

TOPIC 1 – THE PRINCIPLES OF JUSTICE: FAIRNESS, EQUALITY AND ACCESS



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JUSTICE

Universal principle - All individuals have an entitlement to equitable/fair/ reasonable treatment under the rule of law.

Social justice is based on values that relate to human rights; that is what is considered fair in balancing rights of individuals and the state.

Procedural justice relates to how procedures are used to access and resolve dispute resolution through mechanisms and bodies.

FOR JUSTICE TO FUNCTION IN A SOCIALLY COHESIVE SOCIETY, FAIRNESS, EQUALITY AND ACCESS MUST EXIST.

FAIRNESS:

Impartial and just treatment before the law, requiring fair processes and hearings that are unbiased and without favouritism. Fairness is achieved through parties:

- having the opportunity to **know the case against them**
- having the opportunity to **present their case/defence**
- having the opportunity to **test the prosecution's case**

Aspects of the criminal trial which relate to fairness include:

- **time** taken for a criminal trial to be determined
- the **availability of legal representation** for an accused
- whether **laws** have been fairly properly applied
- whether the **judge and jury** have acted according to their **responsibilities**

EQUALITY:

Equal treatment before the law regardless of characteristics and beliefs such as age, gender, nationality, religion, disability or sexuality. Equality is achieved through:

- **parties being treated equally before the law**, with an equal opportunity to present their case
- processes and decision makers being free from bias or prejudice

Aspects of the criminal trial which relate to equality include:

- availability of legal representation for persons of low socio-economic background and equal application of law to everyone

ACCESS:

The ability to approach and make use of the criminal justice system as people understand their legal rights and pursue a case including:

- able to access legal institutions that hear criminal cases ie courts
- access bodies and institutions that provide legal advice, education, information and assistance

Access does not mean that parties seeking access will get the outcomes they want but that they will have the opportunity to make use of the processes and institutions within the criminal justice system.

Some aspects of the criminal justice system which relate to access include:

- timely means to process and finalise criminal cases eg. plea negotiations and sentence indications
- available access to legal advice and assistance to accused who can't afford legal representation

QUESTION 1

Describe the concept of fairness and explain how it may be achieved in a criminal trial or hearing. [2 marks]

QUESTION 2

The system upholds the principles of fairness and equality. Explain these **two** principles. [4 marks]

QUESTION 3

Explain the principle of equality. In your response, include an explanation of how the Victorian criminal justice system upholds this principle. [3 marks]

TOPIC 2 – KEY CONCEPTS IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

(a) The distinction between summary offences and indictable offences

Summary offences are minor offences heard in the Magistrates Court on summons, such as drink driving, speeding and minor assaults. There is no jury, therefore the hearing is presided by the Magistrate who will determine the verdict and sanction.

Indictable offences heard summarily are serious indictable offences under the Criminal Procedures Act 2009, such as theft under \$100,000, that can be heard as a summary offence in the Magistrates Court, instead of a jury in a higher court such as the County Court. The defendant must consent, and a magistrate must agree, for an indictable offence to be heard summarily. This is due to the hearing being less expensive and the maximum penalty is 10 years imprisonment.

Indictable offences are the most serious offences under the Crimes Act 1958, such as homicide, rape and serious drug trafficking which are heard at trial in the County or Supreme Courts before a judge and jury. The jury determines the guilt or innocence of the accused and the judge ensures the strict rules of evidence and procedure are followed during the trial and determines the sanction should the jury return a guilty verdict.

(b) The burden of proof

Burden of Proof: refers to the party who initiates legal proceedings and therefore has the burden or responsibility to prove the facts of the case. In criminal cases this is the prosecution/ Crown, and if they are successful, then a verdict of 'not guilty' must be returned. The accused does not have to prove their innocence, unless the burden of proof is reversed eg in self-defence cases.

(c) The standard of proof

The Standard of Proof refers to the level of proof needed to prove the case. In a criminal case, the prosecution must prove their cases beyond reasonable doubt. If there is real doubt, as to whether the accused committed the offence, then the court must return a verdict of not guilty. A verdict in the Magistrates Court hearing will be determined by a Magistrate, and by a jury of 12 in the County or Supreme Court trial.

(d) The presumption of innocence

The presumption of innocence ensures every person accused of a crime is presumed to be innocent until they have been proven guilty beyond reasonable doubt in a court of law. This presumption of innocence is a common law precedent, guaranteed now by Victoria's Charter for Human Rights and Responsibilities.

The presumption of innocence is upheld through rights such as:

- the burden of proof on the prosecution to prove the defendant's guilt.
- the high standard of proof on the Prosecution to prove their case to an independent magistrate or jury.

- bail avoids depriving an accused of their freedom by remanding them into custody unless there are extenuating circumstances eg risk of reoffending, absconding or threat to witnesses.
- the right to silence where suspects do not have to answer questions or give evidence in court as they may incriminate themselves, unless accused of organised crime.
- prior convictions cannot be taken into account during the trial and only referred to during sentencing, once the accused has been found guilty.

QUESTION 4

Distinguish between summary and indictable offences heard summarily. [2 marks]

QUESTION 5

Referring to the criminal justice system, explain differences between burden of proof and standard of proof [3 marks]

QUESTION 6

Describe two ways the presumption of innocence is upheld in the criminal justice system. [3 marks]

QUESTION 7

Jill has been charged with a criminal offence. Her legal representative states that she doesn't have to answer questions during her hearing and that the prosecution must prove her guilty beyond a reasonable doubt. Explain to Jill what these principles of the criminal justice system mean. [4 marks]

QUESTION 8

Analyse the extent to which the presumption of innocence, achieves two principles of justice. [4 marks]

TOPIC 3 – THE RIGHTS OF AN ACCUSED

(a) The right to be tried without unreasonable delay:

Under the Victorian Charter of Human Rights, any person charged with a criminal offence is entitled “without discrimination” to a guarantee that they will be tried without unreasonable delay. This protects their presumption of innocence, since they have not been convicted and to avoid deprivation of their liberty. Therefore, the accused is entitled to have charges heard in a timely manner eg. summary offences must be brought before the court within 12 months. Delays should only occur if they are reasonable, such as collecting evidence.

Case Example: In Gray v DPP [2008] the Supreme Court determined that if the Crown cannot guarantee a timely trial under the Victorian Human Rights Charter, the only solution is to grant the accused bail.

(b) The right to a fair hearing is two-fold.

A person charged with a criminal offence is entitled to **have the charge decided by a competent, independent and impartial court** in the form of experienced judge or magistrate, free from political influence. They will hear both sides of the case, each side will have equal opportunity to present their case and the hearing must be fair and open to the public. This ensures the public know the trial procedures are transparent and fair, and the right exists for a party to seek leave to appeal if the judge did not enforce the right to a fair hearing. Judges will provide reasons for their decisions, therefore, they are held accountable for their decision.

A defendant is entitled to receive **a fair and public hearing** that includes: the presumption of innocence, the right to silence being upheld, the burden and standard of proof being fulfilled, awareness of charges, time and resources to prepare a defence, the opportunity to cross examine and test the prosecution’s case and the right to interpreters.

Case Example: Dietrich v The Queen (1992) case establishes that a lack of legal representation when defending an indictable offence may result in an unfair trial that the High Court described as a “miscarriage of justice”.

(c) The right to trial by jury

The express right is protected under the Commonwealth Constitution for those charged with Commonwealth Indictable offences. Under Alqudsi v The Queen [2016] the High Court held that the right to trial by jury as per s80 of the Constitution has no exceptions.

Most indictable offences are under state law and therefore this right is protected through legislation and Common Law. Victorians have the right to trial by jury when charged and defending indictable offences that will occur in the County and Supreme Courts before a judge and jury of 12 if a defendant pleads not guilty. In 2014-2015, only 523 Victorian trials (0.5%) were before a jury.

The right to trial by jury assists in the attainment of justice since juries provide safeguards against the power of the State that make the allegations and prosecute the case. Since the jury is made up of impartial individuals from the community that have no vested interest in the case, they are able to participate by listening to the evidence, deliberating and ensuring that the 12 people who represent us, will in theory, ensure a thorough deliberation process where our values will be upheld in their verdict.

QUESTION 9

John is having his criminal trial for murder heard in the Magistrates Court. He believes that he has been charged with a summary offence and that his trial will only be heard by a judge since he does not have a right to a jury. Explain why John is incorrect. [3 marks]

QUESTION 10

An accused has the right to trial without unreasonable delay. Explain what is meant by 'unreasonable delay' and provide a circumstance where a delay could be seen as just? [3 marks]

QUESTION 11

How does the right to trial by jury as afforded to an accused person, uphold justice? [3 marks]

TOPIC 4 – THE RIGHTS OF VICTIMS

Under the Victims Charter Act 2006, a victim is: someone who has suffered injury directly as a result of a criminal offence, a family member of a person who has died as a direct result of a criminal offence, or a child under 18 years or has a mental impairment that prevents them from managing their own affairs, and that person suffers injury directly as a result of a criminal offence.

(a) The right to be informed about the proceedings

Under the Victims Charter, victims are entitled to certain information and support services from the police and the DPP. Once prosecution has commenced, the prosecution is required to give the victim details of the offences against the accused, reasons given if no charge is laid, the date and place of the hearing, the sentence imposed and details of appeals.

(b) The right to give evidence as a vulnerable witness

If the victim is also a witness of the crime, they will have to give evidence in support of the prosecution's case against the accused. Some victims are considered vulnerable and therefore giving evidence may be difficult. This may result in the jeopardising of evidence and additional trauma. The law provides protections for these victims, including of family violence since 2017, to afford them the right to give evidence as a vulnerable victim. This includes: alternative arrangements to give evidence eg by CCTV, disallowing improper questions when a witness is being cross-examined.

(c) The right to be informed of the likely release date of the accused

Under the Victims Charter, a person who is a victim of a criminal act eg sexual offence or kidnapping, can apply to be on the Victims Register. This provides the victim with access to information regarding the offender eg likely date of release, length of sentence, the right to make a submission if the offender applies for release on parole.

QUESTION 12

Explain what is meant by a 'vulnerable witness' and describe how such a witness may give evidence. [2 marks]

QUESTION 13

Describe what information a victim may receive regarding court proceedings. [2 marks]

TOPIC 5 – THE ROLE OF INSTITUTIONS AVAILABLE TO ASSIST AN ACCUSED, INCLUDING VICTORIA LEGAL AID AND VICTORIAN COMMUNITY LEGAL CENTRES

VICTORIA LEGAL AID

Is a government-funded agency and independent statutory body established by the Victorian Parliament in 1995. In 2016, it received \$150 million from state and federal governments and nearly \$28 million from the Public Purse Fund to assist nearly 87,000 Victorians, including 48,000 clients involved in, or affected by criminal matters, therefore seeking expert legal assistance, advice and representation that they would otherwise be unable to afford.

The main role is to **provide legal aid** in the most economic and efficient manner. **Free legal information and advice** is available to all Victorians on the VLA's website, on the phone and in its publications. Those who need and can access free legal advice, and cannot afford legal representation, include the homeless, children, those in custody and risk of family violence.

The VLA manage resources to make legal aid available at a reasonable cost to the community and on an equitable basis for Victorians. For example, free duty lawyers can assist, advice and represent parties at the Magistrates and Children's Courts for a hearing, if they satisfy an income test that reflects they have limited income.

The VLA provide the community with improved access to justice and dispute resolution through the grant of legal assistance for those that meet the means test, based on assets and income. The VLA can provide help for those seeking help to prepare and present a case. If an accused person successfully meets these requirements, they will receive a grant of legal assistance to pay for legal representation from a lawyer of the accused's choosing. VLA may provide a lawyer on behalf of the accused. The accused person may be expected to pay a contribution toward the running of their case, depending on their financial situation. However, a key criticism has been the lack of funding, with the VLA seeking an additional \$72 million to deal with the "crushing pressure" on lawyers to help disadvantaged people. Due to cuts, the VLA has turned away over 32,000 people in need.

COMMUNITY LEGAL CENTRE

CLC operate on state and federal funding, as well as donations from the public and volunteer workers. Generalist CLCs provide broad legal services to people in a particular local geographical area eg Monash Oakleigh Legal Service (in Clayton). Specialist CLCs focus on particular groups of people or areas of law Eg – Family Violence Prevention & Legal Service. Throughout Australia in 2016, CLC's assisted over 200,000 Australians.

The role of CLC's is to provide basic **legal information** by paid and volunteer staff for those who visit with or without an appointment. **CLC's provide initial legal advice and information** such as preliminary assistance, help with writing short letters, and completing forms. Focus is on parties in need due to their circumstances, with particular attention for those with disabilities, mental health issues, refugees, victims of crime particularly of domestic violence.

CLC's can also provide **duty lawyer** assistance, who provide advice or representation for urgent matters or for people whose matters will be completed in one day. CLCs will provide **legal casework**, very rarely will they take on a criminal matter. However, when they do the CLC will provide legal representation and assistance if the party meets the eligibility criteria, such as gaining a grant of legal assistance from Legal Aid. In 2015-2016 VLA provided \$28.4 million to CLCs. Most CLC's do not offer representation and assistance with indictable offences.

CLC and VLA Similarities	CLC and VLA Differences
<p>Both provide extensive free information, publications and resources on their websites</p> <p>Both provide a free duty lawyer, a lawyer who is at court on a particular day and who can help people who are parties to a hearing in the Magistrates of Children's Courts.</p>	<p>VLA can provide grants of legal assistance to people who cannot afford a lawyer. Whereas CLCs cannot provide grants for legal assistance. However, if a person has received a grant of assistance from VLA, CLCs will then provide legal casework.</p> <p>Victorian Legal Aid is a statutory authority, whereas CLCs are independent community organisations with strong local community connections.</p>

QUESTION 14

Describe how Victorian community legal centres can assist an accused. [2 marks]

QUESTION 15

Compare the roles of Victorian Legal Aid (VLA) and Victorian community legal centres in assisting an accused person. [4 marks]

QUESTION 16

Explain two purposes of the VLA in assisting the accused in our criminal justice system. [4 marks]

TOPIC 6 – THE PURPOSES OF COMMITTAL PROCEEDINGS

Committal proceedings in the form of committal hearings are not a trial. They are presided by a Magistrate in the Magistrates Court when an accused has been charged with indictable offences and plead not guilty in order:

1. To determine whether there is enough evidence for the case to go to trial, that is, whether a **prima facie case exists**. That is should the person be committed to stand trial in the County or Supreme Court. The magistrate will assess the strength of the evidence and the accused and determine if it is likely that a jury would convict based on the evidence provided.
2. To determine the **future direction of the case** by a Magistrate determining if the case can be heard. This helps to save time and money as only those cases with a prima facie case will progress to trial. This can also help to reduce waiting times for superior courts.
3. To determine **how the accused will plead**, thereby saving the court time and money if the accused intends to plead guilty.
4. This gives the **accused an opportunity to hear or read evidence** and cross-examine witnesses and put forward a case at an early stage (if they wish). Consequently, this allows the accused to prepare and present their case, and the court ensures issues being argued are defined.

QUESTION 17

Describe **one** purpose of a committal hearing and explain how it can promote justice.

[3 marks]

EFFECTIVENESS OF COMMITTAL PROCEEDINGS

Strengths	Weaknesses
<p>Committal proceedings save time and resources of higher courts: Magistrates Court filters out weak cases which are unlikely to succeed due to lack of sufficient evidence. Therefore, weak cases will not make it to trial in the County or Supreme Courts. Between 2014 and 2017, on average, 80.4% of cases in Victoria were committed to trial.</p> <p>Committal proceedings allow the accused to be informed of the case against them. Committals assist the accused to determine if they should plead guilty and also to help them to prepare their case as all evidence has been disclosed.</p> <p>Committal proceedings support the principle that the accused is innocent until proven guilty since the burden is on the prosecution to establish there is evidence of sufficient weight to convict at trial. This onus supports the principle, as the accused needs to prove nothing.</p> <p>Prosecution may withdraw some or combine charges, if evidence for one charge is weak it may be withdrawn or combined with other charges, thereby resulting in a fairer trial, which save both time and money.</p> <p>The accused may test the strength of the prosecution's case. This is because the accused may examine prosecution witnesses, parties may agree on some facts and issues, thereby saving the court time and money.</p>	<p>Committal proceedings are complicated since they involve the examination, cross-examination and re-examination of witnesses. Therefore, the process is not only time-consuming but difficult for a defendant that is unrepresented or represented by inexperienced counsel. This can increase the risk of an unfair outcome since the accused will face an experienced counsel in the form of the prosecutor.</p> <p>Committal proceedings are expensive. These proceedings require legal representation and this adds to the cost for the accused. For example, the lengthy and costly process is an additional and ineffective step as seen in the Theophanous' committal. He was accused of rape, but the evidence was not of a prima facie standard. Even so, the accused was \$90,000 out of pocket due to legal representation required to defend him without the possibility of being financially compensated.</p> <p>Committal proceedings add to delays and stress as they are a time-consuming and complex process before the parties get to trial, and the process is repeated at trial. Therefore, they may be viewed as unnecessary. There is a belief that cases have strong evidence or they would not have made it to court at all. However, in R v Debs [2007], a trial was held despite the Magistrate's determination of insufficient evidence, and the accused was ultimately found guilty. Therefore, the real power to commit an accused to trial lies with the OPP, which in effect, reduces any motivation or need to run a committal. The former director of the DPP Jeremy Rapke argued committal hearings "should be abolished because they are a waste of time and money and they clog up an overburdened court system". The average length of time for a case to reach a committal hearing in the Magistrates Court blew out from 5.3 months to eight months between 2002-03 and 2010-11. Jeremy Rapke called for committals to be abolished in 2008, deeming them a waste of time and money. Western Australia and Tasmania have abolished them.</p>

QUESTION 19

Discuss the extent to which a committal hearing could achieve **one** of the principles of justice. [4 marks]

QUESTION 20

One recommendation to improve access to justice, is to abolish committal hearings. To what extent do you agree? [5 marks]

TOPIC 7 – THE PURPOSES AND APPROPRIATENESS OF PLEA NEGOTIATIONS AND SENTENCE INDICATIONS IN DETERMINING CRIMINAL CASES

PLEA NEGOTIATIONS

Plea negotiations are when the prosecution offers an incentive to the accused person in return for them pleading guilty. Incentives may include to reduce charges to less serious offences and remove some charges where the accused is charged with more than one offence.

Negotiations are conducted ‘without prejudice’, meaning that any offers made by either party during negotiations cannot be used against them if the negotiation is unsuccessful. Plea negotiations do not determine the sentence and the accused will still need to be sentenced by a court. Plea negotiations can happen at any stage, and even before charges have been laid.

A number of factors will determine whether plea negotiations are appropriate for a particular case. These include: whether the accused is willing to plead guilty, co-operate with the investigation, the strength of the prosecution’s case eg evidence and reliability of witness testimony, likelihood of conviction considering the costs and time involved.

Appropriateness of Plea Negotiations	Inappropriateness of plea negotiations
<p>Negotiations remove the need for a full trial/hearing therefore saving money and freeing up court resources. This is because a prompt determination increases public confidence in the criminal justice system to resolve disputes in a timely manner. As a result, pleas can prevent the trauma of a trial for victims, accused and families.</p> <p>Pleas also reflects the criminality of the offender, since fairness is achieved if the accused pleads guilty to charges that not only reflect the gravity and nature of the offence, but also ensures the certainty of outcome since a sanction is imposed rather than risk going to trial where the accused may be acquitted.</p>	<p>Accused gains a lenient sentence and therefore the community or victim may feel a negotiation may result in an outcome which does not reflect the crime.</p> <p>Additionally, the accused may be pressured to accept a deal, rather than going through their right to a fair trial. If defendants lack counsel and the evidence is not strong, they can accept the plea without appropriate guidance, therefore leading to unjust outcomes.</p> <p>Plea negotiations may avoid ensuring the standard of proof has been met since the prosecution have not proven their case beyond reasonable doubt. This goes against the principle of innocent until proven guilty, as the accused is presumed guilty of the crime/s.</p> <p>Additionally, negotiations can be private and therefore lack of transparency that may make the public question the reasons why the agreement was made. The public may feel justice is not occurring, since the prosecution or the accused has something to hide.</p>

SENTENCE INDICATORS

Sentence indicators are statements given by the court to the accused to inform them of what sanction is likely to be imposed on them if they plead guilty. The key purposes are:

Clarity about the likely sentence: provides the accused with an indication of the likely sentence they can expect if they plead guilty. This will alleviate the fear of the accused that they may receive a custodial sentence if they continue with the hearing or trial. This promotes timely resolution of the case.

Saves time, costs, resources, stress and inconvenience: As a sentence indicator may result in the accused pleading guilty, this will save time, cost and resources of having a complete hearing or trial. It may also alleviate the stress and inconvenience associated with a trial for the accused, victim and their families.

Evaluation of Sentence Indicators

Strengths	Weaknesses
<p>A sentence indicator may result in an early determination of the case since the accused pleads guilty and therefore results in prompt justice that benefits all parties. This saves money and resources for all parties since the case does not proceed to hearing or trial.</p> <p>Furthermore, transparency is achieved as sentence indicators are conducted in open court, rather than the secrecy associated with plea negotiations. This creates greater certainty for the accused who is aware what sentence they can receive. This avoids the risk of going to trial and finding out at the end what sentence will be imposed.</p> <p>In addition, victims are considered when taking into account the impact of the crime on the victim/s, thus giving the victim a voice in the process. Crucially, this is balanced by the rights of the accused who is not bound to accept the indication and plead guilty. This provides fairness for the accused.</p>	<p>For indictable offences, the judge and prosecution are not required to give or consent to a sentence indication if the accused asks for one, therefore the certainty of a sentence is compromised. Similarly, injustice prevailing exists, since not all facts are known (not proven or disclosed). This can be a disadvantage to the offender, who may plead guilty. The outcome of the case may have been different if all the facts were brought out at trial.</p> <p>The accused is also disadvantaged by the brief indication if charged with indictable offences. The court only needs to indicate if the court would impose an immediate term of imprisonment, and not the length of sentence.</p> <p>Additionally, the process prevents the victim from having their day in court as they do not get to see justice occur through the process of a full hearing or trial.</p>

QUESTION 22

Explain how the roles of the judge and jury in a criminal case will change after successful plea negotiations. [2 marks]

QUESTION 23

Using an example, distinguish between plea negotiations and sentence indications.
[3 marks]

QUESTION 24

Describe the purpose of a sentence indicator in a criminal trial. [2 marks]

QUESTION 25

Explain plea negotiations and describe when one will be appropriate in a criminal trial.
[3 marks]

TOPIC 8 – THE REASONS FOR A VICTORIAN COURT HIERARCHY IN DETERMINING CRIMINAL CASES, INCLUDING SPECIALISATION AND APPEALS

The Victorian court hierarchy refers to the way that the courts are organised, based on their jurisdiction, to resolve a range of different matters. Most courts will have both an **original jurisdiction** (cases being heard for the first time) and an **appellate jurisdiction** (cases heard on appeal).

REASONS FOR COURT HIERARCHY: SPECIALISATION OF COURTS

When courts operate in a hierarchy it allows each court to **specialise** in specific areas of law. Judges become experts at hearing certain types and cases that result in fair and unbiased outcomes that are just and less likely to result in an appeal. Additionally, each court utilises procedures that allow for more effective and timely resolution regarding issues of different complexity and seriousness.

For example, the **Supreme Court (Trial Division)** specialises in hearing the most serious indictable offences (murder, murder related offences and treason). On the other hand, the **Magistrates Courts** that are found in more locations, are able to preside over the 92% of criminal cases. Therefore, expert magistrates utilise procedures that allow for specialisation in resolving summary offences and determining in committal hearings whether prima facie cases exist.

REASONS FOR COURT HIERARCHY: APPEALS

Having a hierarchy allows decisions of **lower courts to be reviewed by higher courts** during an **appeals process**. This promotes fairness by allowing any mistakes made in the original decision to be corrected. Appeals, for example to the High Court, require the appellant to seek leave, that is permission.

For example, appeals for criminal matters may be on a **question of law** where the magistrate or judge erred, and therefore access is provided to rectify injustices eg Studded Belt Case 1992. Defendants may **appeal a conviction** to determine if they were found guilty due to a denial of natural justice, eg Button Case 2002. Finally, the Prosecutor representing the State and defendant also have an equal right to put forward an appeal, due to the **leniency or severity** of the sanction imposed. Eg Bayley Case 2016

QUESTION 26

Recently a critic of the Australian legal system commented that a hierarchy of courts is not necessary. Outline **one** reason to justify the existence of the court hierarchy in resolving criminal matters. [2 marks]

QUESTION 27

Explain how access to appeals is an important factor in having a court hierarchy. [3 marks]

TOPIC 9 – THE RESPONSIBILITIES OF KEY PERSONNEL IN A CRIMINAL TRIAL

THE JUDGE

The Judge has the following responsibilities:

Manage the trial:

The judge must make sure the correct court procedure is followed so that both parties have an equal opportunity to present their case. This includes controlling witnesses and legal practitioners. The judge can give directions and make orders during the trial. The judge might ask occasional questions, recall a witness for a matter to be clarified, however, they are not active participants in the trial and they do not take sides.

Decide on the admissibility of evidence:

The judge determines what evidence is permitted and they have the ability to exclude evidence from trial. This can include excluding evidence that is not relevant to the trial, is hearsay evidence (3rd hand evidence), or is evidence of opinion (what the witnesses thinks).

Attend to jury matters:

The judge will provide potential jurors with information about the trial and the accused to determine if something about the case will affect a persons' ability to act as a juror (Eg they know a witness). The judge may address the jury about issues in the trial and the judge may discharge a juror if it appears that the juror is not impartial or cannot continue to act as a juror.

Give directions to the jury and sum up the case:

The judge may need to give directions to the jury to ensure a fair trial. The judge will also summarise the case to the jury, explain the law involved, identify evidence which will assist the jury and refer the way the parties have put their cases.

Hand down a sentence:

If the jury or a magistrate finds the accused guilty (or the accused pleads guilty) the parties will then make submission for sentencing. Following a sentencing hearing the judge or magistrate will hand down a sentence.

Strengths	Weaknesses
<p>Independent/impartial adjudicator cannot favour parties. Therefore, parties exempt from prejudice, ensures fair/unbiased hearing.</p> <p>Rules of evidence and procedure applied equally to parties. For example, only admissible evidence that is legally obtained and relevant, is presented.</p> <p>Therefore, with judge's expert guidance, juries more likely to reach outcome based on facts.</p>	<p>Expertise of judge is underutilised, despite being most experienced party. They are unable to be involved in investigation, cannot suggest questions/areas of evidence to be explored.</p> <p>Their passive role prevents them from assisting poorly represented parties.</p>

QUESTION 28

An author of a journal article wrote the following question: 'Juries should not decide matters of fact. It should all be left up to the judge.' To what extent do you agree? Justify your answer. [6 marks]

QUESTION 29

Outline two roles of the judge. [3 marks]

THE JURY

The Jury is responsible for:

Being objective:

The jury must be unbiased and open minded. They must put all preconceived ideas aside to ensure they determine the guilt or innocence of the accused in an unbiased manner and based on the facts.

Listen to and remember evidence:

Jury members will need to listen to and make sense of all evidence. They must ensure that they concentrate on what is taking place. They must not undertake their own investigation of what happened or make any enquires about trial matters.

Understand directions and summing up:

At the end of the trial the judge will give directions to the jury about issues or points of law and will sum up the case. A jury will need to listen and ask questions about any legal points they don't understand.

Deliver a verdict:

The jury must make a decision on the facts of the case. In a criminal trial a jury will decide whether the accused is guilty. They must aim to reach a unanimous verdict (all jurors the same); however, in most cases (excluding murder and some drug offences) the court will accept a majority verdict (all but one juror).

Note:

In a criminal trial the judge will determine the sanction; however, in a civil trial the jury will determine damages.

Fair	
Strengths Impartiality – 12 jurors randomly selected true cross section of the community provide trial by peers. Effective 'triers of fact' – according to current societal views/values, rather than in legalistic terms.	Weaknesses Selection/empanelment process – not necessarily true cross-section, since jurors can be disqualified, ineligible, excused. Peremptory challenges/challenges for cause – allows parties to construct jury that is skewed in favour → won't represent broader community. Therefore, this undermines fair/unbiased nature of trial by true cross-section. Buttons Case

QUESTION 30

In a recent submission to the Victorian Law Reform Commission (VLRC), an individual stated that the 'jury is outdated and should be abolished'.

QUESTION 31

Describe and discuss two roles of a jury in a criminal trial. [6 marks]

THE PARTIES

In a criminal trial, the parties have the following responsibilities:

Give an opening address:

The prosecution must make a statement to the jury before any evidence is given. The legal representation of the accused will then present a response to the jury. Both parties are restricted to referring to evidence which has been admitted (filed and served) during pre-trial.

Assist the judge in jury matters:

Both parties assist in empanelling the jury as both parties have the ability to challenge potential jurors with or without a reason. Either party can also request during trial that the judge gives directions to the jury.

Present the party's case:

Each party is responsible for presenting their evidence, usually through witness evidence. The prosecution is required to present to the jury all credible evidence that is relevant to the case. The accused has the right to silence and is innocent until proven guilty, thus they do not have to give evidence or answer questions.

Give a closing address:

Both parties are entitled to address the jury to sum up evidence after the close of all evidence.

Make submission regarding sentencing:

Both parties may make submissions about sentencing to the court once the accused is found guilty. This usually occurs at a sentencing hearing.

Strengths	Weaknesses
<p>Parties are empowered to make key decisions regarding investigation/preparation/presentation of case → reflects democratic nature.</p> <p>Parties determine relevant evidence presented/witnesses called → upholds fair nature.</p> <p>Parties choose legal representation → ensure case presented in best possible light.</p>	<p>Parties may have vested interests → focus on winning rather than discovering truth.</p> <p>Parties may not disclose all evidence → hinder ability to achieve justice eg) right to silence may undermine the possibility of the truth being determined.</p> <p>The high cost of legal rep → reduces access parties disadvantaged depending on financial wellbeing → unfair trial.</p>

LEGAL REPRESENTATION

Legal practitioners (solicitors and barristers) have the following responsibilities during a criminal trial:

Be prepared:

Legal practitioners must be prepared to proceed and be familiar with documents that are to be admitted into evidence and the witnesses who are to be called.

Comply with their duty to the court:

Legal practitioners owe a duty to the court to act ethically and in accordance with the law. They cannot twist facts to assist their case. They must be courteous, cooperate with each other and the court, and follow any directions given by the court.

Present the case in the best possible light:

Legal practitioners have a responsibility to present the case in a manner which is in the best interests of their client. They are also responsible for the examination and cross-examination of witnesses.

Strengths	Weaknesses
Parties able to engage expert legal rep to help prepare/present case in best possible light.	High costs reduce financial access, \$300-500 per hour in Supreme Court.
High Court – “they are a pillar of our criminal justice system.”	Parties may be unrepresented, therefore undermines fairness of trial, compromises level playing field.
In theory – available to all parties regardless of socioeconomic background, therefore equal footing	Research has identified – without legal rep, higher chance of conviction/ sentenced to jail
	Parties may face ‘miscarriage of justice’ through no fault of their own (unrepresented) eg Dietrich Case

QUESTION 33

Evaluate the extent to which the use of legal representation contributes to justice. [5 marks]

QUESTION 34

Your friend, Sam, has been charged by the police. Sam is unsure about whether to seek legal advice. Outline two roles fulfilled by legal representatives that may assist Sam. [4 marks]
