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Legal Studies Update

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The purpose of this Legal Studies Update is to provide teachers and their students with some of the recent developments that have taken place in so far as they relate to the VCE Legal Studies Study Design. In this 1st edition, these have been applied to the relevant key knowledge points from Area of Study 1 from Unit 3, and the first three dot points of Area of Study 2.

The 2022 federal election

The Coalition's proposed parliamentary calendar has just 10 sitting days in first half of 2022, based on the expected election date of May 2022.

Unit 3, Area of Study 1

The Victorian criminal justice system

MAGISTRATES' COURT ANNUAL REPORT 2020-21

The Magistrates' Court released its 2020-21 Annual Report. Its workforce includes 120 magistrates working across 51 locations, as well as 28 reserve magistrates, 17 judicial registrars and 935 staff. Highlights of the Report include:

- Chief Magistrate Lisa Hannan commended the Court's WebEx OMC (Online Magistrates' Court) on allowing the Court to continue working during the Covid-19 pandemic. Online hearings were extended to summary crimes, remand hearings, committals, family violence hearings, and VOCAT hearings. The Chief Magistrate said: "When the community could not come to us, we took the court to them."
- The Magistrates' Court usually has between 70,000-80,000 pending matters, but this peaked at approximately 145,000 at the end of 2020. It reduced to 127,000 by 30 June. The civil jurisdiction had largely recovered by year's end, but the recovery of the crime and family violence jurisdictions will take more time.
- Despite the disruptions caused by Covid-19, more than 134,800 criminal cases were initiated and 126,600 were finalised. These statistics are summarised in the table below:

CRIMINAL

Summary

	Notes	2016-17	2017-18	2018-19	2019-20	2020-21	% diff 20-21
Cases initiated		166,499	160,473	143,151	145,625	134,835	-7%
Cases finalised		198,185	196,871	173,778	135,840	126,613	-7%
Bail application orders made		46,520	44,202	40,637	37,372	31,624	-15%
Applications finalised		62,260	68,906	62,273	50,905	40,388	-21%
Breach cases		11,142	10,583	10,219	8211	6882	-16%
Total criminal listings		**726,249**	**713,062**	**660,262**	**606,061**	**607,167**	**0%**

- Two Specialist Family Violence Courts (SFVC) commenced sitting during the year. One in Heidelberg in May 2021 and one in Frankston in June 2021. SFVCs are now operational at five courts: Ballarat, Frankston, Heidelberg, Moorabbin and Shepparton. The SFVCs deliver an integrated family violence response resourced with specialist magistrates, registry staff and family violence practitioners. Features of the SFVCs include separate entrances and safe waiting areas, remote witness technology and private interview rooms. In May, the Victorian Government announced $78 million to expand SFVCs Division to an additional seven court locations.

COUNTY COURT ANNUAL REPORT 2020-21

The County Court released its 2020-21 Annual Report. Its workforce includes 70 judges across 12 locations, as well as 300 staff. It hears more than 10,000 cases a year across three divisions (Criminal, Commercial, and Common Law). Highlights of the Report include:

- After about nine months of suspension, the Court resumed criminal jury trials in Melbourne in November 2020. 94 juries were empaneled in Melbourne between 16 November 2020 and 30 June 2021. 31 judge-alone trials were finalised to verdict at the Court between 1 July 2020 and 30 June 2021.
- Provisions in the *Criminal Procedure Act 2009* that allowed a trial by judge alone were repealed on 26 April 2021. There were 60 applications made to the Court, from which 51 applications were granted, three applications were refused, and six applications were withdrawn. Of the 51 applications granted, 29 accused had their matters heard by trial by judge alone, 12 cases resolved, four cases were discontinued, and six accused had their matters heard by judge alone with the trial being part-heard as at 30 June 2021.
- 3,527 criminal cases commenced. Of those, 1,356 were committed for trial with a plea of not guilty (an increase of approximately 30% from 2019–20, and an increase of approximately 14% from 2018–19); 1,206 were appeals (a decrease of approximately 42% from 2019–20, and a decrease of approximately 59% from 2018–19). 2,942 criminal cases were finalised across the state. This is a

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decrease of approximately 32% from 2019–20 (4,351 cases) and 45% from 2018–19 (5,364 cases) most likely as a result of Covid-19 restrictions.

- Of the 2,942 cases finalised in 2020–21:
  - 87 proceeded to trial and returned a verdict
  - 1,349 were pleas
  - 1,266 were appeals
  - 240 involved other finalisation types

These statistics are summarised in the tables below:

TOTAL CRIMINAL CASES (INCLUDING APPEALS)

Commenced	4,020	3,527	-12.3%
Finalised	4,351	2,942	-32.4%
Pending	2,399	3,076	28.2%
Overall Criminal clearance ratio (%)	108%	83%	
% disposed within 12 months	82%	76%	

CRIMINAL TRIALS AND PLEAS

Commenced	1,950	2,321	19.0%
Finalised	2,060	1,676	-18.6%
Pending	1,940	2,630	35.6%
Trials and pleas clearance ratio (%)	106%	72%	
% disposed within 12 months	67%	66%	

CRIMINAL APPEALS

Commenced	2,070	1,206	-41.7%
Finalised	2,291	1,266	-44.7%
Pending	459	446	-2.8%
Appeals clearance ratio (%)	111%	105%	
% disposed within 12 months	96%	89%	

SUPREME COURT ANNUAL REPORT 2020-21

The Supreme Court released its 2020-21 Annual Report. Highlights of the Report include:

- The Court of Appeal finalised 234 matters (10% fewer than 2019-20) but has fewer matters pending because fewer were initiated during the year.

Criminal cases

	2019-20	2020-21	Variance
Initiations	240	230	-4.2%
Finalisations	260	234	-10.0%
Pending	189	185	-2.1%

Criminal cases – clearance rate and on-time processing

	2019-20	2020-21	Benchmark
Clearance rate	108.3%	101.7%	100%
Cases finalised within 12 months	63.8%	63.7%	75%
Cases finalised within 24 months	100.0%	98.7%	90%
Cases finalised >24 months	0.0%	1.3%	0%

- The Trial Division suffered more significant delays, and has over 60% more matters pending than it did the previous year.

Criminal Division – trials and pleas

	2019-20	2020-21	Variance
Initiations	91	122	34.1%
Finalisations	109	67	-38.5%
Pending	88	143	62.5%

Criminal Division – clearance rate and on-time case processing

	2019-20	2020-21	Benchmark
Clearance rate	119.7%	54.9%	100%
Cases finalised within 12 months	52.3%	58.2%	75%
Cases finalised within 24 months	82.6%	83.6%	90%
Cases finalised >24 months	17.4%	16.4%	0%

- After juries were permitted from November 2020, a maximum of three jury trials could be underway simultaneously, rather than the usual five. This decreased trial capacity. As a result, finalisations in 2020-21 were the lowest in recent history, 67 cases. There were also 122 initiations, the highest number in the past six years, resulting in an increase in pending cases of 55 (63%).
- In 2020-21, the Criminal Division finalised 13 trials, from which 5 (38%) were by judge alone. Trial-related hearing days were also very low. In 2020-21, there were 326 days of trial activity heard in the Criminal Division, 253 days less than the previous year.
- Despite the impact of Covid-19, the median finalisation time of all matters decreased: criminal disputes fell from 10.4 months to 9.2 months.

UNREASONABLE DELAY

In November 2021, Greg Lynn, the suspect in the 2020 suspected killings of campers Russell Hill and Carol Clay, was held without charge for over 70 hours – an unusually long time. The right to be tried without unreasonable delay does not commence until charges are laid, but a similar right exists during investigation if the suspect is held in custody. The *Crimes Act 1958* (Vic) only permits hold for a "reasonable" period of time.

Reasonableness can be determined by case features such as the number of offences being investigated and the complexity of the case. Criminal barrister Philip Dunn QC said, "The question is, is two days enough? Is 60 hours enough? Is 100 hours enough? There is no set period of time under the law because the circumstances of offending can change."

Australian Lawyers Alliance Victorian representative Robert Starry said, "It's unusual to arrest someone and hold them for so long in custody. The question is whether it's reasonable to hold him for so long, and the only people that can answer that are the police involved and the people advising him." Legal representatives can file a writ of *habeus corpus* in the Supreme Court to challenge the length of the hold.

- This relates to rights of the accused in the criminal justice system

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PUBLIC HEARING

In October 2021, Bernard Collaery succeeded in having a secrecy ruling lifted over parts of his trial, allowing evidence to be viewed by the public. The ACT Court of Appeal said there was a "very real risk of damage to public confidence" if it could not be publicly disclosed, and Collaery called it a "victory for justice." The Court cited in its ruling the importance of the open justice principle in preventing "political prosecutions," allowing public scrutiny of prosecutors, and allowing the public to assess the accused's conduct.

Collaery is the former lawyer for 'Witness K', and he is facing five charges of disclosing protected intelligence information to ABC journalists and of conspiring with his former client, an ex-Australian Secret Intelligence Service officer, to communicate information to the Timor-Leste government. Witness K's actions helped expose a 2004 Australian bugging operation against a poorer ally, Timor-Leste, which was designed to give Canberra the upper hand during negotiations to split oil and gas resources in the Timor Sea. A collection of oil and gas companies, led by Australian corporate Woodside, was hoping to exploit the natural resources.

Some evidence will still be kept secret and the matter has been remitted back to the ACT Supreme Court to consider further arguments from the federal attorney general, Michaelia Cash; the Government has used the *National Security Information Act* to continue keeping parts of the case secret.

Labor's shadow attorney general, Mark Dreyfus, said, "Labor strongly supports the principle of open justice and believes Mr Collaery, like any other Australian, has a fundamental right to a fair trial."

- This relates to rights of the accused in the criminal justice system

VICTIMS OF CRIME INQUIRY

Fiona McCormack, Victoria's Victims of Crime Commissioner, is undertaking an inquiry into the experiences of victims in the criminal justice system. She said: "Too many have said the experience of the court process for them was more traumatic than the crime itself, even in violent assaults or sexual assaults. That's really tragic. This is why I'm launching this inquiry, and I'm really keen to learn what victims think."

McCormack's inquiry will be the first from victims' perspective since the Victoria Law Reform Commission found in 2016 that victims felt "marginalised and disrespected," despite reforms such as allowing impact statements to be read, providing support dogs for sex-assault victims, and vulnerable witness protections such as the ability to give evidence remotely. The Commissioner began a victims' survey in November 2021, reviewed hearings and met with key stakeholders. Recommendations will be made to the Government.

"People go about their daily lives, and then they have this horrific thing happen to them that completely turns their life upside down, creates enormous trauma – sometimes irreparable – and they go to court and think, 'My story, what's happened to me is going to be central to this'," MsCormack says. "Then they learn they're irrelevant unless they're witnesses."

Statements made by victims include that "As a victim you don't have control, you don't have power. And I experienced that once again going through this. My power was taken away, I was just told what would happen."

Lacking power is one of the reasons why procedures such as cross-examination, plea deals, delays and sentences are among the stressors that trouble victims the most. Parents of a young man killed by a single punch said, regarding the plea deal arranged by the offender who killed their son, said that they were consulted over the downgraded charges, but that their objection to the deal did not give them any influence over it: "The prosecutors' office will say that we did [approve]. The reality is we had no choice in it. Did we have a consultation with them? Yes, we had a meeting. But if we said, 'No, we don't want that deal', they wouldn't have listened to us."

He understands the Office of Public Prosecutions doesn't act for victims, but for the state and to ensure fair hearings. The police were supportive, but their job is to investigate and collect evidence. "We just didn't have anyone in our corner helping us," he says, arguing the need for an independent person to sit in courtrooms to explain things properly.

- This relates to rights of victims in the criminal justice system
- This also relates to plea deals and sentencing factors

'RECKLESSNESS' REFERRAL

On 1 September 2021, the High Court handed down its judgment on a question of statutory interpretation in *Director of Public Prosecutions Reference No 1* [2021] HCA 26. The question for the Full Court was the interpretation of s17 of the *Crimes Act 1958* (Vic). Section 17 is the offence of 'recklessly causing serious injury' and the issue was that 'recklessness' is not defined in the *Crimes Act*. In cases such as *R v Campbell* [1997] 2 VR 585, the Victorian Court of Appeal interpreted reckless to mean that the accused had foresight of the *probability* that their actions would cause harm.

This interpretation of 'recklessness' is higher and more difficult to prove than the High Court definition in *R v Aubrey* (2017) 260 CLR 305, which defined recklessness as the accused being aware of the *possibility* that their actions would cause harm. The High Court *Aubrey* precedent did not relate to the word 'reckless' in s17 of the *Crimes Act*, however.

The OPP asked the Court to replace the existing precedent with the High Court's definition. This would have lowered the test in Victoria. The matter went to the Court of Appeal and then, with leave, to the High Court. In September, the High Court declined to alter the precedent and rejected the application.

The minority judgment of Kiefel CJ, Keane and Gleeson JJ endorsed *Aubrey* and denounced the Victorian precedent decision as plainly wrong. However, they did not set out reasons why and simply relied on *Aubrey*. The plurality of Gageler, Gordon, and Steward JJ, with Edelman J

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writing his judgment separately, considered that the Victorian Parliament was aware of and sought to retain the judicial definition of recklessness in its amendments to the Crimes Act, because it had never sought to expressly override it. Therefore, the justices held that it would be wrong to change the interpretation of recklessness without Parliament's action.

If the definition had been changed, the gravity of the offence would have been lowered, and some old cases could have been re-heard on sentence.

- This relates to appeals as one reason for a court hierarchy

COURT EDUCATION VIDEOS

Australian actor Richard Roxburgh, who played barrister Cleaver Green in ABC TV's series 'Rake', has been employed by the Victorian Office of Public Prosecutions to lead a series of videos on how the criminal justice system through the courts works. He was flown down from Sydney in December 2021 for filming in Melbourne's Magistrates', County and Supreme Courts.

"The Office of Public Prosecutions is committed to supporting victims and witnesses of serious crime," an OPP spokesperson said. "Victims and witnesses have told us that they like having information available to them in multiple formats."

The production has caused controversy within the OPP, because of the recent dissolution of the Office's specialist sexual offences units. "The spend on PR doesn't sit well when services are being wound back for sexual assault victims," union spokesperson Julian Kennelly said.

PROSECUTION FOR IGNORING COVID-19 PUBLIC HEALTH DIRECTIONS

Monica Smit is the manager of Reignite Democracy Australia, a group opposing the state's response to Covid-19. She was charged in February, June and August 2021 in relation to breaches such as breaking curfew and encouraging participation in a protest that broke public health orders.

Smit was granted bail in the Magistrates' Court on 1 September 2021, but she did not agree to the bail conditions and filed an application with the Supreme Court to vary them. On 22 September 2021, Ms Smit was granted bail by the Supreme Court of Victoria, with a variation in her conditions. On 2 February 2022 she was committed to stand trial in the County Court. Smit's lawyer told the Magistrates' Court that his client had elected to forgo a committal hearing, and instead proceed straight to trial. The trial is expected to take five to seven days and is due to commence on 2 March 2022.

Justice Hollingworth of the Supreme Court heard Smit's challenge to her bail conditions on 22 September 2021. Victoria Police did not oppose bail, but argued that stringent conduct conditions should be imposed, to reduce the risk of Ms Smit offending further, or endangering the safety or welfare of others. Conditions included that:

- She be under curfew between the hours of 7pm and 6am
- She not publish on any social media platform or any website or via any electronic communications service any material inciting any person to fail to comply with the Chief Health Officer's directions
- She not attend any protest in any capacity during the state of emergency related to Covid-19

Smit objected to the conditions imposed by the magistrate. She could either sign the bail conditions under protest, be released on bail, and then apply to have the conditions varied; or, she could refuse to sign the bail conditions, and remain in custody while she applied to have the conditions varied. Smit chose the second option. At the conclusion of the hearing, Justice Hollingworth ordered that Smit be bailed on the following special conditions:

- She must reside at [a specified address], and not change that address without the leave of the court.
- She must not commit an offence against s 203(1) of the Public Health and Wellbeing Act 2008 (Vic).
- She must not incite any other person to pursue a course of conduct that involves the commission of an offence against s203(1) of the Public Health and Wellbeing Act 2008 (Vic).
- She must not disclose or cause to be disclosed the name of the informant or any police officers involved in the investigation of any of the charges against her to any person other than her legal representatives.

Later that day, Smit signed her bail undertaking and was released from custody, after spending 22 days on remand.

Hollingworth J said:

"The court must impose any conduct condition that, in its opinion, will reduce the likelihood of Ms Smit endangering the safety or welfare of any person, or committing an offence while on bail. [...] Notwithstanding the lack of evidence regarding employment matters, a stable and law-abiding background such as Ms Smit's would ordinarily be given considerable weight in assessing the risk of future offending. However, that has to be balanced against the other evidence as to the likelihood of her further offending. The evidence against Ms Smit in respect of all of the offending discussed in these reasons is overwhelming. She also does not dispute having engaged in the relevant conduct; on the contrary, she has boasted about much of it on social media. [...] Ms Smit clearly regards herself as some sort of crusader. It is not the purpose of bail conditions to silence public debate about government policies or actions; Ms Smit is as free to debate such matters as anybody else. But she is not entitled to break the law, or to encourage others to do so, just because she disagrees with it."

- This relates to the purposes of committal hearings
- This also relates to appeals as a reason for the court hierarchy, and the responsibilities of trial personnel

RESPONSIBILITIES OF PERSONNEL

In the case of Henshaw (a pseudonym) v The Queen [2021] VSCA 356, determined on 17 December 2021 by Priest, Kyrou and Whelan JJA, the justices discussed a difference in the responsibilities of the judge versus the responsibilities of the jury. Henshaw had been found guilty of rape in a trial by judge alone. The accused filed an appeal against his conviction, on grounds such as the way that the trial judge weighed the complainant's evidence, and the way that the trial judge considered prior inconsistent statements by the complainant and the complainant's mother.

The justices said in their findings: "Unlike the jury in a criminal trial conducted by judge with a jury, it is incumbent upon the judge in a criminal

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trial conducted by judge alone to provide adequate reasons for decision. Indeed, during its brief existence, s420F of the Criminal Procedure Act 2009 ('CPA') required the judgment in a trial by judge alone to include both the principles of law applied by the trial judge and the facts on which the trial judge relied. Thus, unlike the inscrutable verdict of a jury, the reasons underpinning a judge's verdict are susceptible on appeal to fine analysis and dissection. Moreover, the giving of inadequate reasons may of itself be a reason for appellate intervention." The findings of a judge sitting without a jury should therefore be easier to scrutinise on appeal than the findings of a jury.

The Court of Appeal found the guilty verdict to be unsafe, and set aside the conviction.

- This relates to the responsibilities of trial personnel

IMPRISONMENT AND RECIDIVISM

On 6 September 2021, Emeritus Professor Joe Graffam, Former Deputy Vice-Chancellor of Research at Deakin University, spoke to the Legislative Council Legal and Social Issues Committee as part of its 'Inquiry into Victoria's Criminal Justice System.'

Prof Graffam said that, at the end of June 2020, Victoria's two-year recidivism rate was 44.2%, and that it had risen substantially since 2010. Prof Graffam made a number of points about this, as follows:

- ✓ There is little question that the primary purpose and function of prison currently is containment. Correction plays a somewhat narrow and secondary part, and it will take a significant repurposing to change this.
- ✓ Common conditions of people returning to prison include mental illness, cognitive impairment, alcohol and drug dependence, homelessness, unemployment, low education, family dysfunction and debt.
- ✓ Expecting people to successfully return to their community and live crime free in the same circumstances that led them to prison in the first place is not realistic. A correction focus should be individualised, providing a comprehensive correction program plan based on assessed needs.
- ✓ In my view, acknowledging and addressing disadvantage as a main driver of incarceration is critical to understanding what takes an individual on a pathway to incarceration and to altering that pathway. Clearly there is a community disadvantage effect. Six per cent of Victorian postcodes contribute 50 per cent of the state's prison population and 2 per cent of postcodes contribute 25 per cent of that total. In order to reduce recidivism and the flow of people into prison generally, we need to resource much more effectively the communities that see so many of their residents being incarcerated. It is axiomatic: holistically healthy communities produce healthy people and healthy people do not generally end up in prison.
- ✓ In 2018 the Victorian average of students commencing school with language and cognitive delays was 10%. In postcode 3214, which is Victoria's third most disadvantaged postcode, the percentage was 18% in 2009 and 40% in 2019. As an associated condition secondary school completions in that postcode are half the Victorian average as well. The patterns of disadvantage are widening, and that to me partially explains increases in the flow into prison and recidivism in particular.
- ✓ A very high proportion of people who are currently in prison have pre-existing trauma – either domestic trauma from early childhood, physical, mental or sexual abuse – and then institutional trauma that they acquire possibly at school but in juvenile justice etc. So, trauma is an issue. One-third of the people in prison were being treated for a mental illness in the year before they went in and half have a history of psychiatric treatment, and this is something that we need to address aggressively. And I will say if we have got people contained, then this is an opportunity to commence treatment that will continue when they are released.

- ✓ Two-thirds of the people who reoffended and ended up in prison again were unemployed at the time that they reoffended, so this is a critical feature and the simple reality is that employment service providers, commonwealth-funded employment service providers, are not generally well equipped to support people coming out of prison
- ✓ 25% of prisoners in Victoria are acknowledged to have a serious brain injury, but all acquired brain injury together accounts for probably 65% of the people in prison. And then you have got intellectual disability; estimates vary, but it is probably 10 times as frequent in prison as in the general community. So, there is a lot of disability in prison – let us start with that point – and there are a lot of people in prison who have eligibility for NDIS packages. I think one thing that we could do for those people is get that sorted out while they are still in prison so that they do not have to wait until they are out to begin the process of getting a support package that they will need when they are in the community.

- This relates to sanctions, and the purposes of sanctions

RAISING THE AGE OF CRIMINAL RESPONSIBILITY

The push to influence the Victorian Parliament to raise the age of criminal responsibility from 10 to 14 continues. In December 2021 the First Peoples' Assembly – a body elected by Indigenous Victorians to negotiate a treaty – asked the Andrews government to legislate to raise the age, saying the criminalisation of children disproportionately affects Aboriginal children and entrenches disadvantage. The 32-member Assembly launched its public campaign to pressure the Victorian government ahead of the state election in November 2022, saying any delay could set back another generation of Aboriginal children.

Mr Stewart, of the Taungurung nation, said: "We know the evidence, we understand the disproportionate impact this has on Aboriginal children."

A 2020 Australian Institute of Health and Welfare report highlighted that young people in the criminal justice system are less likely to complete their education or find employment, and more likely to die an early death. Aboriginal and Torres Strait Islander children aged 10 to 17 are 23 times more likely to be in detention than non-Indigenous young people.

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The brains of children under 14 are still growing and developing, meaning they may not have the required capacity to be criminally responsible. One 2018 study published in the British Medical Journal showed that 89% of children at Western Australia's only youth prison had at least one severe neurodevelopmental deficit, such as an intellectual disability or dyslexia.

- This relates to cultural differences as one factor affecting the ability of the criminal justice system to achieve the principles of justice

SENTENCE INDICATIONS

In November 2021 the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021 was passed by the lower house of the Victorian Parliament. It includes an amendment to the sentence indications regime, allowing a County or Supreme Court judge to tell the accused the type of non-custodial sentence they would be likely to receive. If it passes the Legislative Council in 2022, this will bring the higher court regime into line with the Magistrates' Court regime. If passed, the Bill will also allow the accused to receive a second indication if there is a material change in circumstances.

The proposal is aimed at reducing the backlog in the courts caused by the Covid-19 pandemic and to spare victims the trauma of a trial, Attorney-General Jaclyn Symes said. It was one of the recommendations made in February 2021 by the Director of Public Prosecutions, Kerri Judd. It has also been supported by the Criminal Bar Association: "It's our experience that an accused who has a much better understanding of what penalty they might receive if they plead guilty increases that likelihood significantly." Before the pandemic, the wait for a trial to start was usually between a year and 18 months, but this has now extended to two years.

The Bill is interesting because it piggybacks a number of proposals together into one law. It also contains some of the recommendations made by the Royal Commission into the Management of Police Informants; the approval of electronic applications for personal safety intervention orders; the power for the Children's Court to make rules in relation to the exercise of family law jurisdiction; and the approval of evidence being given remotely in proceedings relating to family violence.

- This relates to a recommended reform that could improve the ability of the criminal justice system to achieve the principles of justice

SPECIALIST COURT REFORM

The new subdivision (1C) of Div 2 Part 3 of the Sentencing Act 1991 (Vic) establishes a DATC division of the County Court of Victoria.

The DATC allows for a Drug and Alcohol Treatment Order (DATO) as a sentencing option for people with a drug or alcohol dependency who have committed associated criminal offences. These crimes must not be sexual or have involved infliction of actual bodily harm. The DATC is based on best-practice therapeutic intervention models, and is designed to promote the rehabilitation of participants, protecting the community from substance-driven offending. Some evidence comes from Victoria's first drug court in the Magistrates' Court.

The formal launch was initially scheduled for June 2021, but was delayed due to Covid-19 restrictions. Once fully operational, the program will support 70 County Court participants.

There are two pathways into the DATC, both on application by defence legal representatives: either a fast-track committal from the Magistrates' Court to the DATC, or from matters listed in the County Court of Victoria Criminal Division. To be eligible for a DATO a candidate must:

- be able to demonstrate on the balance of probabilities a drug or alcohol dependency
- be able to demonstrate on the balance of probabilities a connection between the dependency and the offending
- plead guilty
- be facing an immediate term of imprisonment not exceeding four years
- live within the required post code area
- consent to the DATO

Candidates are not eligible if they, amongst other things, are currently on parole or a Community Corrections Order.

A DATO has two parts: a treatment and supervision part and a custodial part. Under the custodial part of the order a term of imprisonment is fixed, which must be no more than four years. The custodial part of the order is not served unless activated. The treatment and supervision part of the DATO consists of core conditions which operate for the length of the custodial part of the order, and program conditions, which operate for two years. Core conditions focus on participant compliance, such as reporting to authorities, attending court regularly for review hearings, not committing further offending, etc. Program conditions focus on participant behavioural change and rehabilitation, such as regular drug testing, undertaking treatment as directed, education or vocation programs, etc.

- This relates to a recent reform that could improve the ability of the criminal justice system to achieve the principles of justice

FAST-TRACK COMMITTALS

In March 2020 the Supreme Court introduced what it called 'Fast-Track Committals' – which actually involve skipping the committal, rather than doing it more quickly. The Fast-Track Committal process allows homicide cases to be committed directly to the Supreme Court, bypassing committal hearings in the Magistrates' and Children's Courts.

The process is optional, at the discretion of the accused, and many accused have requested it to avoid the growing backlog and delays caused by the pandemic. However, given the Supreme Court was unable to conduct jury trials during the pandemic, many criminal trials were unable to be finalised, anyway.

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Fast-tracked cases come to the Court early in the process, and pre-trial steps are managed in the Supreme Court, rather than in the Magistrates' or Children's Courts. These steps include ensuring the prosecution case is sufficiently disclosed and any issues are resolved, such as serving outstanding witness statements or forensic reports on the accused, and conducting pre-trial cross-examination of prosecution witnesses. This increases the lifetime of a case in the Supreme Court. The aim is to reduce the overall time from charge to finalisation by bringing them into the jurisdiction where they will ultimately be determined sooner, allowing for more targeted case management.

Of 122 cases committed to the Court in 2020–21, 46 (38%) were committed via the fast-track process. In fast-track cases, the Court heard 90 days of pre-trial witness examinations, 3 case conferences and 7 guilty pleas before trial, with 1 case discontinued after witness examinations.

- This relates to a recent reform that could improve the ability of the criminal justice system to achieve the principles of justice

INTERMEDIARY PROGRAMME

In 2021 the County Court Intermediary Pilot Program (IPP) was extended indefinitely. It is still not a permanently funded feature of the Court.

The IPP has been in operation since 1 July 2018 to assist vulnerable witnesses to give their best evidence. Since its operation, numerous resources have been developed, including training videos, to assist judges and practitioners when working with children and vulnerable witnesses in the courtroom. Development of the training videos involved commitment and support from all court jurisdictions and the participation of representatives from the Criminal Bar Association. The most recent training video was launched in 2020 and compares the questioning of a witness at a Magistrates' Court hearing without an intermediary, with questioning at a special hearing in the County Court with an intermediary.

A revised multi-jurisdictional court guide for the Program was published on 23 March 2021 in light of the courts' and legal profession's experience of working with and without intermediaries, and the holding of ground rules hearings. Some of the amendments include additional directions the Court will, or may, give at a criminal directions hearing before the ground rules hearing.

- This relates to a recommended reform that could improve the ability of the criminal justice system to achieve the principles of justice

CISP PROGRAMME

The Magistrates' Court and the County Court received funding in July 2019 for an 18-month pilot to expand the Court Integrated Services Program (CISP) into the County Court. The pilot was due to commence in April 2020 but Covid-19 restrictions delayed its start until January 2021; the current pilot concludes mid-2022. CISP has been running in the Magistrates' Court for over 10 years.

CISP coordinates the assessment and treatment of eligible accused. It focuses on proactive ways to address underlying causes of offending behaviour, providing case management support, and linking program participants to support services such as drug and alcohol treatment services, crisis and supported accommodation, disability services, mental health services and acquired brain injury services. This addresses underlying causes of offending, and improves community safety. Accused persons are required to undergo a screening process before being accepted into the program. If accepted, they receive a CISP case manager who coordinates their treatment, provides regular case management, reviews their progress, and provides written reports to the Court.

In order to be eligible for CISP, accused persons must not currently be sentenced to a parole or community corrections order, and must be eligible for bail or a deferral of sentencing. In addition, they must be experiencing one or more of the following:

- mental health issues
- disability, acquired brain injury or cognitive impairment
- substance abuse issues
- family violence
- inadequate social, family and economic support in a way related to their offending
- homelessness
- another relevant clinical support need

The accused must not be accused of a sex offence, and must not have needs that are so significant that they would be unable to comply with the program.

A three-year evaluation of CISP in the Magistrates' Court, conducted by the University of Melbourne, found that CISP made a significant improvement to the physical and mental wellbeing of clients, produced increased compliance with community correction orders, reduced the risk of re-offending, reduced harm to the community and provided a cost savings to the government through reduced nights in prison for offenders and reduced re-offending. A survey of 31 lawyers conducted by the Specialist Courts and Programs team showed that 79% were satisfied with the overall program and 100% of respondents believed that CISP was a very important program.

- This relates to a recent reform that could improve the ability of the criminal justice system to achieve the principles of justice

REVIEW QUESTIONS

1. Identify two ways that one of the Victorian courts performed effectively and achieved a principle of justice in 2020-21.
2. Identify two ways that one of the Victorian courts struggled to perform effectively and achieve a principle of justice in 2020-21.
3. Outline the right of the accused to be tried without unreasonable delay, and discuss the meaning of the word 'unreasonable'.
4. Outline the right of the accused to have a public hearing, and discuss the benefits of public access.
5. Outline one right held by victims in the criminal justice system.
6. Discuss the concerns raised so far in the Victims of Crime Commissioner's inquiry.
7. How does the DPP Reference No 1 case on the meaning of 'recklessness' illustrate the need for a hierarchy to hear appeals?

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8. Outline two purposes of committal hearings, and comment on the choice of Monica Smit to skip her committal.
9. How does the Monica Smit bail review illustrate the responsibilities of judges and legal representatives in a criminal trial?
10. How does the Henshaw case illustrate the difference in responsibilities between the judge and the jury?
11. Discuss two reasons why Prof Joe Graffam argues that imprisonment is affected by social disadvantage.
12. How does the age of criminal responsibility contribute to disadvantage based on cultural differences?
13. What might be the purpose of broadening the sentence indications regime?
14. How might a Drug and Alcohol Treatment Order better achieve the purposes of sanctions than imprisonment?
15. Outline the pros and cons of the Supreme Court's 'Fast-Track Committals' procedure.
16. How does the intermediary programme help achieve the principles of justice?
17. How does the CISP programme help achieve the purposes of sanctions?
18. How does the CISP programme help achieve the principles of justice?

APPLICATION EXERCISE

The final dot-point on the Legal Studies Study Design for each Area of Study in Unit 3, requires that students know "recent reforms and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice."

This can be a difficult topic for a number of reasons:

1. It is the final topic in each AOS and uses material all the way back to the first dot-point of each Outcome, so students can sometimes feel overwhelmed by the content.
2. It is one of the few topics in the course that must be updated each year, as the word "recent" means changes that have been implemented strictly in the last four years. Textbooks can even be out-of-date within a year or two.
3. The word "recommended" also requires the content to be updated, as 'recommended changes' from previous years may have ceased to be relevant or may even have been subsequently implemented!

These Updates can therefore be used to prepare for this final dot-point.

Step One

Draw up a table, preferably in a Word document and with the paper size set on 'landscape'. It should have five columns.

Step Two

Label each of the columns as follows:

a. Name: Name of the change, and name of the person or organisation recommending or implementing it.
b. Description: Description of the change.
c. Problem: Problem it is or was intended to address – draw on the 'factors affecting the ability of the criminal justice system to achieve the principles of justice.'
d. Benefit: How it could or did improve the legal system – link to the principles of justice.
e. Status: Whether it is recommended or recent – and the date it was recommended or implemented, depending.

If an existing recommended change is implemented during the year, the content can be kept and the information in Column E simply updated to reflect that.

Step Three

Go through the current update, taking notes on any recommended or recent change that looks appropriate.

Step Four

Do the same for the three updates yet-to-come in 2020! Recent or recommended changes you see or read about during the year can also be detailed in the same place.

Appropriate notes in the current Update include:

- ✓ The potential reform of an amended sentence indication scheme.
- ✓ The recent reform of Fast-Track Committals in the Supreme Court.

Keeping a record like this will take a lot of the pressure off.

Bonus application task:

Go through the 2018-2021 VCAA examinations and the 2018 VCAA sample examination, and start matching the questions with the Area of Study to which they relate. For instance, you should now be able to find all the questions that relate to content from the criminal justice system.

Start keeping a record of official examination questions that relate to each Outcome you study.

MEMORABLE QUOTATIONS

"When the community could not come to us, we took the court to them."
Chief Magistrate Lisa Hannan, regarding the Online Magistrates' Court, 2020-21 Annual Report

"Too many have said the experience of the court process for them was more traumatic than the crime itself, even in violent assaults or sexual assaults. That's really tragic."
Victims of Crime Commissioner Fiona McCormack, regarding the Commission's 2021 inquiry into victim experiences of the criminal justice system

"[U]nlike the inscrutable verdict of a jury, the reasons underpinning a judge's verdict are susceptible on appeal to fine analysis and dissection. Moreover, the giving of inadequate reasons may of itself be a reason for appellate intervention."
Court of Appeal in Henshaw (a pseudonym) v The Queen [2021] VSCA 356, 17 December 2021

"It is axiomatic: holistically healthy communities produce healthy people and healthy people do not generally end up in prison."
Emeritus Professor Joe Graffam, in evidence given to the Legislative Council Legal and Social Issues Committee's 'Inquiry into Victoria's Criminal Justice System'

"It's our experience that an accused who has a much better understanding of what penalty they might receive if they plead guilty increases that likelihood significantly."
Chair of the Criminal Bar Association, regarding sentence indication reform proposals, November 2021

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