence was not on the low range of seriousness because of the fact that Ristevski had killed his wife in their own home, but that he could not determine whether the killing was mid-range or upper-range.

The prosecution appealed the sentence to the Court of Appeal. The Court objected to the strict categorisation of 'low-range', 'mid-range' and 'upper range', and suggested that seriousness was more of a spectrum, once all the factors of a case had been weighed against each other. The majority judgment identified a range of factors in the case that they considered increased the gravity of the offending, and said, "Those things make this crime more serious than it would have been had the respondent not engaged in that conduct." Ristevski's sentence was increased to 13 years' imprisonment, with a non-parole period of 9 years.

In the VCE Legal Studies course, the factors that are directly examinable are **aggravating factors**, **mitigating factors**, guilty pleas and **victim impact statements**.

Aggravating factors

Core definition

An aggravating factor is any fact or circumstance associated with the crime that increases the gravity of the offence or the offender's culpability.

Detail

Aggravating factors are not limited to only those circumstances of the wrongdoing itself: they can be taken from the context or background of either the offence or the offender. In *DPP (Vic) v England* [1999] VSCA 95, the trial judge refused to take post-offence harm caused to the murdered body into account as an aggravating factor. The Court of Appeal said that determining what factors to take into consideration was a matter of common sense and could extend beyond the start and finish of the crime: "Common sense and moral sense, which are and must ever be the essential foundation of sentencing principles and practices, unite in rejecting the notion that 'the circumstances of the offence', for sentencing purposes, are neatly marked out by two lines, one at the technical beginning and the other at the technical end of the crime."

Section 5(2) of the *Sentencing Act* directs courts to consider aggravating factors when determining an appropriate sentence, but it does not define or list aggravating factors. Instead, these are developed mostly through court decisions. There are a range of factors that can aggravate the culpability of an offender, including:

- pre-meditation, which is pre-planning the crime
- commission of the crime as part of a group against an outnumbered victim
- use of a weapon
- a breach of trust by the offender towards the victim – for example, if the offender is a teacher and the victim is a student
- particular cruelty in the crime.

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

Dunkley-Price was charged with culpable driving arising from an accident near the Myrniong off- ramp on the Western Highway. At the time, his licence was already suspended because of an earlier driving offence and he ought not to have been driving the car.

In sentencing, Judge Pullen found that an aggravating feature of Dunkley-Price's offence was that he was driving while unlicensed, because if he had complied with the licence suspension the accident would not have occurred. This made his personal culpability high, even though it did not change the crime itself.

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

Mitigating factors

Core definition

A mitigating factor is any fact or circumstance associated with the crime that decreases the gravity of the offence or the offender's culpability.

Detail

Like aggravating factors, mitigating factors can be drawn from circumstances arising before the crime was committed, and/or after the crime was committed. For example, if an offender seeks treatment or rehabilitation after committing the offence, this may be taken into account as a mitigating factor, even though the wrongdoing has already been committed. The mitigating factor will not relevant to the offender's guilt, but it may affect sentencing once guilt has been established or pleaded.

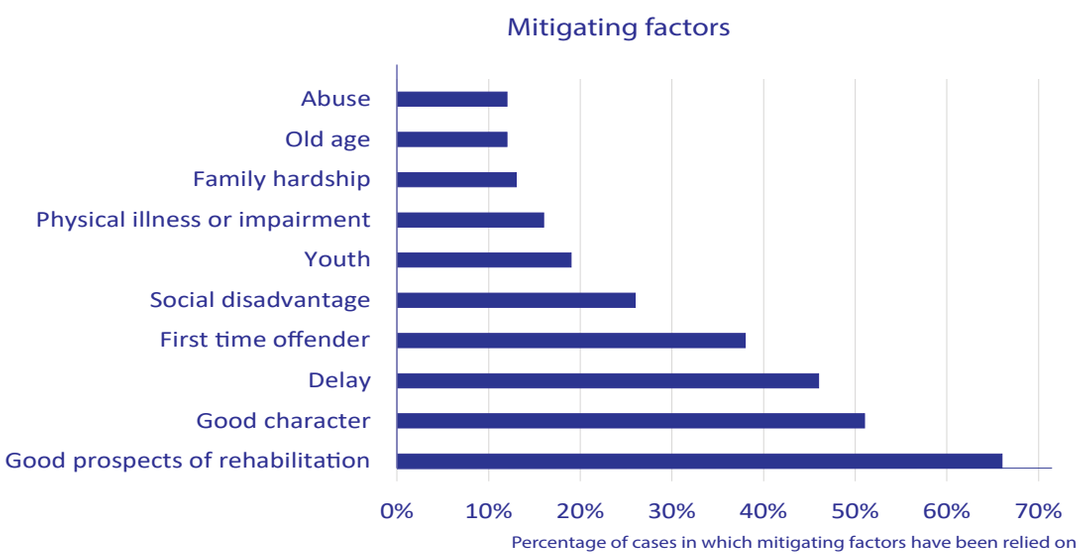
A mitigating factor generally means that the sentencing judge will discount or reduce the offender's sentence to take account of the mitigating factor.

Section 5(2) of the *Sentencing Act* directs courts to consider mitigating factors when determining an appropriate sentence, but it does not define or list mitigating factors. Again, this is the same as with aggravating factors. Instead, what can be taken into account as mitigating is developed mostly through court decisions. There are a range of factors that can mitigate the culpability of an offender, including:

- the age of the offender – particularly if the offender is very young or very old
- the background of the offender – for instance, if the offender experienced childhood neglect or significant disadvantage
- previous good character of the offender
- mental impairment on the part of the offender – as established in *DPP (Vic) v O'Neill* (2015) 47 VR 395, personality disorders can also triggers what are called the Verdins principles for taking into account mental impairment in sentencing, even though O'Neill's own narcissistic personality circumstances did not qualify him for a sentence discount
- remorse shown by the offender for the crime – for the offender to receive full benefit, both remorse and attempts at reformation or rehabilitation must be shown, in order to reduce the need for special deterrence (as per *Tones v The Queen* [2017] VSCA 118)
- whether imprisonment would be particularly hard on the offender
- early guilty pleas
- unreasonable or undue delay that is not the fault of the offender, and that causes anxiety or stress – this mitigates because the delay is punishment in itself, and fairness dictates that punishment be reduced in the subsequent sentence, to compensate.

Study tip: *Practise weighing factors against each other. In sentencing, aggravating factors and mitigating factors can act a little like a 'tug of war'. Aggravating factors will tend to pull towards a heavier sentence while mitigating factors will tend to pull towards a lighter sentence. They are both present in almost every case.*

In 2018 the Victorian jury sentencing project released results from its 2013-14 questionnaire in which County Court judges self-reported the mitigating factors that they had taken into account during the period of the study. The results are summarised below.



Note that guilty pleas are taken into consideration as mitigating factors, but a failure to plead guilty is *not* an aggravating factor. If an offender chooses to plead not guilty and asks the prosecution to attempt to prove their guilt at trial, they are in no way increasing their culpability: instead, they are merely insisting on their statutory right to a fair trial and to the presumption of innocence.

CASE EXAMPLE: *Siganto v The Queen* (1998) 194 CLR 656

In *Siganto*, the High Court considered the aggravating and mitigating effects of pleas. The majority said of guilty pleas that "a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."

They determined, on the other hand, that the inverse could never be true, and that no offender should be penalised for insisting on their right to a trial: "A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed." Sentencing must be for the crime, and not for an unsuccessful defence.

Similarly, remorse may be taken into account as a mitigating factor, but lack of remorse is not an aggravating factor. This was affirmed in 2019 in the Court of Appeal's judgment in the *Ristevski* case: "Remorse is a mitigating factor to be taken into account where it is present. Conversely, a lack of remorse is not an aggravating factor. To this day, the respondent has not shown one scintilla of remorse." (per Ferguson CJ and Whelan J)

Activity 2s: Childhood neglect and disadvantage

DPP v Green [2020] VSCA 23

Terence Green plead guilty to 21 offences including armed robbery, theft, and attempted kidnapping. It emerged that he had grown up in a dysfunctional family environment, and that he had been placed in youth custody for early offending. While in custody, he had been subject to what the Court called "appalling" physical and sexual abuse by custody officers, and had developed post traumatic stress disorder. He had also spent nine months in custody without lawful justification for a different incident.

Green was sentenced to 11 years' imprisonment, with a non-parole period of 8 years and 6 months.

On appeal, the Court considered whether Green's history of abuse had been taken into account too heavily by the sentencing court, and had resulted in a sentence that was manifestly inadequate. The Court also considered whether a longer sentence would "crush" Green's prospects of rehabilitation.

The Court applied the 2013 precedent from *Bugmy*, that childhood trauma can be relied on as a mitigating factor: "Those principles apply with equal force to a case such as this, in which the respondent was subjected significant abuse and degradation during the important formative years of his life. […] In essence, in the present case, the respondent's subjective culpability for his offending could not realistically be equated with that of a person who committed the same offences, but who had had the advantage of a normal, stable and regular home environment, and who had not been subjected to sexual and physical abuse of the kind experienced by the respondent while in custody."

The appeal was dismissed.

Questions/tasks

1. **Outline the factors that the sentencing judge accepted as mitigating the sentence.**
2. **Explain why the sentencing judge discounted Green's sentence, based on these factors.**
3. **Quote a statement from the Court of Appeal that supports this mitigation.**

Guilty pleas

Core definition

A guilty plea is a formal and conclusive admission to all elements of the charge, which the accused gives to the court. If the court accepts the plea, the prosecution does not need to lead any evidence to prove that charge.

Detail

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

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

Because the avoidance of a contested trial in order to obtain a conviction is a benefit to the community, substantial incentives are provided to an accused person to plead guilty to the charges against them. A key benefit to the accused of pleading guilty is that the sentencing judge must reduce the sentence they are given, and must tell them expressly in the court's sentencing remarks what sentence would have been imposed had the guilty plea not been entered. Section 5(2) of the *Sentencing Act 1991* requires the sentencing judge or magistrate to take into account any guilty plea by the convicted person, and the stage of proceedings when they make that plea.

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

Table 2.4: Guidelines for sentence reduction	
If the accused pleads guilty at the committal mention	The prosecutor at the plea should submit that the accused pleaded guilty at the earliest opportunity.
If the accused indicates an intention to plead guilty after the committal, but does not enter a plea until later in the process	The prosecutor at the plea should submit that the accused did not plead guilty at the earliest possible opportunity.
If the accused indicates an intention to plead guilty only after the trial has been listed	The prosecutor at the plea should submit that the reduction of the sentence should reflect a late plea of guilty.

The prosecution cannot make any submissions regarding the length of sentence that should be imposed by the court, however, or the length of the sentence discount that should be awarded. In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2, the High Court held that it was not appropriate for the prosecution to make submissions on sentencing range.

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

Victim impact statements

Core definition

A Victim Impact Statement is a statutory declaration prepared by a victim to a crime that can be given to the court either orally or in writing, and that describes the impact of the offence on the victim, including details of the harm suffered as a result of the offence.

Detail

Victims of crime may, under Division 1A of the *Sentencing Act 1991*, prepare a legal statement outlining how a crime has affected them. This is called a Victim Impact Statement, and in Victoria it can be taken into account in sentencing by the sentencing court. One of its purposes is to assist the sentencing judge or magistrate in determining an appropriate sentence for the offender, and it can be used as evidence of factors that could be either mitigating or aggravating.

'Victim' is defined broadly, as either a primary victim, someone directly affected by the offender's conduct; or a secondary victim. Secondary victims could be relatives of a person who was injured or killed by the offender, or people who witnessed the crime, for instance. Section 3 of the *Sentencing Act* defines a victim as: "a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender."

The Statement must be submitted initially in writing, accompanied by a statutory declaration, and filed prior to sentencing.

Contents of the Statement

The Statement is allowed to address the following matters, according to s8L of the Act:

- The impact of the offence on the victim
- Any injury, loss or damage suffered by the victim as a direct result of the offence.

The impact could be physical, psychological, social, or economic.

It must focus on the impact of the crime on the victim, and not on the victim's perception of the facts of the case or the wrongdoing of the offender. The court may rule any part of the statement inadmissible if it does not comply with the rules of evidence, or is in other ways inappropriate. 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 Statements in their entirety, even if some parts are inadmissible, and allowing the court to ignore inadmissible or irrelevant parts of the Statement in sentencing without specifying which parts those are. Parties can still make submissions about admissibility.

The Statement may include any photographs, drawings or poems that help the victim explain the impact of the crime on them, and a medical report may also be attached. All or part of the Statement may be read aloud in court by either the victim or a nominated person, and the non-verbal parts may be displayed. The Court has the power to direct that alternative arrangements are made for the reading of the statement, such as the use of screens to shield the victim, or allowing the statement to be read from another place and communicated to the courtroom through closed-circuit television.

Any Victim Impact Statement will be considered by the sentencing court at the plea hearing. The judge or magistrate will consider the statement in determining the appropriate sentence, and may refer to it in their published reasons.

CASE EXAMPLE: *DPP v Gargasoulas* [2019] VSC 87

On 20 January 2017 six people were killed by James Gargasoulas as he intentionally drove into them in Bourke Street in the CBD, and twenty-seven people were injured. The car Gargasoulas was driving was stolen and he was under the influence of the drug ice. He has been diagnosed with treatment-resistant schizophrenia and was hearing voices before the killings that gave him permission 'from God' to run people down. He was found guilty of murder and attempted murder after jury deliberation of less than an hour in November 2018.

At the end of January a pre-sentencing hearing was held in the Supreme Court, in which Victim Impact Statements were read and Gargasoulas's lawyer made a statement on his behalf. Victim Jessica Mudie's twin sister gave a statement, as well as her mother Robyn and her brother Kurt. Kurt said that he has dreams about Jessica being there, but he can never make her stay – she always has to go back. Victim Yosuke Kanno's father said that Kanno's mother cannot walk on footpaths now because she is sensitive to the sound of cars. Victim Zachary Bryant's mother described how "I watched his little chest stop moving as he lay in my arms." Victim Matthew Si's wife said he was unrecognisable because of his injuries, and so his young daughter was not allowed to see him to say goodbye. Matthew's father said "Every time I see a little girl call out 'daddy' I feel the pain," and held up a locket with his son's hair inside for Gargasoulas to see. Injured victim Melinda Cleland said she could remember "the sound of my bones crunching inside me as I bounced off a concrete wall" and wishes she had no memory of the day.

Fifty victim impact statements were scheduled for the three-day hearing.

Activity 2t: Prison rioter sentenced to another year of imprisonment

DPP v Luca [2016] VCC 1573

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

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

In sentencing Luca, Chief Judge Kidd made the following reference to Victim Impact Statements in the case:

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

Questions/tasks

1. **Explain why Chief Judge Kidd referred to Victim Impact Statements when sentencing Luca.**
2. **Identify potential mitigating and/or aggravating factors that the Statements might give evidence of.**
3. **Summarise the impact of Luca's crime according to the Victim Impact Statements.**

Review questions 2.8

1. Outline the factors, according to section 5(2) of the *Sentencing Act,* that a court must regard when sentencing an offender in Victoria.
2. Distinguish between aggravating factors and mitigating factors.
3. Outline a range of factors that can aggravate a sentence.
4. Outline a range of factors that can mitigate a sentence.
5. When can an accused enter a guilty plea?
6. Explain why a sentence discount is given to an accused who pleads guilty to the charges against them.
7. Describe how a prosecutor will vary the submissions they make to the court about sentence reduction, depending on the behaviour of the accused in pleading.
8. Outline what a specified sentence discount is.
9. Outline what a Victim Impact Statement is and explain its purpose.
10. Explain the role of Victim Impact Statements in the sentencing process

Activity 2u: Evaluation of the ability of factors considered in sentencing to achieve the principles of justice

The following discussion of strengths and weaknesses has linked the material on factors considered in sentencing back to the three principles of justice: fairness, equality, and access. Use the information in the table to respond to the following questions/tasks, and also feel free to bring in any content from earlier pages to add to your answer.

Questions/tasks

1. **Discuss the ability of factors considered in sentencing to achieve the principles of justice.**
2. **Evaluate the ability of one factor considered in sentencing to achieve the principles of justice.**

STRENGTHS	FACTORS	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 factors 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 they can say was impacted. Allowing a victim impact statement to affect sentencing or the sanction given may be considered 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. Victim impact statements have been heavily redacted during sentencing, with large sections declared inadmissible. This has been distressing for the victims who have been in the courtroom, seeing their statements cut down, and not able to read out sections that were significant to them. 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.

Multiple choice review questions

1. Victoria Legal Aid is

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

2. Which of the following statements is not true?

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

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

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

4. Sentence indications refer to the process

a) By which a magistrate determines whether there is evidence of sufficient weight to support a conviction in a higher court
b) Whereby the court may direct a judicial officer to prepare a report for the court
c) Permitting a court to provide a defendant with a statement indicating the sentence that is likely to be imposed if the defendant pleads guilty at that stage of the proceedings
d) By which courts interpret and apply the words in legislation made by parliament

5. The main reasons for a Victorian court hierarchy in determining criminal cases include
a) Specialisation, a system of appeals, administrative convenience and the doctrine of precedent
b) Justice, fairness, equality and access
c) The right to be tried without unreasonable delay, the right to a fair hearing and the right to trial by jury
d) The intention of legislation not being clear, the wording of legislation can be ambiguous or unclear, sometimes the meaning of words may have changed over time

6. The party in a criminal trial that must oversee proceedings impartially and without the perception of having any bias is
a) The prosecution
b) The jury
c) The judge
d) A solicitor

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

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

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

10. Which of the following is not an aggravating factor?
a) Premeditation
b) Use of a weapon
c) A breach of trust by the offender towards the victim
d) The previous good character of the offender

Assessment preparation

Mark allocations are given as common ranges in School Assessed Coursework and the examination, to indicate the possible depth required. Ranges are *estimates* only, based on the task word(s) and the content required by the question.

Lower-order questions

1. Identify two ways in which Victoria Legal Aid ('VLA') assists members of the community who are involved in legal disputes. (1-2 marks)
2. Explain the role of community legal centres. (2-4 marks)
3. Describe two purposes of plea negotiations. (4-6 marks)
4. Explain one reason for the existence of a Victorian court hierarchy. (2-4 marks)
5. Identify one aggravating factor that might be taken into account during criminal sentencing in Victoria. (1-2 marks)

Higher-order questions

1. Discuss the extent to which you believe committal hearings achieve justice. (4-6 marks)
2. Evaluate the extent to which the responsibilities placed on parties and legal representatives contribute to the effectiveness of the civil justice system. (6-8 marks)
3. Discuss the ability of imprisonment and one other sanction to achieve the aims of rehabilitation and protection. (6-8 marks)
4. Explain the purposes of community corrections orders (CCOs), and comment on the extent to which CCOs are able to achieve fairness in the resolution of criminal disputes. (5-7 marks)
5. To what extent does the ability to submit a victim impact statement contribute to a better experience for victims of indictable crimes? (5-7 marks)

Application and synthesis questions

Question 1
Source 1: The following is a case summary from the County Court website.

> ***DPP v Carter (pseudonym)* [2016] VCC 1173**
>
> Sentence summary: Culpable driving
>
> The offender was aged 17 at the time of the offence and had a learner permit. After a night drinking at a football club function and an after party, the offender took a friend's car for a drive with two friends. He took the car without permission after having been warned not to drive. The offender nevertheless drove at high speed in thick fog without lights and with a blood alcohol level of 0.084 and the drug MDMA in his system. He failed to negotiate a bend and left the road. The car rolled several times. The rear seat passenger was not wearing a seatbelt and was thrown from the car. He died as a result of his injuries.
>
> The offender pleaded guilty to one count of culpable driving causing death.
>
> The judge found that the offender's early guilty plea, expressions of remorse, his youth and his good prospects of rehabilitation were all worthy of consideration. The judge also noted that the offender had no previous breaches of the law and came from a close and supportive family.
>
> However the judge also found that the conduct of the offender's driving and the circumstances of the accident were obviously serious. Because of the offender's age at the time of the offence, the judge said he could have sentenced the offender by way of a Youth Justice Order, however the serious nature of the offending and the offender's culpability meant the sentence needed to be more severe. He held that no sentence other than imprisonment would properly reflect the nature and the circumstances of the offending. The judge recommended, however, that the sentence be served in a Youth Justice Centre rather than an adult prison.
>
> The offender was sentenced to five years' imprisonment with a non-parole period of three years.
>
> *County Court website: https://www.countycourt.vic.gov.au/court-decisions/summary-cases/dpp-v-carter-pseudonym-2016-vcc-1173*

Source 2: The following is an extract from the judge's sentencing remarks in the case of DPP v Carter (pseudonym) [2016] VCC 1173.

> 32. A psychological report from Mr Patrick Newton was tendered on your plea. Mr Newton reported that you do not suffer from any significant symptoms of mental health disorder. You have normal intelligence and thought processes and you have no personality disorder. Prior to the collision you had regularly engaged in binge-drinking at social events and after sporting activity, but otherwise had not indicated physical dependence on alcohol or other drugs that you had occasionally experimented with. You reported that you had reduced your alcohol drinking and have abstained from using drugs since the collision.
>
> 34. Whilst well socialised, Mr Newton concluded that you were quite immature for your age and that detailed evaluation suggested that you are almost certainly experiencing more intense distress than you are willing or able to acknowledge. These issues are likely to resurface after you are sentenced. In a custodial context you will be more vulnerable to negative influence from hardened criminals and there would be some risk that your personality development could be diverted into more pathological paths.
>
> *County Court website link to the transcript: https://jade.io/article/489757?at.hl=vcc+1173*

a. Explain how mitigating and aggravating factors might have been taken into account in the above case. (4-5 marks)
b. Outline the role that the Office of Public Prosecutions might have played in the offender's early guilty plea.(2-3 marks)
c. To what extent is imprisonment an appropriate sanction in this case? (4-6 marks)

Chapter 2 summary

The role of institutions available to assist an accused

1. One institution that is available to assist an accused is Victoria Legal Aid (VLA), an independent statutory authority that provides free legal advice and support to the community, including information, referral, advice and legal representation services. Legal Aid's duty lawyers can provide legal advice, and make applications for bail if necessary.

2. Another institution that is available to assist an accused is Victorian community legal centres (CLCs), independent community organisations that provide free advice, casework and legal education through their strong local community connections, with a particular focus on the disadvantaged and people with special needs.

3. 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.

4. Victoria Legal Aid funds the operations of many CLCs. VLA refers clients to CLCs where they can provide more appropriate assistance; and the CLCs in turn may refer clients to VLA for assistance with their legal issue.

The purposes of committal proceedings

5. Committal proceedings refers to the process by which a magistrate determines whether there is evidence of sufficient weight to support a conviction in a higher court. These proceedings include the filing hearing, the hand-up brief, the committal mention hearing and the committal hearing. Committal proceedings are held before a Magistrates' Court.

6. The main purpose of committal proceedings is to establish whether the prosecution has evidence of sufficient weight to support a conviction of the accused before a properly-instructed jury. Committal proceedings also inform the accused of the case against them, allowing the accused to properly prepare for trial and ensure that their evidence and legal arguments are ready to be presented to the court; improve the efficiency of the justice system; and ensure timely collection of evidence. Other purposes of committal proceedings include determining whether a charge for an offence is appropriate to be heard and determined summarily and determining how the accused proposes to plead to the charge.

The purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases

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

8. Plea negotiations help the accused to understand the case against them, and consider the merits of pleading guilty. They may give the accused a sense of control in their situation, enabling the accused to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence. Plea negotiations can also encourage guilty parties to take responsibility for their wrongdoings rather than to deny responsibility and hope to be found not guilty. Plea deals reached as a result of negotiations protect already traumatised victims and witnesses from suffering further distress by having to give evidence at trial and be cross-examined. Plea deals save court time and money, meaning they can be allocated to higher priority cases that involve more contesting of the evidence.

9. A sentence indication is a statement made by a judge to the accused informing the accused whether or not the court would impose a sentence of imprisonment if the accused entered a guilty plea immediately.

10. The purpose of sentence indications is to tell an accused person (for an indictable offence) whether a guilty plea at that point would result in an immediate custodial sentence or a non-custodial sentence. In the Magistrates' Court, the magistrate will tell the accused what type of sanction they will receive if not imprisonment.

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

The reasons for a Victorian court hierarchy in determining criminal cases

12. The Victorian court hierarchy consists of the Magistrates' Court, the County Court and the Supreme Court (Trial Division and Court of Appeal). While the High Court of Australia is in a different hierarchy of Federal Courts, it does have jurisdiction to hear appeals from the Victorian court hierarchy.

13. One reason for a court hierarchy is specialisation. Because each court has its own jurisdiction, they hear similar types of cases on a daily basis. This means that they can develop expertise in the relevant law and in the procedure for hearing matters.

14. The court hierarchy also allows for the decision of a lower court to be reviewed on appeal by a higher court. A person who has been convicted of a criminal offence may appeal their conviction if they can establish that there has been a mistake in the interpretation of evidence or determination of the facts, there has been a mistake in the interpretation or application of the relevant law or there has been a mistake in sentencing. Likewise, the prosecution may appeal a mistake in law or sentence (but only when the accused was convicted).

15. The court hierarchy also allows for the doctrine of precedent to function effectively. The court hierarchy enables judges to determine which precedents are binding, and which are merely persuasive.

The responsibilities of key personnel in a criminal trial

16. In a criminal trial, the most important responsibility for a judge is to act as an independent and unbiased umpire. They must oversee proceedings impartially and without the perception of having any bias towards either party. In a trial, the judge may ask questions to clarify any aspect of the evidence, but in general the judge must allow the

parties to a criminal trial to introduce evidence and make submissions without interference.

17. The judge must ensure that the parties follow rules of evidence and procedure so that the trial is fair. For example, the judge may need to rule whether evidence is inadmissible. The judge will also need to manage cross-examination.

18. At the conclusion of the trial, the judge will provide directions to the jury. Trial judges do this in order to assist them reach fair and just verdicts. In the Magistrates' Court, the magistrate must determine a verdict of guilty or not guilty at the conclusion of the trial. It is the responsibility of the judge to impose an appropriate sanction when a person has been convicted of a criminal offence, either by pleading guilty or having been proven guilty at the conclusion of a trial.

19. The responsibilities of individual jurors in a criminal trial include choosing a foreperson to represent the jury and deliver the verdict to the court; listening attentively and objectively to the evidence without any bias; following the directions of the judge regarding the relevant law and its application to key evidence; deliberating on the evidence and reaching a verdict of 'not guilty' or 'guilty' beyond reasonable doubt.

20. Jurors in a criminal trial have a number of legal responsibilities. They must disclose known reasons that would prevent them acting impartially. For example, a person must disclose if they are disqualified from being a juror (by reason of having a serious criminal record) or if they are ineligible to be a juror (because their profession is associated with the criminal justice system). Jurors must also keep their deliberations secret. Furthermore, jurors can only rely on the evidence introduced at trial in reaching a verdict.

21. In a criminal trial, the most important responsibility that the parties have is preparing and presenting their own cases. The prosecution will need to decide what evidence to present, and what legal arguments to submit in order to prove that the accused is guilty beyond reasonable doubt. The accused must decide whether to have legal representation or to be self-represented (this may be affected by access to legal aid), whether to plead guilty or not guilty to charges, and what evidence to present, and what legal arguments to submit in order to defend a case.

22. Other responsibilities of the parties include participating in plea negotiations, making submissions regarding the sentence, and deciding on grounds for an appeal.

23. In a criminal trial, the parties may be represented by a legal practitioner to present their case to the judge and jury. The core responsibilities of legal practitioners is split between the advising solicitor taking a greater role in preparing the case, and the barrister then taking a greater role in presenting it in court.

24. Before the trial, a key responsibility of the solicitor is to prepare the witness statements their client will seek to rely on in evidence. At trial, it is the responsibility of the barrister to vigorously test the credibility and reliability of witness evidence introduced by the opposing team through cross-examination.

25. Legal practitioners have professional obligations that include duties to the court, as well as duties to their clients. Legal practitioner should not mislead the court, should not cast unjustifiable aspersions on any party or witness, should not withhold documents or case precedents from the other party which may detract from a client's case, and should raise any irregularity that occurs at trial so that it may be remedied (rather than staying quiet in order to use the incident as a ground for appeal).

The purposes of sanctions

26. A sanction is a legal penalty given to a person who has been convicted of a criminal offence.

27. The purposes of sanctions include rehabilitation (a sanction should help an offender to learn from their mistake and change their life and attitude so that they don't want or need to commit further crimes); punishment (by making the offender suffer hardship for their crime, society obtains revenge against the offender for the harm they have done - which is preferable to individual victims seeking retribution personally); deterrence (a sanction will specifically discourage the offender from committing the offence again (specific deterrence) and should also generally discourage other people from committing similar offences (general deterrence)); denunciation (public disapproval of the offender, expressed by the court, demonstrates the community's view that the offender's role in committing the crime is not acceptable); protection (the community may need to be kept safe from future offending by the convicted person - this is most likely to be achieved by a term of imprisonment).

Fines, community corrections orders and imprisonment, and their specific purposes

28. A fine is a monetary penalty paid by an offender. A court can impose a fine either with or without recording a conviction. The penalty for any offence is stated in the legislation outlining the offence, and is expressed as a number of penalty units.

29. The purpose of a fine is to punish the offender, although the extent of the punishment depends on the amount of the fine. A large fine may operate to provide specific and general deterrence for future similar offences. A large fine may reinforce the court's denunciation of an offender's conduct. A fine has little value in rehabilitating an offender, or providing community protection.30. A Community Correction Order (CCO) is a community

based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender. It is a court order that allows the offender to be released into the community, and that contains a range of terms and conditions. Every CCO has seven compulsory terms that extend for the duration of the order. Each CCO must also have at least one condition attached.

31. One purpose of CCOs is to rehabilitate an offender within the community (an offender is able to remain connected with their support networks, continue their employment, and have access to more diverse treatment programs that address the reasons for their criminal conduct). CCOs provide a range of methods for punishing an offender (the mandatory terms will impact on an offender's liberty - if an offender breaches any condition of their CCO they are likely to face a term of imprisonment for this offence, and the range of conditions available to accompany the order place obligations and limitations on the offender that will cause them to alter their behaviour.). A CCO will deter an offender by addressing the reasons for their offending. Non-compliance with the CCO risks being sent to prison. A CCO denounces the offender by placing restrictions on their liberty, and obligations on them to complete programs ordered by the court to address their criminal behaviour. The community is somewhat protected from future offending, because the offender's freedom of movement is constrained by the terms of the order. The community is further protected because conditions aim to achieve rehabilitation by addressing criminal behaviour.

32. Imprisonment removes an offender's liberty by denying them the right to live in the community for a period of time, depending on the severity of the offence committed. The *Sentencing Act 1991* outlines the penalty scale for imprisonment.

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

Factors considered in sentencing

34. An aggravating factor is any fact or circumstance that increases the gravity of the offence or the offender's culpability. This may possibly result in the offender receiving a harsher sentence. There are several factors that can aggravate the culpability of an offender, including premeditation (pre-planning the crime), committing the crime as part of a group against an outnumbered victim, use of a weapon, a breach of trust by the offender towards the victim, and the cruelty of the crime.

35. A mitigating factor is any fact or circumstance that reduces the gravity of the offence or the offender's culpability. This may mean that the sentencing judge will discount or reduce the offender's sentence to take account of the mitigating factor. There are several factors that can mitigate the culpability of an offender, including the age of the offender, the background of the offender, the previous good character of the offender, the remorse shown by the offender for the crime, and whether imprisonment would be particularly hard on the offender.

36. A guilty plea is a formal and conclusive admission to all elements of the charge, which the accused gives to the court. If the court accepts the plea, the prosecution does not need to lead any evidence to prove that charge.

37. Pleading guilty to an offence provides the benefit of sparing the community the expense of a contested trial and equally spares witnesses and victims the experience of such a trial. Substantial incentives are provided to an accused person to plead guilty to the charges against them.

38. A Victim Impact Statement is a statutory declaration prepared by a victim to a crime that can be given to the court either orally or in writing, and that describes the impact of the offence on the victim, including details of the harm suffered as a result of the offence.

39. The purpose of a Victim Impact Statement is to assist the sentencing judge or magistrate in determining an appropriate sentence for the offender. It can be used as evidence of factors that could be either mitigating or aggravating.