PART A  GENERAL QUESTIONS

Question 1
- Consider circumstances of the offence;
- Consider circumstances of the offender;
- Appropriate sentence decided by intuitive synthesis;
- Type of synthesis determined by characteristics of the crime and the offender;
- Application of statutory purposes of sentencing and statutory maximum penalties;
- Consideration of current court sentencing practice;
- Final outcome is produced by judicial discretion based on intuition, experience and sentencing principles and practices developed by the courts.

Question 2
- Appellate review sets the standards for consistency in sentencing so that similar offences are dealt with by the imposition of similar penalties;
- Legislation has allowed for the introduction of Guideline Judgments by appellate courts, but this has not been utilised in Victoria.

Question 3
- No formal sentencing guidelines currently exist in Victoria;
- Sentencing governed by current sentencing practice and appellate review;
- Sentencing practice informed by decisions in courts of the same jurisdictions;
- Guidance in sentencing available through a number of professional bodies including in Victoria, the Sentencing Advisory Council;
- Failure to apply current sentencing practice may lead to error in sentencing which can be remedied via appellate review.

Question 4
- No mandatory sentences or mandatory minimum sentences in Victoria;
- Only maximum penalties set down by legislation;
- Imposition of a statutory maximum penalty is retained for only the worst cases;
- Jurisdiction is important when considering maximum penalties.

Question 5
- Lenient sentences can be reviewed;
- Application for review can be made by the Director of Public Prosecutions on a limited basis, namely whether the sentence imposed was so manifestly inadequate that it lead to sentencing error;
- Sentence review can be sought over a number of jurisdictions.

Question 6
- Any Defendant is entitled to a reduction in sentence for a guilty plea;
- No fixed formula for quantifying a discount for entering a plea of guilty;
- Discount is dependant on the agreed facts and circumstances which formed the basis of the acceptance of the guilty plea;
- Discount is also dependent upon the circumstances of the offender as put before the court on the plea in mitigation.
PART A

Question 1
In your system, how does a judge decide the appropriate sentence in a criminal case? What are the most important factors he has to consider? Does a judge have a complete discretion as to sentencing? Is he bound in some cases (and if so, in which?) to pass a sentence which is fixed by law? Are there crimes (apart from minor motoring cases) or circumstances in which mandatory minimum sentences are laid down by law? Please give examples.

Answer
Judges decide an appropriate sentence by means of intuitive syntheses. This process is governed by intuition, experience and current sentencing practices and principles developed by courts of differing jurisdictions. Within this process the Judge must take into account the circumstances of the offender together with the circumstances of the offending. These facts concerning the offender and the offending form the basis upon which the sentence to be imposed is formulated.

In Victoria, the purposes of sentencing are fixed by statute. Section 5(1) Sentencing Act 1991 provides that punishment, deterrence, rehabilitation, denunciation, protection of the community and or a combination of two or more purposes. It is the circumstances of each individual case that determine which of the sentencing purposes are appropriate to the instant case. None of the purposes are of a paramount importance. The weight and significance of each purpose will be determined by all of the circumstances of each individual case.

The process of the imposition of any sentence is dependent upon a complicated mix of purposes and principles and the synthesis of those purposes and principles with the facts and circumstances of each particular case combined with the circumstances peculiar to the offender in that particular case. Such sentencing principles allow for the characteristics of the crime and the offender to indicate what type of synthesis may be appropriate in relation to one or more purposes in the imposition of punishment. What is considered as the most appropriate final outcome is essentially a matter of judicial sentencing discretion based upon a combination of factors - that is experience, intuition and sentencing principles or criteria developed by the courts.

Question 2
Does your system try to see that for similar offences different courts pass similar sentences? If so, how does it do this?

Answer
Sentencing standards in Victoria are ill-defined. In Victoria, appellate review forms the mechanism via which consistent standards in sentencing are applied so that similar offences in different courts are dealt with by way of the imposition of similar sentences. There other mechanisms which exists in other Australian jurisdictions as a means of applying sentencing standards and which are used in conjunction with the mechanism of appellate review. For example in New South Wales there exists a judicially endorsed standard sentencing system. Currently no such system exists in Victoria.

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1 There are however a group of what might be called regulatory offences such as driving offences which require by law a fixed penalty to be imposed but in Victoria there no minimum sentences laid down by law.
2 There may be conflicts between sentencing purposes. This issue was elucidated in Veen (No.2) (1988) 164 CLR 465 and Dixon (1975) 22 ACTR 13.
3 The Judicial Information Research System (JIRS) is an online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system. Developed by the Commission, JIRS contains case law, legislation, principles of sentencing, sentencing statistics and other information. JIRS ensures that the courts are kept up to date with the latest developments in law and practice. The primary legal reference material contained on JIRS includes the full text of judgments from the NSW Court of Criminal Appeal, Supreme Court, Court of Appeal, Land and Environment Court, and Industrial Relations Commission, as well as selected High Court cases. It also includes the full text of New South Wales and Commonwealth Acts and Regulations. The secondary legal reference material includes case summaries, commentary on the principles and practice of sentencing, and on-line publications, such as the Judicial Officers’ Bulletin. Quantitative reference material is available in the form of comprehensive and dynamic sentencing statistics, which can be located by reference to the sections of relevant legislation. For a detailed analysis of JIRS, see: I Potas et al, "Informing the Discretion" 1998 6(2) International Journal of Law and Information Technology 99. A subset of JIRS, namely the Sentencing Information System (SIS), is available to the broader legal profession, libraries and educational institutions on a subscription basis.
The **Sentencing (Amendment) Act 2003** (Victoria) introduced a new Part 2AA relating to ‘Guideline Judgments’ into the **Sentencing Act 1991** (Victoria). Those provisions commenced operation on 1 July 2004, but the Victorian Supreme Court of Appeal has yet to utilise this new jurisdiction. This legislation has provided a foundation for the Victorian Supreme Court of Appeal’s utilisation of such judgments, but no doubt there will be a continuing debate fuelled by the issues raised by a number of New South Wales cases.⁴

**Question 3**

Are judges in your system given guidance about the appropriate sentence for a particular crime? If so, does this guidance come from higher courts, from judges’ professional associations or from some other source? Where there are sentencing guidelines, may a judge depart from them?  

**Answer**

The sentencing system in Victoria is governed by current sentencing practice which in turn is governed by appellate review by both the Victorian Supreme Court of Appeal and the High Court of Australia. Current sentencing practice is also informed by other sentencing decisions in courts of the same level of jurisdiction in Victoria. There are a number of Professional Associations in Australia relating to judicial scholarship and education and these bodies hold regular seminars on aspects of sentencing providing informal guidance as to sentencing practices.⁵ There are however no formal sentencing guidelines currently in existence in Victoria. Any failure of consistency in sentencing can be remedied by appellate review in which case a different sentence may be imposed.⁶

In relation to sentencing systems, there are two sentencing projects currently being undertaken by the Victorian Judicial College. One of these projects relates to an updating of the Victorian Sentencing Manual. This third edition, now being compiled, will be primarily an on-line publication and initially it will be available only to judicial users. The second of these projects is in the early

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⁵ In 2004 pursuant to amendments of the **Sentencing Act 1991**, the Sentencing Advisory Council was established in Victoria as an independent statutory body. The functions of the Council include providing statistical information on sentencing, including information on current sentencing practices; conducting research and disseminate information on sentencing matters; gauging public opinion on sentencing; consulting on sentencing matters; advising the Attorney-General on sentencing issues; and providing the Court of Appeal with the Council’s written views on the giving, or review, of a guideline judgment.

⁶ A number of authorities address the significance of consistency of sentence as an independent sentencing goal. In **Omer** 15/2/1996 VSCA, Winneke P stated at 8:

Parity in sentencing is not only a desirable objective in sentencing co-offenders but also, where a pattern of sentencing for particular crimes can be established over a significant period, in sentencing different offenders for the same or similar conduct (cf **Poyner v The Queen** [1986] 68 ALJR 616).

However, it is not the case that inconsistency of a sentence with current sentencing practices gives rise to an independent ground of appeal. Rather, all argument based on general sentencing patterns can only be directed to determining whether the sentence imposed was manifestly excessive or inadequate. In **Wong** (2001) 207 CLR 584 at 604 [58, 59], Gaudron, Gummow & Hayne JJ returned to **House v The King** (1936) 55 CLR 499 for its characterisation of sentencing error:

Reference is made in **House** to two kinds of error. First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons. It follows that for a court to state what should be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which will justify a sentence within the specified range. It is those assumptions that may reflect or embody relevant principle, not the result.

Similarly, recording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were. (See Victorian Sentencing Manual 3rd Edition at 2.2.3)
stages of development and consists of the development of a web based sentencing system for Victoria similar to the Judicial Information Research System (JIRS New South Wales).

**Question 4**

In your system, are there more mandatory or mandatory minimum sentences than there used to be? If so, why do you think this is? What is the reaction of judges? Do judges feel that their independence is threatened?

**Answer**

In Victoria there are no mandatory sentences or mandatory minimum sentences to be imposed. As previously mentioned, there are however a number of regulatory offences for which fixed legislative penalties are to be imposed. In Victoria, there are also maximum penalties set down by legislation. Section 5 Sentencing Act 1991 provides that the court must have regard to the “maximum penalty prescribed for an offence.” The maximum signifies the seriousness of the offence. Any statutory maximum sentence imposed is retained for the worst of cases. All statutory provisions are for maximum penalties but these are not mandatory penalties.

Jurisdiction is important when considering maximum penalties to be imposed with respect to sentencing for criminal offences. The Magistrates’ Court is limited to hearing summary offences and indictable offences triable summarily whereas Victorian County and Supreme Courts hear cases involving indictable offences as set out in the Crimes Act 1958. Summary offences have individual maximum penalties fixed at two years imprisonment or less. Where a summary offence has a penalty fixed higher than two years imprisonment, the maximum term of imprisonment to be imposed is two years.

**Question 5**

Is there a way in your system in which a sentence which is thought to be too lenient can be reviewed and increased by a higher court? If so, who can use this procedure?

**Answer**

If a sentence imposed is considered to be too lenient, then the Director of Public Prosecutions (Victoria) can seek review of that sentence on a very limited basis (author’s emphasis). The basis of such review lies in whether the sentence imposed was so manifestly inadequate that the sentencer fell into sentencing error. There are a number of different types of appeal from different jurisdictions. Appeals may be instituted by the Director of Public Prosecutions pursuant to s.567A Crimes Act 1958 (Victoria), s.84 Magistrates’ Court Act 1989 (Victoria), or s.197(3) Children and Young Persons Act 1989 (Victoria) to the Victorian Supreme Court or the County Court of Victoria.

**Question 6**

In your system, is a defendant entitled to a reduction in sentence if he pleads guilty? If so, how is the reduction calculated?

**Answer**

Any Defendant is entitled to a reduction in sentence if he/she pleads guilty. There is however no fixed formula for calculating the reduction or discount in sentencing for such a plea. The formulation of any discount is dependent upon the context in which the guilty plea is entered. It will depend upon the agreed facts and circumstances that form the basis of the acceptance of the plea together with the circumstances of the offender which may mitigate the circumstances of the offending.

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7 Sentencing Act 1991 s.109(1). Similarly, other tables set out the maximum hours of unpaid community work. The Monetary Units Act 2004 sets out the maximum monetary value of fines which are described as penalty units.


10 Sentencing Act 1991 ss.112 and 113A

11 Crimes Act 1958 s.567A.

In Victoria a guilty plea has three principal consequences, namely that it is potentially evidence of remorse; that it is potentially evidence of a willingness to facilitate the course of justice and it is always considered as being mitigating on the basis of utilitarian considerations of benefit to the community.13 A guilty plea entered at the earliest practical opportunity, eliminating both the costs of a trial and the trauma of witnesses giving evidence at trial normally justifies a significant discount.14 Although Duncan15 may exemplify the principles to be reflected in any sentencing disposition when a plea of guilty is entered it does not exemplify any quantification of any such discount that is to be taken into account.

PART B - SENTENCING EXAMPLES

Example 1
A is 25 and known to be a drug dealer. Acting on information, the police stop and search him. He has no drugs but is found to be in possession of a revolver which is loaded. He says he carries it to defend himself. He is charged with possessing a prohibited weapon.

- The gravity of the offence of possess prohibited weapon cannot be reduced by an explanation relating to the defence of oneself;
- If A classified as a prohibited person (for example a person who has prior convictions) then the maximum penalty (pursuant to the Firearms Act) is 7 years imprisonment or $60,000.00;
- If A not a prohibited person, then the maximum penalty (pursuant to the Controlled Weapons Act) is 6 months imprisonment or a fine of $12,000.00

Example 2
B is 30 and has no criminal record. He meets a woman at a club and they drink together. At the end of the evening, he walks her home and makes it clear he wants to have sex with her. She says no but he pushes her into a quiet place and forces her to have sex. The woman submits out of fear of being injured. He claims that he thought she was consenting but is found guilty of rape.

- The offence of rape generally results in an immediate custodial sentence with the imposition of non-custodial sentences being rare;
- The maximum penalty for such an offence is 25 years imprisonment;
- Although B has no prior convictions, consideration to be given to the fact that the victim submitted out of fear of being injured;
- Depending upon the mitigating circumstances personal to B, any custodial sentence imposed may be partially suspended.

Example 3
C is a heroin addict who pays for his drugs by committing burglaries. He breaks into a dwelling house intending to steal but is caught. It is the third time he has been convicted of a dwelling house burglary since 2000. He is 22.

- There is no mitigation when an offence is committed in order to feed an addiction;
- Addiction is simply a relevant factor to be taken into account in the sentencing process;
- Some relevant personal circumstances of C include the fact that he has prior convictions for burglary, is a drug addict and is young;
- The maximum penalty for burglary is 10 years;
- The gravity of the offending is the first consideration and in imposing any sentence the offender cannot be punished more in order to try and cure the him;
- Combined treatment and custody order could be made in which a sentence of not more than 12 months imprisonment could be imposed and an order could be made that the balance of the sentence could be served in the community on conditions which would be attached to the combined custody and treatment order;

14 Duncan [1998] 3 VR 208. An early guilty plea is said to be indicative of genuine remorse and contrition and demonstrates prospects of rehabilitation and has long been considered to be a mitigating factor in favour of the accused. A guilty plea dictated by self-interest will carry less weight than one entered on the basis of genuine remorse Morton (1986) VR 863 at 867. The distinction between the two can often be a fine one.
15 Ibid.
• Pre-sentence drug and alcohol assessment reports are requires for such a sentence to be imposed.

**Example 4**

With 1 gram of alcohol in his blood, D, who is 40 and has no criminal record, drives his car. Affected by alcohol, he drives dangerously by pulling out to overtake into the path of an oncoming. The driver of the oncoming car is killed. D is charged with causing death by dangerous driving.

• The offence of dangerous driving causing death or serious injury attracts a maximum penalty of 5 years imprisonment and is triable summarily;

• The low maximum compared to the offence of culpable driving (maximum 20 years imprisonment) is a matter to be taken into account in determining the gravity of the offence, although dangerous driving causing death or serious injury is no minor infringement;

• General deterrence is an important consideration as persons who commit this offence are frequently of previous good character;

• D has no prior criminal convictions and is of previous good character;

• Consideration of previous good character must be tempered to the extent to which good character can be a mitigatory factor in light of the need for general deterrence;

• Consideration of age together with no prior convictions and the fact that custodial punishment may be more difficult for an offender in these particular circumstances;

• Sentence imposed could range from a wholly suspended sentence to immediate custodial with part of that term of imprisonment being suspended (dependent upon whether a plea of guilty is entered);

• Any sentence imposed is accompanied by mandatory disqualification of a driver’s licence regardless of being either wholly or partially suspended.

**Example 5**

E is 50 and has been the manager of a branch of a major bank. He has no criminal record and is well-regarded in the local community. Over a period of about 2 years he had stolen money from the bank and used his knowledge of the bank’s accounting procedures to cover up this thefts. The sum involved is £150,000, say 200,000 euros.

• E could be charged with numerous offences including theft, obtaining money by deception and false accounting as well as other matters;

• The maximum penalties for theft obtaining money by deception and false accounting are all 10 years imprisonment;

• General deterrence applicable in cases of “white collar” crimes;

• Consider E’s previous unblemished record and lack of prior convictions together with his age in considering the hardship imposed in undergoing any custodial sentence;

• Consider possible co-operation with investigatory authorities, loss of employment and degree of shame and remorse and whether a plea of guilty is entered and at what stage of proceedings it is entered;

• Consideration of background to the offending such as a psychiatric or psychological condition or gambling addiction;

• Consider that it is a significant breach of trust causing damage to the community;

• Consideration of the degree of gravity in relation to the manner in which the frauds were perpetrated;

• Consideration of good character must be balanced against the duration of the offending and the course of conduct followed in perpetrating the deception;

• Possible sentences could range from a wholly suspended sentence dependent upon the factors personal to the offender put in mitigation or to a partially suspended term of imprisonment;

• If reparations have not already been made, then it would be appropriate to order that compensation be paid and that any costs of, or incidental to, any such application made by the bank be paid by the offender.