

# THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES



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# VCAA STUDY DESIGN 2018

**Exam Tip:** You should consider how the different parts of the course relate to each other. VCAA can, and does, combine content from different Areas of Study in its exam questions, so the Study Design should be read as one document – not as four completely independent topics.

For example, in 2019 the exam asked: “Discuss the extent to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion.” (10 marks) This corresponded to the Key Knowledge dot-point ‘express rights’ in Unit 4 AOS 1, but extended also to the role of the High Court, referendum, pressures on parliament, the principle of representative government, and beyond, as the student chose.

## UNIT 3 – RIGHTS AND JUSTICE

Unit 3 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 3 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 3.

Unit 3 examines the Victorian justice system, and the way in which both criminal and civil disputes progress through a range of dispute resolution and support services in the system. The effectiveness of the criminal and civil justice systems is analysed, and both recent and suggested changes to the system are examined.

### Area of Study 1: The Victorian criminal justice system

AOS 1 (or ‘Outcome 1’) makes up 50% of Unit 3. The Outcome summary from the Study Design reads:

The Victorian criminal justice system is used to determine whether an accused person is guilty beyond reasonable doubt of an offence for which they are charged, and to impose sanctions where guilt has been found or pleaded. The system involves a range of institutions including courts (the Magistrates’ Court, County Court and Supreme Court) and others available to assist an accused. In this area of study students explore the criminal justice system, its range of personnel and institutions and the various means it uses to determine a criminal case. Students investigate the rights of the accused and of victims, and explore the purposes and types of sanctions and sentencing considerations. Students consider factors that affect the ability of the criminal justice system to achieve the principles of justice. They examine recent reforms from the past four years and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the criminal justice system to actual and/or hypothetical scenarios.

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

#### Key Concepts

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian criminal justice system, including:
  - the distinction between summary and indictable offences
  - the burden of proof
  - the standard of proof
  - the presumption of innocence
- The rights of the accused, including
  - the right to be tried without unreasonable delay
  - the right to a fair hearing
  - the right to trial by jury
- The rights of victims, including:
  - the right to give evidence as a vulnerable witness
  - the right to be informed about the proceedings
  - and the right to be informed of the likely release date of the accused

#### Determining a criminal case

- The role of institutions available to assist an accused, including Victoria Legal Aid (‘VLA’) and Victorian community legal centres.
- The purposes of committal proceedings.
- The role, purposes and appropriateness of plea negotiations and sentence indications, in determining criminal cases.
- The reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals.
- The responsibilities of key personnel in a criminal trial, including the judge, jury, parties, and legal practitioners.

- The purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection.
- Examples of sanctions: fines, community corrections orders and imprisonment, and their specific purposes.
- Factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

#### Reforms

- Factors that affect the ability of the criminal justice system to achieve the principles of justice, including in relation to costs, time and cultural differences.
- Recent and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice.

**Exam tip:** The Study Design defines ‘recent’ as within the previous four calendar years. Therefore, if the Study Design specifies ‘recent’ in relation to reforms that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2023 examination no reform before 2019 should be used as a ‘recent reform’.

Pay special attention to the fact that some of the Key Knowledge points imply Key Skills. For instance, the word ‘appropriateness’ is *evaluative* in nature, and requires arguments to be made that are similar to strengths and weaknesses.

#### Key Skills

‘Lower-order’ skills such as explaining and defining apply to all Key Knowledge points.

**Exam tip:** It is safer to apply higher-order skills to most content in your examination preparation. In other words, assume *more* content will need to be analysed and discussed rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic on the Study Design.

‘Higher-order’ evaluative skills such as discussing and analysing are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- The range of means used to determine a criminal case.
- The responsibilities of key personnel in a criminal trial.
- The ability of criminal sanctions to achieve their purposes.
- Recent reforms and recommended reforms to the criminal justice system.
- The ability of the criminal justice system to achieve the principles of justice.

The ‘higher-order’ application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

**Exam tip:** The task word ‘synthesise’ is new on the current Study Design. Essentially, it means ‘to combine’. Very often, a question will provide information in the form of a real or hypothetical fact scenario; ‘synthesising’ this with theory content would, for instance, involve combining the theory with the practice, and commenting on the way in which the theory of the legal system might apply to the facts given. Alternatively, a question may ask you to combine information you know about one legal body with information you know about another legal body, and give an opinion on the ways in which they are the same or different, why one is less effective than the other or more effective.

## Area of Study 2: The Victorian civil justice system

AOS 2 (or ‘Outcome 2’) makes up the other 50% of Unit 3. The Outcome summary from the Study Design reads:

The Victorian civil justice system aims to restore a wronged party to the position they were originally in before the breach of civil law occurred. The system involves a range of institutions to resolve a civil dispute, including courts (the Magistrates’ Court, County Court and Supreme Court), complaints bodies and tribunals. In this area of study students consider the factors relevant to commencing a civil claim, examine the institutions and methods used to resolve a civil dispute and explore the purposes and types of remedies. Students consider factors that affect the ability of the civil justice system to achieve the principles of justice. They examine recent reforms from the past four years and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the civil justice system to actual and/or hypothetical scenarios.

#### Key Knowledge

The Key Knowledge points identified in the Study Design are:

### Key concepts

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian civil justice system, including:
  - the burden of proof
  - the standard of proof
  - representative proceedings

### Resolving a civil dispute

- Factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.
- The purposes and appropriateness of Consumer Affairs Victoria ('CAV') and the Victorian Civil and Administrative Tribunal ('VCAT') in resolving civil disputes.
- The purposes of civil pre-trial procedures.
- The reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals.
- The responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners.
- Judicial powers of case management, including the power to order mediation and give directions.
- The methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness.
- The purposes of remedies.
- Damages and injunctions, and their specific purposes.

### Reforms

- Factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility.
- Recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.

### Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The purposes of civil pre-trial procedures.

'Higher-order' evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- Factors to consider when initiating a civil claim.
- The appropriateness of institutions and methods used to resolve a civil dispute.
- The responsibilities of key personnel in a civil trial.
- The ability of remedies to achieve their purposes.
- Recent reforms and recommended reforms to the civil justice system.
- The ability of the civil justice system to achieve the principles of justice.

The 'higher-order' application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

## UNIT 4 – THE PEOPLE AND THE LAW

Unit 4 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 4 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 4.

Unit 4 examines the role played by both parliament and the courts in law-making, the interaction between them as law-makers, and the role played by the Australian Constitution in relation to the law-making of both institutions. The effectiveness of parliament and the courts as law-makers is analysed, as well as the influence of the Constitution, and students study the ability of the people to have an impact on all three.

### Area of Study 1: The people and the Australian Constitution

AOS 1 (or 'Outcome 1') makes up 40% of Unit 4. The Outcome summary from the Study Design reads:

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. In this area of study students examine the relationship between the Australian people and the Australian Constitution and the ways in which the Australian Constitution acts as a check on parliament in law-making. Students investigate the involvement of the Australian people in the referendum process and the role of the High Court in acting as the guardian of the Australian Constitution.

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

- The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making.
- The division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers.
- The significance of section 109 of the Australian Constitution.
- The means by which the Australian Constitution acts as a check on parliament in law-making, including:
  - The bicameral structure of the Commonwealth parliament
  - The separation of the legislative, executive and judicial powers
  - The express protection of rights
  - The role of the High Court in interpreting the Australian Constitution
  - The requirement for a double majority in a referendum
- The significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution.
- The significance of one referendum in which the Australian people have protected or changed the Australian Constitution.
- The significance of one High Court case which has had an impact on the division of constitutional law-making powers.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

### Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The constitutional law-making powers of the state and federal parliaments.

'Higher-order' evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- The significance of section 109 of the Australian Constitution.
- The ways in which the Australian Constitution acts as a check on parliament in law-making.
- The ability of the Australian people to protect or change the Australian Constitution.
- The significance of High Court cases involving the interpretation of the Australian Constitution.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

The 'higher-order' application skill of comparing two or more topics of content to find similarities and differences is listed explicitly for the following Key Knowledge point:

- The constitutional law-making powers of the state and federal parliaments.

The 'higher-order' application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

## Area of Study 2: The people, the parliament, and the courts

AOS 2 (or 'Outcome 2') makes up the other 60% of Unit 4. The Outcome summary from the Study Design reads:

Parliament is the supreme law-making body, and courts have a complementary role to parliament in making laws. Courts can make laws through the doctrine of precedent and through statutory interpretation when determining cases. In this area of study students investigate factors that affect the ability of parliament and courts to make law. They examine the relationship between parliament and courts in law-making and consider the capacity of both institutions to respond to the need for law reform. In exploring the influences on law reform, students draw on examples of individuals and the media, as well as examples from the past four years of law reform bodies recommending legislative change.

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

#### *Parliament and courts*

- Factors that affect the ability of parliament to make law, including:
  - The roles of the houses of parliament
  - The representative nature of parliament
  - Political pressures
  - Restrictions on the law-making powers of parliament
- The roles of the Victorian courts and the High Court in law-making.
- The reasons for, and effects of, statutory interpretation.
- Factors that affect the ability of courts to make law, including:
  - The doctrine of precedent
  - Judicial conservatism
  - Judicial activism
  - Costs and time in bringing a case to court
  - The requirement for standing
- Features of the relationship between courts and parliament in law-making, including:
  - The supremacy of parliament
  - The ability of courts to influence parliament
  - The interpretation of statutes by courts
  - The codification of common law
  - The abrogation of common law

#### *Law reform*

- Reasons for law reform.
- The ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts.
- The role of the media, including social media, in law reform.
- The role of the Victorian Law Reform Commission and its ability to influence law reform.
- One recent example of the Victorian Law Reform Commission recommending law reform.
- The role of one parliamentary committee or one Royal Commission, and its ability to influence law reform.
- One recent example of a recommendation for law reform by one parliamentary committee or one Royal Commission.
- The ability of parliament and the courts to respond to the need for law reform.

### Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points.

The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law-reform.
- The ability of law reform bodies to influence a change in the law – for this content point, VCAA specifies that only "recent" examples of recommendations from the previous four years may be used.

**Exam tip:** If the Study Design specifies ‘recent’ in relation to examples that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2023 examination no example before 2019 should be used as a ‘recent example’.

‘Higher-order’ evaluative skills such as discussing, analysing and evaluating are listed explicitly for the following Key Knowledge points:

- Legal principles and information.
- Factors that affect the ability of parliament and the courts to make laws.
- Features of the relationship between parliament and courts.
- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law reform.
- The ability of law reform bodies to influence a change in the law.
- The ability of parliament and the courts to respond to the need for law reform.

The ‘higher-order’ application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

### REVIEW/APPLICATION QUESTIONS – Advice

The Review/Application questions are different from the sample examination questions scattered throughout this Study Guide, because they are focused on basic content comprehension and memorisation more than on examination strategy or the active processing of material. Before you can apply knowledge, elaborate on it and actively process it, you first need to comprehend it (comprehension) and have quick access to an accurate version of it in your memory (memorisation).

- If you want to work on COMPREHENSION, use your notes and the relevant topics in this Study Guide to help you answer Review/Application questions. Try to answer questions using different wording from the notes, because this will work on comprehension: do you understand the material well enough to explain it differently?
- If you want to work on MEMORISATION, *do not* use your notes or this Study Guide. Answer everything from memory, and then check your accuracy against your notes and this Guide after you have finished. Testing your closed-book memory has been shown to have some of the best benefits when it is done as soon as possible after learning the material – don’t worry about whether it is ‘too soon’ to test yourself or whether you’ll get some parts wrong.

## CPAP QUARTERLY SUBJECT UPDATES 2023

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# UNIT 3 RIGHTS AND JUSTICE

## INTRODUCTION TO DISPUTE RESOLUTION IN AUSTRALIA

Criminal law regulates human behaviour insofar as it affects society as a whole, whereas civil law regulates human behaviour insofar as it affects the private relationships between individuals. The difference between criminal and civil law is required knowledge for understanding the Unit 3 split between Area of Study 1, 'The Victorian criminal justice system', and Area of Study 2, 'The Victorian civil justice system'.

### Criminal law

Criminal law regulates the relationship between individuals and the state. The state sets out standards of behaviour that everyone is expected to follow for the protection and benefit of the whole community, and anyone who breaks these rules can be prosecuted by the police or the Office of Public Prosecutions, on behalf of the whole community.

The person accused of the crime is called the 'accused', but they can also be referred to as the 'criminal defendant'. The person bringing the action is called the 'prosecution' or the 'prosecutor'.

**Exam tip:** It is important to always use the correct terminology when talking about criminal cases. Words such as 'crime', 'charged', 'guilty', 'accused' and 'prosecution' all denote criminal law and criminal disputes.

Criminal cases begin with the commission of a crime. Once a crime has been reported to the police the police will begin an investigation, and once a suspect has been found and charged she or he will appear in court.

### Civil law

Civil law regulates the relationship between individuals and other individuals – remember that, legally, companies count as individuals, as does the government when it is being sued or launching a private action itself.

The state sets out expectations of conduct for the way that individuals treat each other, with the aim of protecting each individual from another individual unlawfully infringing her, his or its rights. Anyone who feels their rights have been unlawfully infringed can take a civil action against the individual who did it: they can *sue* them. The legal matter will be one individual against the other individual.

The individual bringing the action is called the 'plaintiff', and the individual who is being taken to court is called the 'defendant' – this word is seen in both civil and criminal cases. The word 'accused' is *never* used for civil cases.

**Exam tip:** It is equally important to use the correct terminology when talking about civil cases. Words such as 'tort', 'civil wrong', 'sued', 'liable', 'remedy' and 'plaintiff' all denote civil law and civil disputes. Some language, such as 'rights' or 'defendant', apply to *both* civil and criminal law. In every exam, students mix up criminal cases and civil cases, and write answers using the wrong terminology. This has prevented students from achieving full marks.

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

### Resolution of disputes

The most common means of resolving disputes has traditionally been through the court system. Courts operate on a federal level as well as in each state. Federal courts generally hear cases relating to federal law, while state courts generally hear cases relating to state law.

Courts resolve disputes according to their jurisdiction. The 'jurisdiction' of an official body is the authority it has to use the power of government: for a body like parliament, this will be the authority to make laws; for a body like a court or tribunal, this will be the authority to hear cases and give out criminal sanctions (such as prison terms) or civil remedies or orders (such as monetary damages). Which court or tribunal a party goes to will depend on the type of law covering the area, and how serious their case is.



**Exam Tip:** You must be careful never to define a term by using the same word. For example, never define a fair hearing by saying merely that it must be fair, or that it must involve fairness. You have to say what fairness *means*.

### Detail

The Victorian Charter protects the rights of people in the state to fairness in the legal system in a range of ways. For example, s24 of the Charter protects the rights of all parties “to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;” and states that “[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires.”

The legal system provides a number of mechanisms to help ensure that all parties receive a fair hearing. Some examples of ways in which we attempt to achieve fairness include:

- Because of the presumption of innocence, all criminal defendants are considered innocent until they have been proved guilty. This approach is fairer than adopting an approach where a person is presumed guilty and punished until they prove their innocence.
- A person who believes an error was made in their hearing has the right to appeal – or, at the very least, to apply for leave to appeal (for instance, to the High Court of Australia or the Victorian Court of Appeal). This helps to check that mistakes are not made and that a fair outcome has been reached, based on an appropriate understanding of the evidence and law.

**Exam tip:** ‘Fairness’ does overlap in part with the next two principles: equality and access. It may therefore come in handy as the broadest of the three principles of justice.

## Equality

### Definition

‘Equality’ is the idea that every person or organisation that has a dispute to be resolved is equal in the eyes of the law and in the legal system as a whole. No-one should be privileged and benefited, nor discriminated against or at a disadvantage, for being who they are.

For example, former High Court justice Lionel Murphy said in the *Mclnnes* case in 1992: “Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice.”

‘Equality’ can be interpreted narrowly as formal or procedural equality, or broadly, as substantive or ‘opportunity-driven’ equality. Procedural equality focuses on all people being treated the same, regardless of whether that treatment produces equal outcomes; equality of opportunity focuses on treatment being differentiated according to the needs of the person, in the hopes of achieving more equal outcomes.

### Detail

The Victorian Charter protects the rights of people in the state to equality of opportunity in the legal system in a range of ways. For example, s8 of the Charter provides that “[e]very person has the right to recognition as a person before the law,” and that “[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.”

Importantly, in terms of meaningful equality, it also makes it clear that “[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.”

Equality and inequality in the legal system may be affected by a range of factors including:

- Sex and sexual orientation. Whether someone is a woman or a man, homosexual, heterosexual or bisexual, can affect their treatment, their outcome, and their ability to achieve justice.
- Cultural and community background.
- Physical and cognitive/intellectual abilities and disabilities.



Some examples of ways in which we attempt to ensure equality include:

- Various forms of disadvantage are recognised, and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality of opportunity. For instance, a range of intellectual disabilities and psychological disorders are supported in criminal proceedings through the Assessment and Referral List in the Magistrates' Court, and free interpreters are provided during police questioning and Magistrates' Court criminal proceedings.
- Judicial proceedings are governed by strict rules of procedure that are consistently applied to both parties equally. For instance, evidence can be tested through cross-examination of witnesses, ensuring that all evidence is reliable. Each party is given an equal opportunity to test the evidence tendered through the witnesses called by the other side.

## Access

### Definition

'Access' is the idea that all people must be able to effectively utilise the legal system, and the places and systems for the resolution of disputes and the administration of justice. Access is therefore about more than just not being banned or prohibited from something: it is about the ability, in real life, of different people to use something meaningfully, and to use it in a way that is similar to how other people are able to.

'Access' is made up of knowledge, choice and action: knowledge of the options available, a meaningful ability to choose from among those options, and the power to act on those choices.

### Detail

The Victorian Charter protects the rights of people in the state to meaningful access to the legal system in a range of ways.

For example, s25 of the Charter protects the rights of the accused in a criminal case to "be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands;" to have "adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her"; to "have the free assistance of an interpreter if he or she cannot understand or speak English;" to be "tried without unreasonable delay;" and "to have legal aid provided if the interests of justice require it," amongst other things.



Proper and meaningful access to the legal system may be affected by a range of factors including:

- Knowledge, experience and training. Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it will affect their ability to meaningfully access justice.
- Money. Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can't afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.

Some ways in which we attempt to ensure access to justice include:

- The court hierarchy allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction. Parties therefore have access to experts in the area under dispute, and can more quickly and cheaply go to lower courts for less serious matters. A court hierarchy also allows for administrative convenience, as parties know which court deals with which type of dispute and do not have to complete forms and pay fees that are not relevant to them.
- The first Neighbourhood Justice Centre ('NJC') was opened in the City of Yarra in 2007. The NJC aims to improve the justice system by addressing social disadvantage and improving access to justice services. It combines support services such as drug counselling and childcare with community initiatives, and mixes the legal system with the local community. The NJC focuses on early intervention, and involves the locals in finding solutions to their social problems.

## REVIEW/APPLICATION QUESTIONS – The principles of justice

1. Define the idea of 'fairness'.
2. Identify three things that have the ability to compromise fairness.
3. Outline two ways in which the legal system attempts to achieve fairness in dispute resolution.
4. Define the idea of 'equality'.
5. Identify three things that have the ability to compromise equality.
6. Outline two ways in which the legal system attempts to achieve equality in dispute resolution.
7. Define the idea of 'access'.
8. Identify three things that have the ability to compromise access.
9. Outline two ways in which the legal system attempts to achieve access in dispute resolution.

## KEY CONCEPTS IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

When resolving criminal (and civil) cases in Australian courts the system of trial used is the adversary system. The adversary system is a system where two opposing parties put conflicting arguments before an independent arbiter or 'umpire' (often called a judge), at the end of which the party with the best case wins and the other loses. Under this system the parties to the case are adversaries, or opponents, who each try to win the case; they have a lot of control over the way in which they conduct their case, although they need to follow rules of evidence and procedure that are applied equally to both of them. A judge or magistrate, the impartial adjudicator, oversees the case and ensures the parties are adhering to the rules of the court, and the hearing has the ultimate aim to find a winner and a loser.

In criminal cases the individual is prosecuted by a representative of the government. Because this naturally involves a power imbalance in legal expertise and resources, there are a range of criminal rules and procedures that try to guard against any unfairness resulting for the accused person. In civil disputes, the government is treated as a legal individual, and is therefore on the same footing as any other party.

The key concepts that follow are specific to trials and hearings conducted in courts; they are not applied in the same way, or at all, outside courts and outside courtroom trials and hearings.



## The distinction between summary and indictable offences

### Definition

Criminal offences are classified as either summary or indictable, depending on their seriousness, and whether or not they will be tried before a jury. A summary offence is less serious and does not require a jury as it is heard in the Magistrates' Court; an indictable offence is more serious, and does require a jury (if tried as an indictable offence in Victoria) as it is tried in the County or Supreme Court.

### Detail

Summary offences are the least serious offences. They are heard in the Magistrates' Court, which is the lowest court in the Victorian state hierarchy; and, under the current jurisdiction of the Magistrates' Court, can be punished by no more than two years for a single offence, or five years total for multiple offences heard at the same hearing. Summary offences are prosecuted by the arresting police officer, and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called 'hearings'.

<b>THE MOST SERIOUS INDICTABLE OFFENCES</b>	Dealt with in the Supreme Court (Trial Division) before a Supreme Court justice and a jury.  There is no limit to the fines or jail time a justice can give, except for the maximum penalty for the crime, prescribed in the legislation.
<b>SERIOUS INDICTABLE OFFENCES</b>	Dealt with in the County Court before a County Court judge and a jury.
<b>MINOR INDICTABLE OFFENCES</b>	There is no limit to the fines or jail time a judge can give, except for the maximum penalty for the crime, prescribed in the legislation.
<b>INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY</b>	Dealt with in the County Court before a County Court judge and a jury...  ...UNLESS the accused chooses to have it heard in the Magistrates' Court <i>as though it were</i> a summary offence.
<b>SUMMARY OFFENCES</b>	Dealt with in the Magistrates' Court before a magistrate alone – there is NO jury at any time.  There is a limit to the fines and jail time a magistrate can give.  Some summary offences can be resolved without a court hearing. Instead, a fine or infringement notice is issued by the police; if the accused person pays the fine, the matter is taken to be resolved.

Indictable offences are heard in the County Court and the Supreme Court (Trial Division), which are the higher two of the three state courts. Under the current jurisdiction of the County and Supreme Courts, they can both give out unlimited sanctions – the act of parliament that provides for the offence will therefore state the upper limit of consequences the courts can give for that particular offence. Indictable offences are prosecuted by the Office of Public Prosecutions, and are heard by a single judge or justice sitting with a jury: the judge or justice administers the law, and the jury decides the facts and reaches a verdict. The court proceedings used in indictable offences are called 'trials'.

Some indictable offences can be heard summarily – that is, dealt with in the Magistrates' Court without a jury. Generally, they are offences where the maximum term of imprisonment a guilty party could receive in the County Court is 10 years or where a fine of no more than 1200 penalty units could be given.

**Exam tip:** The value of a penalty unit changes every year on 1 July. It goes up to take account of inflation. Legislation refers to penalty units rather than exact dollars so that the amounts don't rapidly go out-of-date. In the exam you can refer to penalty units, or you can calculate the dollar amount for that year.

If a person is charged with one of these offences, they may seek to have their indictable offence heard summarily in the Magistrates' Court. This means they will not have a jury, but they will also face a lower maximum penalty: the maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence, so there is less risk involved with a guilty verdict. Alternatively, the accused may be planning to plead guilty, and may wish to save themselves time and money in addition to guaranteeing themselves a lower possible maximum penalty.

Every year since 2013 between 28-31% of indictable matters have been finalised summarily after committal.



Procedures and rules in the criminal justice system that protect the presumption of innocence include:

- Once she or he has been charged with an indictable offence, an accused person will be brought before the Magistrates' Court for a bail hearing. Bail is the ability of the charged person to return home, and return to relatively normal life until the conclusion of the dispute or bail is revoked, because it is recognised that the accused is still innocent under the law.
- A committal hearing is a hearing before the Magistrates' Court in which the prosecution will have to demonstrate that they have enough evidence against the accused to support a conviction in a higher court.

#### REVIEW/APPLICATION QUESTIONS – Key concepts in the criminal justice system

1. Outline the difference between a summary offence and an indictable offence.
2. Explain what it means to say that an indictable offence can be heard summarily.
  - a. What would be two advantages of having an indictable offence heard summarily?
3. Which court will a relevant indictable offence be heard in if the accused chooses *not* to have it heard summarily, and which court will a relevant indictable offence be heard in if the accused *does* choose to have it heard summarily?
4. Give a definition of the term 'burden of proof'.
5. Who has the burden of proof in criminal trials?
6. Give a definition of the term 'standard of proof'.
7. What is the standard of proof in criminal trials?
8. Which party is protected by the presumption of innocence?
9. When is the presumption of innocence overturned?
10. Provide two examples of ways in which the legal system tries to protect the presumption of innocence.

#### Extension material:

### Rules of evidence and procedure

Rules of evidence and procedure are not required content in the Study Design, but they provide an important framework for the resolution of criminal disputes.

#### Definition

Rules of evidence determine what evidence is admissible and allowed to be used in court as proof, and what evidence is inadmissible and not allowed. Rules of procedure are the rules dictating how a trial or hearing is run, and what happens in what order.

#### Detail

Evidence must be relevant, reliable and legally-obtained, or else there is a risk that the trial will not be fair. It must also have more probative value than prejudicial value: in other words, the evidence must prove more about the case than it prejudices the court against the defendant. Procedure must be organised to allow both parties' versions of the case to come out effectively, and to ensure that neither party can dominate argument to the exclusion of the other.

Rules of evidence and procedure are complex and applied strictly to ensure that parties are on equal footing and that neither party can gain an unfair advantage.

For example:

- Hearsay evidence is evidence that a witness is not giving first-hand: in other words, the evidence relates to something that the witness does not have personal, first-hand knowledge of. Because of this, hearsay evidence will generally be inadmissible.
- Witnesses are only allowed to respond to the questions asked of them by either party or the judge – court procedure does not permit them to make uninterrupted narrative statements like stories. This allows the parties to control the evidence they want to come before the court, and the order in which they want those pieces of evidence to come out. Each witness led by one party will then be opened up to cross-examination by the other party.

## Evaluation: Key concepts in the criminal justice system

**Exam tip:** There are good reasons to match strengths and weaknesses together in groups – rather than keeping them in two separate lists, or matching every strength against one weakness in pairs. Groups of ‘features’ make the points easier to remember, easier to structure in an answer, and they also prepare for the range of ‘evaluate’-style questions that can be asked. For example, if the examination asks you to “evaluate” one strength, it is asking you to explain the strength and then to examine the flip-side of it, one or more corresponding weaknesses, before coming to a conclusion. The opposite also holds true for evaluating a weakness.

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS	KEY CONCEPTS	WEAKNESSES
<p>Minor offences are not sent to a court with complex, lengthy and expensive procedures. The Magistrates’ Court has simplified procedures and forms, and the fees for different actions are lower. This all helps reduce legal expenses for representation, and increase <b>access</b> to justice.</p> <p>Court time and resources are allocated more effectively, which makes the system operate with increased efficiency and specialisation. Courts that employ more personnel dedicated to time-intensive tasks and with specialised knowledge can dedicate those to more serious cases, ensuring they receive <b>fairness</b> and due process.</p>	<p><b>Summary and indictable offences</b></p>	<p>The accused will sometimes have the ability to elect a summary hearing for a minor indictable offence, but this decision may be made on the basis of costs and resources and not what would deliver the greatest degree of <b>fairness</b>.</p> <p>Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases <b>access</b>. For example, the average timeframe for resolution through the Magistrate’s Court is 6-12 months (58.7% within 6 months in 2021-21); through the Supreme Court (Trial Division) it is 12-24 months (63.4% within 12 months and 12.1% over 24 months in 2020-21).</p>
<p>The accused will have <b>access</b> to the evidence against them before they will be expected to defend themselves. It would not be <b>fair</b> to ask the accused to defend against claims they did not know the details of.</p> <p>The prosecution will be discouraged from bringing unsubstantiated charges because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a prosecution is part of <b>fairness</b>.</p>	<p><b>The burden of proof</b></p>	<p>The party that has already been injured (whose interests are represented by the state in a criminal case), bears the burden of starting the trial and leading all of the evidence first. If they cannot do this adequately, the case is dismissed. The party that might be in the wrong, the accused, is the one who receives the benefit of the doubt, which is <b>unfair</b>.</p> <p>In terms of evidence and legal arguments, <b>equality</b> is not achieved between the parties because the benefit is given to the accused. The defending party can discover all evidence against them before they even start to decide what their defence is going to be.</p>
<p>The accused cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the <b>fairness</b> of the trial, because it would be <b>unfair</b> to prosecute someone if there was little to no evidence justifying it and they were sure to be found not guilty at the end.</p>	<p><b>The standard of proof</b></p>	<p>Juries may interpret the standard of proof differently in each case. This means there is not truly one consistent standard applied to all trials and it is difficult to argue that the standard is strict and objective, and that every defendant is <b>equal</b> in the trial process.</p> <p>For example, studies from the United Kingdom, New Zealand, Queensland and New South Wales all show consistently that jurors have difficulty with the concept</p>

<p>Criminal cases have serious consequences attached to them, and they are also subject to a very high standard of proof: beyond reasonable doubt. This is only <b>fair</b>, because a person's freedom may be on the line.</p>		<p>of 'beyond reasonable doubt' and fail to apply it consistently or interpret it in the same way. This makes accused in different cases <b>unequal</b> to each other in terms of how they are treated, and does not give them the same <b>access</b> to justice.</p>
<p>The presumption of innocence is upheld by procedures such as bail. This protects human rights and <b>fairness</b> by not punishing someone before they have been found guilty. It also allows the accused to prepare adequately for their case and earn money in the months or years before trial, which gives them greater <b>access</b> to justice and increases the <b>equality</b> between them and the prosecution.</p> <p>The accused will never be asked to defend themselves against something they have not been fully informed of and already proved guilty of. This knowledge and protection gives them greater <b>access</b> to justice.</p>	<p><b>The presumption of innocence</b></p>	<p>In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. This decreases <b>fairness</b> because the accused can be brought back to trial even though they were presumed innocent the first time <i>and</i> found not guilty; it also decreases <b>access</b> to justice with the second trial because their finances will be depleted, and they are more likely to be assumed guilty if they are charged multiple times.</p> <p>Procedures such as holding suspects on remand <b>unfairly</b> deny the defendant the right to the presumption of innocence, and jeopardise their <b>access</b> to justice because they are much less able to prepare for their defence and cannot earn money in the meantime.</p>
<p>The rules apply <b>equally</b> to both parties so one party is not advantaged at the expense of the other.</p> <p>The strict rules for the admissibility and inadmissibility of evidence ensure a <b>fair</b> hearing because all evidence must be relevant, reliable and legally-obtained. Greater <b>equality</b> is achieved in the courtroom because evidence must have more probative than prejudicial value, so it is less likely to trigger prejudices against the accused.</p>	<p><b>Rules of evidence and procedure</b></p>	<p>Witnesses are only allowed to respond to the questions asked and cannot elaborate – this may result in some important evidence not being brought before the court, and reduce the <b>fairness</b> of the hearing.</p> <p>Complex rules can be manipulated by experienced parties, either the OPP or an expert defence barrister, and are confusing for inexperienced parties and the jury. Accused do not have <b>equal access</b> to justice when one understands the rules and the other does not.</p>

**REVIEW/APPLICATION QUESTIONS – Key concepts in the criminal justice system: evaluation**

**Application exercise**

The burden of proof discourages the prosecution from bringing a flimsy case to trial, because they will bear the onus of bringing sufficient proof to demonstrate the validity of their claims before the accused will be required to bring forward any evidence of their own. This protects the rights of the accused and the fairness of trial because the accused is protected from the ordeal without proper grounds. The downside is that the state, protecting the rights of victims, bears the responsibility of proving the case, and the party that is potentially in the wrong receives significantly more protection. This also decreases equality in the proceedings, because we consciously protect the accused over the complaining party, the prosecution. Ultimately, the burden of proof is unfairly privileged.

- a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key concepts in the section.

## RIGHTS OF STAKEHOLDERS IN A CRIMINAL CASE

### Rights of the accused

Victoria is the only state in Australia to have enacted a bill of rights: the *Charter of Rights and Responsibilities* ('the Victorian Charter'). It was passed by the Parliament of Victoria and came into force on 1 January 2007. The Victorian Charter protects a range of rights of the accused in the criminal justice system.

For instance:

*Section 21 – Right to liberty and security of the person*

- (5) *A person who is arrested or detained on a criminal charge –*
- (a) *must be promptly brought before a court; and*
  - (b) *has the right to be brought to trial without unreasonable delay; and*
  - (c) *must be released if paragraph (a) or (b) is not complied with.*

*Section 24 – Fair hearing*

- (1) *A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

### The right to be tried without unreasonable delay

#### Definition

The right to be tried without unreasonable delay means criminal trials should be held as quickly as possible after the events that give rise to the charges, taking into account all the circumstances.

#### Detail

The concept of 'as quickly as possible' rests on the idea that the need to be properly prepared for legal proceedings – which will take time – must be balanced against the need to see justice be done and to gain closure. This is why the right is to be tried without *unreasonable* delay, and not without any delay at all.

There are a number of reasons why this is important in protecting the rights of the accused:

- Awaiting trial is a period of great uncertainty for the accused, particularly if there is a prospect of a custodial sentence should the trial result in a conviction. Avoiding lengthy delays in bringing a matter to trial reduces the uncertainty that the accused person faces, and may also minimise legal costs and other expenses.
- People accused of the most serious indictable offences are generally held on remand to await their trial. A delayed trial may result in the accused being held in custody for longer.

Examples of ways in which the criminal justice system tries to avoid unreasonable delay include:

- All indictable matters in Victoria commence with a committal hearing in the Magistrates' Court, usually between three and six months after charging. At this hearing, the magistrate hears the prosecution's evidence and decides whether the evidence is sufficient to support a conviction by a jury at trial.
- All indictable cases are listed for a directions hearing within 24 hours of the completion of the committal hearing in the Magistrates' Court. At this post-committal directions hearing, counsel for the prosecution and the accused are expected to advise the court of the anticipated issues at the trial, an estimate for the hearing time of the trial, and identify any problems that might prevent a trial proceeding quickly. The court will set a trial date, or arrange for case management if necessary.

The length of a "reasonable period" of delay is considered on a case-by-case basis. This flexible definition of 'reasonable' was decided in the Victorian Court of Appeal in *Barbaro v DPP (Cth) & Anor* [2009] VSCA 26. Factors that the court may consider include the complexity of the case against the accused, the amount of evidence to be collected by the prosecutors, the number of witnesses to be called to give evidence, and the risk that the accused will not return to trial if they are released on bail.

There is no fixed number of days or months that is considered 'reasonable'.

## The right to a fair hearing

### Definition

The right to be tried before a competent, independent and impartial arbiter, in a proceeding that the accused adequately understands.

The elements making up the right to a fair hearing in the Victorian Charter include:

- i. That a competent and independent arbiter be in charge of the hearing
- ii. That the hearing be conducted impartially
- iii. That the accused have adequate legal representation if required (*with no guarantee* of legal representation)
- iv. That the accused have an accurate understanding of the proceedings

**Exam tip:** There is no absolute right to legal representation, or to receive legal advice. Saying there is is a common error.

### Detail

The arbiter is the judicial officer – a judge or magistrate – who oversees the hearing. Although judicial officers are appointed by the attorney-general, they are still independent of government. Judicial officers must also be confident in their administration of justice, so that parties to court proceedings have confidence that their criminal matter has been determined by an arbiter who understands the law and criminal procedure. Judicial officers are therefore generally chosen from lawyers admitted to the Victorian Bar.

The public must have confidence in the actual impartiality of the judicial officer presiding over the trial. This means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. Equally as important as avoiding actual bias is the principle that the judicial officer must avoid any *perception* of bias.

The right to a fair hearing includes the right to *adequate* legal representation. In the Charter, the importance of legal representation is outlined in s25: a person charged with a criminal offence is entitled “to have legal aid provided if the interests of justice require it.” This means that an accused person has a qualified legal representative to argue their case in court, but only *if* they could not get a fair trial without it.

Other factors that may contribute to a fair hearing include the assistance of an interpreter if the accused is not fluent in English, and access to specialised communication tools and technology if the accused has difficulties in communication. These support services may be necessary to ensure that the accused understands the proceedings and is enabled to participate in her or his own defence – they are *not* available in every case, however, and this is a weakness in the legal system.



## The right to trial by jury

### Definition

The right to trial by jury means that every accused who pleads not guilty in a criminal trial for an indictable offence has the right to trial by her or his peers to ensure that the judgment of the community is given, and that the power of the government is kept in check.

### Detail

A criminal jury is made up of 12 members of the community, randomly selected from the electoral roll. The jury’s function is to listen to the evidence presented against the accused at trial, follow the directions of the trial judge on the relevant law, determine the relevant facts, and reach a verdict of either guilty beyond reasonable doubt, or not guilty if there *are* reasonable doubts.

The alternative to trial by jury would be trial by judge alone, but this is not permitted in Victoria for indictable offences. In Victoria, s210 of the *Criminal Procedure Act 2009* provides that the trial for an indictable offence commences when the accused formally pleads not guilty in the presence of the jury panel. There is no alternative procedure for the trial of an indictable offence.

Unlike the other mainland Australian states, Victoria has made no provision for a trial before judge alone. In 2020 the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) inserted an emergency provision into the *Criminal Procedure Act* to temporarily allow for trial by judge alone in trials for indictable offences, but it lasted for six months only and was extended in October 2020 until 26 April 2021. Jury trials recommenced in some trials in November 2020.

## Commonwealth trials

One of the five express rights contained in the Commonwealth Constitution is the right to trial by jury for indictable Commonwealth offences.

### Section 80 – Trial by jury

*The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

The s80 right to trial by jury extends only to indictable offences that are contained in federal law, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences and therefore which offences are tried by jury. Section 80 does not apply to any trials for state crimes held in state courts.

## Rights of victims

The *Victims Charter Act 2006* (Vic) outlines many of the rights of victims of crime in the Victorian criminal justice system. The objects of the Act are to recognise the impact of crime on victims and their families, to recognise that all persons affected by crime should be treated with respect, and to reduce the likelihood that victims of crime suffer secondary victimisation by the criminal justice system.

Some of the principles contained in the *Victims Charter Act* are then implemented in other legislation, such as the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic). The *Victims Charter* is not itself legally enforceable.



## The right to give evidence as a vulnerable witness

### Definition

Part 8.2 of the *Criminal Procedure Act 2009* gives courts the power to order alternative arrangements for the giving of evidence by witnesses in matters involving sexual offences, family violence, sexual exposure, or obscene and threatening public behaviour.

### Detail

Section 41 of the *Evidence Act 2008* used to define a class of witness called ‘vulnerable witnesses’. These were witnesses who were under 18 years of age, living with a cognitive impairment or intellectual disability, or possessed any other condition or characteristic that the court considered made that witness ‘vulnerable’. In 2018 this section was removed from the legislation.

Now, Part 8.2 of the *Criminal Procedure Act* gives judges the power to make alternative arrangements for some witnesses if they fall into a group thought to be specially at risk – or, thought to be especially *vulnerable*. For instance, s360 in Part 8.2 gives the court the power to “direct that alternative arrangements be made for the giving of evidence by a witness” in certain types of cases. These cases are the following:

- Sexual offences
- Family violence
- Sexual exposure
- Public behaviour that is obscene or threatening

These categories *replace* the old categories of vulnerable witnesses. The old categories should not be used. Children, for instance, are *not* eligible for alternative arrangements if they do not fall within one of the above offence categories.

Alternative arrangements include the following:

- Allowing the witness to give evidence to the court via closed circuit television from another venue.
- Using screens to obstruct the direct line of vision between the accused and the witness.
- Allowing the witness to have a support person beside her or him while giving evidence.
- Directing that the legal representatives remove their legal robes and question the witness in normal professional attire.

If the hearing or trial is for a sexual offence or assault, ss 366 and 367 of the Act give witnesses with a cognitive impairment, or who are under 18 years of age *at the commencement of trial*, additional potential arrangements: these witnesses are permitted to give evidence through an audio or audiovisual recording so that it can be done once, and the recording can be played for all hearings after that. Leave must also be given by the court for these witnesses to be cross-examined – opposing counsel cannot cross-examine as of right.

If the witness is the complainant in a sexual offence charge, the court *must* make alternative arrangements for their testimony, unless the complainant is aware of these rights and waives them. The exact arrangements are detailed from s363 in the *Criminal Procedure Act*, and include giving evidence in a place outside the courtroom.

The class of ‘protected witnesses’ exists in addition to the above class of ‘vulnerable’ witnesses: the court may declare anyone a protected witness if they are giving evidence in a case for a sexual offence or family violence, and it prevents the accused from being able to cross-examine them in person. The rules regarding a protected witness are contained in Part 8.2 of the *Criminal Procedure Act*.



### The right to be informed about the proceedings

In the criminal justice system, the victim of a crime is not a party to the criminal proceedings. There is a risk that, by being relegated to the position of a witness in the criminal justice process, the victim may feel marginalised. For this reason, ss7, 8 and 9 of the *Victims Charter Act 2006* place obligations on investigatory agencies, prosecuting agencies and victims’ service agencies to provide “clear, timely and consistent information” to any person “adversely affected” by crime.

#### Definition

Section 9 of the *Victims Charter Act* provides that prosecutors must provide the victim with relevant information about the charges laid and the prosecution of the accused, to fulfil a general right of the victim to be informed about the proceedings.

#### Detail

Prosecutors must give the victim timely information, “as soon as is reasonably practicable,” regarding:

- Applications for bail made by the accused, the outcome of those applications and any conditions imposed.
- The offences with which the accused is ultimately charged.
- Reasons why the accused was not charged with a particular offence.
- The hearing of the charges.
- The outcome of criminal proceedings, including the sentence.
- Any appeals, and their outcomes.

During court proceedings, the prosecutor is required to minimise unnecessary contact between the victim and the accused, and protect the victim from intimidation by the accused and people connected with the accused.

#### Department of Justice and Community Safety: ‘Improving victims experience of summary criminal proceedings’

In their 2021 submission to the Department of Justice and Community Safety inquiry into ‘Improving victims experience of summary criminal proceedings’, the Federation of Community Legal Centres reported on a recent case where the victim had been assaulted in an unprovoked attack, but was not informed of the progress of proceedings by Victoria Police. When the victim enquired, he was told that the charge of recklessly causing injury had been withdrawn, and the accused had been found guilty of one lesser count of assault. The victim had not been informed of the reduction in charges or the date of the summary hearing, and had not been able to prepare a Victim Impact Statement.

In the Department’s Final Report they cite an August 2021 survey by Engage Australia that found *most* victims who responded had not received an opportunity to prepare a Victim Impact Statement. Some charges were resolved before a victim was even identified, and other offenders were sentenced on the same day as their guilt was determined. Victims can only provide a VIS *after* an offender is found guilty, however – same-day sentencing does not provide them with enough time.

## The right to be informed of the likely release date of the accused

If the accused is convicted of a criminal offence, she or he may be sentenced to a term of imprisonment. If this is the case, additional rights are given to the victims of the crime.

### Definition

Section 17 of the *Victims Charter* allows a victim of a criminal act of violence in Victoria to include themselves on a victims register. If a victim chooses to be registered, they will be provided with information concerning the offender such as the length of their sentence and the likely date of their release from imprisonment.

### Detail

Once a victim has been informed of the likely release date, they may also make a submission to the Adult Parole Board about the effect of the offender's potential release on them as the victim of the offender's crime. The Board must consider this submission when determining whether to place the offender on parole and release them from prison before their top (maximum) sentence has been served.

### *Victorian Law Reform Commission review*

In August 2016, the Victorian Law Reform Commission ('VLRC') tabled in Parliament its 'Report on the Role of Victims of Crime in the Criminal Trial Process'. The VLRC supported the current legal position that victims are participants in the criminal trial process, but are not parties to proceedings.

The VLRC made a number of additional recommendations for legislative amendments to protect and enhance the role of victims in criminal trials, including to provide a definition of protected victims in the *Criminal Procedure Act 2006* to enable fair witness testimony: the definition recommended was any witness who is "likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence." This has not been implemented.

### **REVIEW/APPLICATION QUESTIONS – Rights of parties to a criminal case**

1. What rights are protected by ss21 and 24 of the Victorian Charter?
2. How might you define 'unreasonable delay'?
3. Provide two examples of ways in which the criminal justice system tries to avoid delay.
4. Identify a number of factors that might contribute to the 'fairness' of a hearing.
5. Provide two examples of ways in which the criminal justice system tries to provide a fair hearing.
6. What is meant by a 'jury'?
7. For what category of criminal matters is a jury used?
8. What legislation provides for trial by jury for Victorians being prosecuted for state offences?
9. What piece of legislation outlines many of the rights of victims in criminal trials?
10. Define what is meant by a 'vulnerable witness' who can receive alternative arrangements.
11. Identify three ways in which the judge might amend normal court procedure to protect a vulnerable witness.
12. Provide two examples of matters that a prosecutor must inform the victim in the proceedings of.
13. What formal role in the proceedings does the victim play?
14. If the offender is sentenced to a term of imprisonment, what additional right does the victim in the case gain?
15. What steps does the victim need to take to receive these additional protections?
16. What role is the victim permitted to play with regard to the offender receiving parole?
17. What general position in relation to the role of victims did the Victorian Law Reform Commission take in its 2016 report?



## Evaluation: Rights of stakeholders in a criminal case

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS	RIGHTS	WEAKNESSES
<p>The courts have been given the power to oversee case management to help ensure that unreasonable delays in proceedings do not occur. Courts have been given the power to help guarantee this right and give parties <b>access</b> to it.</p> <p>Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude. This improves <b>access</b> for people accused of a criminal offence.</p>	<p><b>The right to be tried without unreasonable delay</b></p>	<p>If cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. This can be a weakness, which impacts the <b>fairness</b> of a trial for the accused.</p> <p>As per the <i>Barbaro</i> precedent, what is classed as an ‘unreasonable’ delay is determined on a case-by-case basis. This makes it very difficult for accused parties to challenge the length of time their case has taken, because there is no objective standard, and makes it hard for them to enforce their right.</p>
<p>Courts are constituted to ensure that judges are expert and impartial. This ensures <b>fairness</b> in criminal proceedings for all people.</p> <p>The rules of evidence and procedure ensure that only evidence that is relevant is introduced in a criminal trial. For example, evidence of prior convictions is not admissible as evidence of the offence. This contributes to <b>fairness</b> by ensuring that the accused is tried impartially.</p>	<p><b>The right to a fair hearing</b></p>	<p>A person with greater <b>access</b> to resources to pay for expert legal defence may have a better outcome than a person whose resources are constrained. This may lead to a disparity in the outcomes achieved by an accused with unlimited resources, compared with an accused who suffers socio-economic disadvantage, which undermines <b>fairness</b> and <b>equality</b> in the justice system.</p> <p>Many biases are structural and unconscious: people are not deliberately prejudiced much of the time, but they have been influenced by unspoken social prejudices and the systems they work in unconsciously favour some groups over others. It isn't possible to eliminate bias from the administration of justice.</p>
<p>Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures <b>fairness</b> in the adjudication of a criminal trial. The jury limits the role of the state in the accused's trial. The charges and prosecution are brought by the police and the Office of Public Prosecutions, which are both part of the executive branch of government. The jury, being drawn randomly from the community, provides an objective assessment of the evidence collected and presented against the accused independent of the state.</p> <p>The jury judges the accused from the perspective of the common person. This provides greater <b>equality</b> between the parties because it minimises the power of the state.</p> <p>Juries spread the burden of decision-making. Instead of one person – the judge – being responsible for findings of fact, in a jury trial the evidence must be assessed as being beyond reasonable doubt by a group of people cooperating to reach a</p>	<p><b>The right to trial by jury</b></p>	<p>For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective <b>access</b> for an accused person to sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions.</p> <p>Juries do not have to give reasons for their verdicts, so there is no way to ensure that their decision-making is free from bias. If juries do not act impartially in reaching a verdict, this reduces the <b>fairness</b> of the criminal justice system.</p> <p>Juries are, by definition, composed of people who do not work in the criminal justice system. This means that their knowledge of the procedures, law and terminology is low, and these gaps and errors in understanding could unfairly influence the verdict they deliver. They also differ in their application of the standard of proof. For example, a 2008 NSW Bureau of Crime Statistics and Research survey of 1200 former jurors demonstrated that 55.4% of them believed the standard meant they needed to be</p>

<p>verdict.</p> <p>Since the verdict must be unanimous for the most serious indictable offences, or by majority for less serious indictable offences, the jury's determination of the facts and verdict is more likely to be correct, providing greater protection of the rights of the accused.</p>		<p>"sure," while 10.1% of them believed the standard meant only that guilt was "pretty likely."</p>
<p>Accommodating the special needs of witnesses such as those involved in an alleged sexual offence or family violence ensures that vulnerable people have appropriate <b>access</b> to give evidence in court. It ensures they are treated <b>fairly</b> by legal procedures such as cross-examination.</p> <p>Court processes and facilities that support particularly vulnerable or at-risk victims help to protect them from being re-traumatised by this process, or traumatised on top of the harm that has already been caused to them by the criminal offence.</p>	<p><b>The right to give evidence as a vulnerable witness</b></p>	<p>Providing some witnesses with different conditions in which to give evidence may prejudice a jury in their assessment of the credibility of all witness testimony at trial. A jury may be biased by sympathy in favour of accepting the evidence of a vulnerable witness, or they may develop prejudices against their reliability. These circumstances may impact the <b>fairness</b> of a trial unless carefully managed by the presiding judge.</p> <p>Many recommendations made in 2016 by the VLRC to, in its opinion, improve the protection of vulnerable witnesses, have not been implemented. For instance, the recommended definition of 'protected witnesses' was not adopted.</p>
<p>The obligation to inform victims about proceedings ensures that the prosecution considers the role of victims in a criminal trial. This enhances <b>access</b> for victims to criminal legal procedures, even though they are not technically parties.</p> <p>Parties at risk of emotional harm from seeing the perpetrator in public or living nearby to them are better protected and supported by the criminal justice system if they are given this information.</p>	<p><b>The right to be informed about the proceedings and the likely release date of the accused</b></p>	<p>This right may unfairly intrude on the convicted person's right to privacy after they have served the sanction imposed by the court. This may compromise their right to <b>equal</b> treatment under the law.</p> <p>The OPP has no obligation to take the wishes of the victim into account, even though they do inform them. For instance, the OPP will inform the victim of any plea negotiations held with the accused, but can still proceed with a plea deal that the victim does not support. This gives the victim only superficial <b>access</b>.</p>

**REVIEW/APPLICATION QUESTIONS – Rights of stakeholders in a criminal case: evaluation**

Juries are not required to give reasons for their verdicts, so there is no way of knowing whether the outcome was based on bias, or on a misunderstanding of the law, evidence or procedure. The legal system is complex, and it is difficult for laypeople to understand matters well enough to come to sound decisions, and the fact that we have laws ensuring that all deliberations are kept secret provides no check on this. The benefit of this is that increased finality is brought to each case, because appeal courts are reluctant to overturn a jury's findings without having any clear grounds on which to do it; juries are also given the freedom to consider matters of common sense and empathy in their deliberations, without fear of being criticised for trespassing into 'non-legal' matters. Providing written reasons for their verdicts would potentially stop this, if the law permitted them to do it, so the lack of reasons is overall not a significant weakness.

- a. The above answer is a sample of an evaluation of a weakness. Using this as a guide, evaluate one weakness of each of the rights of parties covered in the section.

## DETERMINING A CRIMINAL CASE

According to the Legal Australia-Wide Survey of 20,716 people, published in 2012 by the Law and Justice Foundation of NSW, half of all Australians will experience at least one legal problem in any given year. Criminal problems are the second-highest frequency after consumer law problems. Most people will not obtain assistance from a lawyer, though; nor will they come into contact with the courts or other legal institutions. For some, this will be because they resolve their legal issue by other means. However, a significant number will not be able to do this satisfactorily because they are unaware of their legal rights, or because they lack the time and resources needed to enforce them.

### Criminal pre-trial

The criminal pre-trial processes start from the point at which the police have identified a suspect in relation to a criminal wrongdoing, and last until the first day of trial or the start of a hearing in the Magistrates' Court.

#### Institutions to assist the accused

There are some institutions that provide public information to improve the general awareness of legal rights in relation to criminal charges and prosecution, and that provide some free or subsidised legal representation – particularly in trials for an indictable offence.

#### Victoria Legal Aid

##### Definition

Victoria Legal Aid ('VLA') is an independent statutory authority established under the *Legal Aid Act 1978* (Vic). Its role is to support improved access to justice in Victoria and to provide limited representation services and advice. The organisation is funded by Commonwealth and Victorian governments, but it operates independently of government.

##### Detail

VLA's objectives, outlined in s4 of the *Legal Aid Act 1978* are to:

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

'Legal aid', as it is commonly called, is the provision of legal advice and information to people involved in a criminal matter who are unable to pay for their own legal representation. Each state and territory has its own legal aid commission that provides legal assistance, information and advice, and lawyers to represent those who are attending court but cannot afford legal representation and fulfil the agency's criteria. People who can afford part of their own defence but not all of it may also receive grants of money to help them obtain legal representation.

#### Duty lawyers

Every person who is arrested, taken into custody and charged with a criminal offence has free access to a Legal Aid duty lawyer at the Magistrates' Court if they are otherwise unrepresented. A 'duty lawyer' is a lawyer who works for the VLA rather than any individual client, and is rostered on for the day at the courthouse to assist anyone who needs help and meets the criteria for advice and basic assistance. VLA sends its own lawyers to perform duty lawyer services, but also uses private practitioners and community legal centre lawyers, who all assist pro bono. In 2021-22, 8,697 duty lawyer services were delivered by private practitioners (15% of the total), and 11,853 (21%) were provided by community legal centre lawyers. VLA lawyers provided 36,499 (64%) duty lawyer services. 45% fewer duty lawyer services were provided than in 2019-20.

All criminal offences commence in the Magistrates' Court, and Legal Aid has lawyers stationed at the courts to support accused people. The priority of the duty lawyers is to provide legal assistance to people in custody who have been brought to court for the first time on a charge. The duty lawyer will provide legal advice, and make an application for bail if necessary. If the accused has her or his own lawyer, the duty lawyer will contact the lawyer to let them know that their client is in custody. Duty lawyers can also assist with smaller matters such as guilty pleas, requests for adjournments and the provision of printed legal information. In addition to the Magistrates' Court, duty lawyers are also stationed in courts including the Children's Court.

## Grants for legal representation

Where a person needs court representation for their criminal matter, they must apply for a grant of legal assistance. VLA does not have unlimited funds, so applicants must meet strict eligibility criteria.

Firstly, VLA will consider what the case is about, the likely benefit of representation to the accused person, and whether legal assistance will be of benefit to the public. Collectively, these considerations are known as the 'merit' test, and they see whether the case has the kind of merit that VLA is designed to fund. Secondly, VLA grants are subject to a means test: if a claimant earns above a specified amount and/or has significant assets, they will not be entitled to a grant of legal aid. The means test ensures that VLA's limited funds are allocated to people who could not otherwise afford legal representation in their criminal matter.

A person who is eligible for a grant of legal assistance can be represented by a VLA lawyer, or by a private lawyer who has been appointed to the VLA criminal practice panel. 84% of criminal law grants were assigned to private legal practitioners in this way in the 2021-22 financial year, totalling 34,086 grants. As of the 2021-22 Annual Report, VLA worked with 302 private firms across Victoria. In addition, 5,787 grants of legal assistance (14% of grants) were given to clients being represented by an in-house VLA lawyer, and 643 (2%) to clients being represented by a community legal centre. Total grants in 2021-22 were 40,486 – 11% less than in 2019-20.

In 2022 VLA began a new programme called 'Help Before Court'. Using a free online form (<https://hb4c.vla.vic.gov.au/>), accused persons can answer a range of questions about their Magistrates' Court or Children's Court matter, and receive either representation or advice on how to prepare for the court date and what to do when in the courtroom.

## Service provision

VLA services are funded jointly by the Victorian and Commonwealth governments. These services are susceptible to government funding cuts: from 1997 to 2017, Commonwealth contributions to the VLA budget fell from 50% to 25%. Special Covid-19 funding was allocated, and in 2020-21 VLA had an underlying surplus of \$24.9m because of the lockdown and case adjournments; however, in the 2021-22 Annual Report, VLA expressed concerns over a projected 2021-22 deficit of \$21m because of expenses being deferred and delayed cases building on top of new ones. The Covid-19 pandemic has also resulted in a greater percentage of Victorians being eligible for legal aid funding under the means test.

In the 2021-22 financial year, according to the Victoria Legal Aid Annual Report:

- 74,760 individual clients received some form of legal advice or representation where a client-lawyer relationship was formed – this does not include people who received only legal information, or who accessed assistance through the website or telephone helpline. 112,939 requests were responded to through the Legal Help service, which includes telephone advice and online chats. The number of webchats has increased by 54% from 2019-20 levels.
  - 18% of clients were from culturally and linguistically diverse backgrounds.
  - 38% had no income (up from 29% in 2017-2018) and 54% were recipients of some form of government benefit.
  - 5,981 clients, or 8%, were experiencing or at risk of homelessness. This is an increase of almost 25% from 2014-15.
  - 14% were younger than 19yo, up from 11% in 2019-20.
  - 26% disclosed having a disability or mental illness.

In the Report, VLA noted that they were seeing "steady increases" in the level of disadvantage experienced by their clients. During the peak of the pandemic, VLA saw a 57% increase in requests for family and domestic violence advice.

## Community legal centres

### Definition

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

### Detail

CLCs provide general legal information over the phone, on their websites, through pamphlets, and at drop-in services held weekly or monthly. They also provide CLC lawyers for the duty lawyer programme run by VLA. CLCs can also provide legal representation for clients, although funding is limited.

As of the 2020-21 VLA Annual Report, 35 of the CLCs located in metropolitan Melbourne and around Victoria received government funding through Victoria Legal Aid. VLA refers clients to CLCs where they can provide more appropriate assistance; the CLCs may then, in turn, refer clients to VLA for assistance if that is the more suitable body. In 2019-20, generalist CLCs were the number one place for the 85,726 referrals that VLA made. CLCs may also assist defendants with their applications to Victoria Legal Aid for funding and representation.

There are two types of community legal centres: generalist CLCs and specialist CLCs. Generalist community legal centres provide general legal services to people in their local geographical area whereas specialist community legal centres focus on particular groups of people or areas of the law. Some CLCs are able to provide legal aid to clients, where VLA has provided a grant for legal assistance. This has risen from 407 grants in 2015-15 to 643 grants in 2021-22.

Fitzroy Legal Service ('FLS') is an example of a generalist CLC. It was established in 1972, to provide free legal advice to all comers, in what was then the poorest suburb in Melbourne. It operates a free, drop-in legal advice service that operates every weeknight. Volunteer lawyers provide legal advice on criminal matters, are available in person or through the national telephone interpretation service. It has a range of specialist service, including a family law clinic and an animal law legal advice service, and publishes the authoritative Fitzroy Legal Handbook, which is available for free online. The FLS publishes its legal information in six languages, including Arabic and Somali.

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

**REVIEW/APPLICATION QUESTIONS – Institutions to assist the accused**

1. What kind of body is Victoria Legal Aid?
2. Provide a one-sentence explanation of the role that VLA plays in the Victorian legal system.
3. Identify two of VLA's specific objectives, according to the legislation that establishes it.
4. VLA provides both duty lawyers and legal representation. Explain the difference between these two services.
5. What is a community legal centre?
6. How does a CLC differ from VLA, and what is the connection between them?
7. Explain the difference between a generalist CLC and a specialist CLC.
8. What role do CLCs play in the Victorian justice system?

**Evaluation: Institutions to assist the accused**

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS	INSTITUTION	WEAKNESSES
<p>VLA funding to private practitioners ensures that a person who is granted legal aid has scope to choose their legal representative and that their lawyer will provide expert legal advice. This allows them <b>access</b> to choice and expert assistance, and their case being better presented helps to achieve a <b>fair</b> hearing.</p> <p>VLA's focus on people who suffer social and cultural disadvantage enables them to specialise in understanding the issues facing many accused parties who need a service like VLA.</p>	<p><b>Victoria Legal Aid</b></p>	<p>The capping of VLA representation funding may place restrictions on the scope of an accused person's defence. Even if a defendant qualifies for financial assistance, they may not be able to defend themselves fully because doing so may exceed the funding cap put on their case.</p> <p>VLA services are vulnerable to each state and federal government's desire to fund legal services, because VLA does not have private streams of revenue and does not charge its clients for the services it provides. If a government decides to cut funding, the effectiveness of all the services provided by VLA will be compromised, reducing <b>access</b> across the board.</p> <p>Not all private practitioners paid with VLA grants are experienced in the area of law the client requires. VLA received one complaint per 200 grants of assistance in 2021-22, and the main types were lack of adequate representation and lack of communication.</p>

<p>CLCs provide free legal services at community-based locations, according to the needs of their clients. They are highly responsive to the community, use volunteer lawyers and paralegals from the local area, and are usually governed by a volunteer board of directors taken in least at part from the surrounding community.</p> <p>CLCs are able to service a large number of clients because almost all CLCs provide basic advice and administrative assistance at regular free drop-in sessions; some CLCs have sessions once or twice a week, while others hold them daily on weekdays. At each session, up to a dozen volunteer lawyers can be rostered on to see clients, providing <b>equality</b> to all people in the catchment area.</p>	<p><b>Community legal centres</b></p>	<p>The funding allocated to CLCs and the resources available to them do not match the demand for their services or guarantee <b>access</b>. Many people wait for over an hour at every drop-in session to speak to a lawyer, and some are turned away because there are not enough volunteer lawyers to see everyone.</p> <p>Drop-in sessions are the primary way in which CLCs provide legal advice to clients, but this is not the same as actual representation. The CLC budget for actual representation is very small, and only a few clients will be able to have official representation at any one time. True <b>access</b> to justice is not achieved if inexperienced people have to present their own cases in court.</p>
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## REVIEW/APPLICATION QUESTIONS – Institutions to assist the accused: evaluation

### Application exercise

In order to assist fairness, the legal system provides institutions to assist the accused: Victoria Legal Aid and community legal centres are two examples. Both focus on people who suffer some kind of social, economic or physical disadvantage or disability. VLA representation is prioritised for people who can pass a strict ‘means’ test and earn income below the poverty line, and specialist CLCs such as the Asylum Seeker Resource Centre focus on groups of people who face special obstacles when trying to obtain justice. This is a strength because it helps them target their resources to the most vulnerable, and assist people most at risk of unfair dispute resolution. Unfortunately, the shortfalls in funding that both of them suffer means that this assistance is inadequate for even the targeted groups – and people outside those groups are benefited little. It is possible, for instance, for a person to earn income below the poverty line, and to fail to obtain funded legal assistance from VLA. Both institutions try to compensate for this problem, though, by giving opportunities for broader assistance. Generalist CLCs conduct weekly or daily advice sessions where anyone living in the catchment area can attend for legal information and basic advice; VLA also provides services such as duty lawyers, so that anyone attending court that day can receive support if their matter falls within an appropriate field.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences

### Committal proceedings

Once bail has been granted or denied, the next stage in pre-trial is the committal proceeding. This is a procedure to determine if the case against the accused is strong enough to justify taking them to trial.

**Exam tip:** The full committal proceedings are more extensive than just the mention hearing that occurs in the Magistrates’ Court; however, this hearing is generally treated as the centrepiece of the proceedings.

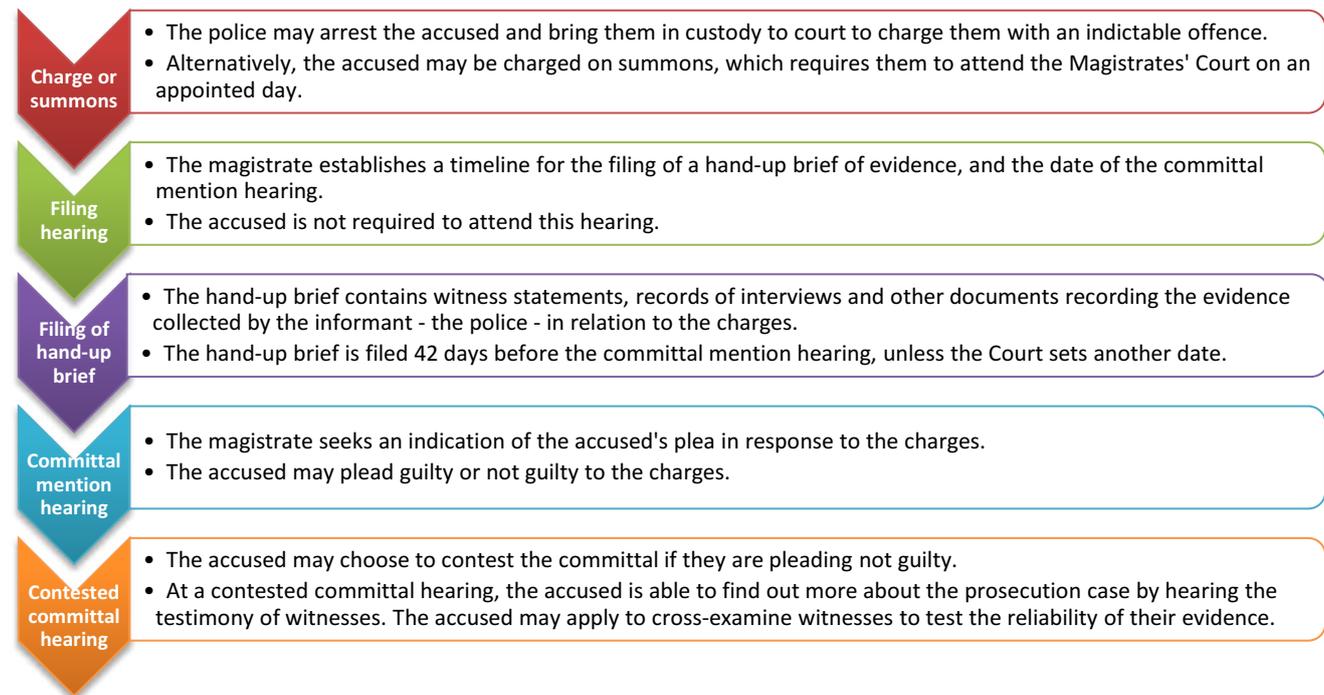
#### Definition

Committal proceedings enable a magistrate to determine if the prosecution has enough evidence to support a conviction in a higher court, before a properly-instructed jury, if the accused pleads not guilty.

**Exam tip:** The test that in the past was applied to the committal proceedings was the *prima facie* test. This asked whether there was enough evidence ‘at first glance’ to support a conviction. This test was thought to be too easy for the prosecution to pass, so it was replaced with the ‘sufficient evidence to support a conviction before a properly instructed jury’ test in order to better weed out weak cases. The *prima facie* test is no longer correct.

Proceedings are composed mainly of the filing of the evidentiary hand-up brief, and a committal hearing that is held in the Magistrates’ Court for all matters going to the County or Supreme Courts in which the accused is pleading not guilty.

## Detail



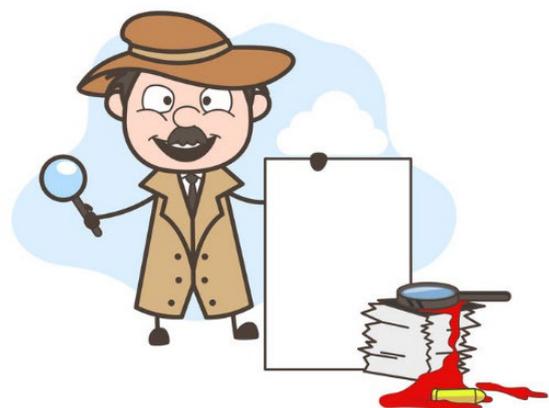
At the hearing, the defence will not present any of its evidence or disclose any of its witnesses. The committal hearing is purely for the prosecution to show its hand, to prove that a trial is justified, and to allow the defendant to prepare adequately for trial.

There are two types of committal hearing:

- A hearing conducted on the **hand-up brief**. The hand-up brief is a collection of all the prosecution's evidence in documentary form – in other words, written witness statements and photographs, etc. Forty-two days before the hearing the accused should be presented with the hand-up brief, and a copy is also provided to the magistrate. The magistrate will review the evidence, hear arguments on the day, and determine if the case will proceed to trial.
- A **contested committal hearing**. This is held if the accused wishes to question witnesses in the hand-up brief – in other words, if they wish to 'contest' the evidence in person, in oral form. They will notify the court at least five days prior to the hearing date, and a kind of mini-trial will occur with the magistrate deciding if the case will proceed. According to the data provided to the VLRC by the Magistrates' Court in April 2019, in 2017-2018, out of 3,426 committal proceedings, a total of 1,734 applications were made to cross-examine witnesses.

In both types of hearing the magistrate is asked to determine whether a strong enough case against the accused exists. This means the magistrate believes there is enough evidence to support a conviction in a jury trial. If sufficient evidence does not exist, the magistrate will dismiss the case because it is likely to be a waste of time and resources, and an unnecessary strain on the defendant and witnesses. Since 2013, no more than 1.6% of cases have been dismissed as a result of the committal hearing.

Partly because of the low discharge rate, in 2020 the VLRC recommended that the committal be replaced with an issues hearing where the magistrate identified case issues for the higher court, and greater case management from the DPP to determine whether sufficient evidence existed. As of the end of 2022 the Victorian Government had declined to implement this recommendation.



- The Director of Public Prosecutions ('DPP') has the power to ignore the magistrate's findings. If the magistrate decides that there is insufficient evidence to support a conviction at trial and dismisses the charge, the DPP may choose to go to trial anyway. This is called a 'direct indictment'. It happened 19 times in 2017-18, but only six in 2021-22.
- The accused may choose to skip the committal hearing and go directly to trial. This is called a 'direct presentment' and is uncommon. No direct presentments occurred in 2021-22.

## Purposes of committal proceedings

The primary purpose of the committal proceedings is to see whether the prosecution has sufficient evidence to support a conviction of the defendant before a properly-instructed jury.

Additional purposes are listed in s97 of the *Criminal Procedure Act 2009*. They include informing the accused of the case against them, improving the efficiency of the dispute resolution, and ensuring the timely collection of evidence.

### Informing the accused of the case against them

Committal proceedings give the accused access to all evidence collected by the police that inculpates them and supports the prosecution of the charges, *plus* that tends to exculpate the accused – the prosecution has a legal duty to disclose evidence that both works for their case and works against it.

**Exam tip:** The word ‘exculpate’ is a legal term meaning to prove that someone is innocent. It is the opposite of ‘inculpate’.

By understanding the strength of the evidence, the accused can make an informed decision about whether to plead guilty or not guilty. If the accused considers that there is little prospect they can successfully defend the charges, they can take advantage of receiving a discounted sentence by pleading guilty at an early stage. In 2021-22, 63.7% of all guilty pleas were achieved by committal.

Once the accused is informed of the case against them through the committal, they can also begin to prepare their defence. The accused does not need to prepare a global defence or prove their absolute innocence: they only need to defend the evidence against them and raise reasonable doubt.

- For example, in the *DPP v Ashman* committal heard 6 August 2019, the case resolved in a plea of guilty to manslaughter after only one witness had been heard. Leave had been given to cross-examine sixteen witnesses including one child, but all fifteen of the remaining witnesses were spared giving evidence once the first witness clarified a vital issue and triggered the guilty plea.

### Improving the efficiency of dispute resolution

In 2020-21, the Magistrates’ Court finalised 2,589 committal proceedings. In 2021-22, 77.6% of prosecutions ended in a guilty plea – 63.7% of those had a guilty plea by the end of the committal proceedings, and approximately 40% of them had the guilty plea entered *at* committal. In May 2017, the indicative time to trial in the County Court, from the committal, was nine months; and, in 2018-19, 82% of matters had a trial longer than a week. The OPP reported in 2018-19 that the average resolution time for an indictable offence was 19 months, and in 2020-21 around 34% of trials were concluded within a year – 66% took longer than 12 months to be scheduled and concluded.

Committal proceedings are an important element of criminal procedure in ensuring that most trials are held in a timely manner. While it could be argued that committals delay the commencement of a trial, they provide compensatory benefits to the criminal process by adequately informing the accused of the evidence against them, enabling them to plead guilty at an early stage, and eliminating weak cases from the trial divisions of the County Court and Supreme Court. The most time-consuming aspect of committal proceedings is cross-examination of witnesses. However, most committal hearings do not require witness examination.

If weak cases are prevented from going to trial, the efficiency of other cases waiting on the courts’ dockets will also be improved, because they will not be delayed for a case that is unlikely to succeed.

- In the 2008 committal of *DPP v Corcoris* the charges involved a multi-million-dollar fraud against the Commonwealth, and 278 lever arch folders of evidence were submitted. After two days of evidence at the committal the DPP withdrew all charges and replaced them with a single count of filing an incorrect tax return – the matter was dealt with summarily. The Magistrates’ Court commented that “It would be pure speculation how long this trial would have taken in the County Court, much less the cost to the system.” (from the 2019 submission to the VLRC Committals Issues Paper)

### Ensuring the timely collection of evidence

The timeframe of the committal proceedings encourages the prosecution to collect evidence and bring it to court in a timely manner. This ensures a speedy preparation of the prosecution’s case, while evidence is fresh and reliable; it reduces delays for the accused; and it ensures that witness testimony is accurate. These benefits contribute to a fair hearing for the accused.

For instance, s126 of the *Criminal Procedure Act* specifies that a committal mention hearing must be held within six months of charges being filed, unless the interests of justice prevent it. This time is shorter for sexual offences: it is three months.

- The Magistrates' Court 2019 submission to the Victorian Law Reform Commission's inquiry on committals disclosed that the standard period for service of the hand-up brief is 6 weeks, but that some evidence takes longer to be produced: DNA and forensic evidence in sex offence matters usually take 10 weeks, some laboratory evidence can take 5-8 months depending on complexity, autopsies take 12-20 weeks, drug analysis takes 4 months, and e-crime analyses (for Internet and computer files) take two years, for instance. States such as Western Australia and Tasmania that have abolished committals, however, have noticed delays at the trial stage in higher courts because of evidence that was no longer disclosed at an early stage.

### REVIEW/APPLICATION QUESTIONS – Committal proceedings

1. For what types of offences will a committal hearing be held?
2. What court conducts the committal hearing?
3. Which party or parties present evidence in a committal?
4. Give a definition of the type of case the magistrate is looking for, in order to commit it to trial.
  - a. Using this definition, explain what a 'committal hearing' is.
5. What are the main purposes of holding a committal before trial?
6. What is a hand-up brief?
7. Outline the difference between using the hand-up brief and holding a contested committal hearing.

### Evaluation: Committal proceedings

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS	WEAKNESSES
<p>The hearing protects the criminal defendant's right to be presumed innocent, by forcing the prosecution to prove they have sufficient evidence to justify trial.</p> <p>The hearing enables the defendant to prepare properly for trial by allowing them to see the evidence against them. This levels the playing field a little – which is necessary, as it is one individual against the state – and it gives the two parties a slightly better outcome-based <b>equality</b>.</p> <p>The accused is informed of the case against them at an early stage, allowing them to prepare a defence only in relation to issues in dispute. This allows the accused to allocate their resources more efficiently, and only focus on those matters that will be relevant to raising a reasonable doubt.</p>	<p>The DPP has the power to override the magistrate's findings, and push a case to trial even if the magistrate dismisses it at the committal. This undermines the role, authority and independence of the magistrate and the committal.</p> <p>The committal does not promote a <b>fair</b> and <b>equal</b> hearing, as the accused does not need to show any of their evidence: they therefore receive an advantage.</p> <p>In practice, the committal test is too easy to pass: since 2013, no more than 1.6% of matters have been dismissed by the magistrate for having insufficient evidence. The check on <b>fair</b> prosecution that is meant to be happening in a committal does not seem to be happening – or else the OPP is so reliably prepared with strong evidence that committals are a waste of time and resources.</p> <p>In 2021-22, 63.7% of indictable charges were resolved by a guilty plea by the end of the committal. This suggests that committals are used more frequently for plea negotiation than for preparing for trial.</p>

### REVIEW/APPLICATION QUESTIONS – Committal proceedings: evaluation

#### Application exercise

For each of the following arguments, work out whether it is a positive point or a negative point. If it is a positive point, find a negative point to balance against it, and say whether the positive aspect is entirely outweighed or only partly outweighed; if it is a negative point, find a positive one to balance against it, and say whether the negative aspect is entirely outweighed or only partly outweighed.

- a. Committal hearings protect the accused's right to be presumed innocent because they force the prosecution to prove it has sufficient evidence to justify taking the accused person to trial.
- b. Committal proceedings allow the court to filter cases by dismissing any charge that has insufficient evidence in support of it; this saves higher courts from wasting their time on criminal matters that are unlikely to succeed.
- c. Committal proceedings put the prosecution at an unfair disadvantage in relation to the accused, because the prosecution has to entirely show its hand early in proceedings. The accused is then able to tailor her or his defence to that evidence, and focus on beating the charges rather than arguing the truth of the dispute.

## Guilty pleas

It is not required that a person accused of a crime go to court and have the evidence against them presented before an independent judge or magistrate. This will only happen if the accused pleads not guilty to one or more of the charges. If, on the other hand, the accused wants to plead guilty to all of the charges, the dispute will avoid a trial or hearing and will proceed directly to sentencing. This is undesirable if the accused is genuinely innocent of the charges, but desirable if they are not.

### Purposes of facilitating guilty pleas

Guilty pleas are necessary for the effective, economic and efficient conduct of prosecutions. In general, a plea of guilty to a charge for an indictable offence relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them; a guilty plea also provides certainty of outcome and saves the community the cost of trials. Plea negotiations and sentence indications are two procedures to support this choice.

The purposes to be achieved by providing procedures for plea negotiations and sentence indications include:

- Giving the accused more complete information about the progress of their dispute and the choices available to them. This empowers them to make better-informed decisions about a proceeding that is likely to have a significant impact on their life.
- Encouraging guilty defendants to plead guilty and save the time and resources required to complete a contested criminal dispute. Hearings and trial consume huge amounts of time, money and emotional energy, and a range of stakeholders benefit if unnecessary hearings and trials are avoided or cut short – the accused and the Office of Public Prosecutions, and also the witnesses, the courts, parties to other disputes and the tax-paying public.
- Encouraging guilty parties to take responsibility for their wrongdoings rather than to deny responsibility and hope to be found not guilty. Encouraging guilty people to fight charges not only favours accused wealthy enough to conduct a rigorous defence over months or years, it also supports an attitude in society that denying wrongdoing is preferable to owning our behaviour.



As of the end of 2021-22, 77.6% of indictable criminal matters were resolved through a guilty plea (down from 88.7% in 2020-21). In February 2021 the Director of Public Prosecutions, Kerri Judd, recommended that sentence discounts of up to 30% be offered for early guilty pleas as one way to reduce the Covid-19 backlog in courts.

### Plea negotiations

#### Definition

A plea negotiation is a private negotiation between the accused and the prosecution that may take place at any time between the time when the accused is charged and the verdict being handed down in their hearing or trial. A plea negotiation may involve discussion about the appropriate charges, the reliability and relevance of any evidence in the case, and the *likely* sentencing consequences if the accused pleads guilty.

**Exam tip:** Plea negotiations do not determine the sentence – only the judge or magistrate can determine the sentence. The prosecutor is also not allowed to ask for a particular length of imprisonment. But plea negotiations may involve conversations about likely or possible sentences, given the charges.

#### Detail

The OPP provides that at every stage of the prosecution case the responsible solicitor must consider whether a plea of guilty to appropriate charges may resolve the case, having regard to:

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

If the prosecuting solicitor decides that a guilty plea is desirable in all the circumstances, she or he may initiate plea negotiations and even offer inducements to the accused such as reduced charges. Plea negotiations may involve the prosecution and defence counsel discussing and negotiating a number of issues, including:

- Which charges against the accused are appropriate to have resolved by a guilty plea, on the available evidence.
- The likely sentence that would apply to a guilty plea, and submissions that the prosecution would be prepared to make to the court regarding sentencing.
- Any assistance the accused may be prepared to give as a witness for other criminal prosecutions, and the value of that assistance to other prosecution cases.
- Whether the prosecution is prepared to reduce or substitute any existing charges for charges on a lesser offence.

## Sentence indications

### Definition

Sentence indications are given before the trial commences to tell the accused the type and maximum length of sentence they would receive if they decided to plead guilty at that point in time.

### Detail

Sentence indications have been available in Victoria since 2008, and the current regime is contained in the *Criminal Procedure Act 2009* (Vic). Part 5.6 provides the regime to be followed in the County and Supreme Courts, and Part 3.3 provides the one to be followed in the Magistrates' Court. The two procedures are roughly similar.

The accused is the only party that can apply for a sentence indication. If the judge agrees to the request, she or he will be given a summary of the facts that both parties agree on, plus any additional relevant material. The judge will then let the accused know whether, if they changed their plea to guilty at that point, they would be given an immediate custodial sentence and be sent to jail straight away, as well as the maximum sentence of custody – or whether their sanction would be non-custodial and, if so, the type of non-custodial sentence. For instance, a community corrections order or a fine. This is generally only allowed to happen once per trial, unless there is a material change in circumstances.



The sentence indications should include a sentencing discount. Amendments to the *Sentencing Act 1991* (Vic) that commenced in March 2008 require judges and magistrates to provide a specified sentencing discount if the accused pleads guilty. The Act does not tell judges and magistrates how much to reduce the accused's sentence by, depending on the stage of trial at which they plead guilty; instead, judges and magistrates take the guilty plea into account as one of the factors weighed up in the "instinctive synthesis" of sentence calculation. The judge or magistrate must impose a less severe sentence, and must then tell the offender what they *would* have received had they persisted with a 'not guilty' plea but been found guilty following trial.

The judge or magistrate may refuse to give a sentence indication if they feel they do not have enough information on which to decide a maximum sentence. For instance, whether they believe a witness may give important information in a sentencing hearing.

### Reform

In 2022 the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act* amended 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, and the *maximum length* of the custodial sentence. Previously, the higher courts could only indicate whether the sentence would be custodial or not. The Act also allows the accused to receive a second indication if there is a material change in circumstances, which was not previously allowed, and it removes the power of the prosecution to veto a request for an indication.

**REVIEW/APPLICATION QUESTIONS – Facilitating guilty pleas**

1. What is a 'guilty plea'?
2. Identify two benefits that the criminal justice system believes guilty pleas give to the wider community.
3. Identify two benefits that the criminal justice system believes guilty pleas give to the parties to the trial or witnesses/victims.
4. Provide a one-sentence definition of 'plea negotiations'.
5. Explain the similarities and differences between a guilty plea and civil pre-trial negotiations.
6. Identify three matters that the prosecutor must take into account when deciding whether to enter into plea negotiations with the accused.
7. Is the court required to accept a guilty plea? Give reasons for your answer.
8. Are sentence indications given for guilty pleas, not guilty pleas, or both? Explain.
9. Outline the purpose of providing sentence indications.
10. Identify the differences in current procedure between providing sentence indications in the Magistrates' Court and in the higher courts.
11. What is meant by a 'sentencing discount'?

**Evaluation: Facilitating guilty pleas**

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

Note also that evaluative questions can be asked in a few different ways in this topic: you could be asked to discuss the effectiveness or merit of facilitating guilty pleas, but you could also be asked to discuss whether they are appropriate and desirable in a particular case, or in cases in general. Arguments have been framed accordingly in the table below.

STRENGTHS		WEAKNESSES
<p>Plea negotiations help the accused to understand the case against them. They may give the accused a sense of control in their situation, enabling them to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence.</p> <ul style="list-style-type: none"> <li>➤ If the accused feels empowered by this information, the plea negotiation may be appropriate.</li> <li>➤ If the accused feels pressured into pleading guilty by this information, the plea negotiation may not be appropriate.</li> </ul> <p>Witnesses and victims benefit by not having to appear and give evidence under cross-examination at a contested trial.</p> <ul style="list-style-type: none"> <li>➤ If the witnesses do not want to give evidence, the plea negotiation may be appropriate.</li> <li>➤ If the witnesses do want to give evidence, the plea negotiation may not be appropriate.</li> </ul> <p>Plea negotiations and sentence discounts encourage the accused to take responsibility for her or his choices and actions.</p> <ul style="list-style-type: none"> <li>➤ If the accused engages in negotiations in good faith or out of remorse, the plea negotiation may be appropriate.</li> <li>➤ If the accused engages in negotiations in bad faith, or out of a strategic desire to take advantage of the system to escape responsibility, the plea negotiation may not be appropriate.</li> </ul>	<p><b>Plea negotiations</b></p>	<p>Plea negotiations take place privately between the prosecution and the accused. Criminal court proceedings, on the other hand, generally take place in public, and the verdict of the court may be scrutinised on appeal. It may be thought inappropriate to resolve criminal matters in relative secret.</p> <ul style="list-style-type: none"> <li>➤ If the victim does not want the details being made public, or there is little public interest in the case, the plea negotiation may be appropriate.</li> <li>➤ If there is public interest in seeing justice be done in the case, the plea negotiation may not be appropriate.</li> </ul> <p>The process for negotiating a plea with an accused person is not regulated by legislation, and the only effective check on the outcome of a plea negotiation is that the sentencing judge is not bound to follow the prosecutor's submissions.</p> <ul style="list-style-type: none"> <li>➤ If the prosecution has negotiated a fair set of charges and recommendations given the details and evidence in the case, the plea negotiation may be appropriate.</li> <li>➤ If the victim or public feel the prosecution has given too much weight to factors such as offender cooperation, and that the offender has been given too lenient a deal, the plea negotiation may not be appropriate.</li> </ul>

<p>Sentence indications help the accused to understand the case against them. They may give the accused a sense of control in their situation, enabling them to make decisions about defending charges vigorously, or pleading guilty for a measurable reduction in sentence.</p> <ul style="list-style-type: none"> <li>➤ If the accused feels empowered by this information, the sentence indication may be appropriate.</li> <li>➤ If the accused feels pressured into pleadings guilty by this information, the sentence indication may not be appropriate.</li> </ul> <p>Sentence indications can only be given once, which means that the accused cannot exploit them to keep getting 'updates' on how successfully they are defending themselves at each stage of the trial.</p> <ul style="list-style-type: none"> <li>➤ If the accused is sincerely considering changing their plea to guilty, one opportunity to receive a sentence indication ought to be enough and the sentence indication may be appropriate.</li> <li>➤ If the accused does not understand the process for some reason and uses their one opportunity in a way that prejudices them later in the trial, the sentence indication may not be appropriate.</li> </ul>	<p>Sentence indications</p>	<p>The courts may refuse to give a sentence indication – for instance, if the statement of facts is too brief, or there are missing victim impact statements.</p> <ul style="list-style-type: none"> <li>➤ If the accused is sincerely changing their plea to guilty, the fact that their request can be refused may not be appropriate, as it may deter them from taking responsibility.</li> <li>➤ If the court believes the accused is not sincerely considering changing their plea, and the rejection of the indication would cause more delays and cost, rejecting the request may be appropriate.</li> </ul> <p>Sentence indications can induce a defendant with a legitimate defence to plead guilty, even when they ought not to in fairness and truth, because a lower sentence is offered to them in a situation where they might be struggling to afford a defence. In 2020 the South Australian parliament reduced sentence discounts from 40% maximum to 25%, to reduce this influence.</p> <ul style="list-style-type: none"> <li>➤ If the accused feels empowered by this information, the sentence indication may be appropriate.</li> <li>➤ If the accused feels pressured into pleadings guilty by this information, the sentence indication may not be appropriate.</li> </ul>
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**REVIEW/APPLICATION QUESTIONS – Facilitating guilty pleas: evaluation**

**Application exercise**

In 2015 the Sentencing Advisory Council published research into sentence indications and sentencing discounts in the higher courts given during the period from 1 July 2009 until 30 June 2014. The report can be accessed on the Council's website at: <https://www.sentencingcouncil.vic.gov.au/publications/guilty-pleas-higher-courts-rates-timing-and-discounts>

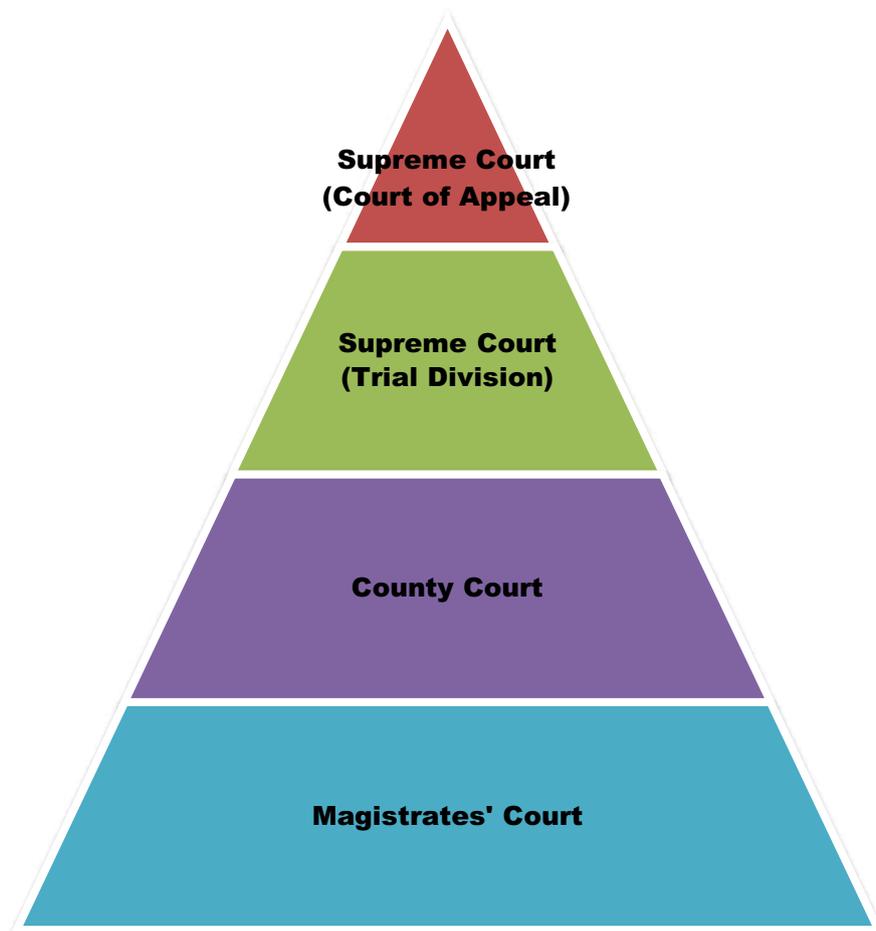
Using evidence from this report and the strengths and weaknesses of facilitating guilty pleas, write a submission to the Victorian Government either in favour of the current regime or against it.



## RESOLVING THE CASE

### Reasons for a court hierarchy

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



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

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

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

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

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

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

## Specialisation

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

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

## Appeals

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

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

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

### REVIEW/APPLICATION QUESTIONS – The court hierarchy

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

#### Extension material:

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

#### The operation of precedent

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

- A principle of law established by a case heard in the Supreme Court (Trial Division) will be binding on the County and Magistrates' Courts when the later cases involve similar material facts and questions of law.
- A principle of law established in the Supreme Court (Trial Division) can be reconsidered and possibly overturned by the Court of Appeal, as the Court of Appeal is higher in the hierarchy.

## Evaluation: Reasons for a court hierarchy

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>The needs of parties can be more efficiently met by personnel, including registrars, judicial officers and support staff, who are familiar with the types of cases being brought. These efficiencies increase <b>access</b> for parties.</p> <p>If the law and procedure are understood in detail, they are more likely to be applied <b>equally</b> across every case of the same type.</p>	Specialisation	<p>The vertical hierarchy is constructed on the basis of very broad distinctions: the County Court jurisdiction is not materially different from the Supreme Court (Trial Division) jurisdiction, for instance. The ability to develop specialisation in courts of general jurisdiction is quite low in reality.</p> <p>Specialisation in law and procedure does not produce significant benefit when most of the differences between cases come in the form of differences in facts and evidence.</p>
<p>Parties have largely <b>equal</b> rights to appeal to decision (other than with the acquittal of a criminal accused), to ensure that both parties are satisfied that the rules of natural justice were followed, regardless of the outcome.</p> <p>The fact that appeals to more highly-ranked judges are possible can increase the perception of <b>fairness</b> and the level of confidence the public has in the system.</p>	Appeals	<p>In reality, there is not <b>equal</b> opportunity to appeal. In addition to the rules that exist limiting certain avenues of appeal, launching an appeal takes a lot of time and money, and requires a sophisticated knowledge of the law and rules. Not every party has <b>access</b> to these.</p> <p>The accused has more appeal rights than the prosecution does: the accused, for instance, can appeal a guilty verdict, while the prosecution cannot appeal a not guilty verdict. This does not achieve procedural <b>equality</b>.</p>
<p>Magistrates and judges in lower courts can be guided by the understanding of the law handed down by panels of experienced judges in higher courts, which enhances the potential for <b>fairness</b> in the resolution of disputes.</p> <p>The application of both binding and persuasive precedent increases the efficiency of the resolution and therefore enhances <b>access</b> for the parties to the case as well as to the parties of other cases waiting for an available courtroom.</p>	The operation of precedent	<p>The vast majority of cases will not be heard by a court that can alter or set precedent in any way: 98% of matters will be finalised below the Supreme Court (based on 2020-21 ABS figures) and the Magistrates’ Court resolved 92% of criminal matters. This decreases the <b>access</b> the average person has to use of the court system in a way that has an effect on the common law, without them being willing and able to pursue an appeal higher up the hierarchy, at the cost of significant time and expense.</p> <p>Regardless of their place in the hierarchy, most courts are reluctant to disturb existing precedent, even if it is technically persuasive only.</p>

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

#### Application exercise

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

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

## Responsibilities of key personnel

### Judge

#### General responsibility

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

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

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

#### Detail on specific responsibilities

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

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

- In the trial stage the judicial officer focuses on ensuring that each party receives natural justice. They will interpret and apply the rules of evidence and procedure, listen to the submissions and evidence given by each party, and reach a final verdict in all matters where there is no jury.
- The judge must recuse themselves if they will be unable to remain impartial, or if there is a material risk of them failing to *appear* impartial. For example, in the case of *LAL v The Queen* [2011] VSCA 111 the judge was criticised for not recusing herself even though she was related to the victim of a similar crime, and there was therefore the risk of *apprehended* bias.
- If there is a jury, the judge will direct the jury and sum up the law and evidence on which the jury verdict should be based. The judge will have to carefully follow the law in relation to jury instruction: for instance, there are strict rules prohibiting them from giving a personal explanation of what 'beyond reasonable doubt' means.
- The judge must only direct the jury on matters that have been raised by the parties at trial, either expressly through legal argument or indirectly through the evidence presented – but they have no responsibility to direct the jury on matters that were not raised by the parties. This was established by the High Court in the case of *R v Getachew* [2012] HCA 10.
- If the accused is found guilty, the judge will be responsible for conducting the sentencing proceedings. They will determine which parts of victim impact statements are admissible, and they will receive sentencing submissions from both the prosecution and defence; they will also be responsible for calculating any sentence discounts, and weighing up mitigating factors and aggravating factors.

### Jury

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

#### General responsibility

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

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

## Detail on specific responsibilities

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

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

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

- Jurors must disclose known reasons that would prevent them acting impartially. Failure to inform the Juries Commissioner as soon as practicable is an offence, punishable by a fine.
- Jurors must elect a foreperson to coordinate jury discussions and deliberation.
- The foreperson of the jury has special responsibilities to conduct jury votes, to record and communicate any questions the jury wishes to ask of the judge, and to deliver the final verdict to the court.
- Jurors can only rely on the evidence introduced at trial in reaching a verdict. It is an offence to investigate any matter that is the subject of a trial, even just by conducting an Internet search. The *Juries Act 2000* criminalises this as a form of contempt of court, and it is punishable by a fine of up to 120 penalty units. In 2014, for instance, a man was charged for looking up the meaning of 'beyond reasonable doubt' on the Internet during deliberations.
- Each juror has the responsibility to listen carefully to the judge and to counsel, to try to understand the law in the area and the elements of the offence. In 1999 the New Zealand Law Commission published findings that showed "fundamental misunderstandings of the law at deliberation stage" in 73% of trials.
- Jurors must keep their deliberations secret. It is an offence to disclose any information such as opinions expressed, votes cast or arguments made in the course of reaching a verdict.



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

## Parties

### General responsibility

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

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

### Detail on specific responsibilities

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

### Legal practitioners

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

### General responsibility

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

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

### Detail on specific responsibilities

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

- Prosecution lawyers have a special responsibility to only pursue charges that are supported by evidence and that have a material chance of success in prosecution.

### REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel

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

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## Evaluation: Responsibilities of key personnel

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

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

<p>Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give <b>access</b> to the accused with the need to serve justice and overall <b>fairness</b> in terms of the system.</p> <p>Experienced legal representatives are responsible for helping the accused to present their case in the best possible light. This gives the accused confidence in the system, and a better chance at a <b>fair</b> and just trial.</p> <p>The use of expert and experienced legal practitioners saves the courts time and money, because they know the correct way to prepare documents, the correct way to make legal submissions and elicit evidence from witnesses, and the best arguments to make to allow the court to home in on the significant issues. This efficiency increases overall <b>access</b> to the system because it allows the courts to operate more quickly.</p>	<b>Legal practitioners</b>	<p>‘Justice’ may belong to accused people who can afford the better legal representatives, rather than accused people on the basis of their innocence, and this decreases proper <b>access</b> to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. The 2019 trial of George Pell resulted in multiple appeals to a successful High Court appeal, and involved some of the most successful lawyers in Australia – Robert Richter is an acclaimed senior barrister, whose fees were estimated at \$30k per day of trial. In 2021 The Australian published a total fee estimate of \$3m for all lawyers involved in Pell’s case. It is unlikely that many other accused persons would have the resources to do this, and would simply have had to accept the first finding of guilt.</p> <p>Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in plea negotiations because it is not always in the lawyer’s best interests to register a guilty plea, or they may believe they can win a ‘not guilty’ verdict outright for their client; or the prosecution may reject a <b>fair</b> plea, or accept an inappropriate one, in order to get an easy ‘win’ on the board for their career and the department.</p>
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### REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel: evaluation

#### Application exercise

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

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
  - strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences
- b. Using the answer above as a sample, write a paragraph analysis of each of the other categories of personnel.

## CRIMINAL CONSEQUENCES

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

### Purposes of sanctions

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

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

**Exam tip:** Circular definitions – or, when a word is defined by using the same word – are common in this topic, and prevent full marks being awarded. For example, the aim of 'punishment' is often defined as wanting to "punish" the offender; the aim of 'denunciation' is often defined as wanting to "denounce" the behaviour; and the aim of 'rehabilitation' is often defined as wanting to "rehabilitate" the offender.

You must define a term using a synonym – a term that means the same thing, but that uses different wording.

### Rehabilitation

#### Definition

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

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

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

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

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

### Punishment

#### Definition

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

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

### Deterrence

#### Definition

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

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

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

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

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

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

### Denunciation

#### **Definition**

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

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

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

### Protection

#### **Definition**

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

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

#### ***DPP v Gargasoulas [2019] VSC 87***

In 2017, James Gargasoulas drove at high speed through a crowd of pedestrians in Melbourne CBD. He killed six people and inflicted serious injuries on 27 others. In 2018 a jury found him guilty of six counts of murder, and 27 counts of reckless conduct endangering life – the maximum sentence for each count of murder was life imprisonment, and for each count of recklessness was 10 years.

At the time of the offending, Gargasoulas was experiencing periods of a drug-induced psychosis. Evidence was also led that he had a form of paranoid schizophrenia that was resistant to medication and treatment. When he committed the murders, he was on bail for another set of charges and he had an extensive criminal history. The prosecution submitted that Gargasoulas should be denied the possibility of parole because his offending demonstrated an “unspeakable disregard for the sanctity of human life,” and “The court, representing the community, needs to stress that the law will operate to protect innocent members of the public going about their affairs.”

Justice Weinberg sentenced Gargasoulas to life imprisonment, but set a non-parole period of 46 years, after which Gargasoulas could apply for release. Weinberg said: “you have shown no genuine remorse, and I do not accept that you have displayed any true empathy for those whose lives you have shattered or destroyed. [...] the need to ensure that you are adequately punished for what you did, and that the community is adequately protected from you, means that any such non-parole period would have to be one of exceptional, even extraordinary, length.”

## Examples of sanctions

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

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

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

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

### Fines

#### Definition

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

#### Detail

Fines are calculated in ‘penalty units’, with one penalty unit being equal to \$184.92 (from 1 July 2022 until 30 June 2023). For example, the on-the-spot fine for a natural person (not a company) selling a tobacco product to someone under the age of 18 is currently four penalty units. Every year the value of a penalty unit is increased by legislation. Level 1 (the most serious) offences cannot be punished by a fine. Other than that, fines are the most common penalties imposed.



#### Imprisonment for fine default

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

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

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

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

## Community Corrections Orders

### Definition

Community Corrections Orders (CCOs) are flexible orders involving sentences that are served in the community but that may be combined with up to one year imprisonment. Core terms are attached to every CCO, in addition to at least one additional condition such as rehabilitation classes or counseling, unpaid community work or restricted movements.

### Detail

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

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

Other conditions are imposed on top of these. Each CCO must have at least one condition attached that relates to the risk and needs of the offender and the severity of the offence. Conditions may include undertaking medical treatment or rehabilitation programmes, completing unpaid work up to a total of 600 hours, staying away from nominated places or areas, or paying a bond that is forfeited if the offender breaches the CCO.

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

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

CCOs came into effect in 2012 to replace Combined Custody and Treatment Orders, Home Detention, Intensive Corrections Orders and Community-Based Orders, all of which no longer exist. In 2020-21 a CCO was given in 12% of cases in the County and Supreme Courts, and in 6% of cases in the Magistrates' Court.

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

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

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



## Imprisonment

### Definition

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

### Detail

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

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

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



### **R v Kevin John Carr [1995] VSC 225**

Carr was the first person in Victoria to be given an indefinite jail term. Once he had served his initial sentence he was not guaranteed release; instead, he had to apply for a review of the sentence at three-yearly intervals. He was convicted in 1995 of the rape of a 77-year-old woman at Spencer Street Station – over the previous 18 years he had received 57 other convictions, including jail terms for five separate instances of rape and sexual assault.

At a review of his incarceration in 2009 he was refused release, and the chief judge of the County Court at the time, Michael Rozenes, said: "I am satisfied to a high degree of probability that he is still a serious danger to the community."

### **REVIEW/APPLICATION QUESTIONS – Criminal consequences**

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

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## Evaluation: Criminal consequences

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’. This has historically been a particular problem with sanctions: it is assumed, for instance, that imprisonment achieves punishment and deterrence, but often no reasons are given why; and students have failed to consider reasons why it may *not* achieve those things, too.

STRENGTHS	SANCTION	WEAKNESSES
<p>Punishment: The offender suffers hardship by having to give money and receive nothing in return for it.</p> <p>Deterrence: The public can see that, if they commit the same crime, they will have to give up their money. This is general deterrence.</p>	<b>Fines</b>	<p>Protection: The offender isn’t in any way removed from society or prevented from doing the harmful behaviour – as long as they can pay the fine for it.</p> <p>Punishment: Fines fail to create hardship for many wealthy offenders or corporations who do not materially miss the money paid in the fine. Some organisations, in particular, will save more money by offending than they will spend if they get caught; the same applies to many individuals who commit minor crimes such as traveling on public transport without a valid ticket.</p>
<p>Rehabilitation: The judge is able to select conditions that are most appropriate to the offender’s circumstances and crime, with the aim of integrating them back into society successfully.</p> <p>Punishment: Conditions attached may include restrictions on movement and unpaid community work. The offender must give up some of their liberty, time and energy.</p> <p>Deterrence: A 2022 report from the Sentencing Advisory Council showed that only 1.6-1.7% of offenders serving a CCO from 2017-21 committed a serious offence while on a CCO.</p>	<b>Community Corrections Orders</b>	<p>Protection: The restrictions on personal movement are much more flexible than imprisonment, and still allow the offender to live in society. They are still able to harm people.</p> <p>Denunciation: Because the outside public does not see a visible, external change in the offender’s circumstances, they may feel that the offender’s behaviour has not been publicly criticised enough.</p> <p>Rehabilitation: A 2022 report from the Sentencing Advisory Council showed that 43.9% of people serving a CCO that <i>included</i> a custodial component committed a serious offence after being released from custody. SAC Chair Arie Freiberg speculated that their custodial experience could have had a “criminogenic effect.”</p>
<p>Protection: The community is protected from further harm because the offender is removed from society.</p> <p>Punishment: The offender suffers the hardship of being separated from friends and family and losing their liberty.</p>	<b>Imprisonment</b>	<p>Deterrence: In 2019, 73% of people entering prison in Australia had been in prison before, and 45% had been in prison in the last 12 months. Statistics from the Sentencing Council show that 52.5% of prisoners released in Victoria during 2018-19 returned to corrective services within two years, 43.6% to prison. The number of offenders given CCOs over the same period who received another CCO within two years was 26.7%, by comparison.</p> <p>Rehabilitation: The greatest risk for reoffending comes after release, when the offender faces limited employment and housing opportunities, and may be surrounded again by negative social influences. In 2019, 63% of prison entrants had an education level of Year 8 or below, and between 75-83% of prisoners were using unlawful drugs before going to prison (figures differ between women and men).</p>



## Aggravating factors

### Definition

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

### Detail

Aggravating factors may include the following:

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

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

## Mitigating factors

### Definition

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

### Detail

Mitigating factors may include the following, for example:

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

Note that mitigating factors are not always the opposite of aggravating factors. Pleading guilty is a mitigating factor, for instance, but pleading not guilty is *not* an aggravating factor. Pleading not guilty is a right of the accused.

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

### 'Good character' in child sex offence sentencing

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

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

## Guilty pleas

### Definition

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

### Detail

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

A guilty plea entered immediately before the verdict is handed down will not be treated the same as a guilty plea entered at a much earlier stage. This is because a late guilty plea saves less time, fewer resources and less stress than an early one, and it may indicate an offender pleading guilty to receive a discount and not because they had a genuine good faith desire to take responsibility and reduce the negative impact of a trial. Evidence of genuine remorse is not required to receive a sentence discount, however.

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

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

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

## Victim impact statements

### Definition

A victim impact statement is a legal submission prepared by one or more primary or secondary victims to a crime, and given to the court during sentencing. It outlines to the court how the crime has affected that victim, and may also make requests of the judge or magistrate in relation to the sentencing of the offender.

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

### Detail

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

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

The presiding officer may take it into consideration when deciding the sanction, because they may provide evidence of mitigating factors or aggravating factors. If no statement is made, the judge or magistrate will still consider the impact of the crime on the victim or victims; they will use evidence from the trial instead of a direct statement.

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

### REVIEW/APPLICATION QUESTIONS – Factors considered in sentencing

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

**Application exercise:** Using your notes and the following guide on victim impact statements, prepared by the Victorian Department of Justice, answer the questions below.

<https://www.victimsofcrime.vic.gov.au/guide-to-victim-impact-statements-0>

- a. Provide a definition of 'victim impact statement' that focuses on using words other than 'victim', 'impact' and 'statement'.

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

### Evaluation: Factors considered in sentencing

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

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

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

#### Application exercise

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

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

Podcast: Undisclosed

Episode: *State v Jamar Huggins* – Addendum 1 – Unintended Consequences

Air date: 9 February 2017

Duration: 36 minutes 31 seconds



## PROBLEMS AND REFORMS

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

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

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

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

#### Costs

##### Definition

An accused is being charged by the state, which has a government-funded budget, but as an individual they may not be able to afford to adequately defend themselves, or may be forced to plead guilty or self-represent and risk a poor defence.

##### Detail

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

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

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



Legal advice is gained through a solicitor in Victoria. A solicitor is the lawyer that meets with clients, provides legal advice, conducts research into the case, and files many of the necessary legal documents. Solicitors usually charge by the hour, split into smaller increments such as six minutes or 15 minutes. Solicitor fees vary wildly across the profession, but it is not uncommon for a junior solicitor to charge around \$300ph, or a senior one to charge \$500-\$800ph – Victoria Legal Aid pays senior counsel and solicitor instructors \$401ph for preparation and consultation from 1 January 2022, for instance. In addition to their hourly fees, solicitors will also charge reimbursement for photocopying, making telephone calls, reading letters and emails, parking, transport, and other expenses – these are called ‘disbursements’. For instance, the Law Institute of Victoria sets the baseline rate for sending an email formally acknowledging receipt of information (eg. an email informing the client that documents are attached) at \$39.50 per email (as of the 1 January 2023 Practitioner Remuneration Order).

Barristers are the lawyers engaged to present a case at trial. Senior counsel usually charge \$8,000-\$10,000 per day, and junior counsel charge around \$3,000-\$6,000 per day. The 2021 Supreme Court Scale of Costs lists a barrister’s daily court rate at \$9,500 for senior counsel and \$6,340 for junior in civil matters; in criminal matters barristers negotiate directly with the accused and their solicitor.

## The principles of justice

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

## Time

### Definition

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

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



### Detail

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

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

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

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

- The busiest court in the state is the Magistrates' Court. According to the 2019-20 Annual Report, almost 146,000 new criminal matters were commenced in 2019-20. Total listings for those criminal matters, including bail hearings, committal hearings, guilty pleas and other hearings, were 606,061. The Court finalised 82.1% of matters within six months, and finished the year with 9,299 matters that had been ongoing for more than 12 months. Because of the pandemic, at the end of 2020-21, the Court had 28,802 matters pending for over 12 months and unresolved.
- The increasing complexity of evidence, often brought about by enhanced technology being applied to evidence and investigation, creates longer trials. More evidence overall is presented, but complex evidence also takes longer to adduce: expert witnesses must usually be called, and the evidence must be explained piece-by-piece so that the judge and jury understands it.
- According to the Annual Report of the County Court, in 2019-20 a total of 4,020 criminal matters were commenced (including appeals), of which approximately 1,045 were committed to trial with a plea of not guilty. Of the 4,351 matters finalised, only 18% of matters were finalised at trial with a verdict. Because in March 2019 committal proceedings were abolished for sexual

offences involving children or complainants with a cognitive impairment, the County Court will now conduct pre-trial cross-examination of witnesses. The Annual Report states that “these reforms will increase the number of hearings in the Division and therefore impact on the Court’s judicial resources and time.”

- In the 2020-21 Annual Report of the Supreme Court, the Court reported that it had 38.3% of matters pending longer than 12 months, and 15.4% of matters pending longer than 24 months. These numbers are comparable with 2019-20 figures.
- In the 2009-10 financial year Victoria had the largest backlog of criminal sentencing appeals of any state or territory in Australia – the Supreme Court peaked at over 650 appeals waiting to be heard, but in the 2009-10 year the Court had only heard 506 matters. To try to deal with this, in February 2011 the Court of Appeal implemented appeals reforms including reducing the number of sitting justices to two per case from three, and hiring another Judge of Appeal, taking the number from eleven to twelve. The Court also began managing appeals more closely, resulting in 80 cases being dropped for failure to comply with directions, and the Court permitted judges to begin deciding on the papers (ie without oral arguments) if leave to appeal should be granted. Pending criminal appeals decreased to 170 in the Court of Appeal in 2016-17, the median time to resolve appeals against conviction halved from 19.4 months in 2010-11 to 9.5 months in 2016-17, and the median time to resolve appeals against sentence more than halved from 12.5 months in 2010-11 to 5.5 months in 2016-17 (according to the first and second reports into sentencing appeals in Victoria, from the Sentencing Advisory Council).

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

### The principles of justice

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

### Cultural differences

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

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

#### **Definition**

The criminal justice system tries in a number of ways to accommodate differences in language, ethnicity, religion, socio-economic status and cultural norms. Despite this, it is still a system founded primarily on a culture of westernised education extending to a tertiary level, patriarchal structures, Judeo-Christian religious beliefs, and middle-class incomes. It is less compatible with people who do not share the same cultural influences.

#### **Detail**

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

- In 2008, researchers Kathy Mack and Sharyn Roach published the results of their eight-year study into Australian judges, conducted through the Magistrates Research Project and the Judicial Research Project run by Flinders University. The researchers paraphrased their findings: “To sum up, larger proportions of judges, compared with Australians generally, are male, older, have grown up in a large city, identify as Australian, have no religious affiliation, attended a private or Catholic school and are married/partnered.”
- The Australian Human Rights Commission published a fact sheet on ‘Human rights and Aboriginal and Torres Strait Islander peoples’ in 2009, in which it summarised: “On a daily basis, Indigenous peoples live with the consequences of Australia’s failure to protect their basic human rights, and continue to experience racial discrimination in many spheres of life. There are clear differences between the experiences of Indigenous and non-Indigenous people in Australia across all indicators of quality of life. Indigenous people generally experience lower standards of health, education,

employment and housing. They are over-represented in the criminal justice system and the care and protection systems nationally compared to non-Indigenous people.” The statement remains true.

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

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



### The principles of justice

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

### Recent reforms

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

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

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

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



## Evaluation

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

## Criminal justice system

### Abolition of committal hearings in some matters

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

#### Definition

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

#### Detail

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

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

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

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

## Evaluation

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

### Support dogs for victims and witnesses

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

#### Definition

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

#### Detail

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

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

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

There were two support dogs working with the OPP as of the end of 2021-22. They had been trained over 18-24 months to recognise signs of distress and anxiety in humans, and to offer comfort by doing things such as lying on a witness’ feet, licking their hands or resting their heads in the witness’ lap. The original support dog Coop had been known to lick the tears off a victim’s face. In 2021-22 the dogs worked on more than 100 hearings in remote rooms at the OPP and Child Witness Services. The OPP has made over 350 requests to magistrates and judges for a dog to accompany a witness when giving evidence, and there have been only five refusals.

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

Lucy and Kiki, the first two full-time support dogs employed, were trained in the Southern Queensland Correctional Centre by an inmate serving time for murder, as part of the Pups in Prisons programme. The inmate trainer said, “I know I have hurt a lot of people and by now helping people it makes me hate myself a little less.”



## Evaluation

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

## Recommended reforms

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

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



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

## Criminal and civil justice systems

### Juror eligibility

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

#### **Definition**

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

### Detail

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

### Evaluation

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

## Criminal justice system

### Intermediaries programme

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

### Definition

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

### Detail

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

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



In 2016 the Victorian Law Reform Commission ('VLRC') tabled its report *The Role of Victims of Crime in the Criminal Trial Process*, in which it recommended 51 actions to minimise trauma to victims caused by their participation in the criminal justice system. Recommendation 30 was the establishment of an intermediary programme, based on the Witness Intermediary Scheme in England and Wales. In August 2017 the Royal Commission into Institutional Responses to Child Sexual Abuse recommended a similar scheme. In 2020, in its 'Committals' report, the VLRC further recommended expanding the scheme to cover all witnesses with communication difficulties.

On 30 June 2020 the Pilot Programme was extended, but was not made permanent. As of the end of 2022, no change had been made to this and the Programme is not guaranteed into the future. The expansion recommendation from the 'Committals' report has also not been implemented.

## Evaluation

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

### Removal of committal hearings

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

#### Definition

In October 2018 the Victorian Office of Public Prosecutions published a policy paper, proposing that committal hearings be replaced with a more complete hand-up brief being provided to the accused, and more active case management by the OPP to determine the charges that should proceed to trial or summary hearing (if the offence can be heard summarily). In 2020 the VLRC essentially agreed with this proposal, and recommended that the test for committals be abolished, and that the committal hearings should be replaced by an “issues” hearing in the Magistrates’ Court (except for matters within the exclusive jurisdiction of the Supreme Court, which should be filed directly with the Supreme Court).

In 2021 the Victorian Government declined to fully implement the proposal, but did not publish a statement saying whether they intended to implement the VLRC report in part.

#### Detail

##### Background data

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

##### OPP proposal

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



##### VLRC inquiry

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

The Commission reported back in 2020, with the recommendation that an issues hearing replace the current committal hearing. The magistrate would not apply a test to the evidence, but would instead exercise case management powers and write up a statement of issues to inform the higher courts of any matters that arose. As in the OPP’s proposal, more responsibility would rest with the prosecution to disclose relevant evidence to the accused in a timely manner, and choose to discontinue cases with weak evidence.

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

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

### Evaluation

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

### REVIEW/APPLICATION QUESTIONS – Problems and reforms

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

## THE PRINCIPLES OF JUSTICE

Aspects of the principles of justice are protected in the Australian Constitution, the common law developed by the courts over time, and statutory rules such as the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The Charter focuses primarily on criminal disputes, but it still contains many provisions that apply to civil law and the resolution of civil disputes. Section 24, for instance, specifies that “[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public” except in certain circumstances. There are, however, more sections that apply only to criminal law and criminal proceedings.

### Fairness

#### Definition

A fair hearing requires a level of impartiality and a lack of bias. All parties who come before the courts or other dispute resolution bodies ought to be treated equally, each party ought to have a real opportunity to present its side of the dispute, and the outcome ought to be reached according to consistent and transparent rules and procedures.

These ideas are gathered together in what is known as the principle of ‘natural justice’.

**Exam Tip:** Remember never to define a term by using the same word. You must have synonyms and connected phrases when talking about the principles of justice.

#### Detail

The Victorian Charter protects the rights of people in the state to fairness in the legal system in a range of ways. For example, s24 of the Charter protects the rights of all parties “to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;” and states that “[a]ll judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires.”

The legal system provides a number of mechanisms to help ensure that all parties receive a fair hearing. Some examples of ways in which we attempt to achieve fairness include:

- There is no civil ‘presumption of innocence’ *per se*, but disputes always begin with the complainant having to demonstrate liability. The plaintiff in a civil case still bears the burden of proof, and has the responsibility to bring evidence to prove their case. The party that makes claims about another person has the responsibility to explain and prove those claims before the defendant has to defend themselves, which ensures the defendant knows what they are supposed to defend.
- A person who believes an error was made in their hearing has the right to appeal – or, at the very least, to apply for leave to appeal (for instance, to the High Court of Australia or the Victorian Court of Appeal). This helps to check that mistakes are not made and that a fair outcome has been reached.

### Equality

#### Definition

‘Equality’ is the idea that every person or organisation that has a dispute to be resolved is equal in the eyes of the law and in the legal system as a whole. No-one should be privileged and benefited, nor discriminated against or at a disadvantage, for being who they are.

For example, former High Court justice Lionel Murphy said in the *McInnis* case in 1992: “Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice.”

‘Equality’ can be interpreted narrowly as formal or procedural equality, or broadly, as substantive or ‘opportunity-driven’ equality. Procedural equality focuses on all people being treated the same, regardless of whether that treatment produces equal outcomes; equality of opportunity focuses on treatment being differentiated according to the needs of the person, in the hopes of achieving more equal outcomes.

#### Detail

The Victorian Charter protects the rights of people in the state to equality of opportunity in the legal system in a range of ways. For example, s8 of the Charter provides that “[e]very person has the right to recognition as a person before the law,” and that “[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.” Equality will therefore be dependent on how effective these guarantees and protections are in practice.

Importantly, in terms of meaningful equality, it also makes it clear that “[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.”

Equality and inequality in the legal system may be affected by a range of factors including:

- Sex and sexual orientation. Whether someone is a woman or a man, homosexual, heterosexual or bisexual, can affect their treatment, their outcome, and their ability to achieve justice.
- Cultural and community background.
- Physical and cognitive/intellectual abilities and disabilities.

Some examples of ways in which we attempt to ensure equality include:

- Various forms of disadvantage are recognised, and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality of opportunity. For instance, Victoria Legal Aid provides a duty lawyer service within the Victorian Civil and Administrative Tribunal to assist with a range of civil claims such as tenants with residential tenancy disputes, or claimants with anti-discrimination matters.
- Judicial proceedings are governed by strict rules of procedure that are consistently applied to both parties equally. For instance, evidence can be tested through cross-examination of witnesses, ensuring that all evidence is reliable. Each party is given an equal opportunity to test the evidence tendered through the witnesses called by the other side.

## Access

### Definition

‘Access’ is the idea that all people must be able to effectively utilise the legal system, and the places and systems for the resolution of disputes and the administration of justice. Access is therefore about more than just not being banned or prohibited from something: it is about the ability, in real life, of different people to use something meaningfully, and to use it in a way that is similar to how other people are able to.

### Detail

The Victorian Charter protects the rights of people in the state to meaningful access to the civil justice system primarily through ss8 and 24, because of how important access is to the achievement of fairness and equality.

### ***Ragg v Magistrates’ Court of Victoria and Corcoris [2008] VSC 1 (24 January 2008)***

Justice Bell of the Supreme Court interpreted s24 of the Victorian Charter in light of article 14 of the International Covenant on Civil and Political Rights, and determined that the principle of ‘equality of arms’ applied, and required that both parties “be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial,” even if that required differentiated treatment.

The principle of ‘equality of arms’ means that courts must be aware of the different barriers standing in the way of parties with different circumstances, and take steps to help both present their cases on a level footing. This phrase acknowledges the nature of a trial as adversarial, using weaponry as a metaphor for trial ability, and recognises that parties do not go into a trial equally ‘armed’.

Proper and meaningful access to the legal system may be affected by a range of factors including:

- Knowledge, experience and training. Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it, will affect their ability to meaningfully access justice.
- Money. Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can’t afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.

Some ways in which we attempt to ensure access to justice include:

- The court hierarchy allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction. Parties therefore have access to experts in the area under dispute, and can more quickly and cheaply go to lower

courts for less serious matters. A court hierarchy also allows for administrative convenience, as parties know which court deals with which type of dispute and do not have to complete forms and pay fees that are not relevant to them.

- The Family Court provides civil interpreter services for deaf, hearing-impaired and speech-impaired clients. The Court can make arrangements for AUSLAN interpreters, and for Communication Access Real-time Translation providers to attend hearings.
- Interpreters are not available for free in civil matters in the courts, but they are in the Victorian Civil and Administrative Tribunal.

### REVIEW/APPLICATION QUESTIONS – The principles of justice

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

## KEY CONCEPTS IN THE VICTORIAN CIVIL JUSTICE SYSTEM

The system of trial used in civil courts is also the adversary system, although there are a wider range of cooperative methods available outside the courtroom for civil disputes. The adversary system is the system where two opposing parties put conflicting arguments before an independent judicial member, at the end of which the party with the best case wins and the other loses. Under this system the parties to the case are adversaries, or opponents, who each try to win the case; they have a lot of control over the way in which they conduct their case, although they need to follow rules of evidence and procedure that are applied equally to both of them; a judge or magistrate, who is an impartial adjudicator, oversees the case and ensures the parties are adhering to the rules of the court; and the ultimate aim of the adversary system is to find a winner and a loser.

The judicial officer in a civil case has significant power in pre-trial proceedings to scrutinise the parties' preparation of their cases and to make directions about the manner in which they present their cases. In civil disputes, the government is treated as a legal individual, and is therefore on the same footing as any other party.

The key concepts that follow are specific to trials and hearings conducted in courts; they are not applied in the same way, or at all, outside courts or outside courtroom trials and hearings.

### The burden of proof

#### Definition

The burden of proof is the responsibility borne by the party bringing the case to show sufficient evidence to prove the defendant liable for the civil wrong. In a civil hearing or trial, the burden will be on the plaintiff or complainant to bring evidence to prove the claims it has made against the defendant.

This burden must be satisfied before the defendant/respondent has a responsibility to defend herself or himself.

#### Detail

The defendant should not bear any part of the burden – in other words, they should not need to prove that they are not liable, and they should not need to prove an alternative version of events if they disagree with the version put forward by the plaintiff.

If the evidence is evenly balanced, and doesn't persuasively point to either one party or the other, the effect of the legal burden being on the plaintiff means that the defendant should win by default.

In practice, the burden of proof is very occasionally reversed. For instance:

- The *Fair Work Act 2009* reverses the burden of proof in relation to evidence for a civil unfair dismissal claim. Adverse action (such as firing) taken against an employee who exercises a workplace right (such as joining a union) will be presumed without evidence to be for an unfair reason *unless* the defendant employer proves otherwise. Once the former employee has established that an adverse action has occurred, the burden of proof shifts to the defendant employer to prove that they did *not* act for an unfair reason. The reason for creating this presumption is to address the imbalance in knowledge that an employee faces in proving a claim for unfair dismissal against their employer.

But a reversal of the burden of proof is considered a denial of fairness and natural justice.

## The standard of proof

### Definition

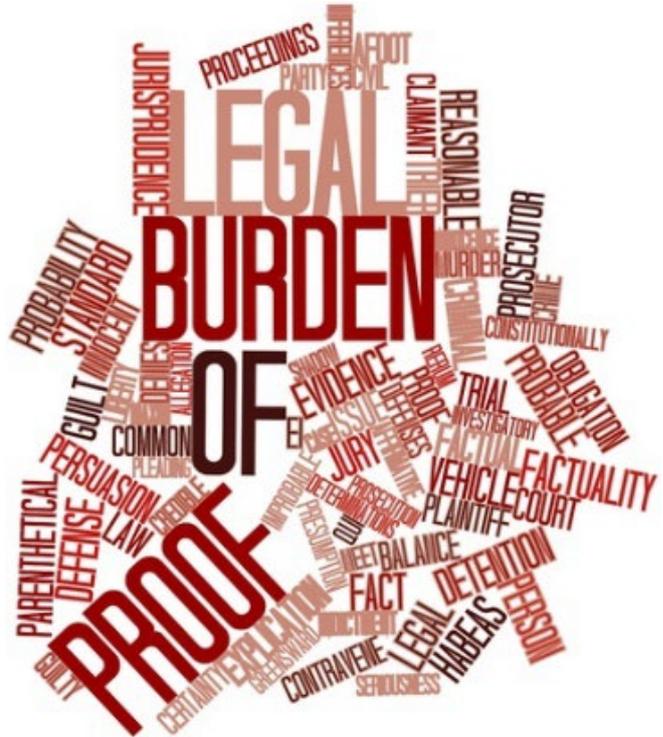
The standard of proof is the quality or weight of evidence that must be led by the party with the burden of proof in order for them to discharge that burden. In a civil hearing or trial, the standard of proof is the quality of evidence required for the plaintiff or complainant to demonstrate that the defendant should be held liable.

In a civil hearing or trial, s140 of the *Evidence Act 2008* (Vic) gives the precise standard of proof as ‘on the balance of probabilities’, meaning the court must be satisfied that it is more probable than not that the plaintiff’s version of the case is the correct one.

### Detail

The civil standard is lower than the criminal standard partly because the legal consequences of being held liable for a civil wrong are usually lower than for being found guilty of a crime. The most common civil remedy, for instance, is an order for the defendant to pay compensatory damages to the plaintiff; there is no option for imprisonment.

There is more disagreement in law over what ‘on the balance of probabilities’ means than over what ‘beyond reasonable doubt’ means. Current Australian interpretation by courts defines ‘on the balance of probabilities’ as the court (magistrate, judge or each juror) feeling *personally satisfied* that what the plaintiff says is true. According to a number of cases, including the Victorian case of *NOM v DPP* (2012) 38 VR 618, the adjudicator must reach a state of “personal satisfaction” that the plaintiff’s case is more likely than *not* likely – it is not enough if the plaintiff’s case is more likely than the *defendant’s* version, because that is not the test and the defendant does not have an onus of proof and does not need to have a ‘version’. They can simply discredit the plaintiff’s version.



## Representative proceedings

### Definition

A representative proceeding is a civil claim in which the party bringing the action belongs to a larger group of seven or more people, and litigates on behalf of the group. Group members are not listed by name in the pleadings, and they play a largely passive role.

### Detail

Because the named plaintiff represents a ‘class’ of people who all share a common characteristic or interest, representative proceedings are also known as class actions or group proceedings. The person or people representing the rest of the group must have the same interests as the group, but the exact harm and damages allocated to each group member do not need to be the same. Group members do not instruct lawyers, participate in pre-trial procedures, or pay legal fees.

The Victorian Law Reform Commission in 2018 in its class action inquiry found that large class actions cost on average approximately \$10m to bring, with the risk of an adverse costs award of around the same amount.

Any remedy that is won, such as damages or a financial settlement, will be divided between all members of the group according to their level or category of harm. The named plaintiff does not receive a larger share by virtue of bringing the action.

The Australian regime uses an ‘opt out’ model for group members: this means that all potential claimants who fall within the definition of the class become members of the group when the claim is filed, regardless of whether they are aware of the case and consent to be a class member. They must register their name by the deadline to receive a portion of the compensation, but unless they opt out they will not be able to bring their own claim in the future.

Representative proceedings can be heard by the Federal Court and the state Supreme Courts.

## Litigation funding

To ease the burden of costs on the named plaintiff, some actions may be funded by a 'litigation funder': this is a company that enters into a contract to pay agreed costs in return for a set percentage of any final damages or settlement. The named plaintiff must pay costs that the litigation funder does not agree to cover, however.

The VLRC found in 2018 that litigation funders take on average 20 to 45% of the final damages or settlement amount, although in some insolvency matters it has been as high as 75%. The funding fee is usually the largest single cost. In 2021, a class action was launched against class action lawyer Mark Elliott and Australian Funding Partners, the litigation funding company he ran, after Elliott and his 'shell' company attempted to claim \$19.3m in fees and commission from a \$64 million settlement in the Banksia Securities case.

Between 2000 and 2017, litigation funders were involved in only ten actions in Victoria – and four of these were shareholder actions that were transferred to the Federal Court.

The *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) allows the Court to make 'group costs orders', effectively allowing the law firm representing the class action to act as a litigation funder, and take a percentage of the final damages or settlement instead of simply charging costs. This change is largely in line with recommendations made by the VLRC in their March 2018 *Justice Litigation Funding and Group Proceedings Report*. The first group costs award was allowed in March 2022 with a 27.5% fee permitted.

The remainder of representative proceedings are mostly funded through 'no win no fee' arrangements with the law firm representing the group; through pro bono work from lawyers; and/or through legal organisations such as Victoria Legal Aid. It is rare for a named plaintiff to bear the entire burden.

## Examples

From 2000-21, 421 representative proceedings had been filed in Australia, with approximately two-thirds of them settling before trial. Class actions have included:

- From 2013-14 the Victorian Supreme Court heard a class action on behalf of around 10,500 people seeking damages for loss in the Kilmore East-Kinglake bushfire.
- Personal injury claims arising from defective products. Types of products include pacemaker batteries, artificial knees, arthritis medications and tobacco.
- Improper actions under the federal *Migration Act 1958* (Cth) including determinations of refugee status, the refusal of visas and illegal detention. In October 2001, however, the Commonwealth amended the Act to prohibit any class actions being taken in relation to visas, deportations and other removals of non-citizens.

## Representative proceeding against Uber

Law firm Maurice Blackburn has launched a representative proceeding against ride-share company Uber on behalf of licenced taxis, hire-cars, limousines and charter vehicles. Uber is being sued for lost income and loss of licence values as a result of it operating illegally in Victoria, New South Wales, Queensland and Western Australia for a period of time before the parliament of each state legislated to allow it.

Commercial Passenger Vehicle Association President Rod Barton said Uber knew it was operating illegally without requiring drivers to have a taxi or hire car licence, but "They chose not to do so and had a huge commercial advantage over the operators here and that advantage has caused us enormous financial harm." Uber spent \$1.7m to cover fines for its unlicensed drivers in Queensland in one year alone, to put pressure on the Queensland Government to give in and change laws to allow it to operate the way it wanted. After Uber negotiated a deal with the Victorian Government, the cost of licences fell from a high of \$500,000 in 2010 to \$22,000 a year, and the number of registered taxis on the road doubled, from 5600 to 10,500. In New York a similar situation occurred, and the value of licences has fallen from over \$1m per licence to \$130,000 – six drivers died by suicide in the seven months after this happened. The Queensland Taxi Licence Owners Association reports of four similar cases, and the Victorian Hire Car and Taxi Families group has reported seven.

Maurice Blackburn filed the writ in the Supreme Court on 3 May 2019 on behalf of around 6,000 registered group members. The matter is being funded by one of the world's largest litigation funders, Harbour, and the law firm is operating as 'no win no fee'.

In July 2020 Uber lost an application to block the class action, and in January 2021 they lost an application to shrink the number of taxi drivers eligible to be counted within the class. The matter was delayed due to the 2020 Covid-19 pandemic, but in April 2022 a preliminary ruling was handed down that found there were reasonable grounds to suggest that Uber was operating illegally from 2014.

**Exam tip:** It is important to use case studies and examples selectively. You should not spend an entire paragraph explaining every detail of a case when the point you want to illustrate could be done in one sentence. Students make this mistake repeatedly in examinations, and waste time doing it. The only part of the case or example that needs to be used is the part that illustrates the strength, weakness or point being made: once you understand the case, work out the important part for each point you want to make.

## REVIEW/APPLICATION QUESTIONS – Key concepts in the justice system

1. Give a definition of the term 'burden of proof'.
2. Who has the burden of proof in civil trials?
3. Give a definition of the term 'standard of proof'.
4. What is the standard of proof in civil trials?
5. Outline three differences between a representative proceeding and a civil dispute brought by multiple plaintiffs against the one defendant.
6. What are the conditions that must be fulfilled in order for a group of people to qualify as a 'class'?
7. Which courts have the power to hear representative proceedings?
8. Identify two terms commonly used instead of the term 'representative proceeding'.
9. To what extent are group members involved in the proceedings?

### Extension material:

## Rules of evidence and procedure

Rules of evidence and procedure are not required content in the Study Design, but they provide an important framework for the resolution of civil disputes.

### Definition

Rules of evidence determine what evidence is admissible and allowed to be used in court as proof, and what evidence is inadmissible and not allowed. Rules of procedure are the rules dictating how a trial or hearing is run, and what happens in what order.

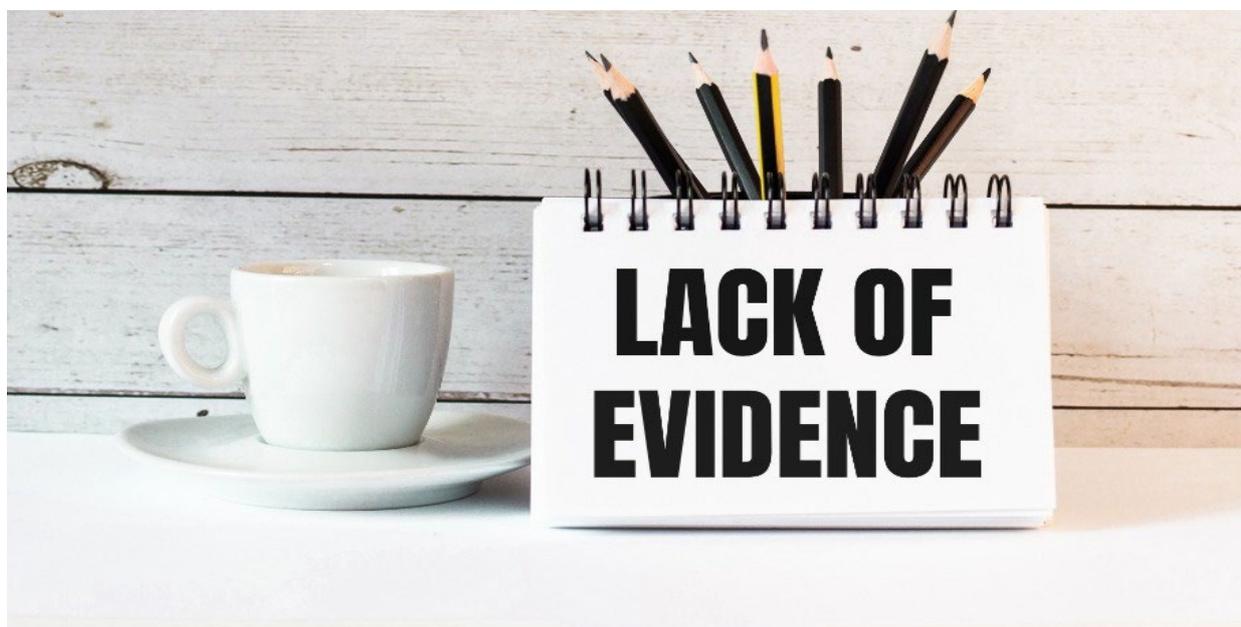
### Detail

Evidence must be relevant, reliable and legally-obtained, or else there is a risk that the trial will not be fair. It must also have more probative value than prejudicial value: in other words, the evidence must prove more about the case than it prejudices the court against the defendant. Procedure must be organised to allow both parties' case to come out effectively, and to ensure that neither party can dominate argument to the exclusion of the other.

Rules of evidence and procedure are complex and applied strictly to ensure that parties are on equal footing and that neither party can gain an unfair advantage.

For example:

- Hearsay evidence is evidence that a witness is not giving first-hand: in other words, the evidence relates to something that the witness does not have personal, first-hand knowledge of. Because of this, hearsay evidence will generally be inadmissible.
- Witnesses are only allowed to respond to the questions asked of them by either party or the judge – court procedure does not permit them to make uninterrupted narrative statements like stories. This allows the parties to control the evidence they want to come before the court, and the order in which they want those pieces of evidence to come out. Each witness led by one party will then be opened up to cross-examination by the other party.



## Evaluation: Key concepts in the civil justice system

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>The plaintiff will be discouraged from bringing unsubstantiated lawsuits because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a trial is part of <b>fairness</b>.</p> <p>The defendant will be thoroughly informed of all the evidence against them before they will be asked to defend themselves. This gives them <b>access</b> to justice, because it’s impossible to effectively defend oneself against claims without knowing the full details of them.</p>	The burden of proof	<p>The party that has already been injured bears the burden of starting the trial and leading all of the evidence first. If they cannot do this adequately, the case is dismissed. The party that might be in the wrong, the defendant, is protected, which is <b>unfair</b>.</p> <p>In terms of evidence and legal arguments, <b>equality</b> is not achieved between the parties because the benefit is given to the defendant. The defending party can discover and use cross-examination to challenge all evidence against them before they decide the details of their defence.</p>
<p>The defendant cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the <b>fairness</b> of the trial, because it would be <b>unfair</b> to sue someone if there was little to no evidence justifying it and they were sure to be found not liable at the end.</p> <p>Civil cases have less serious consequences attached to them, are run by individuals rather than the state, and they are also subject to a lower standard of proof. This is only <b>fair</b>, because a person’s freedom isn’t on the line and complainant individuals have fewer resources than the OPP. Civil cases have a standard of proof that is appropriate to their consequences.</p>	The standard of proof	<p>Juries may interpret the standard of proof differently in each case. This means there is not truly one consistent standard applied to all trials and it is difficult to argue that the standard is strict and objective, and that every defendant is <b>equal</b> in the trial process. It is very easy, for instance, for a juror to ask which party’s version seems more probable, giving the defendant a burden to prove their case – the standard should only be whether the <i>plaintiff’s</i> case is more probable than not.</p> <p>In the case of <i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336, Justice Dixon established that the meaning of ‘on the balance of probabilities’ changes depending on nature of the facts and the consequences of a finding of liability. This means that it is harder for a plaintiff to prove that a defendant is liable if the claims are very serious.</p>
<p>Since the inception of the modern scheme for representative proceedings, judges on the whole have reported that class actions demonstrate positive outcomes.</p> <p>The introduction of the modern class action regime seems to have permitted a range of claims to be brought that would otherwise not have been pursued. For instance, cases where each individual claim was not financially valuable enough to warrant a lawsuit; or claims where group members had no financial ability to sue individually, such as the 2017 class action launched against the federal government in relation to the treatment of asylum seekers in detention centres. This has given better <b>access</b> to parties who would otherwise have avoided formal legal proceedings.</p>	Representative proceedings	<p><b>Equality</b> between the parties may not be achieved by a representative proceeding. Most often a defendant is sued by a group representative, and may feel overwhelmed by the potential damages that could attach to a single unfavourable decision – simply because of the number of members in the group.</p> <p>Representative proceedings are not permitted to settle at a pre-trial conference or mediation without the consent of the court and without group members being notified. This can slow down negotiated settlements, and reduce <b>access</b>.</p> <p>The named plaintiff is responsible for all costs of the action, including any adverse costs award. This may diminish their <b>access</b>, because they have to be willing and able to take this risk – costs will only be paid if a litigation funder comes on board, or if costs can be taken ‘no win no fee’ out of a final successful remedy or settlement.</p>
<p>The rules apply <b>equally</b> to both parties so one party is not advantaged at the expense of the other.</p> <p>The strict rules for the admissibility and inadmissibility of evidence ensure a <b>fair</b> hearing because all evidence must be relevant, reliable and legally-obtained. Greater <b>equality</b> is achieved in the courtroom because evidence must have more probative than prejudicial value, so it is less likely to trigger prejudices against the defendant.</p>	Rules of evidence and procedure	<p>Witnesses are only allowed to respond to the questions asked and cannot elaborate – this may result in some important evidence not being brought before the court, and reduce the <b>fairness</b> of the hearing.</p> <p>Complex rules can be manipulated by experienced parties, and are confusing for inexperienced parties and the jury. Parties do not have <b>equal access</b> to justice when one understands the rules and the other does not – this is particularly true when an individual is self-represented, or is suing the government or a large corporation.</p>

**Application exercise**

The standard of proof in a civil matter works effectively because the way in which Australian courts interpret it is more fair than other interpretations that are based on statistical likelihood. Instead of thinking of ‘the balance of probabilities’ as something like being 51% sure, Australian courts ask each magistrate, judge or juror to ask themselves whether they feel “personally satisfied” that the plaintiff’s version is more probable than not. This was affirmed in the 2012 Victorian case of *NOM v DPP*. This also allows courts to decide on a case-by-case basis what is required to make them ‘satisfied’, which is flexible according to the circumstances. A downside to this is that flexibility can produce inconsistency and therefore procedural inequality, because a slightly different test might be applied in cases where one adjudicator was harder to ‘personally satisfy’ than another. It is important that appeals on liability be allowed, therefore, to maintain the fairness of the verdict.

- a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key concepts in the section.

## CIVIL PRE-TRIAL

### Factors to consider when initiating a civil claim

Civil law actions are taken by one individual against another individual. Therefore, once someone believes their rights have been infringed or they have unlawfully been caused harm, they need to choose whether or not to assert their legal rights by seeking justice through the legal system. When making this choice, there will be a range of things the potential plaintiff will need to take into account.

**Exam tip:** Call a potential plaintiff a ‘complainant’ until the civil action has been commenced in a court with the filing of a writ.

### Negotiation options

No particular negotiation options are required in this Key Knowledge point of the Study Design. A selection of options has therefore been provided as a sample.

#### Definition

‘Negotiation options’ are ways in which the parties can work collaboratively to resolve the dispute, without a third party actively making a resolution decision for them.

### Letters of demand

#### Definition

A letter of demand is sent by a party who believes they have been wronged to the person or organisation they believe has wronged them. It is sent prior to a claim being formally filed in a court or tribunal; it informs the potential defendant of the legal complaint and the basis for that complaint, and it gives the recipient a period of time in which to respond before legal action may be taken.

#### Detail

A letter of demand has various purposes, including:

- Informing the recipient that the complainant has a complaint against them.
- Outlining the compensation that the complainant seeks.
- Warning the recipient that the complainant may commence legal proceedings if their complaint is not resolved.

On receiving a letter of demand, an individual or corporation has some options: they may seek legal advice of their own, to determine whether they have engaged in conduct that may raise legal liability; they may choose to ignore the letter of demand, and wait to see if the complainant follows through on their threats of legal action; or they may acknowledge their wrongdoing and negotiate terms with the complainant to settle the dispute. If the complainant does succeed in a legal claim, the court would consider whether the defendant had made reasonable attempts to negotiate a resolution when deciding an appropriate remedy, and whether the requests made by the complainant in the letter of demand were reasonable.

### Mediation

#### Definition

The parties may take part in mediation: they may meet with an independent third party who acts as a mediator, assisting them to discuss the issues in dispute and identify a way to resolve the claim. With the assistance of the mediator, the parties may reach agreement of their own accord and avoid the need for a trial or hearing.

## Detail

The mediator may be legally qualified, or have expertise in the process of mediation itself. They may be engaged privately by the parties, or may be accessed through a formal dispute resolution body such as a court or tribunal. Mediation conducted prior to a hearing or trial through VCAT or one of the courts is legally binding and enforceable because if an agreement is reached it will be ratified in a deed of settlement and consent order. Otherwise, it will be up to the parties to draw up a private contract if the complainant drops the action – although this is rarely done.

If the mediation is unsuccessful, or only partly successful, the matter may proceed to a trial or hearing for full resolution. Mediation tends to have a 30-80% success rate, depending on the venue and type of dispute. According to the 2020-21 Supreme Court Annual Report, 748 of the 4,102 cases initiated were referred to judicial mediation, but only 446 mediations were completed. 53% of mediated matters settled on the day of the mediation. In VCAT, mediations were conducted in person in 674 disputes in 2021-22, and via telephone or Zoom in 1,234 matters, after remote mediation was introduced in March 2020. This is compared with 362 total mediations, all in person, in 2018-19. The resolution rate in VCAT mediations was 63% in 2018-19 and 54% in 2021-22.



### ***Al Azhari v 27 Scott Street Pty Ltd & ors [2017] VSC 600***

On 24 January 2017 the parties and their legal representatives attended a court-ordered mediation and reached nominal agreement in relation to the dispute. The lawyers for 27 Scott Street Pty Ltd drew up a handwritten document at the end of the mediation conference; the mediator gave this to lawyers for Al Azhari, who added some additional wording, and lawyers for both parties signed it. This ‘mediation terms’ document laid out a number of matters on which the parties had agreed, and agreed that a further contract would be drawn up later to finalise the details. It said: “These terms of settlement are in summary form of terms to be more fully engrossed.”

The lawyers for 27 Scott Street Pty Ltd intended to be bound by the mediated agreement and tried to hold Al Azhari to the agreed terms; Al Azhari argued that the agreement was to draw up a detailed contract later, and to only be legally bound by the details in *that* contract. No later contract was drawn up.

27 Scott Street Pty Ltd argued that the parties intended to be bound by what they had agreed, and the later contract would merely clarify superficial details. They relied as evidence on an email sent by the plaintiffs after the mediation that read: “A mediation was held in the matter on 24 January 2017 in which the matter was settled on the basis of a heads of agreement, to be formalised in a deed of settlement which is currently being finalised. Accordingly we do not expect that a directions hearing will be required on 16 February 2017.”

The Court held that the parties had *not* both “reached finality” or were “content to be bound immediately and exclusively by the terms agreed at mediation.” The Court found there were “simply too many matter[s] of importance on which the parties had not reached a consensus for it to be otherwise.” The mediation agreement was therefore not binding or enforceable.

## Conciliation

### **Definition**

The parties may take part in conciliation: they may talk with an independent third party who acts as a conciliator, assisting them to discuss the issues in dispute, and actively advising on ways to resolve it. With the assistance of the conciliator, the parties may reach agreement of their own accord and avoid the need for a trial or hearing.

### **Detail**

The conciliator may be legally qualified, or have other expertise in the subject matter of the dispute. They may be engaged privately by the parties, or may be accessed through a formal dispute resolution body such as a court or tribunal. Conciliation conducted prior to a hearing or trial through VCAT or one of the courts is legally binding and enforceable, because if an agreement is reached it will be ratified in a deed of settlement or consent order. Otherwise, it will be up to the parties to draw up a private contract if the complainant drops the action – although this is rarely done.

If the conciliation is unsuccessful, or only partly successful, the matter may proceed to a trial or hearing for full resolution.

Fewer courts and tribunal lists use conciliation conferences than mediation conferences, so private conciliation or conciliation through an organisation outside the formal legal system are more common. Some negotiation methods use a procedure that is very similar to conciliation, even though the body does not itself call the method 'conciliation'. The compulsory conferences run by VCAT are examples of this.



## Early neutral evaluation

### **Definition**

Early neutral evaluation is a process used by some courts to encourage negotiation and settlement: the parties present arguments and evidence in support of their case to a dispute resolution practitioner, and the practitioner gives a non-binding opinion on the likely outcome of the case. This helps each party determine its likely chances of success at a full hearing, and might therefore encourage negotiation.

### **Detail**

In the Magistrates' Court, early neutral evaluation is offered by a magistrate, giving the parties access to expert evaluation of their case before a contested hearing. If the parties decide to proceed with a contested hearing, a different magistrate will be appointed to oversee the hearing.

The outcome of an evaluation is non-binding, which means that either party can pursue legal proceedings afterwards without consequence.

## Costs

### **Definition**

A key consideration for any potential plaintiff is whether they can afford to pursue the issue through to conclusion, because they may be forced to either abandon the claim or settle for an unfair amount if they run out of funds to service the dispute.

### **Detail**

The federal government's Attorney-General's Department estimated as far back as 2007-08 that the legal fees and disbursements for an applicant to the Federal Court would average \$111,130 – and the Federal Court is one of the country's most efficient courts. In the South Australian Supreme Court a former chief justice estimated around \$150,000 per side for an average two-day commercial case. But, unfortunately, there is a lack of gathered data on actual costs involved with conducting lawsuits.

Even if a plaintiff enters into a 'no win no fee' arrangement with a law firm, they will still need to service all costs (including personal costs such as time off work and transport) not covered by the fee arrangement, and then the fees deducted from a final remedy or settlement may leave the plaintiff with less than they need for compensation.

**Exam tip:** Use the word 'disbursements' when you are talking about the expenses a party incurs as a result of pursuing a case, in addition to paying for their lawyer. Disbursements are composed of charges such as court costs, and are charged to the client by the solicitor *on top* of the fees charges for legal representation.

Since 1 July 2015, though, the *Legal Profession Uniform Law Application Act 2014* has required that legal practitioners disclose an estimate of total legal costs to clients before or at the time they are retained to provide legal advice, if the amount of legal costs is likely to exceed \$750. If there is a significant change to this estimate, the client must be advised again in writing.

### Cost of representation

Aside from certain categories of civil dispute such as family law matters, Legal Aid is not focused on civil representation. The costs of representation, for both solicitor advice and barrister advocacy, must therefore be borne by the parties personally.

It is not uncommon for a junior solicitor to charge around \$300ph, or a senior one to charge \$500-800ph. The Supreme Court Scale of Costs puts a solicitor's hourly rate at \$425.00 as of the 2021-22 financial year for instructing at court. In addition to their hourly fees, solicitors will also charge reimbursement for photocopying, making telephone calls, reading letters and emails, parking, transport, and other expenses. The Law Institute of Victoria sets the baseline rate for sending an email formally acknowledging receipt of information, for instance, or an email informing the client that documents are attached, at \$37.30 per email (as of the 1 January 2022 Practitioner Remuneration Order).



Barristers are the lawyers engaged to present a case at trial. Senior counsel usually charge \$8,000-\$10,000 per day (rates vary considerably depending on the status and reputation of the advocate and may sit outside this range), and junior counsel charge around \$3,000-6,000 per day. The 2021 Supreme Court Scale of Costs lists a barrister's daily court rate at \$9,500 for senior counsel and \$6,340 for junior.

### Expert evidence

A plaintiff may consider calling evidence from an expert to support their case; the expert may be a forensic accountant or a doctor, for instance. This will usually involve the expert preparing an analysis and written report, and then perhaps being called to give oral testimony in court. Expert witnesses charge a fee for each of these, amounting usually to several thousand dollars.

### Court costs

Court fees are in addition to the fees payable for legal representation. Every court charges a particular set of fees for starting a claim, and then additional fees are charges for things like issuing summonses, photocopying and attending hearings in a courtroom. Applying for leave to appeal with the Court of Appeal costs a filing fee of \$4,660.40 (2022-23 at the Corporate rate), for instance. Filing a claim worth less than \$500.00 with the Magistrates' Court costs \$568 in initial filing fees (from September 2022). Filing a Magistrates' Court claim worth \$70,000 to \$100,000 costs \$2,559.10 in initial fees.

Courts and tribunals also charge daily hearing fees for most cases, although the first day of the hearing may be included in the initial filing fee.

Note that in the second half of 2018 the County and Supreme Courts introduced a new tiered costs system, where parties are divided into 'Corporate', 'Standard' and 'Concession' categories, and a different fee is charged for each. This was done in an effort to make the fees charged fairer.

### **Adverse costs awards: Sarah Hanson-Young versus David Leyonhjelm**

When one party is unsuccessful (either the plaintiff, for failing to prove liability, or the defendant, for being found liable), the court can make an 'adverse costs award': this is an award that asks the losing party to pay the reasonable costs of the winning party.

On 28 June 2018 the Senate debated whether women should be armed with tasers to respond to sexual violence against women, and Senator Sarah Hanson-Young opposed this by saying that the responsibility to not be sexually violent lay with men and not with women to stop it. Then-senator David Leyonhjelm responded by calling out "Well now you'll have to stop shagging men, Sarah." Leyonhjelm was asked to withdraw his first comment as sexist and offensive, but he refused and repeated it in the media through June and into July. His original comments were protected by parliamentary privilege, but Hanson-Young sued him for defamation based on those subsequent media interviews.

Leyonhjelm defended himself by claiming that she was saying that "all men are rapists." Hanson-Young's statement of claim said that he painted her as a hypocrite for having sexual relations with them and a misandrist with a violent hatred for all men. Leyonhjelm tried twice to have the lawsuit dismissed by the courts, in November 2018 and February 2019, and twice failed. In February 2019 he was ordered to pay Hanson-Young's legal costs for defending his attempts, which her lawyer estimated at around \$100,000.

## Limitation of actions

### Definition

Having a 'limitation of actions' means the plaintiff in a civil case must bring her or his cause of action against the defendant within a period of time defined by the *Limitation of Actions Act 1958* (Vic), or else the defendant may have an absolute defence to it.

In general, a claim in tort or contract must be commenced within six years after the date on which the cause of action accrued.

### Detail

The limitation period applies only to the commencement of legal proceedings; a case can continue, and may not be concluded, for a long time after the limitation period has elapsed. The plaintiff does not need to show they are within time – instead, the defendant must raise an argument that they are *not*.

The limitation period is different for personal injury cases and defamation cases. Section 5(1AAA) of the *Limitation of Actions Act* provides that the limitation period for defamation actions is *one* year, and s5(1A) of the Act provides that, where the plaintiff seeks damages for personal injury arising from the defendant's negligence, nuisance or breach of duty, the action must be brought within *three* years after the date on which the cause of action accrued. For personal injury cases, however, "accrued" does not mean the date of the wrongdoing; instead, it means the date on which the plaintiff first knows (or *should* have known):

- a. that they suffered personal injuries; and
- b. that those personal injuries were caused by the defendant's act or omission.



Even though the timeframe for personal injury cases is shorter – three years rather than six – this definition of "accrued" means the law is more generous than a set six-year period when applied to conditions and disorders that often have late onset, such as post-traumatic stress arising from a particular incident.

Even if the injury has not been discovered yet, any personal injury action is barred by legislation after twelve years except if the claim is for historic child sex abuse. In 2015 Victoria legislated to remove limitation periods for these claims.

## Scope of liability

### Definition

'Scope of liability' relates to the extent of a person's legal responsibility for harm. Multiple defendants may have contributed to the harm, or a defendant may be technically liable but not held legally responsible for policy reasons. The court may also feel that the plaintiff contributed to their own harm, and that it would be unfair to hold a defendant liable for this percentage.

Any potential plaintiff will therefore need to consider their choice of defendant, based on the likely scope of liability, and the extent to which they themselves may be thought to have contributed to that harm.

### Detail

When considering bringing a claim specifically in negligence, a plaintiff must gather their evidence and assess whether they can prove the defendant breached their duty of care. Even if they can, however, the court may still decide that it is not appropriate in the circumstances to hold the defendant responsible for that harm, because of policy reasons based on 'fairness' or 'reasonableness' in the circumstances. The court may decide that the harm is outside the defendant's reasonable 'scope of liability'.

Section 51(1) of the *Wrongs Act 1958* requires that two separate questions be asked in negligence cases: firstly, whether the defendant's negligent conduct legally *caused* the plaintiff's harm; then, secondly, whether public policy considerations justify that the defendant be held *liable* for that harm. This second question can be thought of as a 'reasonableness' test: even if the defendant caused the plaintiff's loss, is it reasonable to hold them liable and ask that they compensate it?

Additional considerations in scope of liability include contributory negligence, vicarious liability, and multiple defendants. Contributory negligence is where the plaintiff's own negligence contributed to their loss; vicarious liability is where an employer can be sued for the actions of their employee; and multiple defendants is where liability is shared.

## Enforcement of orders

Whether or not a monetary judgment will be able to be enforced against a defendant may influence a potential plaintiff's decision on whether to bring a claim. The complainant may choose not to sue, or may choose to sue another entity with greater capacity to pay.

### Definition

The plaintiff may succeed in her or his claim, but not ultimately see any financial compensation because the order is unable to be enforced: if the defendant cannot fulfil a judgment against them because they lack the assets or financial resources to pay it, or refuse to pay it, the plaintiff's victory may be in name only.

### Detail

Enforcement issues may include the following:

- The defendant may lack savings, and not have any investments or physical assets they can sell or leverage to raise the money.
- The defendant may be relying on insurance coverage to satisfy the judgment, and the insurance company may give a reason not to pay.
- The defendant may be unwilling to satisfy the judgment, and may force the plaintiff to take further court action to get an order compelling payment in some way. Essentially, the defendant may try to 'outlast' the plaintiff and make them give up.

There are a range of enforcement orders the court can make:

- An 'attachment of debt order' is an order that enables any money owed by another person to the judgment debtor to be paid to the judgment creditor instead.

**Exam tip:** Use the term the 'judgment debtor' when you mean the party that is ordered to pay as a result of the court order. Use the term the 'judgment creditor' when you mean the party who is owed money as a result of the dispute.

- An 'attachment of earnings order' is an order that requires an employer to deduct instalments from the wages of the judgment debtor to pay the debt owed to the judgment creditor.
- An 'instalment order' is an order that the judgment debtor must pay the debt by instalments.
- A 'warrant to seize property' empowers the sheriff to go to the judgment debtor's residential address and, if they do not make a payment on the spot, to seize assets of the judgment debtor to compensate for the debt.

## REVIEW/APPLICATION QUESTIONS – Initiating a civil claim

1. At what point in a civil dispute is a letter of demand sent?
2. What information will a letter of demand include for the alleged wrongdoer?
3. Identify two ways in which a person receiving a letter of demand may choose to respond to it.
4. Why might a person receiving a letter of demand be motivated to agree to it?
5. Define 'mediation' as a procedure that might take place before trial.
6. Define 'conciliation' as a procedure that might take place before trial.
7. How is a dispute resolved during mediation or conciliation, in the absence of a hearing/trial and a judge or magistrate?
8. Is it possible for parties to attend a mediation or conciliation in pre-trial and still be required to attend the trial? Explain.
9. Name one court that conducts early neutral evaluation.
10. Provide a one-sentence explanation for the procedure 'early neutral evaluation'.
11. To what extent does the early neutral evaluation procedure *resolve* the dispute pre-trial?
12. Explain the difference between costs for legal representation, witness costs and court costs.
13. Provide two specific pieces of detail or evidence that support the claim that bringing a civil dispute to court is costly.
14. What does 'limitation of actions' mean?
15. How long is the limitation of actions period in general, and are there any significant exceptions?
16. What is the purpose of having a limitation of actions period?
17. What does the word 'scope' mean, in the context of 'scope of liability'?
18. What do the two questions in the *Wrongs Act 1958* (Vic) mean regarding scope of liability in negligence?
19. How does the concept of 'contributory negligence' affect scope of liability?
20. How does the concept of 'vicarious liability' affect scope of liability?
21. Why might the question of enforcement of orders be relevant to the plaintiff's decision-making process pre-trial?
22. Give two reasons why an unsuccessful defendant might default on a court order to pay damages.
23. Define two of the types of enforcement orders that can be given by the courts if the defendant does not easily comply.
24. What is the difference between a judgment debtor and a judgment creditor?

## Evaluation: Factors to consider when initiating a civil claim

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
<p>Letters of demand provide a very early opportunity to negotiate and settle the claim before it reaches court in any fashion. This contributes to <b>fairness</b>, by informing the responding party of the existence of a complaint against them, and <b>access</b>, by giving them the opportunity to avoid the legal system altogether but still achieve justice.</p> <p>Mediation and conciliation are relatively inexpensive, and can be conducted in any neutral place. This enhances <b>access</b> to dispute settlement for a party who may wish to preserve a continuing relationship, and who does not desire the adversarial approach of a court proceeding.</p> <p>By giving parties expert advice on their prospects of success before a trial, early neutral evaluation facilitates more informed <b>access</b> to the legal system.</p>	Negotiation options	<p>Many potential defendants ignore letters of demand because they are often sent as 'scare tactics' by wealthy organisations or individuals who do not intend to take formal legal action. If a letter is ignored, however, and the defendant ultimately loses the case, not responding reasonably to the letter may be held against them.</p> <p>The absence of strict rules of evidence and procedure may allow one party to dominate the other and obtain an outcome they were not otherwise entitled to. The mediator or conciliator has no power to intervene if this is the case. The absence of strict rules may reduce the <b>fairness</b> of the process for both parties.</p> <p>Early neutral evaluation is not binding – it gives an indication of likely success, but one or both parties can ignore this.</p> <p>Admissions made during the negotiation processes are without prejudice, meaning that an opposing party cannot later rely on them during court proceedings and the outcome could be <b>unfair</b> if they do not come out in court.</p>
<p>The courts (and VCAT, to some extent) are able to use their discretion when ordering payment of costs. The court will only order that the costs it finds were <i>reasonable</i> must be compensated. This contributes to a <b>fair</b> allocation of costs.</p> <p>Parties have some control over the costs they incur because they are able to make choices such as the extent of their legal representation, whether they request a jury, and (within reason) where they file their claim. This gives them greater control over their <b>access</b>.</p>	Costs	<p>Adverse costs orders usually do not reimburse the successful party for all of their actual costs. This is <b>unfair</b>, because the system has determined they were in the right.</p> <p>Funding of litigation includes obtaining legal advice, retaining legal representatives to advocate a case, and court filing and hearing fees. These combined costs of bringing a case to court can be prohibitive, and may prevent individuals from having effective <b>access</b> to the courts for resolution of their dispute if they simply cannot afford them.</p> <p>Costs can reduce <b>equality</b> if only one of the parties can effectively pay them, or a greater capacity to pay gives one party an unfair advantage in terms of choice of representative, witness appearance or evidence testing.</p>
<p>Having a limitation of actions timeframe ensures that cases brought to the courts are based on recent evidence that is reliable, which contributes to a <b>fairer</b> hearing.</p> <p>Courts have the discretion to allow an extension of the statutory limitation period for plaintiffs who would otherwise be barred, if it is appropriate to do so. This supports <b>access</b>.</p>	Limitation of actions	<p>A defendant who faces a plaintiff who has obtained an extension of the limitation period may struggle to effectively defend a claim. The lapse of time between the incident and legal proceedings may prevent a defendant from <b>accessing</b> reliable evidence to avoid a finding of liability.</p> <p>Limitation of actions time limits may prevent harmed plaintiffs from pursuing their rights, thereby denying them <b>access</b> to legal redress.</p>
<p>The scope of liability is based entirely on an assessment of <b>fairness</b>. It is in addition to the legal questions of duty of care and causation, and is only concerned with whether it is <b>fair</b> and reasonable in all the circumstances to hold someone liable for harm.</p> <p>Scope of liability encourages complainants to seriously consider the extent to which they may have contributed to their own harm, and the likelihood of the courts refusing to hold a defendant liable because of that contribution. Considering scope encourages complainants to consider responsibility with some perspective.</p>	Scope of liability	<p>Defendants who breach a duty of care and cause harm can still avoid liability. The principle of the scope of liability may <b>unfairly</b> prevent worthy plaintiffs from obtaining relief for their loss or injury through the courts.</p> <p>Because the scope of liability is judged on mostly policy grounds rather than legal ones, the interpretation of the scope can change depending on the composition of the court and can feel <b>unequally</b> applied across different defendants.</p>

<p>By assisting the successful litigant in securing payment of their debt, the courts protect the integrity of the legal process, promoting the principles that judgments will be enforced <b>fairly</b>.</p> <p>Having a range of options for a judgment debtor to repay their debt recognises that some parties may struggle to meet their obligations, but acknowledges the right of the judgment creditor to obtain payment of the debt. This gives a plaintiff <b>access</b> to justice, even against a less wealthy defendant.</p>	<b>Enforcement of orders</b>	<p>Seeking enforcement of an unpaid court debt may engage a plaintiff in an additional round of legal proceedings after they may reasonably have expected that their case should have concluded. This erects a further barrier to <b>access</b>.</p> <p>The likelihood that a judgment debtor will be unable to pay may factor into a judge's calculation of an appropriate civil penalty – they may order a lower amount be paid by a less wealthy defendant. Different parties may not be treated <b>equally</b> by the courts under this approach.</p>
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## REVIEW/APPLICATION QUESTIONS – Factors to consider when initiating a civil claim: evaluation

### Application exercise

Having a limitation of actions period is important for fairness because it ensures that evidence is fresh when the case is being examined and liability is being determined. The defendant could not be reasonably expected to defend themselves if, years down the track, the memory of witnesses had faded, documents had been destroyed or lost, and their own recollection of events and places and times had become confused. This does, however, have the effect of barring some deserving plaintiffs from justice – especially those who were children at the time of the wrongdoing, or who were so traumatised by the wrongdoing that they had a psychological barrier to initiating proceedings earlier. This is so common, that having a limitation of actions in these cases is unfair to an entire class of plaintiff. The limitation period is therefore only appropriate if there are significant exceptions to it.

- a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key concepts in the section.

## Non-judicial bodies

Courts are judicial bodies because they operate under the principle of independence of the judiciary established by Chapter III of the Australian Constitution and the corresponding sections of the state constitutions. In addition to judicial bodies there are a range of non-judicial bodies that can also offer assistance with the resolution of civil disputes. These do not operate as part of the judiciary.

### Consumer Affairs Victoria

#### Definition

Consumer Affairs Victoria ('CAV') is a Victorian Government body responsible for regulating Victorian consumer law. It educates consumers and businesses about relevant Victorian consumer protection legislation; it investigates complaints on behalf of consumers; it conciliates disputes between consumers and traders, and tenants and landlords; and it takes enforcement action in the courts against traders and landlords for major breaches of consumer protection legislation.

#### Operation

CAV provides information enabling consumers and tenants to understand the law, and to know their rights; they also provide assistance in the form of, for instance, factsheets and letter and demand templates. This information is provided via their website, a telephone helpline and email. CAV may also call a trader or landlord on the complainant's behalf and conduct telephone conciliation to attempt to reach an agreement with the respondent.



CAV's online 'Dear Landlord' tool, for instance, explains the options private renters have to stay in their homes, helps them draft letters to their rental provider, and helps renters prepare for a VCAT hearing or lodge a VCAT review application if they miss their hearing.

If, as a result of receiving this assistance, a consumer or tenant is unable to resolve the dispute themselves, CAV will accept a formal complaint about the business trader or the landlord who is involved in the dispute. CAV will only investigate complaints if the circumstances fall within their jurisdiction. The complaint must be against a business or a landlord/property manager; also, it must be a situation where legislative or contractual rights appear to have been breached. CAV's area of authority is outlined by Schedule 2 of the *Competition and Consumer Act 2010* (Vic), plus a range of other pieces of legislation that are listed on the CAV website.

CAV has its own compliance powers, and can impose a range of pecuniary penalties or take its own legal action on behalf of a consumer who has suffered loss.

### **Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd [2017] FCA 1521**

In 2016, CAV launched action in the Federal Court against the real estate agency Fletcher & Parker (Balwyn), alleging that it underquoted on 25 properties in Melbourne's east and southeast in 2015, in an effort to generate interest for auctions. Evidence was supplied that, at one sales meeting in 2015, for instance, employees were directed to "market the f\_\_\_ out of it and then underquote the s\_\_\_ out of it: good vendor management." CAV, which ultimately brought the action against it, was also called a "toothless tiger" within the real estate agency.

This dispute was one of a number resulting from the 2015 investigation 'Taskforce Vesta' that CAV launched to crack down on misleading real estate quoting.

In December 2017 the agency was fined a record-breaking \$880,000 by Justice Bernard Murphy. The agency was also ordered to pay \$40,000 to CAV; to implement an agency program to educate its agents about their legal obligations; and to publish notices about its misleading and deceptive, unlawful conduct on its website and in full-page advertisements in local newspapers.

## **The Victorian Civil and Administrative Tribunal**

### **Definition**

The Victorian Civil and Administrative Tribunal ('VCAT') is a quasi-judicial tribunal created to provide a forum for the resolution of relatively simple civil disputes that is less expensive, more informal, and quicker than court.

VCAT deals with many different disputes across a range of highly-specialised sections called 'lists'. These include disputes regarding the purchase and supply of goods, such as faulty goods, regarding discrimination and sexual harassment, and regarding rental agreements. VCAT has no cap on the value of disputes it can hear.

### **Operation**

If the matter falls within VCAT's jurisdiction, the complainant can file with VCAT instead of filing with one of the courts; alternatively, the complainant may discover that VCAT has exclusive jurisdiction over their matter, and they will be required to go to VCAT instead of court. Once that decision has been made in the 'pre-trial' stage, the dispute will then be legally resolved in VCAT instead of in a court.

The 2021-22 Annual Report lists 68,095 cases lodged in the year, down approximately 17,000 from 2018-19; and 60,263 matters finalised, down approximately 23,000 from 2018-19.

VCAT is presided over by a president who is a Supreme Court justice usually on a seven-year term with VCAT. The president is assisted by vice-presidents (as of the start of 2023 there were nine vice-presidents), who are County Court judges. Below the vice-presidents are deputy presidents, senior members and ordinary members. Senior members and ordinary members may work on a full-time, part-time or sessional (casual) basis, and most of them are professionals in a relevant field: not lawyers or judges. 29 senior and ordinary members are listed in 2021-22 as academic or medical doctors, for example; only one is listed as a judge. Overall, VCAT lists 206 members hearing cases, as at 30 June 2022, 108 of whom are sessional.

**Exam tip:** VCAT is not a body that handles a dispute in 'pre-trial' before it goes to court, but this is a common misconception. VCAT is an *alternative* body to courts: if a dispute is filed with VCAT, it will not be heard in court as well.

### **VCAT makes orders on failed hair bleaching**

In April 2019 Jessica Bray sued a South Melbourne hair salon for overbleaching her hair to the point that it started breaking and falling out in clumps. She asked for \$30,230.60 in damages because of shattered confidence, difficulty continuing with her work in sales and retail, \$13,000 in hair extensions, and the cost of an almost-\$2,000 wig that she took out a loan for. Bray said "Everyday things became embarrassing, even just getting a parcel from downstairs and worrying I would run into someone in the lift. Going through airport security, I had a hat on to cover the damage. The man asked me to take it off and then said, 'I'm so sorry, you can put your hat back on.' My confidence, social life, love life, everything came crashing down."

Saint James Hair Studio owner James Yong said that Bray's hair was in poor condition because of being bleached for many years, and it was therefore vulnerable to breaking. VCAT member Danica Bulian found that the studio had breached consumer laws, but found that the \$15,000 claim for humiliation and distress was "excessive and without justification"; the claims for the wig and the hair extensions were similarly dismissed. Instead, Bray was awarded a refund of \$270 for the hair treatment and \$114 compensation for a session with a psychologist. Bray said she did not believe she had been given a fair hearing and was considering an appeal to the Supreme Court. She said she has not applied for any jobs since the hair bleaching because she knew she would be rejected, and that it would take years to return to its former style.

VCAT members perform a role similar to a judge or magistrate in court because they listen to the case put by each party and at the end they issue a binding determination. However, VCAT tribunals operate with much less formality than courts. According to

the rule in s98 of the *VCAT Act 1998* (Vic), VCAT must observe the principle of natural justice – which includes providing a fair hearing with a lack of bias – but is not bound by rules of evidence and procedure. Hearing rooms sometimes employ a round table for the parties to sit at, instead of a judicial bench and bar tables, and members observe minimal legal procedure and follow informal rules of evidence.

Appeals can be made to the Supreme Court (Trial Division) or the Supreme Court (Court of Appeal) if a party feels that the tribunal member erred in their understanding or application of the law. Appeals from a decision of the president or a vice-president go to the Court of Appeal; all others go to the Trial Division. No appeal can be launched simply because one party disagrees with the finding or order (eg. compensation) in the case.

**Exam tip:** VCAT decisions do need to be enforced by the Magistrates' Court or the County or Supreme Courts if one party refuses to comply with them, but they are automatically binding and enforceable despite this additional step.

VCAT fees are designed to minimise the expense of bringing a claim. For some lists, such as the Human Rights and Guardianship Lists, there are no fees. For particular cases in other lists, such as disputes over the refund of tenancy bonds, there is also no fee payable. In some lists such as the Civil Claims List, application fees are scaled depending on the amount of the claim: as of the 2022-23 financial year, for instance, fees for individuals range from \$67.40 for claims of under \$3,000 to \$1,723.20 for claims of over \$5 million.

Costs are also limited because of the lesser use of legal representation. In most cases, parties will need VCAT's permission to have legal representation, unless they fall into one of the categories allowed automatic representation or their opposition is represented or *is* a professional representative. It is also rare for VCAT to order the losing party to pay the winning party's costs.

#### ***Preston Markets Developments v Darebin City Council* [2017] VCAT 1689**

On 27 October 2017, VCAT's Planning and Environment List handed down an order granting Preston Market Developments the ability to redevelop part of the markets to replace some carparking structures with high-density residential living (283 apartments) and commercial spaces. Seven expert witnesses submitted evidence for the applicant, the hearing was conducted over seven days, and written reasons of 66 pages were published. The permits were granted, but a range of conditions were imposed in relation to matters including Sustainable Management Plans, public transport, VicRoads and Melbourne Water approval, and time limits for development.

#### **Use of dispute resolution methods at VCAT**

- Most matters at VCAT are resolved at a hearing. This hearing uses a flexible form of the adversary system, without rules of evidence and procedure.
- Some matters at VCAT are referred to voluntary mediation. The 2021-22 Annual Report shows that, of the 68,095 cases lodged in the year, 1,234 mediations were conducted using the Fast Track Mediation and Hearing ('FTMH') programme, using Zoom or telephone. 54% of these (640, or 0.9% of total VCAT matters) settled at the mediation. 3,131 matters were assessed as suitable for FTMH, but parties in 1,897 disputes refused.
- Larger or more complex matters at VCAT are sent to a compulsory conference prior to the hearing. A compulsory conference uses a similar negotiation style to conciliation. According to the 2021-22 Annual Report, 1,882 matters (2.8% of VCAT's total cases that year) went to compulsory conference, and 818 (43%) of these settled at the conference.
- Larger or more complex matters can also be referred to pre-hearing mediation outside the FTMH programme. According to the 2021-22 Annual Report, an additional 674 disputes (1% of VCAT's total cases that year) were sent to non-FTMH mediation, and 361 (0.5% of the annual caseload) were resolved at the mediation.

#### **REVIEW/APPLICATION QUESTIONS – Non-judicial bodies**

1. Does CAV belong to an arm of government?
2. Identify the four functions that CAV performs.
3. Describes the kinds of disputes in which CAV will intervene.
4. What is a 'tribunal'?
5. Outline three differences in the operation of tribunals as opposed to courts.
6. Explain what VCAT is.
7. What types of legal matters are usually heard by VCAT in general?
8. Outline the process of resolving a claim with VCAT.
9. Give an example of a list that exists within VCAT, or a claim that could be heard through the tribunal.
10. Explain the role of legal representation in VCAT.
11. Outline two reasons why costs may be lower in VCAT than in courts.

**Application exercise:** Christine is considering having her claim settled in VCAT, but a friend who recently went through a VCAT hearing feels the member erred in their interpretation of the relevant law and with their calculation of compensation. Advise Christine on the extent to which VCAT might be a beneficial option for her, in light of her friend's experience.

## Evaluation: Non-judicial bodies

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>The provision of advice and support processes to consumers and tenants for contacting traders and landlords assists less sophisticated consumers to achieve <b>equality</b> in their attempts to resolve disputes independently.</p> <p>CAV’s compliance role enables it to take action against traders and landlords for breaches of consumer protection legislation. CAV can obtain orders of refunds and damages for consumers. This ensures <b>fairness</b> where widespread conduct has impacted consumers significantly.</p>	Consumer Affairs Victoria	<p>CAV is considered to be a ‘toothless tiger’ by many because its resources are mainly focused on educating members of the public about the law and providing templates and advise for consumers and tenants to negotiate with the businesses and landlords themselves. There is a popular perception that they do not significantly increase <b>access</b>.</p> <p>CAV does not use its compliance powers in individual cases affecting only one person or organisation. There needs to be some ‘public interest’ component to the case.</p>
<p>VCAT members who have specialised legal or professional knowledge appropriate to their list provide reliable, impartial determinations of legal disputes. Their decisions are binding, providing certain and <b>fair</b> outcomes for the parties.</p> <p>It is more difficult for a wealthier party to use its resources to gain an advantage in VCAT, because procedures are designed to be fast and streamlined, and legal representation can be denied parties.</p> <p>Open hearings ensure that VCAT determinations are transparent, contributing to the <b>fairness</b> and <b>equality</b> of its procedures.</p>	Victorian Civil and Administrative Tribunal	<p>Fees for VCAT increased significantly under the last state government, and the current Andrews Labor Government introduced a 3-tier fee structure and put a cap on the increases but did not reduce them to previous levels. Daily hearing fees have also been introduced for most claims. VCAT has been criticised since these increases for slowly putting itself out of the reach of many everyday people, and therefore eroding the benefit of <b>access</b> it had compared with courts.</p> <p>VCAT frequently rules against parties being permitted legal representation in its hearings, but lack of legal representation can be viewed as a weakness if one party is not confident or knowledgeable enough to express themselves without it. Lack of representation can reduce <b>equality</b> of opportunity.</p> <p>Because VCAT operates without strict and consistent rules of evidence and procedure, and because members do not have the same legal training or oversight as judges and magistrates, VCAT is often called the ‘Wild West’ and is criticised for being unpredictable and inconsistent.</p> <p>VCAT timeliness has been affected by increased demand and the Covid-19 pandemic. The Civil Claims List, for instance, had 80% of its claims resolved within 16 weeks in 2018-19, but within 56 weeks in 2021-22. This has decreased time-based <b>access</b>.</p>

### REVIEW/APPLICATION QUESTIONS – Non-judicial bodies: evaluation

#### Application exercise

Consumer Affairs Victoria (‘CAV’) is vital for the achievement of equality between consumers and traders. Granted, it is often dismissed as a ‘toothless tiger’ because much of its role is focused on consumer education and advocacy, and on providing templates for consumers to contact traders themselves and pursue complaints without representation; however, this does not mean CAV is ineffectual. Even if consumers are taking first steps themselves, having someone to talk to so they know their legal entitlements and obligations is invaluable. The templates for letters also take some of the amateur error out of the negotiation, and make it more likely that the trader will take the complaint seriously. Even though this power is not used in the vast majority of cases, CAV also has a power of enforcement. Not only can CAV pursue legal matters through the courts on behalf of consumers, it can levy its own penalties against traders if they are in breach of consumer protection legislation. No, traders do not have their own ‘CAV’ body, but they start most negotiations with more power and money than consumers, and CAV works to equalise this relationship.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences
- b. Using the answer above as a sample, write a paragraph analysis of the Victorian Civil and Administrative Tribunal.

## Pre-trial procedures

A civil action is initiated once the plaintiff files the writ or originating motion with the appropriate court. The filing of the writ or originating motion is the point in time at which the injured party becomes the plaintiff, and the person against whom they are making allegations becomes the defendant.

Both parties should at this point begin preparing for the resolution of the dispute: part of their preparation will be assessing whether any aspects of the claim can be settled out of court; part will be collecting evidence and researching the law in the area; part will be preparing logistical matters such as a timetable for trial and funding for the various stages of the dispute. This is called the 'civil pre-trial' process.

**Exam tip:** In the previous Study Design, pre-trial procedures "and their purposes" was the required knowledge; in the current Study Design, the focus is squarely on the purposes, and the procedures are just used to illustrate.

### Purposes of pre-trial procedures

#### Establishing legal claims

Pre-trial procedures ensure that each party is aware of the legal claims made by the other side. The specific civil wrongs that the defendant is alleged to have committed must be spelt out, and the defendant will often have to give notice of the defences they plan to rely on.

#### Establishing claims of fact

Pre-trial procedures ensure that each party is aware of the factual claims made by the other side. They force each party to break their larger argument into a number of small, individual claims of facts. Parties can compare how they see the facts of the case with how the opposition sees them.

#### Disclosing evidence

Pre-trial procedures ensure that each party is aware of the evidence the other party has to prove their version of the facts, and they ensure that each party has full copies of all admissible, non-privileged evidence held by the other side so they can properly inspect it. Privileged evidence does not need to be disclosed, and mainly includes private communications between lawyer and client or the lawyer's own personal preparation.

#### Facilitating settlement

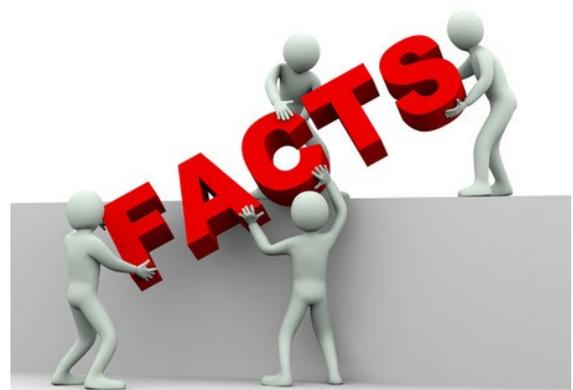
Pre-trial procedures encourage settlement before trial, partly by giving both parties full and equal knowledge of claims, facts and evidence. Parties can make educated decisions about their likelihood of success, and can offer or accept settlement if they decide they are likely to fare worse at trial. Pre-trial procedures facilitate negotiation by giving multiple opportunities for parties to come together and negotiate.

#### Helping court administration

Pre-trial procedures enable the courts to effectively manage their resources and timetable cases by giving them a detailed written record of the progress and complexity of the case.

#### Increasing speed of resolution

In addition to speeding up resolution by giving opportunities to settle prior to trial, pre-trial procedures also aim to speed up resolution in trial by encouraging parties to limit the number of matters in dispute to as few as possible, and by managing the evidence and legal arguments that are allowed to be presented at trial. The hearing or trial can also be timetabled before it starts, with due regard to the likely number and availability of witnesses, and the probable duration of their examination.



## Examples of procedures

These purposes will be explored through the use of two examples of pre-trial procedures: pleadings and discovery.

**Exam tip:** Civil directions hearings are discussed in further detail later in this section, in relation to the case management powers given to judges in civil cases. Directions hearings are another good pre-trial procedure to use for examples in this topic.

### *Pleadings*

#### **Definition**

Pleadings is the civil pre-trial stage in which legal documents are filed with the court and exchanged between parties, containing details of the claims made by the plaintiff, what the defendant will be relying on in their defence, and each party's response to issues raised by the other side.

#### **Detail**

Pleadings commence with the writ or originating motion, notifying the defendant that civil action has been taken. The statement of claim sets out the exact claims and the remedies sought.

The defendant files a notice of appearance to inform the plaintiff that they will be defending the action, and responds to the statement of claim in a statement of defence. They may also counterclaim.

Either party may ask for further and better particulars, to clarify any matter that is still left unclear.

### *Discovery*

#### **Definition**

Discovery is a civil pre-trial stage where both parties engage in full and honest disclosure of the evidence they have to support their claims and version of the facts.

#### **Detail**

Interrogatories are lists of written questions sent by one party to the other party. They aim to resolve any unanswered questions about how the other party sees the details of what happened, and to fill in any gaps in the facts of the case. For example, in a car accident lawsuit the defendant may wish to ask the plaintiff if they have ever been involved in a car accident before. The plaintiff would not have included that information in their claims, and it would not be relevant to their evidence in this case. For the defendant, however, the question could open up a whole new set of arguments.

Each party will be required to 'discover' all the documents and evidence in their possession to the other side – they do this by recording every evidence item on a list that is legally certified and called an affidavit of documents. 'Production of documents' is then when one party requests a copy of an item on the opposing party's affidavit, and the other party must provide it. Parties must supply a copy of anything requested, except if the item is privileged. For example, the affidavit of documents would list every letter, photograph, contract, map, file on a computer, audiotape or videotape, plan, financial document, medical record, witness statement, expert analysis, bill and other piece of physical evidence.

**Exam tip:** In a civil trial, *both* parties must disclose relevant evidence to the other side. This should not be confused with the criminal procedure of committal hearings, where only the prosecution must disclose its evidence.

If the plaintiff is suing for personal injury, the defendant may request copies of their medical and hospital records. They may also request that the plaintiff be examined by a doctor or specialist of the defendant's choosing.

### **REVIEW/APPLICATION QUESTIONS – Civil pre-trial procedures**

1. Outline three purposes of pre-trial procedures.
2. What information will the defendant gain from the pleadings?
  - a. Connect this with one of the purposes of pre-trial procedures.
3. What information will the plaintiff gain from the pleadings?
4. Outline the main aims of the pleadings stage in general.
5. What step commences pleadings?
  - a. Explain the difference between this step and the notice of appearance.
6. Explain the difference between the statement of claim and the statement of defence.
  - a. What might the defendant file at this point if they believe the plaintiff has also committed a wrongdoing?
7. What optional step occurs at the end of pleadings?
8. How do the main purposes of the discovery stage differ from the purposes of the pleadings stage?
9. Will both parties engage in discovery or only one? Explain.
  - a. Connect your answer with one of the purposes of pre-trial procedures.

10. Define 'interrogatories'.
11. Outline the difference between the 'discovery' of documents step and the 'production' of documents step.
12. In what circumstances would the plaintiff be expected to undergo medical examinations and produce hospital reports?
13. Are there any other civil pre-trial procedures, in addition to pleadings and discovery, that you know are in place to achieve one or more of the aims of pre-trial?

### Evaluation: Purposes of pre-trial procedures

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
<p>Parties are encouraged to agree on as many issues as possible. Any claim that the defence is willing to admit to (also called 'stipulate' to) does not then have to be proved at trial. This speeds up final resolution and increases the <b>accessibility</b> of the process.</p> <p>Strict time limits are imposed on the filing and exchange of documents. This limits the ability of one party to drag the dispute out <b>unfairly</b>.</p> <p>Each party finds out the claims of fact the other side will be making, and the main law they will be relying on. This produces relative <b>equality</b> of information between them, and helps each party prepare effectively and efficiently for trial, reducing barriers to <b>access</b>.</p>	<b>Pleadings</b>	<p>Every document filed with the court attracts a fee that must be paid, and will usually be drafted by a solicitor who is paid hundreds of dollars an hour. The cost of proceedings is a major obstacle to <b>access</b> and <b>equality</b> of opportunity.</p> <p>Even with time limits the documents take weeks or months to be completed. Further and better particulars, especially, can be very detailed and time-consuming. This is <b>unfair</b> for the plaintiff, in particular, who has a vested interest in resolving the matter quickly.</p>
<p>Discovery offers the opportunity for each party to see documents and other evidence held by the opposing party, and therefore to judge the strength of each case. This can encourage pre-trial resolution, and speed up the process required to gain closure.</p> <p>Strict rules of evidence apply so that parties cannot use evidence that is tainted: evidence that is irrelevant to the dispute, unreliable or illegally obtained. Discovery allows parties to ask the judge for rulings on the admissibility of evidence. This promotes <b>fairness</b>, and ensures greater <b>equality</b> as one party is less able to manipulate inappropriate evidence to gain an advantage over the other.</p> <p>The element of surprise is reduced, as both parties know exactly what evidence the other side will be leading. Parties can adequately prepare, which contributes to a <b>fair</b> trial, and they are given <b>equality</b> through full knowledge of the other side's evidence.</p>	<b>Discovery</b>	<p>Every document filed with the court attracts a fee that must be paid, and will usually be drafted by a solicitor who is paid hundreds of dollars an hour. This can reduce <b>access</b> for parties without the resources to easily afford the cost; and, if one party can afford it, it also reduces <b>equality</b> of opportunity.</p> <p>The rules regarding evidence and the drafting of court documents are very complicated. They are confusing for parties and require expensive lawyers to navigate. This need for legal representation reduces <b>access</b> for parties – not only if they can't afford it, but also if the costs of representation exceed the value of the claim.</p>

## REVIEW/APPLICATION QUESTIONS – Purposes of pre-trial procedures

### Application exercise

One of the aims of civil pre-trial procedures is to encourage settlement before trial, reducing the time and cost of resolution for both parties and saving court resources. Civil claims are often most effectively resolved when resolution is achieved without the need for trial. Pleadings facilitate this because the statement of claim identifies, one by one, each matter on which the plaintiff will be relying, and the defendant is asked in the statement of defence to go through every single one of these claims and either agree to it *or* lay out their alternative version. One problem with this is that it is done very early, before each party has really seen the strength of the evidence held by the other side, and it may therefore be ineffective at encouraging agreement because parties may be unwilling to concede points against them before they know whether the opposition has evidence to support them anyway. This is why discovery achieves this aim slightly better, because it allows parties to see that evidence. Parties can request copies of all non-privileged evidence that is relevant to the claims made in the case and that they don't already have possession of, and this lets them see which claims they are likely to lose in court. Discovery is a long and expensive process, but electronic discovery is now default in Victorian courts and the potential for one party to entirely settle the case once they see that the other side is making very well-supported claims makes the time and money worth it.

- a. The above answer is a sample of an evaluation by aim: to what extent do pre-trial procedures achieve one of the aims of pre-trial? Using it as a sample, evaluate the extent to which pre-trial procedures achieve one other aim of civil pre-trial.

## Judicial case management

Judicial case management occurs primarily at directions hearings. Directions hearings are pre-trial conferences where the trial judge may direct the way the trial progresses.

### ***Commonwealth v Australian Capital Territory [2013] HCA 55***

Courts have the ability to manage their dockets and use judicial case management to fast-track urgent matters. For instance, on 22 October 2013 the ACT legislated to create a new version of legally-sanctioned marriage that could be used for same-sex marriages, different from the one enshrined in the Commonwealth *Marriage Act 1961*.

On 23 October 2013 the Commonwealth of Australia requested that the High Court order an expedited (ie fast-tracked) hearing, and asked that (a) the ACT be ordered to file its defence on or before 30 October, (b) that a directions hearing be held on 31 October and (c) that a full hearing commence before the Full Court on 26 November 2013. The Commonwealth justified this request for such a fast hearing by arguing it would “reduce the uncertainty” that would “hang over the validity” of the ACT *Marriage Equality Act*.

One week after the ACT *Marriage Equality Act* came into operation and couples began getting married, the High Court unanimously struck down the law, declaring it inconsistent with the Commonwealth *Marriage Act*.

There will always be an initial directions hearing held, and subsequent hearings may follow if the court believes they are required. All directions given by the judge at these hearings must be complied with, as they are court orders.

## Giving directions

### Definition

‘Directions’ are instructions given to the parties about the conduct of the case, and the judge may give any directions for the conduct of the case that she or he thinks will assist effective, prompt and economical resolution.

### Detail

The primary purpose of the court giving directions is to help the parties to achieve effective, prompt and economical resolution. These orders may be directed towards a range of specific aims, including any or all of the following:

- Encouraging parties to cooperate with each other.
- Identifying the issues at an early stage.
- Encouraging the parties to use a non-judicial dispute resolution procedure if the court considers it appropriate; then, facilitating the use of that procedure.

The *Civil Procedure Act 2010 (Vic)* gives Victorian courts significantly enhanced powers of case management to compel parties to take whatever steps are most likely to achieve these aims, and to impose penalties on parties who breach their duties.

## Examples

Specific orders may include any of the following:

- Courts can control the timetabling of witnesses for trial, which witnesses will be allowed to appear at trial, what they are allowed to be questioned regarding, and how long they are allowed to be questioned for.
- Courts can direct parties to prepare an overall statement of key issues in dispute. This statement could then be used as the basis for the rest of the pre-trial processes and the way the matter proceeds at trial.
- Courts can direct parties to have a telephone or sit-down meeting rather than exchange a large number of pre-trial emails.
- Courts can direct parties to rely on one common expert witness rather than each party using its own competing expert witness.

But there are many more examples that can be added to this list.

## Ordering mediation

Mediation is one example of a direction often given in pre-trial for civil disputes.

### Definition

The judge may use their powers of case management to give directions that parties must attend a mediation conference conducted by the judge, a court registrar, or an external mediator. Any agreements reached will be made legally binding with a deed of settlement or court orders.

### Detail

A mediation conference is a private, confidential discussion between the parties to the case (including potentially their legal representatives), in which parties attempt to reach an agreement on as many issues as possible. It is presided over by a third-party mediator, and operates outside the normal rules of court even when it is being done within a court and in relation to a case that is otherwise scheduled to go to a full hearing or trial.



Depending on the circumstances of the case, the court in which it is being heard and the wishes of the parties, a mediation can be conducted by a judge, a court registrar, a judicial registrar, or an external mediator. It will be compulsory for the parties to attend, and any agreement reached during the conference will be inserted into the court's final orders or ratified formally with a deed of settlement.

Examples of pre-trial or pre-hearing mediation include:

- Many suburban and regional Magistrates' Courts have an internal mediation programme for disputes where the amount claimed is less than \$40,000.
- The County Court writes on its website that: "Mediation is encouraged in the great majority of cases, on occasions ordered without the consent of the parties, at the first directions hearings."
- The Supreme Court has had an internal mediation process since 2009, where mediations are conducted by a court registrar, a judicial registrar or a Supreme Court justice, for appropriate disputes.

## REVIEW/APPLICATION QUESTIONS – Judicial case management

1. What power does case management give to judges?
2. Will every case receive a directions hearing?
3. What piece of legislation gave Victorian judges enhanced powers of case management in 2010?
4. Identify two of the reasons why case management powers have been given to judges, despite trials usually being based on the principle of party control.
5. Explain two orders that judges might give parties at directions hearings, using their powers of case management.
6. Why might a judge order pre-trial mediation?
7. Which courts use pre-trial or pre-hearing mediation?
8. Is any resolution made at pre-trial mediation binding on the parties? Explain.

## Evaluation: Judicial case management

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
<p>Case management powers are directed towards facilitating the most effective, efficient and prompt resolution possible. <b>Access</b> is increased for both parties if the resolution process is shorter, cheaper and more efficient.</p> <p>Case management over evidence can reduce the ability of parties to overwhelm the court with immaterial or contradictory evidence. Evidence can be limited to only that which is strictly necessary to prove or disprove the key issues in dispute, aiding financial and time-based <b>access</b>.</p>	Giving directions	<p>Some parties may feel that the case management powers strip them of <b>access</b> to justice by taking too much of their decision-making ability away.</p> <p>The fact that case management powers extend into trial conduct arguably diminishes the adversarial nature of civil trials. The adversary trial was developed as a way of discovering the truth, and of achieving <b>equality</b> between the parties.</p> <p>The timelines established for trial can be estimates only, and will often blow out from what was expected. Parties cannot be kept strictly to projected timelines, however, because this may prevent them from presenting their case and their <b>access</b> to justice would be impaired.</p>
<p>Mediation has a demonstrated success rate of around 30-80% depending on the court in which it is used – including for cases on appeal. In every single one of these resolved cases, days to years of time has been saved, and potentially hundreds of thousands of dollars. This form of resolution increases <b>access</b> by decreasing the cost and time barriers to justice.</p> <p>Compelling at least <i>attempted</i> mediation reminds parties to a civil dispute that their matter is a private one between individuals, and that the state is only providing them with a framework to resolve their problem. Usually, however, living in a community and working with others requires the individuals involved to take responsibility and compromise – this leads to longer-term resolution and better <b>access</b> to meaningful and permanent justice than the state stepping in and enforcing its own decisions.</p>	Mediation as a specific direction	<p>Judges can only order parties to attempt mediation – they cannot order parties to agree to a resolution. If one party is determined to frustrate the proceedings, the time and money spent in mediation will not achieve much. The increase in costs and time decreases <b>access</b>.</p> <p>Judges cannot ensure that the resolution agreed upon in mediation is <b>fair</b> and appropriate to the evidence in the case. This means that one party may agree to an <b>unfair</b> outcome if they lack knowledge or are less assertive or aggressive.</p>

### REVIEW/APPLICATION QUESTIONS – Judicial case management: evaluation

#### Application exercise

For each of the following arguments, work out whether it is a positive point or a negative point. If it is a positive point, find a negative point to balance against it, and say whether the positive aspect is entirely outweighed or only partly outweighed; if it is a negative point, find a positive one to balance against it, and say whether the negative aspect is entirely outweighed or only partly outweighed.

- a. Case management tries to give timetables for the resolution of civil disputes, but any timetable can be a hopeful estimate only: new legal questions can arise mid-trial, witnesses can change their availability or be faster or slower to question than anticipated, and additional claims can even be added to the dispute after the trial has begun.
- b. Parties may think they want a contested trial in the resolution of their dispute, but most court mediation settlement rates being over 50% demonstrates that the majority of parties are actually willing to settle and cooperate if given the chance and professional support.
- c. Case management powers are an important tool in changing the culture of litigation and teaching parties and lawyers that it is not appropriate to engage in bad faith tactics such as overwhelming the opposition with unnecessary motions or evidence, or dragging their heels on filing necessary paperwork.

## RESOLUTION OF THE CASE

### Reasons for a court hierarchy

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

There are a number of reasons why the courts for civil disputes are separated vertically into a hierarchy. These include the improvement of administrative convenience, and the provision of appeals.

#### Appeals

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

An appeal on a question of law means that one party believes the law has been interpreted or applied incorrectly. An appeal on a question of fact means that one party does not believe the facts of the case properly support wither the verdict or the remedy awarded.

- Civil appeals on alleged errors of law *or* fact can be made from the County Court to the Court of Appeal.
- All appeals from the Supreme Court (Trial Division) progress to the Court of Appeal, if they are given leave.



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

#### Administrative convenience

Allocating matters across a vertical court hierarchy depending on the seriousness and complexity of the dispute allows the courts to better allocate their resources and achieve efficient resolution – this is administrative convenience. Each court only needs the paperwork and physical facilities that suit its types of disputes, and parties do not have to pay fees or participate in procedures that are not appropriate to them and the needs of their case.

- The Magistrates' Court charges lower fees than the Supreme Court.
- The County Court and Supreme Court are fitted with jury boxes and have procedures for the empanelment of a jury, while the Magistrates' Court is not and does not.
- Different filings are required for filing a request for leave to appeal in the Court of Appeal than for filing a claim with the County Court, for instance.

#### REVIEW/APPLICATION QUESTIONS – Reasons for a court hierarchy

1. What is a 'court hierarchy'?
2. In one sentence each, define the two primary reasons for a civil court hierarchy.
3. Why is a hierarchy necessary for appeals to occur?
4. Why would appeals not be possible in a flat hierarchy?
5. Why are appeals a desirable feature of a court system?
6. Outline the two different kinds of appeals that can be made.
7. How does the Magistrates' Court and the Supreme Court hearing different severities of cases allow them to have more administrative efficiency?
8. What is the difference between specialisation and administrative convenience? Find one example of each to illustrate the difference.

*Extension material:*

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

### The operation of precedent

The doctrine of precedent relies on the principle of *stare decisis*, which deems that courts should stand by previous decisions and uphold them. The court hierarchy supports the operation of precedent, because it allows presiding members including judges and magistrates to determine which precedents are binding, and which are merely persuasive.

- A principle of law established by a case heard in the Supreme Court (Trial Division) will be binding on the County and Magistrates' Courts when the later cases involve similar material facts and questions of law.
- A principle of law established in the Supreme Court (Trial Division) can be reconsidered and possibly overturned by the Court of Appeal, as the Court of Appeal is higher in the hierarchy and sits with three justices who can confer and reach a majority opinion.

**Exam tip:** The concept of administrative convenience was not studied in Unit 3 AOS 1 in criminal law, but you may use it in a criminal answer if you wish. Similarly, you may use the concept of specialisation in a civil answer if you have material that illustrates it. Prepare appropriate examples if you wish to do this.

### Evaluation: Reasons for a court hierarchy

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
Parties have largely <b>equal</b> rights to appeal to decision (other than with the acquittal of a criminal accused), to ensure that both parties are satisfied that the rules of natural justice were followed, regardless of the outcome.  The fact that appeals to more highly-ranked judges are possible can increase the perception of <b>fairness</b> and the level of confidence the public has in the system.	Appeals	In reality, there is not <b>equal</b> opportunity to appeal. In addition to the rules that limit some avenues of appeal, launching an appeal takes a lot of time and money, and requires a sophisticated knowledge of the law and rules. Not every party has <b>access</b> to these.  Some avenues of appeal are not available in all cases. For instance, a party to a Magistrates' Court case cannot appeal the amount of damages awarded.
Greater convenience and efficiency promote greater <b>access</b> to the system because they reduce the time required for resolution, the costs involved and the difficulty of pursuing the case.	Administrative convenience	The vertical hierarchy is not a significant factor in the tailoring of administration within each court. The specialised divisions within each court, at the same level in the hierarchy, are the main vehicles by which the court system tailors its processes and procedures to the needs of different disputes and facilitates <b>access</b> . For example, the Arbitration List in the Supreme Court provides more administrative efficiency than the Supreme Court does compared with the County Court.
Magistrates and judges in lower courts can be guided by the understanding of the law handed down by panels of experienced judges in higher courts, which enhances the potential for <b>fairness</b> in the resolution of disputes.	The operation of precedent	The vast majority of cases will not be heard by a court that can alter or set precedent in any way: close to 98% of matters will be heard below the Supreme Court. This decreases the <b>access</b> the average person has to use of the court system in a way that has an effect on the common law, without them being willing and able to pursue an appeal higher up the hierarchy, at the cost of significant time and expense.  Regardless of their place in the hierarchy, most courts are reluctant to disturb existing precedent, even if it is technically persuasive.

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

### Application exercise

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

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

## Responsibilities of key personnel

### Judge

#### General responsibility

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

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

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

#### Detail on specific responsibilities

- In the pre-trial stage the judicial officer often meets with the parties to give directions and manage pre-trial procedures. In a civil trial these pre-trial responsibilities will extend to helping identify the issues in dispute, facilitating negotiation and encouraging out-of-court settlement, and ruling on the evidence that can be led and the witnesses that can be called. The judge will be instrumental in establishing a timeline for the trial and ensuring that pre-trial disclosures have been made according to schedule. Trials have more extensive pre-trial than hearings.

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

- In the trial stage the judicial officer focuses on ensuring that each party receives natural justice. They will interpret and apply the rules of evidence and procedure, listen to the submissions and evidence given by each party, and reach a final verdict in all matters where there is no jury.
- The judge must recuse themselves if they will be unable to remain impartial, or if there is a material risk of them failing to appear impartial. For example, in the case of *LAL v The Queen* [2011] VSCA 111 the judge was criticised for not recusing herself even though she was related to the victim of a similar crime, and there was therefore the risk of apprehended bias.
- If there is a jury, the judge will direct the jury and sum up the law and evidence on which the jury verdict should be based. The judge will have to carefully follow the law in relation to jury instruction: for instance, the jury in a negligence case needs to understand that the standard is what a reasonable person would do, and not what they personally would do.
- The judge must only direct the jury on matters that have been raised by the parties at trial, either expressly through legal argument or indirectly through the evidence presented – but they have no responsibility to direct the jury on matters that were not raised by the parties. This was established by the High Court in the case of *R v Getachew* [2012] HCA 10.

- If the defendant is found liable, the judge will be responsible for deciding the remedy to award. They will hear submissions from the parties on the appropriate damages or the injunction (ie court order) that the plaintiff wants, and will then make an order. In cases where there is a jury the jury will decide the amount of damages in every matter except defamation – damages in defamation matters return to the judge to determine.

## Jury

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

### General responsibilities

Each juror individually, as well as the jury as a whole, has the responsibility to listen impartially to the evidence and the judge's directions in order to decide questions of fact and to return a verdict of liable or not liable based on the standard of proof 'on the balance of probabilities'.

Juries are responsible for giving both civil parties a trial by their peers.

Civil juries will decide the amount of damages to be awarded in all cases except defamation. This is different from criminal juries, who *never* decide the sanction. The jury will also never issue injunctions.

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

### Detail on specific responsibilities

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

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

- Jurors must disclose known reasons that would prevent them acting impartially. Failure to inform the Juries Commissioner as soon as practicable is an offence, punishable by a fine.
- Jurors must elect a foreperson to coordinate jury discussions and deliberation.
- The foreperson of the jury has special responsibilities to conduct jury votes, to record and communicate any questions the jury wishes to ask of the judge, and to deliver the final verdict to the court.
- Jurors can only rely on the evidence introduced at trial in reaching a verdict. It is an offence to investigate any matter that is the subject of a trial, even just by conducting an Internet search. The *Juries Act 2000* criminalises this as a form of contempt of court, and it is punishable by a fine of up to 120 penalty units. Mistrials have been declared because jurors brought in Google Maps printouts of the area, for instance.
- Each juror has the responsibility to listen carefully to the judge and to counsel, to try to understand the law in the area and the elements of the offence. In 1999 the New Zealand Law Commission published findings that showed "fundamental misunderstandings of the law at deliberation stage" in 73% of trials.
- Jurors must keep their deliberations secret. It is an offence to disclose any information such as opinions expressed, votes cast or arguments made in the course of reaching a verdict.



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

**Exam tip:** If the question does not specify whether the jury is operating in a criminal case or a civil case, you should address *both*. The only real change will be the addition of calculating damages for civil juries – and noting that the civil standard of proof is on the balance of probabilities as opposed to beyond reasonable doubt, if that detail is included in the answer.

## Parties

### General responsibility

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

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

### Detail on specific responsibilities

- The plaintiff has the responsibility to decide whether to bring the matter to trial, and to prepare the necessary documents for that to happen – for instance, preparing a letter of demand and filing a writ.
- The defendant has the responsibility to decide whether to contest the case and file a notice of appearance, or whether to attempt settlement.
- Each party has the responsibility to decide whether to have legal representation or be self-represented.
- Each party has the responsibility to decide what evidence to present and what legal arguments to submit in order to argue or defend the case.
- The precedent set in the *Getachew* case in 2012 gives parties the clear responsibility to raise, through legal arguments and/or evidence, all matters they want the jury to take into account during deliberations, because the judge has no responsibility to direct the jury on anything not brought into trial by the parties.
- Each party owes a primary responsibility to the court and to the principle of natural justice, over and above their own concerns and desire to achieve a favourable outcome. In the case of *Giannarelli v Wraith* [1988] HCA 52 Mason CJ said that “The duty to the court is paramount and must be performed.”
- In civil matters the parties have additional obligations, legislated for by the *Civil Procedure Act 2010 (Vic)*. These are called the “overarching obligations”, and they are encompassed by one “paramount duty”: “Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved [...]”
- The overarching obligations include responsibilities such as acting honestly; having a proper evidentiary basis for every claim; cooperating with other parties and the court; and ensuring that costs are reasonable and appropriate. The courts have legislated powers to enforce these obligations on parties.

## Legal practitioners

Because the rules of evidence and procedure are quite complex, because the judge does not actively manage the presentation of the parties’ cases, and because the parties have so much responsibility for understanding what law to argue, what evidence to lead and how to navigate the required procedure and timelines in the case, most people could not effectively argue or defend legal claims without representation.

### General responsibility

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

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

### Detail on specific responsibilities

- A solicitor is the party’s primary legal adviser, and it is the solicitor’s responsibility (possibly with the assistance of other solicitors and/or legal assistants and paralegals) to understand the client’s case, advise them of the relevant law, file the necessary paperwork with the court, and brief a barrister to appear at trial.

- A barrister is the legal representative who has the responsibility to speak on behalf of the client inside the courtroom: they are called 'counsel', and sit facing the judge's bench. Parties may be represented by more than one counsel – for instance, by a senior barrister plus a number of junior barristers.

- There are a range of ethical obligations held by every lawyer. Lawyers have a double duty: a duty to their clients, to give the client the most effective representation possible and to act on the client's instructions; but also a duty to the court, to act in the best interests of justice. The case of *Giannarelli v Wraith* [1988] HCA 52 confirmed that the advocate's duty to the court overrides her or his duty to the client to act on the client's instructions. Mason CJ said: "The performance by counsel of [her or his] paramount duty to the Court will require [her or him] to act in a variety of ways to the possible disadvantage of [her or his] client."



- Legal advocates have the responsibility to not mislead the court.
- Legal advocates have the responsibility to bring every irregularity in the resolution of the case to the court's immediate attention, and not to keep it secret in the hopes of using it later as a ground of appeal. This was explicitly listed as one of counsel's ethical duties by Mason CJ in the case of *Giannarelli*.
- Counsel for the plaintiff has a special ethical responsibility to dissuade the client from pursuing an unjust cause of action, and to advise them to abandon a lawsuit if it appears that they were in the wrong.
- Counsel for the plaintiff has the responsibility to advise the client of their likely chances of success, and to alert them to any concerns regarding the scope of liability, the limitation of actions, or the likely enforcement of orders.

#### REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel

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

## Evaluation: Responsibilities of key personnel

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

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

<p>Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give <b>access</b> to the accused with the need to serve justice and overall <b>fairness</b> in terms of the system.</p> <p>Experienced legal representatives are responsible for helping the plaintiff and defendant to present their cases in the best possible light. This gives the parties confidence that the strongest case won, and gives each of them a better chance at a <b>fair</b> and just trial.</p> <p>The use of expert and experienced legal practitioners saves the courts time and money, because they know the correct way to prepare documents, the correct way to make legal submissions and elicit evidence from witnesses, and the best arguments to make to allow the court to home in on the significant issues. This efficiency increases overall <b>access</b> to the system because it allows the courts to operate more quickly.</p>	<b>Legal practitioners</b>	<p>Justice may belong to the party who is able to afford the better legal representative, rather than the party who is truly in the right, and this decreases proper <b>access</b> to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. Historically, individual claimants who have tried to sue tobacco companies for hiding evidence of the cancer-causing properties of cigarettes have been fought by dozens of lawyers and strategic delays. Some claimants have died of their tobacco-related illness before the case was concluded.</p> <p>Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in settlement negotiations because it is not always in the plaintiff lawyer’s best interests to agree to a lower amount than claimed, or defence practitioners may believe they can win a ‘not liable’ verdict outright for their client; or the defence lawyer may reject a <b>fair</b> offer, or accept an inappropriate one, in order to get an easy ‘win’ on the board for their career.</p>
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### REVIEW/APPLICATION QUESTIONS – Responsibilities of key personnel: evaluation

#### Application exercise

The *Civil Procedure Act 2010* (Vic) places additional responsibilities on parties to a civil case, because the focus of the civil justice system is efficiency and cost-effectiveness, and using formal legal channels as little as possible. Parties therefore have a paramount duty to “further the administration of justice,” and that includes discharging overarching obligations such as cooperating with the other party where possible, and the legal representatives ensuring that costs charged are reasonable and appropriate. These laws make operating in good faith a legislated, mandatory part of civil dispute resolution, and they make it difficult for parties to refuse to work cooperatively with each other by engaging in mediation or sharing one common expert witness if the court orders it. The downside is that the adversarial nature of court is being diminished, and people can feel that their fate is out of their hands. It may not always feel appropriate to mediate or negotiate, especially if one party feels they are entirely blameless and the other party has infringed their rights. Especially if the judge exercises their case management responsibilities in an active way, parties could feel that the system has taken too much control away from them. In practice, however, it is mainly the ability of the parties to frustrate justice and act in bad faith that has been taken away from them, so parties should ideally be content with this.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
  - strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences
- b. Using the answer above as a sample, write a paragraph analysis of each of the other categories of personnel.

## Methods used to resolve civil disputes

As already discussed in this chapter, parties to a civil matter often have a range of places they can go to resolve the dispute and seek justice: the courts are one venue, the Victorian Civil and Administrative Tribunal is another, Consumer Affairs Victoria is another.

Within these venues, there will be a selection of processes available that structure the way in which parties go about that resolution: these are called methods of dispute resolution. Venues often use their own particular names for dispute resolution methods, but you will see common features in the operations of methods that are superficially labeled differently. The Resolution Institute, for instance, lists expert determination as a separate method, even though it has a lot in common with arbitration; and negotiation, assisted negotiation, and mediation are all listed individually, even though they overlap.

**Exam tip:** The place you go is the venue or avenue for dispute resolution; the 'method' of dispute resolution is what you physically do when you get there.

For each broad type of resolution method, it is important to know the following details:

- Its basic nature and aim.
- How formal it is and the extent to which strict rules are applied to it.
- Who is involved in it and what the role of each party is.
- How an outcome is decided and what its legal status is.
- Where and when it is used.

The information covered so far in the course has focused on judicial determination through a hearing or trial – indeed, this is the only method available for the resolution of criminal disputes. Civil disputes, however, can be resolved using other, non-judicial, methods, because the parties involved are two private individuals. If a non-judicial method is used, however, there is generally no right of appeal.

Three popular non-judicial options are mediation, conciliation and arbitration. These are the methods listed in the Study Design.

### Mediation

#### Definition

A mediation conference is a private, confidential discussion between the parties to the case (including potentially their legal representatives), in which they attempt to reach an agreement on as many issues as possible. It is presided over by a third-party mediator, whose task it is to facilitate problem-solving conversation and encourage cooperation.

#### Detail

Mediation works by the mediator bringing the parties together in a private, confidential, neutral and non-confrontational setting. Each party is able to communicate their goals and objectives, and say what they hope to get out of the mediation – the mediator can then tailor some of the rules of the mediation to the needs of the dispute. The mediator helps parties explore the issues in the dispute, identify options for resolution, negotiate, and hopefully reach agreement. Any outcome achieved is done by the parties, however: the mediator does not have the power to impose an order on the parties, and that is not their role.

Agreements will be made legally-binding by a deed of settlement being drawn up, or by the agreed terms being included in the court or tribunal's final consent orders. If the mediation is conducted privately, the parties can choose to write up the terms of the agreement in a private contract.

Mediation is used in most courts and in VCAT, for selected civil disputes. The frequency and success of mediation depends on the list and the type of dispute.

#### Robodebt class action

In November 2019 law firm Gordon Legal launched a representative proceeding against the Australian Government for the 'Robodebt' programme it implemented through Centrelink. Six named plaintiffs were found. On 16 November 2020 the Commonwealth agreed to a settlement with the plaintiffs through judicial mediation.

In June 2021 the Honourable Justice Murphy of the Federal Court of Australia approved the settlement. More than \$1.2 billion will be distributed: \$112 million in compensation to 400,000 group members, after the deduction of legal costs; and the repayment of \$720 million in debts collected from group members invalidly. In mid-October 2021 the Commonwealth started notifying all Group Members of how they were categorised in terms of their loss amount. The majority of settlement payments were made in 2022.

Gordon Legal's FAQ page explained: "Subject to its approval by the Court, the settlement agreement binds the parties to the agreement and will determine the rights of the Group Members who did not opt out of the proceedings by 29 June 2020. Now that a settlement has been reached, there is no need for a trial to take place." No group member will be able to sue the Government for the same issue, unless they opted out by the deadline.

## Conciliation

### Definition

A conciliation conference is a private, confidential discussion between parties to the case (including potentially their legal representatives), in which they attempt to reach agreement on the most fair and legally-appropriate way to resolve the dispute. It is presided over by the third-party conciliator, whose task it is to encourage a fair distribution of claims and an adherence to common industry practice and standards.

### Detail

The process for a conciliation conference mirrors closely the process for a mediation conference. The biggest determinants of the process used will be the venue conducting the conciliation and the needs of the dispute.

Agreements will be made legally-binding by a deed of settlement being drawn up, or by the agreed terms being included in the court or tribunal's final consent orders. If the conciliation is conducted privately, the parties can choose to write up the terms of the agreement in a private contract.

Conciliation is used by courts less frequently than mediation, although the Magistrates' Court and County Court, for instance, have procedures with other names that seem to follow the definition of conciliation. In the Magistrates' Court these are called 'pre-hearing conferences', and the procedure seems similar even though the label is different. They are not referred to as 'conciliation'. VCAT does not officially use conciliation, but its 'compulsory conferences' use a process that seems like conciliation. In 2021-22 VCAT conducted compulsory conferences in 1,882 matters and 43% of them resolved at the conference.

Conciliation is used by CAV, but only as a way of facilitating the parties to resolve their own matter: CAV does not have the power to make a resolution but, instead, will call the trader or landlord on behalf of the consumer or tenant, and a CAV professional will conduct a conciliation call.

## Arbitration

### Definition

An arbitration is an informal hearing that may be called inquisitorial or quasi-judicial. It aims to discover which party is more in the right than the other, as efficiently as possible. Parties present evidence according to the principle of natural justice but without strict rules of evidence and procedure and, at the end of the hearing, the arbitrator will award the matter to one of the parties and give an order for restitution or another remedy.

The Resolution Institution defines arbitration as a "formal dispute resolution process [...] in which two or more participants refer their dispute to an independent third person (the arbitrator) for determination," and says of it that: "Providing that an arbitration is conducted according to the principles of natural justice its procedures may be varied by the participants to suit the size and complexity of the dispute."

### Detail

Arbitration is conducted in a private or public hearing, during which each party presents her or his case and evidence to an independent third-party arbitrator, in line with flexible rules of evidence and procedure. The arbitrator has the flexibility to tailor the procedure of the hearing to the needs of the case, by asking her or his own questions of witnesses, admitting some evidence in the form of documents rather than requiring oral testimony, and giving the parties opportunities to negotiate and possibly settle mid-hearing.

Appeals are possible from an arbitration award, but they are limited to questions of law rather than fact. There must have been something legally improper in the proceedings.

Arbitrations are held for some civil disputes in the Magistrates' Court and Supreme Court (Trial Division) such as in the Arbitration List for commercial disputes.

**Exam tip:** Because VCAT hearings are less formal and do not follow judicial rules of evidence and procedure, sometimes students mistakenly call them 'arbitration'. You should not describe a VCAT hearing as arbitration.

**REVIEW/APPLICATION QUESTIONS – Methods used to resolve civil disputes: evaluation**

1. When will mediation be compulsory to attend?
2. What is the aim of mediation?
3. What level of formality is present in mediation?
4. Outline the role of the third party in a mediation session.
5. How will the resolution be achieved in mediation?
6. Can the parties ever be forced to resolve the dispute at mediation?
7. To what extent will the outcome of a mediation be binding on the parties?
8. What types of disputes might not be appropriate for mediation?
9. Which of the following three things will be the most important at a mediation, and why: law, evidence, or agreement?
10. Where is mediation used in the civil justice system?
11. When will conciliation be compulsory to attend?
12. What level of formality is present in conciliation?
13. What is special about the person who will usually be chosen to conduct the conciliation?
14. Outline the role of the third party in a conciliation.
15. What advantages does the role of the conciliator give to parties?
16. How will the resolution be achieved in conciliation?
17. Which of the following three things will be the most important at a conciliation, and why: law, evidence, or agreement?
18. To what extent will the outcome of a conciliation be binding on the parties?
19. Where is conciliation used in the civil justice system?
20. To what extent is arbitration compulsory to attend?
21. What level of formality is present in arbitration?
22. Outline the role of the third party in arbitration.
23. Outline the role of the parties in arbitration.
24. Which of the following three things will be the most important at an arbitration, and why: law, evidence, or agreement?
25. To what extent is the outcome of arbitration binding on the parties?
26. What advantages does arbitration give to parties?
27. Where is arbitration used in the civil justice system?

**Evaluation: Methods used to resolve civil disputes**

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>Mediation is generally more cost-effective than a method such as judicial determination, which aids in <b>access</b>. For example, mediation at the Dispute Settlement Centre of Victoria (‘DSCV’) is free, and mediation conducted through VCAT does not incur an additional charge.</p> <p>Mediation will result in resolution in a shorter space of time than a court or VCAT hearing, if the parties are able to compromise. Generally, mediation conferences last from a few hours to a few days and, at VCAT, hearings can sometimes be scheduled for later that same day if mediation is unsuccessful (through the FTMH programme).</p> <p>Mediation has no complex or exclusionary rules of evidence because the process is not focused on proof, and the rules of procedure are supportive rather than intimidating; parties are encouraged to ‘tell their story’ rather than prove they’re right according to a set of rigid, pre-determined standards. This gives greater <b>equality</b> across parties who have experienced with the legal system and parties who haven’t.</p>	<p>Mediation</p>	<p>Mediation with a private mediator, done before most court matters and some VCAT matters, is still quite costly for the average person. Mediators charge by the half-day, with fees commonly ranging from \$5,000-15,000 per party. This cost still prevents <b>access</b>.</p> <p>One party may compromise too much in an effort to resolve the dispute, because there is no requirement that the agreement be ‘legally <b>fair</b>’.</p> <p>Because reaching agreement is in the hands of the parties, a failed mediation will result in a court trial or VCAT hearing going ahead anyway. The time and money spent will therefore not have achieved resolution.</p>

<p>Conciliation conferences are less formal than hearings. There are no rules of evidence, and the procedure is not as intimidating for parties because the conciliator will lead the discussion, ask questions and give advice. This gives greater <b>equality</b> across parties who have different levels of experience with the legal system.</p> <p>The conciliator is often an expert in the practical field of the dispute, and is able to offer suggestions to encourage resolution. Parties may feel they are receiving the benefit of expert and independent knowledge.</p> <p>Matters discussed at conciliation conferences are not admissible in later proceedings, which encourages full participation and cooperation from parties in the knowledge that disclosures cannot be used against them in the future.</p>	<b>Conciliation</b>	<p>Conciliation is only as successful as the parties to the dispute and the skill of the conciliator allow it to be. Otherwise, it is still fraught with the same problems regarding lack of agreement, one-sided outcomes and party animosity.</p> <p>Conciliations do not involve a lot of documentation, but there is still material that must be prepared. This prevents <b>access</b> for people who do not understand the documentation or have to pay for an expert to assist them.</p> <p>Conciliation is not used extensively by courts or VCAT. If parties want an independent expert third party conciliator, they will probably have to pay for a private one themselves, or engage the conciliation services of an organisation such as CAV before one of them has commenced formal legal action.</p>
<p>The rules of evidence and procedure are flexible, but arbitration tribunals are still bound by the basic principles of natural justice. This means that flexibility cannot be provided at the expense of <b>fairness</b>.</p> <p>Arbitrations are compulsory to attend – either because they are being conducted by a court, or because the parties have agreed to an arbitration in a pre-existing contract. This means that, if either party fails to attend in person or at least through a legal representative, the dispute can be awarded against them. The party who did the right thing and attended may win by default.</p>	<b>Arbitration</b>	<p>The arbitrator's award often cannot be appealed if one party believes an error has been made or the outcome was <b>unfair</b> or a product of an <b>unequal</b> capacity to argue their case.</p> <p>Arbitrations are about more than simply party agreement, but they cannot be used to set precedent, and decisions do not have to follow precedent. Parties in different cases may therefore be treated <b>unequally</b>.</p> <p>Arbitration hearings are not usually open to the public, so parties may feel a lack of transparency – especially if the arbitration is between parties with unequal power, such as an employer and an employee. The award can then often be final, with no opportunity to appeal.</p>

### REVIEW/APPLICATION QUESTIONS – Methods used to resolve civil disputes: evaluation

#### Application exercise

Following is a list of arguments about the *judicial* resolution of civil disputes through courtroom processes – there are some positive points and some negative points. For each point, identify whether it is a strength or a weakness. If it is a strength, consider the extent to which *non-judicial* processes are capable of delivering the same benefit; if it is a weakness, consider the extent to which *non-judicial* processes are susceptible to the same problem.

- a. Strict rules of evidence and procedure apply in court and during pre-trial. These allow both parties to be treated equally and to prepare for trial, and also ensure that all evidence presented is relevant, reliable and legally obtained.
- b. Pre-trial court processes such as discovery and directions hearings reduce actual court time by narrowing the scope of issues in dispute and encouraging out-of-court settlements. Timetables can be set for the resolution of disputes, and the judge can rule on the legal arguments and evidence that she or he believes is necessary for the resolution of the core dispute.
- c. Strict rules of procedure mean that each party will always have an equal opportunity to present their arguments, and an equal opportunity to test the arguments of the other side. The presiding member cannot manipulate the hearing to favour one side over the other. The procedure is more focused on treating parties equally and fairly rather than determining the truth, which means the party truly in the right may not win.
- d. All elements of trial and hearing decisions in courts are usually subject to appeal. This gives an opportunity for any errors to be fixed and justice to be achieved.
- e. Legal representatives are used in the vast majority of cases at court, and they are able to present the case in the best manner possible and increase the chances of the most successful outcome possible for their party. Legal representation makes the trial or hearing more efficient, and ensures the party's case is put forward the most effectively.
- f. Many judges come from a similar background and tend to be more conservative than many groups in the community, especially younger citizens. They are more commonly from an Anglo or European background, more commonly educated at private or religious schools, more commonly in heterosexual married or *de facto* relationships, and more commonly Christian than the general Australian population.



## CIVIL CONSEQUENCES

A civil remedy is that which is awarded to a successful plaintiff at the conclusion of a civil trial, often to restore the rights that have been infringed. It travels from the defendant to the plaintiff.

### Purposes of remedies

The aims of remedies are focused on the plaintiff rather than on the defendant. Each purpose may be achieved more or less by the specific remedy ordered – no remedy will achieve all purposes.

The two primary purposes are restoration and compensation:

- Remedies may aim to return the plaintiff to the position they were in before their rights were infringed. This is the general purpose of *restoration*.
- Remedies may aim to *compensate* the plaintiff for the infringement of their rights, if returning them to their original position is not technically possible. Compensation means to give someone something of roughly equal value, so it is not exactly the same as restoration.

**Exam tip:** Ask yourself whether what the plaintiff has been lost can properly be restored. If it cannot, then the remedy may be trying to give the plaintiff something (usually money) of roughly equal value, to compensate them.

Additional purposes include:

- In some instances, a remedy may aim to *prevent* the harm from occurring in the first place – or, to prevent further harm from occurring. For example, a plaintiff may wish the defendant to follow through with their commitments under a contract, to avoid significant financial hardship from being suffered. If the financial harm can be avoided by the defendant fulfilling their contractual obligations, the court will likely make an order for specific performance of the contract rather than wait until the harm is suffered then order compensation for that harm.
- Remedies may also simply *vindicate* the plaintiff: in other words, publicly acknowledge that they have been harmed.
- Very occasionally, remedies may work to *punish* the defendant for particularly bad conduct.

### Examples of remedies

The two most common remedies are damages and injunctions. These are the remedies required by the Study Design. Each remedy will serve a slightly different specific purpose, but will aim to achieve at least one of the general purposes identified above.

#### Damages

##### Definition

Damages are sums of money awarded to a successful plaintiff, paid to them by the defendant.

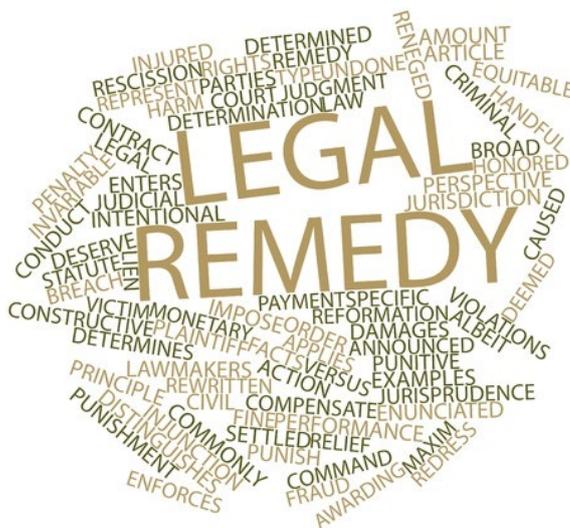
##### Detail

The most common type of damages claimed are compensatory damages, which are sums of money intended to compensate the plaintiff for harm or loss by awarding them a sum of money that the court considers equivalent to the value of that loss.

**Exam tip:** ‘Damages’ are not ‘compensation’. Damages are sums of money, and one of the aims of the court awarding that money *might* be to compensate. But don’t call damages compensation, or define damages as compensation.

Compensatory damages can be split into two primary categories:

- Specific compensatory damages are awarded for loss that has an exact dollar value – for instance, lost wages or medical treatment. The court does not have to calculate the approximate worth of the harm or loss, because the financial extent of it can be substantiated with evidence such as receipts and bills.



- General compensatory damages are awarded for loss that does not have an exact dollar value – for instance, pain and suffering. The court needs to calculate an approximate equivalent dollar value.

**Exam tip:** Other types of damages are sometimes awarded – for instance, exemplary damages or nominal damages. Exemplary damages are rare, but they are used to punish a defendant for deliberate, egregious conduct. Compensatory damages are the most common, though.

## Injunctions

### Definition

An injunction is a court order either prohibiting the defendant from doing something, or compelling the defendant to do something or take a prescribed action.

### Court-ordered medical treatment

In December 2017 a Victorian woman lost an appeal in the Supreme Court against an order of the Children’s Court that required her three children, all aged under five and in the care of the Department of Health and Human Services, to be vaccinated for measles. The children’s father told the Court that there was a greater risk of the children being bitten by a dog than of contracting measles, and that he believed they had ‘natural immunity’ passed on from him, as he had once had measles. The Department argued that the children were at high risk of contracting measles, and were not allowed to attend childcare under the Victorian ‘no job no play’ laws until they were vaccinated. Justice Robert Osborn found that it was in the children’s best interests to receive the vaccine, and upheld the magistrate’s earlier order.

### Detail

An order *prohibiting* the defendant from taking action is called a ‘restrictive’ or ‘prohibitive’ injunction, and an order *forcing* the defendant to take particular action is called a ‘mandatory’ injunction. They may be awarded on a temporary basis before trial has commenced, or as a permanent order at the conclusion of trial. Courts will only order injunctions if they are convinced that an award of damages is not an adequate remedy.

### REVIEW/APPLICATION QUESTIONS – Civil consequences

1. Outline the main aim of civil remedies *in general*.
- a. When might it be impossible to achieve this aim?
2. Outline two other specific aims of civil remedies.
3. Define the term ‘damages’.
4. What is the main aim of compensatory damages?
5. Explain the difference between specific compensatory damages and general compensatory damages, using examples to illustrate your answer.
6. Define the term ‘injunction’.
7. Explain the difference between a mandatory injunction and a restrictive injunction.
8. Give one example of harm that would be effectively addressed with a mandatory injunction, and one example of harm that would be effectively addressed with a restrictive injunction.

### Extension material:

## Costs

Costs are different from remedies, and are calculated separately and on top of any remedies.

### Definition

Costs awards are orders that the court makes for one party to pay the reasonable costs of the other party. Usually, costs will be ordered against the losing party, and they will have to pay the reasonable costs of the winning party – this is known as an ‘adverse costs award’.

Costs are a separate monetary award from damages. Costs compensate for expenses such as legal representation fees and court filing fees rather than for loss. Unlike damages, costs can also be ordered for the plaintiff to pay to the defendant.

### Detail

There are two kinds of costs awards:

- Standard costs are when one party is ordered to pay the ‘reasonable’ costs of the other party. This will usually equal around 40% of their actual costs, and is currently calculated according to the Supreme Court ‘Scale of Costs’ – although the 2022 ‘Report on Litigious Costs’ recommended that this be reformed.
- Indemnity costs are when one party is ordered to pay *all* the costs of the other party, over and above the Scale of Costs. This can be for the entire dispute or part of it, and happens when one party has acted improperly.

## Evaluation: Remedies

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>Damages are often able to return the plaintiff to the position she or he was in before the harm was suffered, because frequently the harm <i>is</i> financial in nature. This gives the plaintiff <b>access</b> to meaningful justice for their loss.</p> <p>Damages are able to compensate the plaintiff for rights infringements, even if the harm was not financial and cannot be literally restored, because the courts work with complex estimates of the <i>value</i> of different kinds of harm. This keeps the treatment of different plaintiffs somewhat <b>equal</b>.</p>	Damages	<p>Ultimately, damages are awards of money. They may financially restore a plaintiff on paper, but this might be years after the event and after time, money and emotional effort has been <b>spent</b> on the lawsuit. The plaintiff does not emerge from this as <b>equal</b> to the defendant, who did not suffer the initial loss.</p> <p>The pursuit of damages encourages plaintiffs to pursue action only against wealthy defendants who might not in reality be the most culpable for the harm. If a plaintiff takes action against a ‘person of straw’, they may never see any damages they have been awarded. This prevents true <b>access</b> to justice against the real wrongdoer, and it also contributes to different parties having <b>unequal access</b>.</p>
<p>Injunctions have the power to order the defendant to perform concrete actions that either prevent the harm from occurring in the first place, or put some aspect of the wrongdoing right again. For example, a publisher may be ordered to print a retraction and apology following a lawsuit for defamation. This gives the plaintiff <b>access</b> to a meaningful outcome.</p> <p>Injunctions recognise generally that not all human behaviour is best reduced to a monetary value. For example, a public apology may be of more practical worth than a financial settlement. This makes plaintiffs with financial loss more <b>equal</b> to plaintiffs with non-financial loss.</p>	Injunctions	<p>There is a fairly defined scope for court orders, and this may not be flexible enough to deal with the range of circumstances in which rights can be infringed. Negotiated agreements through a process such as mediation are more flexible and may provide <b>fairer</b> outcomes that are better suited to the facts.</p> <p>Court orders are only pieces of paper, and they need to be respected by the defendant for them to be effective. If the defendant fails to honour the order, court proceedings will be required again to enforce it. This is an obstacle to <b>access</b> to justice for the plaintiff.</p>

### REVIEW/APPLICATION QUESTIONS – Remedies: evaluation

1. Explain one aim of remedies that is likely to be achieved by damages, outlining *why* it is likely to be achieved.
2. Explain one aim of remedies that is likely to be achieved by injunctions, outlining *why* it is likely to be achieved.
3. Explain one aim of remedies that is not likely to be achieved by damages, outlining *why* it is not likely to be achieved.
4. Explain one aim of remedies that is not likely to be achieved by injunctions, outlining *why* it is not likely to be achieved.
5. Explain one of the purposes of remedies and discuss which remedy most effectively achieves that purpose and why.
6. Select one civil case you have studied. For the circumstances of that case, discuss the ability of damages to fulfil the purposes of civil remedies.

#### Application exercise:

Take one of the case studies given in this chapter on *Outcome 2 – The Victorian civil justice system*. You could choose the case regarding court-ordered medical treatment, discussed in this section; or you could choose the case regarding careless hair bleaching, discussed in the VCAT section. There are others to choose from, also.

One of the questions you might be given on the exam is to consider the “appropriateness” of one of the features of dispute resolution, in relation to a case. Practise this. It requires matching the strengths and weaknesses of a feature of dispute resolution, such as a remedy, against the facts of a real or hypothetical case.

Use the case you have selected to answer the following question:

**What remedy do you think would be most appropriate to award in this case? Give reasons for your answer. (4 marks)**

In your answer, you may also wish to consider the reasons why a *different* remedy might be *less* appropriate. This kind of comparison can illuminate your answer.

## PROBLEMS AND REFORMS

### Factors that affect the ability of the civil justice system to achieve the principles of justice

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

- The costs of achieving justice and resolving civil disputes.
- The time required to achieve justice and resolve civil disputes.
- The ability of individuals to access the knowledge, avenues and processes needed to resolve civil disputes.

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

#### Costs

##### Definition

A plaintiff may not have the funds to pursue justice or to fund the action until settlement or verdict, or they may decide that the remedy they are seeking does not justify the cost. A defendant may not be able to afford to adequately defend themselves and may be forced to settle or have a judgment ordered against them.

##### Detail

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

In order for a plaintiff to defend their rights, or for a defendant to defend themselves against claims they don't agree with, a party must usually obtain legal advice from a solicitor; pay fees to file documents with the court and issue summonses to potential witnesses; pay for expert reports and expert evidence during the trial; hire a barrister to speak for them in court proceedings; fund their own transport, research, post and telephone costs, as well as pay for that of their lawyers; and often cope with time off work without pay. Specific factors that may contribute to the intimidating cost of resolving a civil dispute include the following:

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

Legal advice is gained through a solicitor in Victoria. A solicitor is the lawyer that meets with clients, provides legal advice, conducts research into the case, and files many of the necessary legal documents. Solicitors usually charge by the hour, split into smaller increments such as six minutes or 15 minutes. Solicitor fees vary wildly across the profession, but it is not uncommon for a junior solicitor to charge around \$300ph, or a senior one to charge \$500-\$800ph. The Supreme Court Scale of Costs puts a solicitor's hourly rate at \$425.00 as of the 2021-22 financial year (for attendance at court). In addition to their hourly fees, solicitors will also charge reimbursement for disbursements. For instance, the Law Institute of Victoria sets the baseline rate for sending an email formally acknowledging receipt of information (e.g. an email informing the client that documents are attached) at \$39.50 per email (as of the 1 January 2023 Practitioner Remuneration Order).

Counsel in civil matters charge a similar amount to those in criminal matters, but in civil disputes the parties are also responsible for court fees and costs relating to the finding and giving of evidence. The accused has fewer of these in a criminal defence. Court fees and fees for witnesses are in addition to the fees payable for legal representation. Every court charges a particular set of fees for starting a claim, and then additional fees are charges for things like issuing summonses, photocopying and attending hearings in a courtroom. Applying for leave to appeal with the Court of Appeal costs a filing fee of \$2,330.20 (as of 1 July 2022 at the Standard rate), for instance, and obtaining a hearing date costs \$1,440.30 on the Standard rate.



## The principles of justice

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

## Time

### Definition

Delays can affect the ability of people to use the legal system because they may want closure and to be able to get on with their lives: both plaintiffs and defendants in a civil dispute may feel pressured into accepting an inappropriate settlement; and long delays can impair the ability of witnesses to give accurate evidence.

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



### Detail

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

- According to the 2018-19 Magistrates' Court Annual Report, a total of 40,100 new civil claims were filed, but only 7,243 were defended and went to a hearing. 79.3% were therefore finalised within six months. In the County Court, on the other hand, had 85% of criminal matters resolved within 12 months, but only 53% of civil matters. The Common Law Division of the Supreme Court sits at 67% of matters finalised within 12 months. (The 2020-21 Annual Reports are unreliable as to trends because of the impact of Covid-19.)
- The increasing complexity of evidence, often brought about by enhanced technology being applied to evidence and investigation, creates longer trials. More evidence overall is presented, but complex evidence also takes longer to adduce: expert witnesses must usually be called, and the evidence must be explained piece-by-piece so that the judge and jury understands it. This is why Part 4.6 of the *Civil Procedure Act 2010* (Vic) gives so much power to judges to case manage the provision of expert evidence.
- In 2012 the Law and Justice Foundation of NSW published findings from a survey of 20,716 Australians that showed that 50% of people had experienced at least one legal problem in the last 12 months, and 21% of these were consumer disputes – 12% were rental and housing disputes, and 11% were government and administrative matters.
- In the Civil Claims List at VCAT the average time between filing and hearing has stretched from 8-15 weeks to 56 weeks in 2021-22 because of Covid-19. The Planning and Environment Division is more complex, using pre-hearing procedures such as directions hearings and compulsory conferences, and matters took between 25-26 weeks to resolve at a hearing before Covid-19 delays – now it sits at 49 weeks.

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

## The principles of justice

- Fairness is compromised because delays of months or years in resolution have a significant impact on the life, and physical and mental health, of the parties and their families, and the quality of evidence degrades over time.
- Equality is compromised because delays will not impact on every person the same way.
- Access is compromised because delays can encourage parties to a civil dispute to settle in a way that denies them justice; parties may also exhaust their funds before the end of the case, and lose their ability to properly represent themselves.

## Accessibility

**Exam tip:** In the Study Design, the problem of ‘accessibility’ is listed specifically in relation to the civil justice system. Accessibility will also impact on the effectiveness of the criminal justice system, but this is outside the required scope of the course.

### Definition

Access to justice refers to the ability of people to engage with the many formal and informal aspects of the justice system and to enjoy the benefits of living in a society where their rights can be protected. Access includes access to knowledge and understanding, access to physical locations, meaningful access to choices, and the ability to use systems and procedures.

### Detail

Improving access involves making it easier for people to resolve their disputes according to law; making it easier for people to know when their disputes involve laws and legally-protected rights; and making it easier for people to engage with the actual processes of dispute resolution within the system, regardless of whether they are using formal or informal means.

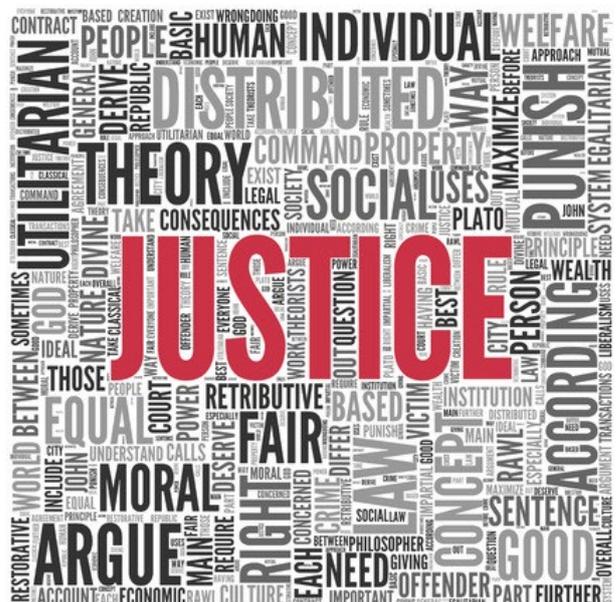
For the 2015 ‘Access to Justice Review’, the Victorian Department of Justice had to consider the meaning of the phrase ‘access to justice’. It cited the definition used by the Productivity Commission, in its own 2014 inquiry – which was the ability for people to resolve their disputes according to law, using both formal and informal institutions and processes, and including the receipt of information and advice.

Factors that influence the accessibility of the civil justice system include the following:

- Whether or not a party has existing knowledge of the structure and operation of the legal system, and how to use the various mechanisms for dispute resolution and the defence of their rights. Prior experience and knowledge will make the system more accessible.
- Whether or not a party has the language, cognitive and psychological skills to negotiate dispute resolution and research and argue their side of the dispute. If a party is working with any language impediment such as poor English or low literacy, or with any cognitive or psychological impairment, there will be obstacles to their access to the civil justice system.
- Whether or not a party has the financial and time resources to pursue their case.

Self-represented litigants (‘SRLs’) are parties who lack legal representation during the dispute resolution. An SRL may have obtained some legal advice outside the hearing, but inside the hearing or negotiation conference they appear on their own behalf. People who can afford representation still face barriers to access, but SRLs face additional barriers because they lack the knowledge and experience of a professional advocate. Regardless of the strength of their case, in terms of facts and law, the Victorian Government’s 2016 Access to Justice Review showed that SRLs are more likely to lose. 29% of all appeals are successful in the Court of Appeal, compared with only 4% of appeals filed by an SRL in 2011-12 and zero in 2012-13.

The Magistrates’ Court Annual Report 2015-16 said: “The time taken for a judicial officer to explain the processes and procedures affects the efficient running of the Court, which causes further delays.” In 2020-21, 40% of the appeals filed with the Supreme Court Trial Division were filed by SRLs.



## The principles of justice

- Fairness is compromised when one section of the community experiences obstacles or barriers standing in the way of them effectively using the civil justice system, especially if other groups in society do not face the same barriers.
- Equality is compromised when barriers to accessibility do not affect parties equally.
- Access is compromised in every way accessibility is not supported and provided equally. The core of accessibility is the ability of each person in the community to *use* the civil justice system, its formal and its informal components, in meaningful and satisfying ways.

## Recent reforms

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

**Exam tip:** When answering questions on this topic, you should ensure you avoid specific changes to individual laws. Try instead to ask what criminal or civil procedures or dispute resolution body or institution is being changed by the reform – if you cannot identify an entire procedure or an entire institution, your reform *may* not be to the system of dispute resolution in a wider sense.

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

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

## Civil and criminal justice systems

### Disallowance of improper questions

As included previously in Unit 3 AOS 1. This reform may also be used in relation to civil disputes.

### Civil justice system

#### Three-tiered fee structure

The last year this reform will be considered recent is 2026.

#### **Definition**

In September 2022 the Magistrates' Court brought in a 3-tier fee system, echoing the tiered system brought in by VCAT in 2016 and the County and Supreme Courts in 2018.

Fee categories are Corporate fee payers, Standard fee payers and Concession fee payers. 'Concession' is defined as a person in possession of a current Commonwealth healthcare card. Concession rates span from waived fees (ie no fee charged) through to 50% of the Standard rate. The Standard rate is fixed at 50% of the Corporate rate, as it is in the County and Supreme Courts.

#### **Detail**

For example, in the Magistrates' Court fees legislated in the 2022 *Magistrates' Court (Fees) Regulations*, the cost for starting a proceeding claiming less than \$1,000 is 20.4 fee units for a Corporate applicant, but 10.2 fee units for a Standard applicant and 5.1 fee units for a Concession applicant. A mediation session conducted by a magistrate or registrar is 36.2 fee units for a Corporate party, down to 9.1 fee units \$139.80 for a Concession party. One fee unit is \$15.29 for the 2022-23 financial year.

The state attorney-general issued a Regulatory Impact Statement in June 2022 proposing the fee structure that was adopted. In her Gazette statement following the inquiry, on 5 September 2022, she stated: "The objective of these Regulations is to restructure the fees payable at the Magistrates' Court to support the charging of fees on an equitable basis which balances the Government's objectives in recovering a share of the costs incurred in providing services, while promoting fair and increased access to justice."

## Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
<p>According to the 2022 Regulatory Impact Statement that recommended the reform, the tiered structure will increase the overall fee revenue for the Court by around \$9.1m per year (or, 40%). The new fee structure allows a comparable level of cost recovery, but imposes the greater burden on corporate payers with more resources – the Impact Statement notes that Corporate fees are set at around 100% cost recovery, and the system “increases equity for litigants, as the option better reflects the capacity of litigants to pay for court services, according to their means to pay.” This is <b>equitable</b>, and protects <b>access</b> for concession parties.</p> <p>The definition of the Corporate rate protects small business owners with a turnover of less than \$200,000 per year, allocating to them to Standard category. Roughly 60% of businesses in Australia fall into this category. Looking at assets protects <b>fairness</b>.</p> <p>Traditionally, fees have been scaled according to the value of the claim, but this is based on a false assumption that a large claim equals a large capacity to pay. For a personal injury claim, for instance, this is generally not the case, and is <b>unfair</b> and inaccurate.</p>	<p>The 2018 Regulatory Impact Statement for the change to the County and Supreme Courts noted that court costs generally make up less than 10% of party costs. The fee structure therefore does little to increase <b>access</b> for people struggling to afford resolution. The 2022 RIS for the Magistrates’ Court stated: “However, in practice, fees charged by the Magistrates’ Court are generally small compared to other costs of initiating proceedings in the Court (such as costs of legal representation). Therefore, the level of fees set for the Magistrates’ Court is unlikely to have a material influence on a litigant’s choice of court, or whether to pursue a claim in a court at all.”</p>

### Introduction of immediation

The last year this reform will be considered recent is 2024.

#### **Definition**

Immediation is a videoconferencing online dispute resolution (‘ODR’) platform that uses former judges, mediators, arbitrators and legally-trained clerks to provide fully remote mediation and arbitration services. It provides legal experts to assist clients remotely, and chat functions that allow for both group discussions and private chats. Once parties agree to an outcome, or an arbitrator makes a decision, the outcome is made binding.



#### **Detail**

In 2020 the Immediation platform was put into use in the Victorian Civil and Administrative Tribunal and the Federal Court of Australia, and the Family Court of Australia and the Federal Circuit Court selected it as their online dispute resolution platform.

The Immediation platform was founded by a former barrister, Laura Keily, who says, “I just found that it was basically impossible for anyone to navigate the court system unless they were an ASX-listed company or had enormous resources.” She says that giving each dispute “the Rolls-Royce treatment” in an historic court building, with multiple court personnel and lawyers on both sides, is not sustainable and cannot cope with the volume of civil disputes seen in modern society: “If nobody can access that system, then that rule of law is undermined. And ultimately, that’s not sustainable.”

The Immediation platform employs a tech services team as well as a dispute resolution panel of 90 legal and mediation experts. Members of the panel include former chief justices Marilyn Warren and Wayne Martin, former Court of Appeal presidents Carmel McLure and Tony Fitzgerald, and former Federal Court judge John Gilmore.

The average timeframe for dispute resolution in the first year of operation was within 30 days, and the average cost was 10% of the value of the dispute.

VCAT’s implementation of Immediation hosts both mediation and hearing sessions, and provides separate virtual rooms for the mediator to talk privately with parties. VCAT expected over 1,000 disputes to be resolved using the platform in the second half of 2020, particularly given the limitations on in-person resolution posed by the Covid-19 pandemic regulations, but an update was not provided in the 2021-22 Annual Report.

## Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
<p>The <i>Access to Justice Review</i> received feedback from many stakeholders that ODR services would be welcome, and would increase the <b>access</b> that participants felt they had to civil dispute resolution services.</p> <p>ODR helps achieve <b>equality</b> across parties to the dispute by reducing personality factors and the ability to argue a case persuasively. It may be easier to reach a <b>fair</b> decision on the merits of the case if the decision-maker can focus on relevant documents such as contracts, invoices, photographs and statements, and parties are receiving expert advice from the same panel members on the Immediation platform.</p> <p>ODR is likely to be more easily <b>accessible</b> to many people: something they can engage with from home, school or work, and that doesn't require extensive travel or days taken away from other commitments. This is particularly true for parties living in remote areas, or who have barriers to movement such as illness, childminding responsibilities, or quarantine restrictions.</p> <p>Because of the panel members provided, Immediation ODR has the ability to decrease the need for and reliance on legal representation, which can decrease the cost to parties and promote greater <b>equality</b> if one party cannot afford to be represented.</p>	<p>ODR actually decreases, in many instance, the <b>access</b> to justice that already-vulnerable groups have. A reliance on online services disadvantages parties from non-English speaking backgrounds in particular, but also parties from rural areas with poor Internet connections, parties without the wealth to give them easy access to technology, and parties with low literacy. The <i>Access to Justice Review</i> acknowledges this.</p> <p>The videoconferencing nature of Immediation allows participants to see the identities of the people involved, but it is difficult to guarantee that parties do not have others present elsewhere in the room, giving instruction or recording otherwise confidential discussions.</p> <p>Many parties need in-person support services in order to be able to properly <b>access</b> dispute resolution services and achieve meaningful <b>equality</b> with the other side.</p>

## Recommended reforms

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

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

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

## Civil and criminal justice systems

### Juror eligibility

As included previously in Unit 3 AOS 1. This recommended reform may also be used in relation to civil disputes.

### Civil justice system

#### Self-representation services

##### Definition

In October 2015 the Victorian Department of Justice and Regulation was asked by the state attorney-general to undertake the Access to Justice Review, specifically focusing on (amongst other things) the best way to support self-represented litigants ('SRLs') in civil disputes. Two recommendations specifically relating to SRLs were made: to broadly improve the way courts and VCAT work with SRLs; and to establish a Self-Representation Service ('SRS') in courts and VCAT, to provide general legal advice for parties considering their options for resolution or preparing their case.

##### Detail

The final report was released in October 2016, and it contained 60 recommendations organised into four key strategies. The state government published its official response in May 2017. Recommendation 8.1 suggested that the courts and the VCAT consider

establishing a regular consultative forum on self-represented litigants that would allow the jurisdictions to co-ordinate their approaches to self-represented litigants, and share ideas and information. Recommendation 8.4 advised that the Victorian Government should work with the Supreme, County and Children’s Courts, VCAT, and the community legal sector to establish a Self-Representation Service, to be administered by a not-for-profit organisation.

In its official response, the state government announced \$1.1 million for the County Court, to help fund specialist SRL workers. So far, the County Court and Court of Appeal have published information guides for SRLs (in August 2018 and November 2018 respectively), and the County Court has a number of SRL Case Managers working in the Court Registry who can assist parties with understanding court procedure, but they do not give legal information or advice. There were approximately 78 civil proceedings at any one time in the Supreme Court Common Law Division involving a self-represented litigant in 2019-20, so the Court piloted a self-representation service, provided through Justice Connect and run in conjunction with the Supreme Court of Victoria. It ran in the Commercial Division, which handles around 70% of the Court’s matters involving SRLs. In 2020-21 it responded to 139 enquiries from SRLs seeking assistance, and in May 2021 the Victorian Government announced that it would continue to fund the Supreme Court / Justice Connect pilot until at least 2024-25.

VCAT was developing a self-help service for SRLs, in collaboration with Justice Connect, which was anticipated for roll-out across 2019-20. VCAT announced in 2019 that it was unable to secure funding for the service, and has put exploration for other funding sources on indefinite hold.

### Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
<p>An effective SRS achieves significant cost and time savings for both the parties involved and the courts. This increases the <b>access</b> to justice enjoyed by the parties, but also by parties to other disputes waiting on the court’s calendar.</p> <p>All evaluations of existing SRS programmes indicate that they contribute to a perception on behalf of SRLs that the legal system is <b>fair</b> and just.</p>	<p>SRLs will still be at a significant disadvantage if they are faced with an experienced and well-resourced opposition, especially if that opposition has a large legal team of professional representatives. They will still not be on an <b>equal</b> footing.</p> <p>An SRS will only be beneficial long-term if it is combined with measures to keep dispute resolution processes understandable by the average person, and not prohibitively expensive or time-consuming.</p> <p>The assistance materials published by courts give at best marginal help with <b>access</b> for SRLs. For instance, the video for SRLs produced by the County Court first advises SRLs to obtain legal advice, and then recommends that any SRL read the entire <i>Civil Procedure Act 2010</i> and the County Court Civil Procedure Rules 2008 before they file anything with the Court.</p>

### Increased funding for interpreters

#### Definition

In October 2015 the Victorian Department of Justice and Regulation was asked by the state attorney-general to undertake the Access to Justice Review to identify ways in which access to justice could be improved for both everyday cases and matters involving particularly vulnerable or disadvantaged parties. The final report was released in October 2016, and it contained 60 recommendations organised into four key strategies. The Department recommended that more accessible interpreter services be available in courts, and that court staff be trained in recognising when the services of a specialised legal interpreter are necessary



The state government published its official response in May 2017.

#### Detail

One of the four broad strategies identified in the Report was to provide more flexible and integrated services, tailored to the needs of individual disputes and the circumstances of parties to those disputes. The Review reported that: “Vulnerable and disadvantaged members of the Victorian community can require more intensive services to help them to manage and resolve their legal problems.” The recommendation specifically relating to the provision of interpreter services was made within this strategy.

The Government agreed with this recommendation in its official response. Currently, interpreters are not provided for free in all venues or for all types of disputes. Free interpreters in civil disputes are limited largely to VCAT hearings.

The national Translating and Interpreting Service estimates a day booking at \$1732.50, based on a single-day onsite interpreter booking with court hours of 9:30am until 4:30pm in 2023. The Supreme Court schedule of fees contained in the Supreme Court (General Civil Procedure) Rules 2015 (as at 1 January 2023 update), however, lists an interpreter allowance of only \$616.70 for a full day, whether or not the interpreter is required by the party during the time they are in attendance. This is what a successful party is likely to have awarded to them in costs, if they have needed to engage an interpreter – ‘reasonable’ costs are usually calculated based on the Court’s schedule of fees rather than the actual price.

## Evaluation

ARGUMENTS IN FAVOUR	CONCERNS
<p>People cannot be expected to make decisions regarding the conduct of their case if they are unable to understand what is being said in the courtroom, or in directions hearings and other conferences outside court. It is unfair to demand that people either make decisions without this understanding, or relinquish their decision-making entirely to someone else such as a lawyer. This denies them <b>access</b>.</p> <p>Interpreters are always permitted in legal proceedings, but the cost of an interpreter can be prohibitive for people without significant financial resources. The government has a responsibility to assist with basic <b>accessibility</b> services such as interpretation – particularly when the legal system and law are so complex, and so full of special terminology, that a basic interpreter without special legal training is often inadequate.</p> <p>VCAT provides interpreters at no charge to participants in a dispute. Interpreters are also provided free of charge in police interviews. The legal system provides interpretation services when it considers it to be a priority, but not all disputes are treated as <b>equal</b>.</p>	<p>Conversational interpreters cannot be used in many disputes, because they are not familiar enough with legal terminology and the most accurate way to translate this specialised language into a second language. Interpreters must therefore come from a very small pool of people trained both in translation and in law. This reform would be very difficult for the government to fund effectively across all venues.</p> <p>Logistically, language differences can be particularly difficult to handle effectively. Based on census results, there are more than 200 different languages spoken in Australia, and accommodating every language that might be spoken in one jurisdiction is simply very difficult and expensive.</p>

## REVIEW/APPLICATION QUESTIONS – Problems and reforms

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

## MINI-EXAM NO 1: UNIT 3

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

*The mark and time allocation has been calculated on the basis of the examination average of 1.5 minutes per mark. The time allocation has been rounded up to an easy figure.*

### Question 1

Outline two advantages of having a court hierarchy for criminal disputes. (2 marks)

### Question 2

Jane is 19 years of age and has been charged with the minor indictable offence of committing a robbery of goods to the value of \$15,000. It is her first offence, and her lawyer is seeking to have the case heard summarily.

Explain one benefit to Jane of having her case settled summarily. (2 marks)

### Question 3

*The jury is the “heart and lungs of liberty.”* (John Adams, 2<sup>nd</sup> President of the United States, 1774)

Outline one responsibility of the jury in criminal trials. (2 marks)

### Question 4

Explain what the legal system is aiming to achieve through imposing sanctions in criminal cases. In your answer use two examples of sanctions. (4 marks)

### Question 5

#### Source 1

The following is the Issues Paper notice for the Committals inquiry that was conducted during 2019 by the Victorian Law Reform Commission.

#### Committals: Issues Paper

The Victorian Law Reform Commission invites input on its review of the committals process. It has published an issues paper to assist with responses. See the link below.

The Commission has been asked by the state government to review the committals process to:

- make it more efficient
- reduce the trauma to victims of crime
- ensure fair trial rights.

Options under consideration include reforming the process or abolishing committals completely.

The paper includes questions on the best ways to reform the system. You can have your say by completing an online form or writing to the Commission.

Submissions are invited by **16 August 2019**.

Source: <https://www.lawreform.vic.gov.au/projects/committals/committals-issues-paper>

## Source 2

The following is an extract from the Policy Paper on Committals published by the Office of Public Prosecutions in October 2018, suggesting that the prosecution commit an accused to trial instead of the current procedure.

### The Proposal

This new process strikes the right balance by improving the experience of victims and witnesses in criminal proceedings without compromising the rights of the accused and the need to prove a case beyond reasonable doubt. This proposal will expand the essential role magistrates play in ensuring the proper disclosure of evidence, narrowing the issues in dispute and obtaining fair resolutions (and avoiding trials) as early as possible. The role of assessing the strength of evidence will fall, at this pre-trial phase, to the Director of Public Prosecutions.

Source: <http://www.opp.vic.gov.au/getattachment/0da88912-0a57-48f0-9048-31a0ad1b15df/DPP-Policy-Paper-Proposed-reforms-to-reduce-furthe.aspx>

- a. Discuss to what extent committal proceedings contribute to an achievement of the principles of justice. (4 marks)
- b. Comment on the desirability of the criminal justice system's focus on facilitating guilty pleas. (3 marks)
- c. Identify two problems that can affect the achievement of the principles of justice by the criminal justice system. For each problem identified, provide one change or proposed change, and explain how that change or proposal has improved, or would improve, the legal system. (8 marks)

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The lecture programs run for three and a half hours and are presented exclusively by experienced teachers who have years of experience assessing final examinations. The programs are designed to show students how to apply their knowledge of the course in the examination in a way that enhances examination performance and impresses the examiners. Each program will include:

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- tips and tricks to employ to increase efficiency and time management
- strategies to unpack the most difficult parts of the course
- strategies to incorporate relevant and contemporary information into responses.

All participants are provided with notes to complete during the program and there will be opportunities to quiz our experienced examination assessors at the conclusion of the program.

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## MINI-EXAM NO 2: UNIT 3

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

The mark and time allocation has been calculated on the basis of the examination average of 1.5 minutes per mark. The time allocation has been rounded up to an easy figure.

### Question 1

#### Source 1

The following are extracts from the March 2018 report of the Victorian Law Reform Commission into litigation funding and representative proceedings, *Access to Justice – Litigation Funding and Group Proceedings*.

#### The costs of winning

5.23 As set out in Chapter 3, the payment of legal costs in class actions is different to other litigation. If an ‘all in’ settlement is reached, legal costs will generally be deducted from any settlement amount prior to distribution to class members. Each class member effectively contributes part of their settlement amount toward legal costs, even if they have not signed a legal costs agreement. This is appropriate because all class members enjoy the benefit of the services for which the costs were incurred, as observed by Justice Gordon in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd*:

The legal costs were incurred and achieved a settlement for all group members. The group members who did not sign a LCA [legal costs agreement] with [the representative plaintiff’s lawyers] should not be entitled to receive a windfall by reason of their refusal to sign an LCA. [...]

#### Conclusion

7.1 Victoria’s class action regime has improved access to justice. Thousands of Victorians have benefited from the procedures introduced in 2000 by Part 4A of the *Supreme Court Act 1986* (Vic). Combined, they have received more than one billion dollars in compensation that they would have been unable or unwilling to recover in separate claims. Eighty-five class actions have been filed on behalf of a wide variety of claimants, from vulnerable individuals to institutional investors and insurers. Two in every three class actions settled.

7.2 Crucially, the regime affirms the Supreme Court’s role in ensuring that the procedures are fair and that the outcome takes into account the interests of all class members.

- a. Explain the main purposes of one civil remedy. (3 marks)
- b. Describe the meaning of the burden and standard of proof as they apply to civil trials. (4 marks)
- c. Comment on the extent to which two pre-trial procedures involved in a civil trial in the Supreme Court achieve the purposes of pre-trial procedures. (4 marks)

### Question 2

Differentiate between the responsibilities of the parties in the civil justice system and the responsibilities of the parties in the criminal justice system. (3 marks)

### Question 3

Michael was defamed by an article in a local newspaper. He commenced legal action in the Supreme Court. “I will be glad when this is all over. It took months to come to trial and cost me tens of thousands of dollars. I wish there was a better way to achieve justice,” he said.

Recommend two non-judicial ways Michael might have chosen to resolve his dispute instead of going to trial. (4 marks)

### Question 4

Comment on the accessibility of justice in the civil justice system, and provide one recent or recommended reform that addresses the question of access. (5 marks)

## YOU BE THE ASSESSOR: UNIT 3

In this section, you are required to assess the responses presented for each of the questions. You should award the responses a score and justify your decision. Once complete, compare your assessment with mine (provided at the end of the Study Guide).

### Question 1

Describe one method of dispute resolution that could be used to resolve a civil dispute. (3 marks)

*Sample answer 1:*

One method of dispute resolution that could be used in either courts or the Victorian Civil and Administrative Tribunal (VCAT) is mediation. Mediation is a cooperative method of dispute resolution in which two parties sit down with each other in an informal environment and talk about the problem. There are no rules of evidence or procedure, and the role of the third party is to keep the conversation flowing and make sure everything stays positive. They are not allowed to give any advice or say anything while the parties are talking together. The decision reached in a mediation is not legally binding, which is good because neither party will feel threatened or pressured into making a decision, and if the verdict isn't fair to one of them they won't have to follow it. This can be bad, though, because it could mean the dispute has to progress to conciliation, arbitration or even judicial determination next, wasting time and money.

Score out of 3: \_\_\_\_\_

Justification:

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*Sample answer 2:*

One method is conciliation. Conciliation is like mediation, except that the third party is allowed to give advice to the parties about what outcome should be reached. The decision made by the parties is not legally binding, but it can be enforced by VCAT if the parties choose to put it into a contract. Conciliation is mostly used for industrial or employment-related disputes.

Score out of 3: \_\_\_\_\_

Justification:

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*Sample answer 3:*

Arbitration is an inquisitorial method of dispute resolution in which parties present arguments and evidence to an independent and impartial third party who weighs up the strength of each case and awards the claim to one party. The third party is often legally-trained, but is not sitting as a judicial officer even if they do work as a judge or magistrate. When hearing the dispute they have the ability to apply flexible rules of evidence and procedure, tailored to the needs of the individual case, and can ask parties or witnesses questions – or even encourage parties to negotiate right in the hearing room. Arbitration is often open to the public, and the award made by the arbitrator is legally-enforceable through the courts: it is binding on both parties.

Score out of 3: \_\_\_\_\_

Justification:

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**Question 2**

Discuss the operation of courts and the Victorian Civil and Administrative Tribunal ('VCAT') in the hearing of legal disputes. In your answer, justify the use of tribunals such as VCAT in addition to the court system. (5 marks)

*Sample answer 1:*

VCAT exists in addition to courts to provide people engaged in relatively simple civil disputes the option to have them resolved generally more cheaply and efficiently than would happen in court. Court hearings involve a level of formality and expense, and not all cases with law and evidence that is straightforward need the scrutiny and laboured legal argument that courts supply. There are many similarities between courts and VCAT despite this overall difference, though. Both hear civil disputes between individuals, government agencies and corporate entities, and both apply the law in the area to the facts of the case to come to a decision on behalf of the parties. Both employ people to sit as independent and impartial third parties, and many of these people are legally-trained and qualified – courts use judges, and VCAT uses judges, too, sitting as the president and vice-presidents. Both have avenues of appeal that are open to parties who are dissatisfied with the outcome of their case; if either party believes that an error has been made on a question of fact or law, they can appeal their case to a higher court with a more experienced judge and have the error remedied. VCAT and courts also provide parties with options for resolution in addition to the hearing: VCAT and courts will both resolve matters at a mediation conference instead of a hearing if the dispute is of an appropriate type, or they can use a conciliation conference or a less formal hearing (such as early neutral evaluation in courts). None of these alternative options use strict rules of evidence and procedure. Finally, both VCAT and courts give binding outcomes, which gives finality to the disputes and ensures that people can move on with their lives even if they are not able to compromise and come to an agreement themselves.

Score out of 5: \_\_\_\_\_

Justification:

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*Sample answer 2:*

There are many similarities and differences between the operation of courts and the operation of VCAT. One similarity is that both can hear civil disputes. One difference is that only courts can hear criminal disputes. One similarity is that both have third parties that are independent of the parties to the dispute. One difference is that only courts use juries. One similarity is that all court decisions in cases will be binding on the parties, whereas VCAT decisions are not binding on the parties and parties may therefore end up in court anyway, wasting valuable time and money. Other differences include that VCAT uses many more methods of alternative dispute resolution than court, including mediation and conciliation. Also, VCAT orders cannot be appealed on questions of fact; they can only be appealed on questions of law. VCAT members are also not judges and they have no legal training. Instead, they are experts in the area of law the dispute covers, so they bring more common-sense and practical experience to the hearing of the dispute. VCAT also is much cheaper than courts, as well as faster and less intimidating. This is why it is important to have VCAT as an option for people in society as well as courts, because court resolution would be too expensive and formal for the average person to want to take their dispute there and defend their rights.

Score out of 5: \_\_\_\_\_

Justification:

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**Question 3**

Sam, 23, has prior convictions and drug and alcohol addictions. Sam has been charged with three indictable offences, including armed robbery. The prosecution alleges that Sam was in possession of high-heeled shoes when committing the armed robbery and, therefore, possessed an ‘offensive weapon’ within the meaning of the *Crimes Act 1958* (Vic).

Provide one sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purposes. (5 marks)

*Sample answer 1:*

Community corrections orders (‘CCOs’) came into effect in 2012, replacing combined custody and treatment orders, home detention, intensive correction orders and community-based orders. Sentences are mainly served in the community, but may be combined with up to one year imprisonment, and a wide range of conditions can be imposed, including rehabilitation classes or counseling, unpaid community work or restricted movement. CCOs aim to rehabilitate the offender, because the conditions attached are tailored to the circumstances of the individual and the crime; they also aim to provide specific deterrence, because negative consequences such as potential jail time are attached to encourage the offender to want to avoid these punishments in the future. General deterrence may also be achieved if other people in the community see conditions such as jail or unpaid volunteer work and decide against committing a similar crime because they want to avoid those consequences.

Score out of 5: \_\_\_\_\_

Justification:

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*Sample answer 2:*

A drug treatment order could be given to Sam, because of her or his history with substance abuse. This achieves rehabilitation, because the jail sentence is suspended while the offender undergoes treatment and supervision. This gives the offender the opportunity to learn from their mistakes; here, Sam might overcome her or his problems with drugs and alcohol, and not want to commit crimes again in the future. The conditions attached to the order, such as having urine tests, counseling sessions and submitting to rules regarding restricted movement, can also help rehabilitate, because they are squarely focused on the reasons contributing to the offending and not merely on the criminal behaviour: often, this behaviour is just a symptom of a larger problem, anyway. The main problem with the success the order has with rehabilitation, though, is that it could be criticised for failing to achieve any of the other aims. The fact that it can’t be given in situations of sexual or violent crimes is an admission by parliament that it fails to protect society, and, because the prison sentence is deferred, the public could think it looks too soft on crime and therefore believe it doesn’t punish enough or publicly denounce the offender’s actions.

Score out of 5: \_\_\_\_\_

Justification:

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*Sample answer 3:*

A prison sentence could be given to Sam. A period of time in jail would punish Sam for her wrongdoing because it would remove her from her friends and family, prevent her from working, and stop her from living as an independent person and making a wide range of decisions about her everyday life. Losing privacy and freedom is difficult. Prison therefore deters both Sam and other members of the community because of this hardship: specific deterrence may be achieved because Sam would not want to go back to jail afterwards, so might stop committing crime; general deterrence might be achieved because other people would look at what Sam has lost and not want to lose it themselves. Also, for the time that Sam is locked up, the community will be protected from future harm being caused. Because prison is the sanction of last resort it is the strongest message of denunciation the court can give to the community. One aim that is not achieved, though, is rehabilitation. Even though prisons nowadays have options for counseling and educational or employment programmes, prisoners are surrounded by other criminals so are given little incentive to be a different

person, the way that non-offending family members might give them. Also, statistics show that around half of the prison population have been incarcerated before, which shows that rehabilitation does not seem to be working.

Score out of 5: \_\_\_\_\_

Justification:

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#### Question 4

Evaluate how effectively the jury performs one of its responsibilities in a criminal trial. (4 marks)

*Sample answer 1:*

The jury system relies on untrained members of the community looking at the case from a layperson's point of view and bringing common sense and contemporary values into their judgment. This allows non-legal members of the community to be educated in the law, but it also means their verdicts could be based on prejudice and emotion rather than the law. Untrained people in the community do not have experience looking at evidence dispassionately and objectively; in a way this is why we use them, because otherwise it would be the same as having a panel of judges, but it can mean the parties don't receive a fair trial. An example of this happening was in the Lindy Chamberlain case, where comments from the jurors after the trial (and the fact that Chamberlain was later pardoned) suggests that the test used in deliberations was whether the jurors could picture a dingo taking a baby and not whether the prosecution had provided proof of murder beyond reasonable doubt.

Score out of 4: \_\_\_\_\_

Justification:

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*Sample answer 2:*

One weakness of the jury system is that a lot of evidence we have suggests that coercion goes in the deliberation of a verdict, so the verdict reached is not as reliable as we might think it is. Even though each juror votes as an individual, a verdict can only be delivered if all jurors independently come to the same conclusion – or, in cases where majority verdicts are allowed, all but one. This can place an enormous amount of pressure on jurors to conform to the group, especially if there is someone with an assertive personality on the jury, someone with prior legal experience, or if deliberations are approaching a holiday or a weekend. People currently involved in the justice system such as police officers and lawyers are ineligible for jury duty to minimise this, but coercion and pressure still occur. A NSW juror study in 2011 found significant juror concern over influence and pressure – specifically, that coming from other jurors. Judges can even exacerbate it by refusing to accept a hung jury, and telling the jury repeatedly to go back and try to all come to agreement. Often it may just be the less assertive jurors caving in. It is difficult to think of a reform that would fix this entirely, but replacing a layperson jury with a jury of experts might help.

Score out of 4: \_\_\_\_\_

Justification:

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**Question 5**

How does the provision for representative proceedings help enhance the effective operation of the civil justice system?  
(4 marks)

*Sample answer 1:*

Representative proceedings are civil claims in which the party bringing the action belongs to a larger group of seven or more people and litigates on behalf of that group. Group members are not listed by name in the pleadings, and they play a largely passive role. The linking factor between them is that all members of the class share a common characteristic or interest, even if the precise harm they suffered is slightly different. Damages will therefore be allocated differently across members of the class, based on the individual damages each person suffered. Group members are not required to instruct lawyers or pay legal fees: their interests are protected and pursued by the named plaintiff in the representative proceeding.

Score out of 4: \_\_\_\_\_

Justification:

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*Sample answer 2:*

Representative proceedings enhance the civil justice system because they help achieve the principles of justice. They achieve fairness because it is fair for people to be compensated for harm; they achieve equality because every person in the class action has an equal opportunity to have their harm compensated; and they achieve access because it is cheaper for a class action than for every person to sue individually.

Score out of 4: \_\_\_\_\_

Justification:

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# UNIT 4 THE PEOPLE AND THE LAW

## INTRODUCTION TO GOVERNMENT IN AUSTRALIA

### Democracy

Australians are given the power to participate both directly and indirectly in the government of the community: we can stand for political office, and we can vote for the people we want to hold political office. This is what living in a democracy means – the word ‘democracy’ comes from Greek and essentially means government by the people. The government only has validity as long as it has the consent of the governed, and the governed – regular citizens – can become part of the government themselves.

### Parliament

A parliament is a group of people elected to represent the views of the community, debate, and decide the laws that will govern behaviour in the community. A proposed law is called a ‘bill’, and once it has been passed by parliament it is called an ‘act’, a ‘statute’, or ‘legislation’ – then it becomes something that needs to be followed by the people.

**Exam tip:** Laws made by parliament must always be referred to by the right terms, and terms for parliament-made law – such as ‘legislation’ – must not ever be used for laws made by other bodies like courts. You should also ensure you use the words ‘bill’ and ‘act’ correctly; a bill is not yet a law.

Parliament has the responsibility to represent the views of the public, but the public has millions of different views – parliament will always have to choose what laws to make and what views to support.

### Political parties

Every person elected to parliament also has the choice of whether or not to belong to a political party. A political party is a group of people who all share roughly the same ideology and have promised to pursue a similar agenda in politics. There are two major parties in Australia: the Labor Party, or ‘ALP’, and the Liberal Party, or ‘LNP’ (which in many parliaments around Australia is in a cooperative union, or ‘coalition’, with the smaller National Party). This focus on two major parties is why Australia has what is called a ‘two-party system’. In addition to the two major parties there are a range of other parties, such as the Nationals, the Greens, and various smaller parties.

**Exam tip:** We often vote for members of parliament based on the political party they belong to, and not because we know anything about the candidate personally.

### The King

In addition to the elected members of parliament, Australian parliaments also contain a representative of the King. This is because we are a constitutional monarchy and not a republic, so we have a monarch as our head of state – he is not only the King of England, but also the King of Australia. The King, or his representative, is often referred to as the Crown. The Crown’s representative is called the governor-general at the federal level of government and the governor at the state level.

### Federation

Australia has more than one parliament because we live in a federation. A federation is a system of government in which multiple parliaments share power. Each parliament is supreme and sovereign in its own geographical area and jurisdiction, but there are some areas of overlap where the parliaments need to cooperate or decide which one overrules the other.

Our federal system is composed of one central parliament and six regional parliaments. The central parliament is called the Commonwealth Parliament or the federal parliament, and the regional parliaments are called the state parliaments – for example, the Victorian Parliament, the New South Wales Parliament, and so on. There are parliaments in the territories, but these come under the authority of the federal parliament and are not sovereign; there are also local government councils, but these come under the authority of the states.

## The Australian Constitution

The Constitution is the law that establishes our federation, and when it was passed in 1900 it gave the different layers of government different focuses or responsibilities.

**Exam tip:** The Constitution is a law passed by the United Kingdom parliament, because the Australian federal parliament didn't exist until after the Constitution was law.

## The structure of parliament

The Commonwealth Parliament and Victorian Parliament are both bicameral, meaning they have two houses. A house, in the context of parliament, is a group of democratically-elected parliamentarians who all work together to vote on proposed laws. Therefore, a bicameral parliament is a parliament in which two separate groups of elected people have to agree on the same bill before it is allowed to become law. We call one house the 'lower house' and the other house the 'upper house'.

The structure of parliament also includes the King's representative.

### Commonwealth Parliament

	LOWER HOUSE	UPPER HOUSE	KING'S REPRESENTATIVE
NAME	House of Representatives	Senate	Governor-General
# OF MEMBERS	150	76	1

**Exam tip:** The lower house had 151 members until the federal election in 2022, at which time the number decreased to 150 members based on the redistribution of seats calculated by the Australian Electoral Commission.

Each of the 150 members of the lower house in Commonwealth Parliament is elected to represent one electorate – an electorate is a geographical area of around 110,000 voters. The upper house is composed of twelve members elected from each state, and two members elected from each mainland territory. The King's representative is appointed, not elected.

Elections are held every three years. Each election, the entire lower house is re-elected, and half the upper house is re-elected. Each senator therefore stands for election every *second* election, and has a term of six years.

### Victorian Parliament

	LOWER HOUSE	UPPER HOUSE	KING'S REPRESENTATIVE
NAME	Legislative Assembly	Legislative Council	Governor
# OF MEMBERS	88	40	1

Each of the 88 members of the lower house in the Victorian Parliament is elected to represent one electorate – an electorate at Victorian level is a geographical area of around 40,000 voters. The upper house is composed of five members elected from eight slightly larger areas, each composed of around 470,000 voters. The King's representative is appointed, not elected.

Elections are held every four years, on the last Saturday in November. Each election, the entire lower house and the entire upper house are re-elected.

**Exam Tip:** Students often forget to include the Crown or his representative. We have bicameral parliaments at Victorian and federal levels, but parliament will always include the Crown in addition to this, as he (or his representative) is our head of state.

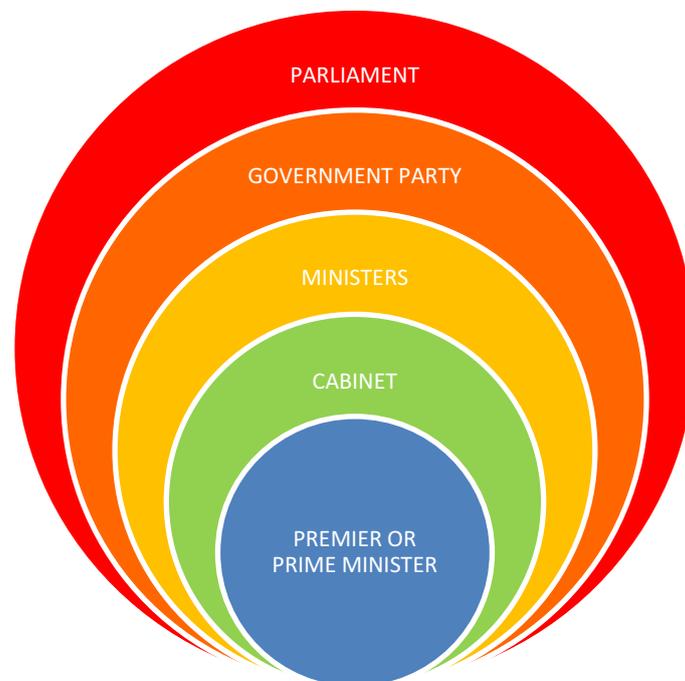
## The Government

Parliament will be made up of 128 elected representatives in state parliament, and 226 elected representatives in federal parliament, but its day-to-day operation will be dominated by the members that belong to the governing party. We call this governing party ‘the Government’ (often with an upper-case ‘G’) or the ‘executive’, and we usually add the name of the party and the name of the leader of the party to make it more specific: for example, the federal Morrison Liberal National Government, or the state Andrews Labor Government.

**Exam Tip:** It is common for students to confuse the terms executive government and parliament. The Government is the party in power, while the parliament is every elected member of every political party regardless of whether they are members of the Government, of the opposition, or are crossbenchers from neither major party.

In a two-party system like Australia has, the party that does not form the executive government is called the Opposition, or the party ‘in opposition’.

The governing party is determined by which political party (or coalition of parties) has the majority vote in the lower house of parliament, and members of the Government are given titles and powers in addition to being members of parliament. In other words, members of parliament who *also* belong to the governing party will wear two hats: first and foremost they will be normal elected members of parliament, representing their electorates or districts and having the same vote as any other member of parliament; in addition to this, however, they may be given special powers as members of the executive government party, and they will perhaps be given responsibility over a government department such as Education or Energy that operates outside parliament. If a member of the Government is given a special responsibility, that area is called their ‘portfolio’ and they are called a ‘minister’.



The ministers collectively will form ‘cabinet’, which is the chief decision-making body in the Government, and the party in government will collectively choose a leader – this leader receives the title of ‘prime minister’ in federal parliament, and ‘premier’ in state parliament.

### Arms of government

Parliament is our primary law-maker, but it is not the only arm of government because there is more to governing a country than just making new laws and amending old ones. Those laws also need to be formulated in the first place, according to policy and ideology; they need to be implemented in society with police, signage, regulations and community education; they need to be supplemented by specific detail that relates to everyday practice and can be quickly updated; and they need to be adjudicated when someone is accused of breaking them.

The parliaments therefore make laws, the executive Government administers them, and the courts enforce them if an individual, company, or even the government itself is believed to have broken them. This distribution of power and responsibility across different arms of government is called the separation of powers, and will be described in greater detail later.

## REVIEW/APPLICATION QUESTIONS – An introduction to government in Australia

1. What is a 'parliament'?
2. What is a political party, and what is the relationship between political parties and parliaments?
3. What does 'federation' mean?
4. The Victorian and Commonwealth Parliaments are both bicameral:
  - a. What does 'bicameral' mean?
  - b. Who or what is part of the structure of parliament in addition to these two houses?
5. For the Commonwealth Parliament, identify:
  - a. The name of the lower house.
  - b. The name of the upper house.
  - c. The title of the King's representative.
6. For the Victorian Parliament, identify:
  - a. The name of the lower house.
  - b. The name of the upper house.
  - c. The title of the King's representative.
7. Members of the House of Representatives are elected to represent their divisions or electorates, while senators are elected to represent their states. Outline what this means.
8. Distinguish between 'parliament' and 'Government'.
9. Explain how a political party is able to become the Government.
10. What kinds of responsibilities and power does being in Government give to a party?
11. Using an example for each to illustrate, explain the terms:
  - a. Minister
  - b. Portfolio

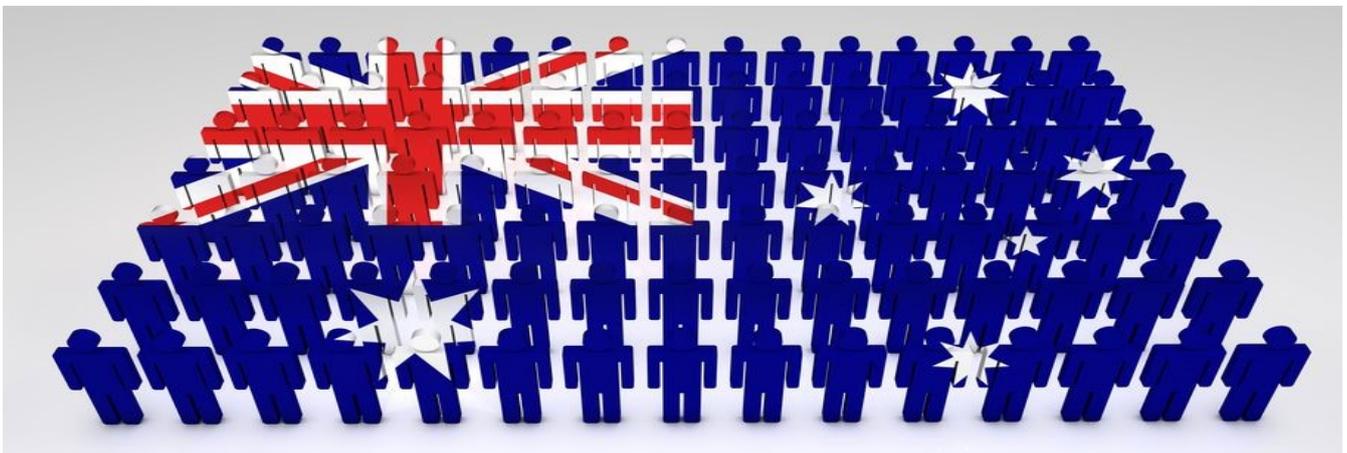
## AOS1: THE PEOPLE AND THE AUSTRALIAN CONSTITUTION

The *Commonwealth of Australia Constitution Act 1900* (UK) is called the "birth certificate of the nation" because it created the country of Australia as the country of Australia.

In the late 1800s, when the Constitution was being written, the Australian continent was divided into six British colonies. Each colony stood alone as a system of government, and had its own parliament, its own constitution, its own government, its own military, and even its own power to create a unique currency and language. Each colony was technically controlled by the United Kingdom, but in practice each was largely autonomous and independent.

The Australian Constitution was drafted in the colonies, voted on in the colonies according to the voting rules in each colony, and then passed as a law by the United Kingdom Parliament. When federation was successful and the nation of 'the Commonwealth of Australia' was created, these colonies became what we know now as the states. Amongst other things, the Constitution enacted the following:

- It created the nation Australia, bringing together the six separate colonies to form one country. This process is called 'federation'.
- It created Commonwealth Parliament.
- It divided law-making responsibilities between the state parliaments and the Commonwealth Parliament, giving each level of governance its own areas of responsibility. The colonial parliaments became state parliaments, and kept most of the powers they had before federation; the new federal parliament gained some new powers, took some of the old colonial powers, and shared a range of powers with the states.
- It created the High Court of Australia, and gave it the sole jurisdiction to interpret the meaning of the Constitution to resolve disputes.



## THE ESTABLISHMENT OF PARLIAMENT

Within the scope of the law-making powers given to it by the Australian Constitution and defined through High Court interpretation, parliament is the supreme law-maker.

**Exam tip:** Remember not to use the phrase 'supreme law-maker' to mean *best* law-maker. It has a more specific legal meaning, outlined below.

The phrase 'supreme law-maker' means:

- Parliament's primary responsibility is to make law.
- Parliament is responsible for more law and reform than the other arms of government are.
- Parliament is able to override the law made by the other arms of government, even if it is made within the jurisdiction of those other bodies.
- The other arms of government cannot override or veto the law made by parliament, if that law is made within parliament's jurisdiction.

Even though the parliament is the supreme law-maker, it will not have unfettered ability to make whatever law it pleases. There are a number of practical and legal barriers to unrestricted law-making.

### The roles of the Crown and houses of parliament in law-making

Parliament performs a range of roles: some directly related to law-making, some indirectly related, and some arguably not related. The focus of the Study Design is on the roles that impact parliament's law-making.

**Exam tip:** When explaining the roles of each tier of parliament, consider how and why that particular tier performs each of its main roles better than, or differently from, the other two tiers.

#### Roles of the lower house

The roles played exclusively or most prominently by the lower house include the formation of government, the initiation of most new bills, controlling money bills, performing responsible government, and acting as the people's house.

**Exam Tip:** For the purposes of the exam, you are going to get far more benefit from having a smaller number of roles in more detail than a long list of roles in dot-points. It is better to choose three to know in detail than to choose six to only know in one short sentence each. This applies to roles of the upper house and Crown, as well.

#### Forming the Government

The political party or coalition of parties with the support of the majority of seats in the lower house forms the Government. This is why the lower house is called the 'Seat of Government'. The governing party is then responsible for determining the main policy direction of the state or country, and responsible for formulating and drafting most of the bills that will eventually become law.

**Exam tip:** The support of the lower house in this sense is also called the 'confidence' of the house.

If the government party loses the confidence of the lower house, a different government will be appointed.

- This role is exercised the same in both state and federal parliaments.

#### Initiating most new bills

The Government is responsible for developing the major policy direction for the state or country, and therefore for introducing almost all new laws. The prime minister and most Government ministers will sit in the lower house, and this makes it the best house in which to initiate Government bills that will benefit from having the relevant minister introduce them and explain their contents and purposes. In addition, since the Government holds the confidence of the house it can virtually guarantee its bills will pass there. In the 46<sup>th</sup> federal parliament, for instance, from 2019-22, only 51 (9%) of the 573 bills originated in the upper house. In 2018 this was around 8%, with 92% of bills originating in the lower house, but the average for the 44<sup>th</sup> parliament was 2%.

- This role is exercised the same in both state and federal parliaments.

### Initiating and amending money bills

All legislation that raises government revenue through taxation and spends government money through the budget must be introduced in the lower house, and can only be amended in the lower house. These kinds of laws are called ‘money bills’ or ‘appropriation bills’. Because money bills are determined according to the programme of taxation and spending developed by the Government, this power gives the lower house a special role in scrutinising Government administration and expenditure.

- This role is mostly the same in both state and federal parliaments. The state upper house is prevented in the state constitution from initiating, rejecting or amending money bills; the federal upper house is only prevented in the federal constitution from initiating or amending them – it retains the power to reject them.

### Performing responsible government

The relationship between the executive government and the parliament is governed in the Westminster system by a principle called ‘responsible government’ – responsible meaning accountable, or answerable. There is a chain of accountability from the executive government to the parliament, and therefore indirectly to the people, because the Government is answerable to the parliament and the parliament is answerable to the people. One important vehicle for this is parliamentary Question Time.

**Exam tip:** In Question Time, ministers can be questioned by other members of parliament. This questioning is televised, broadcast on radio and over the Internet, and reported in the news. Question Time is therefore an important vehicle for government accountability.

- This role is exercised the same in both state and federal parliaments.

### Acting as the “people’s house”

The lower houses in parliaments are often called the “people’s houses” because they are usually the most democratically-elected, on the basis of ‘one vote one value’, and their role is to reflect the will of the people. Every electorate is a single-member electorate, meaning it only elects one person – and that one person has the responsibility of keeping in touch with the needs and views of the people who live there. Upper houses often have a different voting system that doesn’t give every vote the same weight and where representing the people in the electorate isn’t the primary concern.

**Exam tip:** Even though upper houses are still democratic, it is appropriate to acknowledge that a voter in Victoria has less influence over the Senate than a voter in Tasmania, for instance – because Victoria has a larger population, but both states receive twelve senators.

- This role is mostly the same in both state and federal parliaments.

### Roles of the upper house

The upper house is usually a check on the lower house, which can lack the time to properly investigate complex issues and can be dominated by the interests of the governing party. Often, lower house interests are interests that favour the majority and the larger states from which most ministers and premiers/prime ministers tend to come.

The roles played exclusively or most prominently by the upper house include acting as a house of review, representing regional interests, scrutinising delegated legislation and the Government, and initiating most new private members bills.

### Acting as a house of review

Since most bills are initiated in the lower house, the upper house spends more time debating, researching and amending these bills – this is known as being a ‘house of review’. Because the upper house is usually not controlled by the executive, it can be a powerful check on Government power, and can be a significant hurdle in the way of poorly-considered or unfair legislation being created. If minor parties or independents hold the deciding votes the Government will be forced to listen to their suggestions for improving a bill.

**Exam tip:** Being in charge of the deciding votes between the governing party and the opposition party is called ‘holding the balance of power’. Ensure you use the phrase ‘balance of power’ correctly. It essentially means holding the deciding votes when neither the Government nor the Opposition has a majority.

### ACOSS lobbying crossbenchers

In January 2018 the Australian Council of Social Services ('ACOSS') launched a lobbying campaign directed at Senate crossbenchers in an effort to convince them to reject the Turnbull Coalition Government's proposed changes to Centrelink and welfare payments in the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019. Despite public backlash and no submissions in support of the plan, except for the Government's own one, in May 2018 the Senate Community Affairs Legislation Committee endorsed a trial of drug-testing welfare recipients – even though all Labor and Greens members of the Committee published dissenting reports that did not support the bill. Any person testing positive would be put on 'income management' for 24 months, where 80% of their income would be quarantined for approved expenses.

Tony Reidy, the president of ACOSS, said: "The Senate crossbench must oppose this bill to guard against increasing poverty, homelessness and financial hardship for people already hurting in Australia." Greens Senator Rachel Siewert, deputy chair of the Legislation Committee, said: "For the government to continue in its pursuit of this flawed policy shows total failure to listen to the advice of those with expertise in the field, and dogged determination to pursue a punitive, ineffective and damaging policy in the face of all the evidence." The bill passed the lower house on 13 August 2018 and the second reading was heard in the Senate on 6 December 2018. It lapsed in July 2019 after it failed to progress, and another version of the Bill was introduced in the lower house again on 11 September 2019, passing on 17 October 2019; as of January 2022 it was still before the Senate, and lapsed at the 2022 election when the governing party changed from Coalition to Labor.

President of the Royal Australasian College of Physicians, Assoc Prof Adrian Reynolds, said, "We would like to thank members of Parliament for listening to experts in the medical and social services community who made robust and evidence-based cases for the drug testing trial to not progress."

If the upper house is controlled by the governing party *and* passes bills without amendment or debate it is called a 'rubber stamp'. This is rare. If the upper house actively tries to destabilise the Government and rejects key parts of its platform as a political strategy to have the Government undermined it is called a 'hostile' upper house. This is also rare.

The upper house is also able to effectively scrutinise proposed legislation because it has a more vigorous committee system. Effective scrutiny, debate and amendment is not the same as being 'hostile'.

**Exam tip:** Parliamentary committees are smaller groups within parliament that investigate specialised areas of parliamentary business. They are covered in more detail in the next section, but you can use content from that section to elaborate in this topic.

- This role is mostly the same in both state and federal parliaments. The federal upper house has a larger number of committees than the state upper house does, though – many of the state committees have members drawn from both the upper and lower houses.

### Representing regional interests

The upper houses are elected using proportional voting systems, which allow a number of people to be elected from the same region or state. This proportional voting system means each candidate needs relatively fewer votes to win one of the seats, and they do not need to be the *most* popular candidate in the region; this gives them increased freedom to represent a range of concerns in that region instead of campaigning only for a party platform or for the support of the majority.

Electing equal numbers of members from geographical regions also allows regional interests to be more effectively represented, because representation is not dominated by population.

- This role is similar across state and federal parliaments. The federal upper house more effectively represents regional interests than the state upper house, though, because Senate seats are *not at all* based on population – the Senate is called the "states' house" because it was designed expressly so that the smaller states could protect themselves against the power of the more populous states.

### Scrutinising delegated legislation

Parliament has the responsibility to review delegated legislation enacted by subordinate authorities, and to veto or disallow any regulations they feel go outside the authority's power or that infringe improperly on the public's rights and freedoms. Even though either house can disallow a regulation, it is expected that the upper house will be more willing to exercise this power because it is not usually controlled by the governing party.

**Exam tip:** Subordinate authorities are people or bodies to which parliament has given the authority to make legal rules. This power is given in a piece of legislation, and the authority can only make regulations within the power given to it. Subordinate authorities mostly operate in the executive arm of government.

- This role is similar across state and federal parliaments. The federal upper house is arguably more effective at scrutinising delegated legislation, though, because individual parliamentarians cannot move to disallow a regulation without the support of the Scrutiny of Acts and Regulations Committee – and the Committee is controlled by the Government.

### Initiating most new private members bills

Private members bills are all bills introduced by a member or senator who is not a Government minister: they might be a backbencher within the Government, a member of the Opposition, or a crossbencher. Because it is difficult for a private members bill to gain enough support in the lower house, it is often easier for them to be introduced initially in the upper house; the upper house also tends to have a greater number of minor party and independent parliamentarians. In 2021, 37 of 181 bills were private members bills, compared with 7 from 203 in 2008.

**Exam tip:** If a private members bill is introduced in the upper house in federal parliament it is often called a ‘private senators bill’ instead. The name ‘member’ is usually reserved for members of the lower house. Members of the Legislative Council in the state parliament are usually called ‘councillors’, but the term ‘private councillors bill’ is not used.

- This role is exercised the same in both state and federal parliaments.

### Roles of the Crown

Technically-speaking, the Crown is head of all three arms of government: the legislative arm, or parliament; the executive arm, or Government; and the judicial arm, or courts. They have long since removed themselves from influence over the courts, preferring to maintain the independence of the judiciary. Nowadays the Crown prefers to remain separate from both politics and the administration of justice and acts only on advice – usually, on advice of the prime minister or premier of the day, but also on advice of the parliament.

The main role of the representative of the Crown is to provide royal assent to bills that have passed both houses of parliament, but she or he performs a range of other functions as well.

### Providing royal assent

With respect to law-making, the Crown’s primary function is to grant royal assent to bills that have passed the lower and upper houses of parliament. Giving royal assent to a bill involves the King’s representative signing the bill on the King’s behalf to signify his approval. This must occur in order for the bill to become law.

- This role is exercised the same in both state and federal parliaments.

### Acting as head of the executive government

The Crown will exercise the executive power of the government by performing a number of roles on advice of the prime minister or premier of the day and the executive council, which is composed of the prime minister or premier, the governor-general or governor, plus all ministers and parliamentary secretaries. For instance, the Crown, acting as head of the executive, appoints judges to courts, authorises delegated legislation, and designates sitting dates and times for parliament.

- This role is exercised the same in both state and federal parliaments.

### Exercising reserve powers

The Crown will generally act on the advice of the executive government of the day or of the parliament, but there are some roles that it can perform without advice. These are called the Crown’s ‘reserve powers’, and it can use them to ensure that the country remains governed when the Government or the parliament is unable to govern. An example of a commonly-accepted reserve power is calling a double dissolution of both houses and a general election, against the advice of the prime minister or premier; but there is no definitive list of reserve powers recorded in any act or rulebook. Instead, they exist by convention.

**Exam tip:** A legal convention is an agreed set of principles and behaviours that evolve over time, and that people adhere to largely by choice.

- This role is mostly the same in both state and federal parliaments, except the federal constitution and the state constitution have different histories and therefore slightly different conventions.

## Evaluation: Roles of the Crown and houses of parliament in law-making

The following strengths and weaknesses have been organised by tier of parliament, to help with paragraph organisation. The focus of this evaluation in the Study Design is the impact that each tier has on the ability of parliament to effectively make law.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>As the “people’s house”, the lower house is democratically elected and answerable to the public: members of parliament passing laws that society finds unacceptable are likely to be voted out of office. Furthermore, the public can become involved in parliament’s law-making processes through signing and submitting petitions, or lobbying their local member of parliament. This should ensure proposed laws match the values of the majority of society, making them more likely to be accepted and followed.</p> <p>Question Time is televised and streamed online so the public can watch ministers justify policy and departmental actions, and debate the principles behind new bills introduced. The Victorian Parliament recently amended the rules regarding Question Time to make it more effective, and has introduced constituency questions.</p> <p>Each electorate is represented by one member, therefore people have a clear spokesperson for their district to lobby and present petitions to.</p>	<b>Roles of the lower house of parliament</b>	<p>Because the lower house is popularly elected, the fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and equal civil rights often meets opposition, and politicians’ fear of outcry may prevent change in the law.</p> <p>Parliament’s primary role is to legislate, but only 45% (approx) of its sitting time is devoted to legislation; its sitting time averages 625 hours per year (or, less than 16 weeks of full-time work). The lower house cannot introduce and debate unlimited new bills. In the first half of 2023 the lower house of federal parliament is scheduled to sit only 37 days.</p> <p>Single-electorate members don’t represent the people more directly or effectively than other systems; if anything, they can discourage members from deviating from party line, and from listening to minority voices.</p>
<p>When the balance of power is controlled by minor parties or independents the upper house is more likely to be an effective house of review. The Government will need to work with these crossbench senators and/or the Opposition to obtain their support to pass legislation, which may involve improving the content of the bill. These non-Government senators may request amendments in return for voting ‘yes’ on the bill, which means these bills will be further debated, scrutinised and amended before being passed.</p> <p>Upper house members often see themselves as representing the issues belonging to a region or state, which gives them a bigger-picture perspective than just looking at majority opinion in the group of suburbs that make up their electorate.</p> <p>Private members bills give minority interests a chance to be represented and heard, and can fight against the tyranny of the majority – which doesn’t always respect the rights of others.</p>	<b>Roles of the upper house of parliament</b>	<p>Parliament may not achieve sufficient review if the upper house is controlled by the Government, like the Senate was under former prime minister John Howard from 2005. Inappropriate laws may be rushed through parliament because the upper house acts as a rubber stamp for Government policy and does not make necessary amendments or engage in proper scrutiny. The stages set out for the passage of a well-considered bill may not be fully utilised.</p> <p>An upper house member elected by less than 5% of the vote and representing a niche, unpopular regional or local interest has the same power as a member elected with many times those votes. Fraser Anning, for instance, was elected in the 2016 election with only 19 votes being cast for him personally, because he was brought in as a One Nation senator and party received votes that it allocated to him; he then quit the party on his first day in parliament and voted as an independent, following his own preferences.</p> <p>Regional interests are often sidelined in favour of party policy, which is often influenced by the larger states because they have more members in the party.</p>
<p>Royal assent is the final stage in a bill becoming law during which errors can be caught and the parliament can be prevented from acting outside its powers.</p> <p>The reserve powers are the ultimate safeguard of responsible government, the rule of law, and the effective running of the democratic system</p> <p>The people can be confident that the head of the executive is ultimately a non-political figure whose interests are only for the country.</p>	<b>Roles of the Crown</b>	<p>If the crown does only act on advice, it could be argued that royal assent is unnecessary and time-wasting formality.</p> <p>The state governor is not given explicit power in the Victorian Constitution to refuse assent, so that safeguard possibly isn’t present at state level.</p> <p>Allowing an unelected sovereign to use reserve powers and act against the wishes of a democratic government can be seen as undemocratic and inappropriate. This makes the role of the Crown redundant, however.</p>

**Application exercise**

One weakness of the role played by the upper house is that it can frustrate the will of the Government and block proposed changes from going through. Usually, the upper house is not controlled by the governing party, which means that bills must be subject to scrutiny and the Government must often be willing to change provisions in them and take on board policies supported by the crossbenchers holding the balance of power. Passing legislation in the upper house can therefore be the result of back-room deals and horse-trading for niche independent interests. This weakness is entirely outweighed, though, by the fact that Government power needs to be checked. There is a very good reason why we want the upper house to have a voting system that is less likely to return a majority to the same governing party, and that is because the executive would gain absolute power over policy and law-making. The separation of powers is incomplete because of the existing lower house combination of the executive and legislative arms – it is vital that one house of parliament retains the ability to scrutinise Government policy, force amendments to poorly-considered laws or laws that harm large groups of people in order to please Government donors and voters, and demand that the Government consider the needs and values of groups other than their supporters. The trade-off that occasionally crossbenchers will get concessions from the Government on niche interests is worth it.

- a. The above answer is a sample of an extended evaluation of a weakness. Using this as a guide, evaluate one weakness of each key factor in the operation of parliament that is covered in the section.

## The allocation of law-making powers

### The division of constitutional law-making powers

One of the most important tasks of the Constitution was to establish the federal parliament and determine what areas it was permitted to make law in. This involved, in part, deciding what areas should be taken away from the new state parliaments, what areas should be kept by the state parliaments alone, and what areas should be shared between the two tiers. This allocation is called the ‘division of constitutional law-making powers’ or the ‘division of powers’.

**Exam tip:** Do not confuse the division of constitutional law-making powers with the separation of powers. Confusing the two will likely result in your answer being awarded zero marks.

From the beginning, it was planned that the allocation of legislative powers would favour the states and would focus narrowly on giving the Commonwealth the power to govern only those activities that were necessary for the defence and trade of a united country. This has not been how the allocation has evolved over time.

### Exclusive powers

#### Definition

Exclusive powers are those areas of law-making given to the Commonwealth for it to legislate on alone, and on which the states cannot make laws. Exclusive powers are all specific powers that have also been taken away from the states.

Express powers may be made explicit in the wording of the section, may be constructed by reading two or more sections together, or may be interpreted as express in nature by the High Court.

#### Examples

- The imposition of uniform duties of customs and excise: s90
- The naval and military defence of the Commonwealth and the states: ss51(vi) and 114, where s51(vi) gives the Commonwealth the power and s114 restricts it from the states.

### Concurrent powers

#### Definition

Concurrent powers are those specific law-making powers that are shared between the Commonwealth and state parliaments. These are matters upon which state and Commonwealth parliaments can both make law, because they were granted to the Commonwealth at federation but were not simultaneously taken away from the states.

If the Commonwealth Parliament and a state parliament pass laws in the same area that are inconsistent with each other, the federal law will override the state law to the extent of the conflict, pursuant to ‘the inconsistency rule’ in s109 of the Australian Constitution.

**Exam tip:** The impact of s109 is discussed further in the next topic. You can use material from there here if you need it.

### Examples

- Marriage: s51(xxi)
- Postal, telegraphic, telephonic, and other like services: s51(v)

### Quarantine power

The Covid-19 pandemic triggered confusion over the nature of concurrent powers. For instance, the December 2020 article 'Quarantine constitutionally a commonwealth power and responsibility' by Stephen Bartos, previously a NSW Parliamentary Budget Officer, said, "One of the mysteries of Australia's pandemic response is why states and territories were sucked in to taking responsibility for quarantine," and that "Quarantine is unequivocally a commonwealth power under section 51(ix) of the Constitution."

However, quarantine is a concurrent power. In 2011 the National Health Security Agreement was signed by the states and territories to support the Commonwealth's *National Health Security Act*, and it expressly divides responsibility between the Commonwealth and the states: the Agreement gives responsibility to the Commonwealth for coordination of quarantine, and gives the states and territories responsibility for the local implementation of quarantine, using state resources such as hospitals and police. Also, in *Gerner v Victoria* [2020] HCA 48 the High Court stated that: "Section 51(ix) of the Constitution confers on the Commonwealth Parliament an express power to make laws with respect to 'quarantine'. By virtue of s 106 of the Constitution the concurrent legislative power of the States with respect to the same subject matter was expressly preserved."

### Residual powers

#### Definition

Residual powers are all those law-making powers that were kept solely with the states at federation, and that only the states can legislate on. They were not listed in the Constitution or given to the Commonwealth, and therefore remain the responsibility of state parliaments. Laws made by state parliaments using their residual powers will be different from state to state, unless the state parliaments all work together to pass a uniform law.

**Exam tip:** The High Court cannot directly interpret the scope of the residual powers because they are not written in the wording of the Australian Constitution.

### Examples

- Public transport.
- Primary and secondary education.

### Extension material:

The following category of specific powers is not listed in the Study Design, but can be useful if understood as an 'umbrella' category for *all* Commonwealth powers. It is the umbrella category covering both exclusive powers and concurrent powers.

### Specific powers

#### Definition

Specific powers are all the law-making powers given to the Commonwealth Parliament in the Commonwealth Constitution. Most of these are listed in s51, spread across 40 different sub-sections, and they are called the Commonwealth's "heads of power".

#### Examples

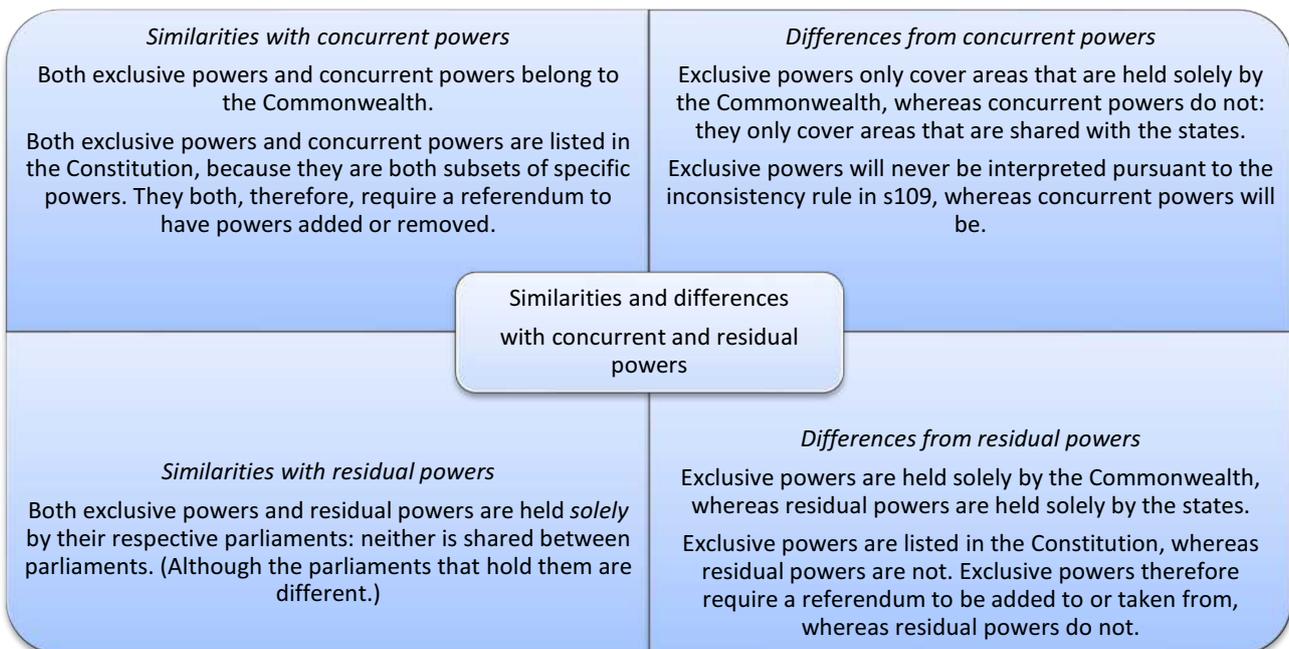
- Trade and commerce with other countries and among the states: s51(i)
- Taxation, but not so as to discriminate between states or parts of states: s51(ii)

## Comparison of types of law-making powers

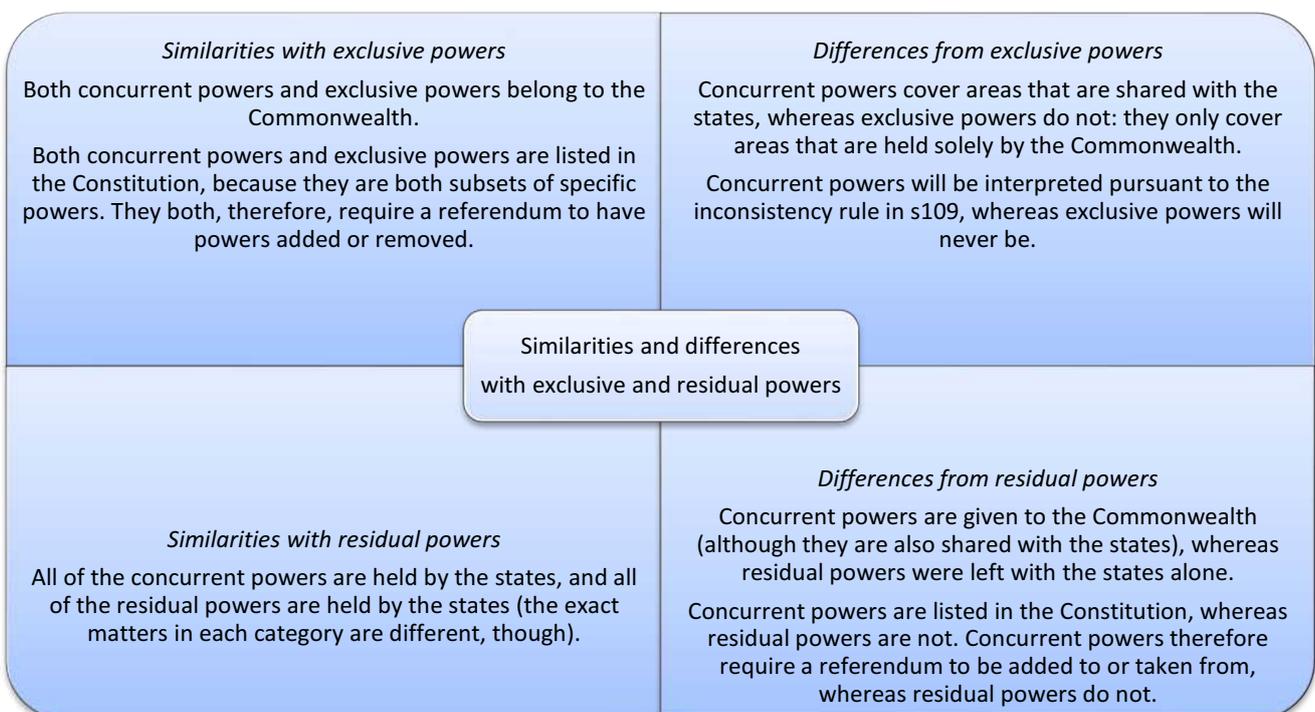
**Exam tip:** The key skill of ‘comparison’ is not expressly required for many topics in the Study Design – although similarities and differences could work their way into other questions through skills such as ‘analysis’. A comparison *is* expressly required for the categories of law-making powers established by the division of constitutional law-making powers, though.

A comparison requires a contemplation of similarities and differences. The concept of specific powers has been left out of this comparison because it is not explicitly required by the Study Design, but the same template can be followed if you want to prepare one for it. A sample of arguably the more important similarities and differences has been included here, but there are additional points.

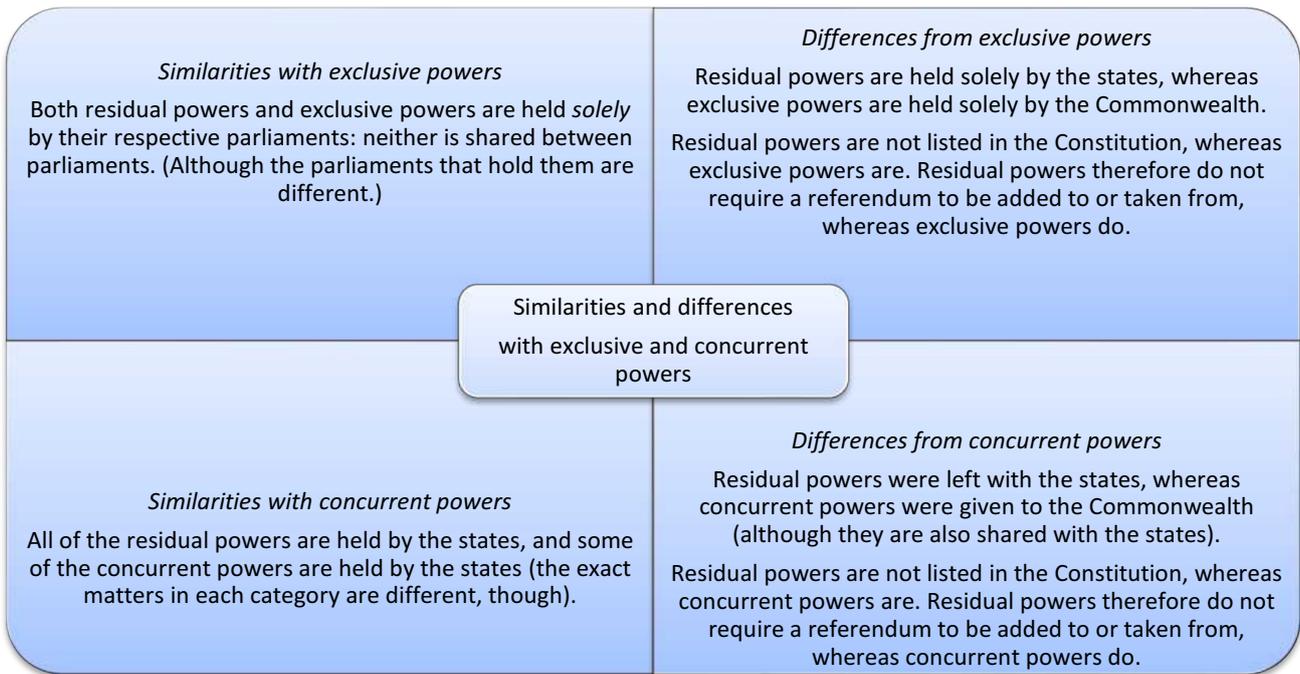
### Exclusive powers



### Concurrent powers



## Residual powers



### The significance of section 109

Section 109 of the Constitution is known as “the inconsistency rule”, and it can be applied in situations where the Commonwealth *and* one or more states have used concurrent powers to enact legislation that is in conflict on the same topic. These are what the courts call ‘inconsistent’ laws.

The text of s109 reads:

*When a law of a State is inconsistent with a law of the Commonwealth, the latter [Commonwealth] shall prevail, and the former [state] shall, to the extent of the inconsistency, be invalid.*

#### Definition

If the federal parliament and one or more state parliaments legislate in an area of concurrent power and the laws are in conflict with each other, the state law can be challenged and the s109 inconsistency rule can be used by the court to declare the state law invalid to the extent of the inconsistency.

#### Detail

For example, a federal law may promise a freedom from discrimination on the basis of racial identification; a Victorian law may then allow state government departments to administer different treatment to people from different racial backgrounds. Confusion will therefore be created over whether Victorians still have the right to the same treatment regardless of race, or whether the two laws can be interpreted in such a way as to make them compatible with each other (for instance, by interpreting ‘freedom from discrimination’ as permitting actions that benefit marginalised racial groups).

**Exam tip:** The Study Design explicitly includes the number of the section as well as its popular name – ‘the inconsistency rule’. Questions can therefore request information on the section by using the number only.

#### The impact of the rule

The High Court applies the s109 rule to situations in which one law grants a right that another law takes away; in which one law tells the public to do something prohibited by another law; and in which the Commonwealth law seems to intend to cover the whole field of law in the area.

If there is an inconsistency between a Commonwealth law and a state law, the Commonwealth law will prevail – in other words, the federal law wins. The entire state law will not be invalid: only the sections of the state law that are in conflict with the federal legislation will be invalid, to the extent of that conflict. The rest will continue to be enforceable.

**McBain v State of Victoria [2000] FCA 1009**

The Victorian law, the *Infertility Treatment Act*, stated that a woman had to be married or in a *de facto* (formally together but not legally married) relationship to access IVF treatment. The Commonwealth *Sex Discrimination Act* made it unlawful to deny a person a service such as IVF treatment on the basis of her marital status. Dr McBain could not obey both laws at the same time. If the doctor denied a woman treatment because she was not in a *de facto* relationship or marriage he was obeying the Victorian law but breaking the Commonwealth law; if he gave a woman IVF treatment even though she was not married or in a *de facto* relationship he was obeying the Commonwealth law but breaking the Victorian one.

The Federal Court determined that the Commonwealth law prevailed and the section of the Victorian law that limited IVF treatment based on marital status was invalid. Dr McBain’s patient (a single woman) was therefore entitled to receive IVF treatment.

**REVIEW/APPLICATION QUESTIONS – The allocation of law-making powers**

1. Explain two things that were achieved by the commencement of the Australian Constitution in 1901.
2. Define each of the following concepts, providing one example of a power to illustrate each:
  - a. Concurrent powers
  - b. Exclusive powers
  - c. Residual powers
3. In which area or areas of power will laws be uniform across the whole of Australia? Explain your answer.
4. In which area or areas of power will laws be potentially different from state to state in Australia? Give reasons for your answer.
5. In which area or areas of power is it most likely that the state and Commonwealth parliaments will come into conflict? Provide reasons for your answer.
6. Identify two differences between exclusive and residual powers.
7. Explain the primary difference between exclusive and concurrent powers.
8. Are residual powers more similar to exclusive powers or to concurrent powers? Give reasons for your answer.
9. Why are specific powers broken into two categories: exclusive and concurrent? Explain.
10. The state and Commonwealth parliaments have passed conflicting acts on the same area, and it is impossible for people to follow both laws at the same time. Explain how the Commonwealth Constitution can be used to resolve this issue.
11. Explain how s109 of the Constitution impacted one Australian case.

**Evaluation: The allocation of law-making powers**

The following strengths and weaknesses have been organised by feature, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>The division of powers allows for an efficient enactment and implementation of laws because it ensures laws of a national character are made centrally, without conflict and overlap in their relationship to state laws; the division also makes it so that many areas in need of local expertise, such as public transport and crime, are handled at a state level where the policies will be more tailored to the population.</p> <p>The division of powers protects the autonomy of the states by keeping the Commonwealth to an enumerated list of powers; the federal parliament does not have plenary power to make any laws it likes. For instance, the Murray-Darling Basin water management plan had to be coordinated by the states passing cooperative legislation.</p>	<p><b>The division of constitutional law-making powers</b></p>	<p>The division of powers is written with mostly oblique or non-specific language, which means the High Court is ultimately the body in charge of the powers of the parliaments. The High Court has a great deal of power to change its interpretation of specific powers and restrictions, and to radically alter the jurisdictional relationship between otherwise democratic, elected parliaments.</p> <p>The intentions of the framers of the Constitution were to preserve the powers of the states against the might of the central government, but this is not how the division of powers has worked in practice. Over the last century, the constitutional division of law-making powers has operated (partly through High Court interpretation) to facilitate a massive shift of power from the states to the Commonwealth – people have even called for the dissolution of the states, seeing them as unnecessary.</p>

<p>Section 109 is a powerful restriction because the concurrent powers make up the majority of the Commonwealth's powers, and s109 applies to all concurrent powers.</p> <p>Section 109 is a powerful restriction because the fear of losing a case on the basis of existing precedent can discourage a state parliament from passing law in the first place.</p> <p>Section 109 is an effective restriction because national unity and interest should override state preference. This is the point of coming together into a federation.</p>	<p>The significance of s109</p>	<p>Section 109 is not a very powerful restriction because it only relates to areas of concurrent power. Section 109 cannot be used to invalidate state law on any matter of residual power, and the Commonwealth still has many exclusive powers.</p> <p>Section 109 is not a very powerful restriction because the states do not lose the power to legislate, they merely lose the power to enforce those laws, and only for the period of time during which the federal law remains valid. If the federal law is repealed, the state law continues to operate.</p> <p>Section 109 is not an effective restriction because the Commonwealth has gained more power since federation than the founders ever intended when they wrote the Constitution.</p>
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## REVIEW/APPLICATION QUESTIONS – The allocation of law-making powers: evaluation

### Application exercise

Section 109 acts as a partial limitation on the state parliaments because laws passed in areas of concurrent power might be declared invalid, at least in part, if the Commonwealth legislates to cover the same area. The extent to which this will restrict the states in practice is somewhat limited, however, as the inconsistency rule only relates to laws passed pursuant to concurrent powers and not residual areas, and the effect of it can only be activated by a federal court such as the High Court: if the state law is not challenged, it will continue to remain enforceable. Also, s109 doesn't prevent the state parliaments from passing the law in the first place; it is merely a declaration of invalidity for the time that the federal law exists. If the federal law is later repealed or amended to remove the inconsistency, the state law would recommence operation. Even while the inconsistency is active, it is only the conflicting sections of the state law that are affected. The scope of concurrent powers has grown over the years, though, as a result of High Court interpretation, which increases the topics on which the states can be overridden by federal law; also, the decision of the Court to interpret some legislation as intending to "cover the field" – such as the *Marriage Act 1961* (Cth) – even if it doesn't expressly conflict with the state provisions, expands the scope of s109.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences
- b. Using the answer above as a sample, write a paragraph analysis of the constitutional division of law-making powers.

## Means by which the Australian Constitution acts as a check on parliament

The following key ideas are listed in the Study Design as fundamental to the way in which the Australian Constitution checks the power of parliament – so, ensure you relate each point back to parliament and its power either increasing or decreasing. The Study Design does not specify federal parliament or state parliament, but the focus will be slightly on the federal over the state parliament because the Australian Constitution is a federal law.

### The bicameral structure of parliament

#### Definition

The bicameral structure of parliament is the division of the legislature in s1 of the Australian Constitution into an upper chamber and a lower chamber, both with approximately equal powers of law-making.

#### Detail

In the Commonwealth Parliament these houses are the Senate and the House of Representatives, and in the Victorian Parliament they are the Legislative Council and the Legislative Assembly.

### The separation of powers

#### Definition

The separation of powers is that the power to govern the country is split into three separate arms or branches of government in Chapters I, II and III of the Australian Constitution: the legislature, the executive and the judiciary. This denial of absolute power to any one body is intended to curb the abuse of power.

#### Detail

- The legislative function, the power to make laws, is exercised by parliament.

- The executive function, the power to administer laws and ‘conduct the business of government’, is exercised by the governor or governor general, but in practice the day-to-day work is done by the premier or prime minister and government departments.
- The judicial function, the power to apply laws when disputes arise and to resolve these disputes, is exercised by the courts.

In theory, all three powers are kept separate from each other and there should be no interference between the three branches. In Australia there is not a complete separation of powers, because ministers (who are in charge of Government departments and therefore exercise executive power) are also members of the parliament, and parliament exercises legislative power.

The judicial power is kept the most separate because of the importance of the independence of the judiciary. No member of the courts can be a member of either the parliament or the executive government; judges and magistrates have security of tenure, in that they cannot be fired and their salaries cannot be decreased; and parliament and the Government cannot take for themselves a judicial role.

## The express protection of rights

### Definition

Express rights are protections from government power that are each explicitly written into one section of the Australian Constitution. We call these rights ‘entrenched’ because they cannot be changed or removed without following the referendum process in s128.

### Detail

There are five sections in the Constitution that contain what are commonly agreed to be ‘express rights’ – although, because the wording is ambiguous, there is some disagreement in society over the exact number.

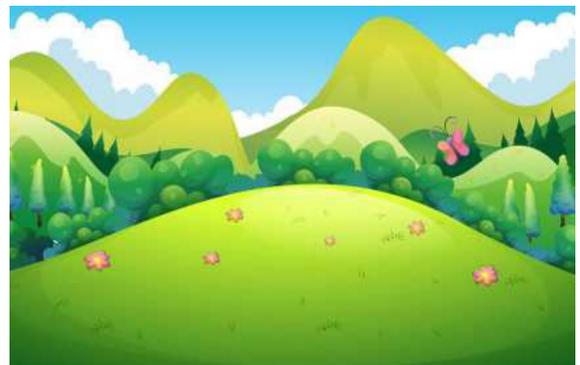
The five that are required knowledge in the Study Design are:

- The right to receive ‘just terms’ compensation when private or state property is acquired by the Commonwealth: s51(xxxi)
- The right to have a trial by jury when an accused person is tried on indictment for a Commonwealth offence: s80
- The right to be free from unreasonable state or Commonwealth burdens on interstate trade, commerce and movement: s92
- The limited freedom of religion, to be free from Commonwealth laws establishing a compulsory religion, preventing the free exercise of a religion, mandating compulsory religious practices, setting a religious test for a Commonwealth government job, or prohibiting the practise of atheism: s116
- The right not to be discriminated against on the basis of out-of-state residence, when in another state: s117

### Section 117: Tasmanian free parks pass

Before the March 2018 Tasmanian state election the Liberal Government promised to give the 100,000 Tasmanian residents with a seniors card free access to all national parks for one year, followed by a 50% discount on annual membership. The policy was costed at \$750,000 over three years.

After the law was implemented, concerns were raised that the pass would breach s117 of the Australian Constitution. The policy was therefore expanded to cover all Australian seniors. In the six months following the change in July 2018, over 19,000 Australian seniors took advantage of the free pass, and Head of Tasmania’s Department of Primary Industries, Parks, Water and the Environment, John Whittington, told a parliamentary budget estimates hearing that the law had already cost \$1.5m in foregone revenue, and Premier Will Hodgman (also Minister for Parks) said it was expected to cost \$330,000pa ongoing.



The High Court might not deem it to breach s117 anyway. Previous decisions have drawn a distinction between placing a burden versus providing a benefit: if the free pass is a benefit to Tasmanian seniors rather than a burden on interstate seniors, similar to student concession tickets on public transport for local students, it may not even fall under the s117 prohibition.

**Exam tip:** Some aspects of the rights have been altered by High Court interpretation of the Australian Constitution, or have yet to be clarified by High Court interpretation because no case has come before the courts. For example, the definition of “just terms” is dependent on High Court interpretation; also, no cases regarding Commonwealth discrimination under s117 have been heard by the Court and the section doesn’t expressly list the states *or* the Commonwealth in terms of where it applies – so the section likely applies to both, but we can’t be sure.

## The role of the High Court in interpreting the Constitution

### Definition

The High Court is given jurisdiction over the interpretation of the Australian Constitution in s76 of the Constitution. The justices can determine the meaning and scope of the specific powers of the Commonwealth, the meaning and scope of the constitutional rights, and the meaning and scope of the restrictions that apply to both state and federal parliaments.

The High Court cannot change the wording of the Constitution, but it can change the meaning of the wording, and then enforce that meaning on the legislature and executive.

### Detail

The High Court is established in s71 of the Australian Constitution and is given jurisdiction over the interpretation of the Constitution in s76. Its findings in relation to the Constitution are fully enforceable, meaning that neither the Commonwealth nor the state parliaments can ignore or override the High Court's interpretation. The most the Commonwealth can do is draft a referendum bill to ask the people to alter the wording of the Constitution, but it has historically been difficult to change the Constitution this way. The states are unable to initiate referenda.

If the High Court gives the specific powers in a broad way, or the constitutional rights or restrictions in a narrow way, they give the Commonwealth Parliament more law-making power. If the Court interprets the specific powers in a narrow way, or the constitutional rights or restrictions in a broad way, they restrict the power of the Parliament.

## The referendum 'double majority'

### Definition

The process for changing the words of the Constitution is laid out in the Constitution itself, and provides that any bill to alter the Act must be approved by federal parliament, put to the people at a referendum, and then be given royal assent by the governor-general. At referendum, for the wording to be altered the people must accept the change by a "double majority": that is, a majority of voters nationwide in favour of the proposal when the votes are counted Australia-wide, and a majority of voters *in a majority of states* in favour when the votes are counted state-by-state.

### Detail

- The residents of the territories are only counted in the first stage of the double majority and not the second.
- If the referendum proposal has an adverse impact on any particular state or states, that state or those states must be one of the ones in favour of the proposal.

### REVIEW/APPLICATION QUESTIONS – The Australian Constitution as a check on parliament

1. Identify where in the Australian Constitution the bicameral structure of parliament comes from.
2. Identify the body that performs each of the following functions in the Australian system:
  - a. Legislative function
  - b. Executive function
  - c. Judicial function
3. Identify the role that is performed by each of the following arms of government:
  - a. Legislative arm
  - b. Executive arm
  - c. Judicial arm
4. In the Australian system the executive and legislative functions overlap. Explain how ministers exercise both executive and legislative powers.
5. Outline two ways in which the judicial arm is kept almost entirely separate from the legislative and executive arms of government.
6. In 2005 a new crime of 'defensive homicide' was created through legislation, and in 2011 the first woman was found guilty of it after killing her abusive husband and being arrested. Explain how this case illustrates the role of each branch of government in the separation of powers.
7. What is an 'express right'?
8. Express rights are entrenched in the Constitution. What does it mean for rights to be 'entrenched'?
9. Assume a man is charged with a criminal offence under the Victorian *Crimes Act*. Does s80 of the Australian Constitution guarantee a jury at his trial? Why or why not?
10. Outline the protections granted by two express rights other than s80.
11. What powers does s76 of the Australian Constitution give the High Court in relation to the Constitution?
12. What does s128 of the Australian Constitution say about the level of support required by any proposal to change the Constitution?
13. Outline whether Victoria and NSW can use s128 to pass a referendum giving their states significant benefits, using their greater populations to push through a majority vote?

## Evaluation: The Australian Constitution as a check on parliament

The focus of this evaluation in the Study Design is the impact that each constitutional idea has on the ability of the Australian Constitution to effectively check the power of parliament and ensure it doesn't abuse its power. This is therefore the focus of the strengths and weaknesses chosen. Note that this is different from an evaluation of the key ideas themselves: we are not evaluating bicameral parliaments in general, for instance; we are evaluating the extent to which a bicameral structure can *check the power of parliament*.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

EMPOWERS PARLIAMENT	IDEA	LIMITS PARLIAMENT
<p>In theory, the bicameral nature of parliament will have little impact on the law-making of parliament because both houses are given virtually equal powers with respect to legislating.</p> <p>If the executive government controls both houses, law-making will not be restricted by having two houses.</p> <p>The bicameral structure can enhance the law-making ability of parliament as a result of the greater scrutiny and inquiry performed by the upper house compared with the lower house. Parliament can be made more effective.</p>	<p>The bicameral structure of parliament</p>	<p>Since the upper house is elected according to a proportional voting system, and its members represent sections of the public in a way less influenced by popular majorities, it can check the tendency of parliament to cater to short-term whims and attacks on minority rights.</p> <p>Deadlock between the houses can, on occasion, check or limit the legislative power of parliament.</p> <p>The roles the upper house performs in scrutinising proposed legislation, debating policy, investigating the actions of the executive and introducing non-government bills all work to some extent to limit the impact the political and Government-dominated lower house can have.</p>
<p>The separation of powers gives parliament a great deal of power because its implementation in the Westminster system allows the executive and the legislative arms to be combined: the lower house of parliament exercises control over the executive, and the executive also dominates many activities in the upper house.</p> <p>The separation of powers asks the judicial arm to second-guess the decisions of parliament as little as possible. As long as laws have been made within the powers of the parliament, it is not the role of the courts to ask whether the laws are good or bad.</p>	<p>The separation of powers</p>	<p>The High Court determines what the scope of the Commonwealth Parliament's powers are. If the Parliament acts outside what the High Court interprets its powers to include, the Court has the authority under s76 of the Constitution to invalidate the legislation and the Parliament does not have the power to either overrule or ignore that finding.</p> <p>The separation of powers prevents the parliament from giving itself, or the executive government, judicial power. The former Australian Military Court was dismantled in 2009 because of this, for instance.</p>
<p>Rights do not prevent the parliament from legislating or the executive from developing policy and regulations. All they do is provide a means by which we can challenge those laws and policies. The ability of the rights to check the power of parliament is therefore dependent on the ability of people with standing to <i>know</i> they have standing and a valid legal argument, to have the <i>time</i> to pursue the matter over what might be years, and the <i>money</i> to spend what will likely be a million dollars or more.</p> <p>Most of the rights apply only to Commonwealth laws. The state parliaments are therefore not significantly limited in their power by the operation of the express rights in the Australian Constitution.</p> <p>Most express rights are able to be limited in situations where it is reasonable and necessary. For instance, the 2020 Covid-19 border closures were ruled valid by the High Court in December 2020, pursuant to the Clive Palmer challenge to WA's hard border, because the laws were considered reasonable responses to the pandemic.</p>	<p>The express protection of rights</p>	<p>Rights are not things that apply to some people but not to others. Human rights do not apply selectively to some members of society but not to others: they apply to all members of society, and prevent parliament from abusing its power in relation to everyone.</p> <p>Express rights are well-protected because they are 'entrenched' and cannot be changed or removed without following the referendum process in s128 of the Constitution.</p> <p>The express rights are fully enforceable, in that the parliament cannot ignore or overrule a court finding that it has infringed constitutional rights. The law is invalid if the courts say it is.</p>



## CHANGING THE AUSTRALIAN CONSTITUTION

When looking at how the Constitution has been altered since 1901, two ways will be most important:

- How the express wording of the Constitution has been changed through the referendum process. This has made eight alterations in 121 years.
- How the meaning of the Constitution has been changed through High Court interpretation and the creation of common law precedent. This has made countless changes in 121 years.

The referendum process in s128 of the Constitution is the only way a change to the wording can occur, and the High Court jurisdiction in s76 of the Constitution is the main way a change to the meaning of the wording can occur, so these are arguably the two most important methods of alteration.

### Changing the Constitution through the people

#### Changing or protecting the Constitution through referendum

A referendum is a compulsory ‘yes or no’ vote on a proposed change to the wording of the Constitution, involving everyone on the federal electoral roll. The process for changing the Constitution using a referendum is outlined in s128, and it requires a “double majority” of the people to be in favour: a majority of voters nationwide in favour, and a majority of voters in a majority of states.

The ability to approve or reject a referendum question gives the people the power to either change the form of the Constitution, or to protect its current form. Only 8 out of 44 referendum questions have succeeded since federation. Of these, only two had a direct impact on the division of legislative power between state and federal parliaments, and none impacted on the protection of rights. Conversely, the people have rejected proposals that would have affected – even increased – rights protection.

The Study Design specifies that you must understand the impact and significance of *one* referendum question that the people either accepted or rejected. This Study Guide will provide summaries of a selection of appropriate cases: you should choose just *one*.

#### 1946: The social services referendum

The social services referendum asked the people to include a new specific power for the Commonwealth in the Australian Constitution. There was no change to the wording of an existing clause: instead, it was adding a new clause. Section 51(xxiii) already gave the Commonwealth the power to make laws in relation to some other pensions such as the old-age pension – the amendment was not seeking to change this subsection, but was proposing to add another after it to expand this power to matters including maternity allowances, widows’ pensions and medical benefits.

##### **Impact**

- The proposal was accepted by the people and the Constitution was changed.
- The referendum gave the Commonwealth additional specific powers.
- These new specific powers were held concurrently with the states.

The Commonwealth gained a non-exclusive power to make laws in relation to a range of pensions, allowances and healthcare benefits – matters that until that time had been part of the residual power of the states. This did not in theory decrease the power of the states; but, because of the operation of s109 of the Constitution, it can be argued that it did decrease it in practice. If the states pass legislation contrary to Commonwealth law, relevant to these social services powers, the Commonwealth has the ability to challenge the inconsistent state law and have it declared invalid.

#### 1967: The Aboriginal Advancement referendum

The Aboriginal Advancement, or ‘race power’, referendum changed the division of power by deleting wording and removing a Commonwealth restriction from the Constitution. Prior to the referendum, the s51(xxvi) ‘race power’ empowered the Commonwealth to make laws for all races of people *other than* the Aboriginal race; First Nations people were an express restriction on Commonwealth power.

##### **Impact**

- The proposal was accepted by the people and the Constitution was changed.
- The referendum gave the Commonwealth additional specific powers.
- This new specific power was held concurrently with the states.

As a result of the referendum, the Commonwealth gained the ability to pass legislation dealing explicitly with the needs of Indigenous people. In theory, the states could continue to pass laws specific to Aboriginal people; in practice, however, the Commonwealth gained the ability to pass contradictory legislation and then challenge the inconsistent state law in the courts pursuant to the s109 inconsistency rule, asking for a declaration of invalidity. At the time, the popular belief was that the power only extended to laws that were for the benefit of First Nations peoples; this is not specified in the wording of the section, however, and is not how the power has been used. The Northern Territory federal 'Intervention', for instance, increased the number of Indigenous children being removed from their families and communities threefold (between 2007 and 2016) while the number of non-Indigenous children removed decreased over the same time period by 58%.

### 1988: The rights and freedoms referendum

The Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth) sought to alter ss80 and 116, and to add two new sections to work in conjunction with the existing s51(xxxi) 'just terms' protection. All amendments were drafted to *expand* existing rights in the sections, or to *add* additional rights. For instance, the s80 right to trial by jury was to be extended to trials for state crimes, and the limited freedom of religion was to be extended to protect against state and territory legislation.

The proposal put to the people at referendum did not give the exact changes; instead, it summarised the three alterations: "A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government."

#### Impact

- The proposal was rejected by the people and the Constitution was not changed. Instead, its existing form was protected.
- A majority of the people chose to preserve a significant amount of state autonomy. They chose to permit states to continue to: decide on the presence or absence of juries; decide on appropriate laws regarding the practice, establishment and prohibition of religion; and decide on the nature and extent of compensation to give a property owner if that property is seized by the state government.
- They also preserved the ability of the High Court to determine the type of verdict that is required by a federal jury, and the number of people that must, at a minimum, sit on a jury.



No states were in favour of the change, and the nationwide 'yes' vote for the 'rights and freedoms' proposal was the lowest of any referendum since federation: 30.8%. The 'no' campaign was a mix of arguments against increased Commonwealth power, arguments based on the premise that rights were already adequately protected, and arguments made on misinformation or highly speculative interpretation and hypotheses.

### **REVIEW/APPLICATION QUESTIONS – Changing the Constitution through the people**

1. What is a referendum?
2. How might a referendum change the constitutional division of law-making powers?
3. How might a referendum change rights protection?
4. How might a referendum change restrictions on law-making?
5. Outline the three stages of a referendum.
6. Define the term 'double majority'.
7. Give one example of a voting outcome that *would* satisfy the double majority, and one example of a voting outcome that *would not*.
8. Describe one alteration to the Constitution that succeeded. In your response, include:
  - a. The section that was altered and how it was altered.
  - b. The specific change this alteration had on the operation or meaning of the Constitution.
  - c. One possible reason why the voters accepted this proposal.
9. Describe one alteration to the Constitution that failed. In your response, include:
  - a. The section that was proposed to be altered and what that proposal was.
  - b. The specific change this alteration would have had on the operation or meaning of the Constitution.
  - c. One possible reason why the voters rejected this proposal.

## Evaluation: Changing the Constitution through the people

The following strengths and weaknesses have been organised by feature, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
<p>The double majority provision ensures that any proposal that succeeds will be supported by the vast majority of groups across the country.</p> <p>Australia has, on average, a high standard of living, and people are right to be wary of the Commonwealth making 'grabs for power'. We want to be governed locally at least in part, because then we retain more control over our lives.</p> <p>Asking the public to vote on a referendum proposal is an important part of everyday citizenship education. It encourages Australians to participate in how their society is governed, and to understand legal and political institutions.</p>	<b>Public nature of the vote</b>	<p>Australia has, on average, a high standard of living, and most people would rather keep the <i>status quo</i> (the way things currently are) because they fear losing power. This can make progress and favouring marginalised groups difficult to achieve.</p> <p>Radical changes are extremely unlikely to succeed because of the need for bipartisan support – and radical changes are sometimes necessary, such as in the ending of apartheid in South Africa. In Australia, most successful proposals will be 'vanilla': unimportant changes, or watered-down compromises.</p> <p>The Constitution is not an easy document to read or understand, and there is a large body of precedent built up around it. The average citizen is in a terrible position to understand the change proposed and the legal significance of it.</p>
<p>Referendum is the only process that has the power to alter the wording of the Constitution. Other methods are limited by the words and phrases in the Act, and are therefore not able to make changes of the same magnitude.</p> <p>A clear change to the wording of the Constitution is made. Referenda are unlike High Court interpretation, for instance, which leaves the public searching through precedent, trying to work out the change that has been made.</p>	<b>Ability to alter the wording of the Constitution</b>	<p>Referendums can change the wording of the Constitution, but the wording will always be subject to High Court interpretation. Interpretation determines the meaning, scope and application of words, and therefore has the power to radically change the proposal in practice. For example, the High Court determined in the Hindmarsh Island Bridge Case that the inclusion of Indigenous people in the 'race power' in 1967 also permitted the Commonwealth to make laws that <i>disadvantaged</i> Indigenous people.</p> <p>Because changes made to the Constitution are difficult to repeal or alter, if the needs of society change over time or the provision doesn't operate in the way people planned, it is very difficult to have another successful referendum to fix the situation.</p>
<p>It is difficult for people in the larger states to dominate those living in the smaller states in important, constitutional matters, because of the double majority provision <i>and</i> the requirement that any state negatively affected or singled out by the proposal be one of the states in favour.</p> <p>If a referendum proposal is one of the issues in an election, voters will be engaged with the change and candidates will spend time debating the issue. This may create a greater likelihood of more 'yes' votes, as the public can devote proper attention to the referendum proposal and making an informed decision.</p>	<b>Method of conducting a referendum</b>	<p>The state parliaments have no authority to vote on a referendum bill, and no member of the public has the authority to initiate a referendum bill. This increases the power the Commonwealth has over proposals to change its own powers and restrictions.</p> <p>Arguably, the s128 process is too difficult, and it is too hard to have a referendum pass. This makes the Constitution too rigid.</p> <p>When an election is being held, many voters are likely to be more concerned with it than with the Constitution, and may give little thought to the referendum proposal. This may lead to more 'no' votes, as voters are usually reluctant to vote in favour of a change on which they are uninformed and that they do not understand.</p>

**Application exercise**

One feature of the referendum procedure is the public nature of the vote: every person enrolled to vote for the House of Representatives must vote on any proposal to alter the wording of the Constitution. One benefit is that the Constitution is the “people’s document” and a referendum is the ultimate expression of direct democracy; the people are the ones ultimately in charge of their system of government, and they have the ability to check the power of all three branches of government through changing the wording of the Constitution or keeping it as it is (and, for example, rejecting a Commonwealth request to gain another power). The people are, however, unable to initiate any referendum proposal, and frequently are voting on changes they do not fully understand. The Constitution is a legal document, written for lawyers rather than laypeople, and the changes proposed for it have over the years become increasingly legalistic and wordy. Referendums are also held at the same time as elections usually, which gives the people even less of an opportunity to understand the proposal because their attention is taken by election issues. This leaves us with a democratic document that can only be changed by the people perhaps least qualified to do it, and where the vote will succeed or fail based on media rhetoric and ignorance rather than proper information.

- a. The above answer is a sample of an evaluation by feature: the public nature of the vote is one feature, or aspect, of the referendum procedure. Using it as a sample, evaluate two other features of the referendum procedure as a means of changing or protecting the Australian Constitution.

## Changing the Constitution through the High Court

The High Court of Australia has the power to interpret the Constitution, and to apply that interpretation to law or policy, any time a case comes before it. The meanings that the High Court gives to the words of the Constitution form part of the law, even though they are not inserted into the wording of the Constitution. The meanings attached to the words of the Act form precedent, and are written down in law reports; these precedents are just as binding as the words of the Constitution themselves.

### The significance of High Court interpretation of sections 7 and 24

Sections 7 and 24 have been used as the basis of implied principles and freedoms. A system of representative democracy is created by ss7 and 24 of the Constitution, and it protects things such as voting and advertising for political parties and candidates for election. Section 7 requires that the Senate be directly elected by the people of each state, and s24 requires that the House of Representatives be directly elected by the people of the Commonwealth of Australia.

The Study Design specifies that you must understand the impact and significance of *one* High Court case that required interpretation of ss7 and 24 of the Australian Constitution. This Study Guide will provide summaries of a selection of appropriate cases: you should choose just *one*.

**Exam tip:** Sections 7 and 24 are two other section numbers in the Constitution that the Study Design says must be known by number alone. In the past, the examination has given just the number of these kinds of named sections in a question, and asked students to answer the question without any hints regarding content.

### Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106

The Commonwealth Parliament passed the *Political Broadcasts and Political Disclosures Act 1991* to ban most political advertising on radio and television in the six months before a federal, state or local government election. Australian Capital Television challenged the validity of the law on the grounds that it contravened an implied protection contained in the meaning of ss7 and 24 of the Australian Constitution.

#### Significance

- The law was held to be invalid.
- An implied freedom of political communication was found in the Constitution.
- The freedom was held to be subject to a test for proportionality: in other words, if necessary, it could be limited for appropriate reasons and in appropriate ways.

The Court held that ss7 and 24 insisting that the houses be “directly chosen by the people” created a democratic system of representative government and elections. In order to make any kind of informed choice about which candidate they wanted to cast their vote for, the people needed to be able to listen to information about competing policies and participate in discussion about the relative merits of different candidates. To participate in a democracy, the public needed a freedom of political communication.

Despite it not being express in the wording, the meaning of ss7 and 24 therefore protected the ability of the Australian people to engage in political debate and discussion. The power of government to limit these things was restricted.



## The significance of High Court interpretation on the division of powers

The High Court also has the power to interpret the scope and meaning of the Commonwealth's specific powers and of any constitutional restrictions on its power or the power of the states. The Court has the power, when a case comes before it, to give either a broad construction or a narrow construction to the powers of the Commonwealth: a broad construction will expand the federal powers and reduce the state ones, while a narrow construction will effect the opposite.

The Study Design specifies that you must understand the impact and significance of *one* High Court case that required interpretation of the division of legislative powers in the Australian Constitution. This Study Guide will provide summaries of a selection of appropriate cases: you should choose just *one*.

**Exam tip:** Keep in mind that this is the *second* category of High Court case you need to learn – first, ss7 and 24; second, division of powers. In past examinations students have mixed their cases up and received zero for those questions. Ensure you're using the right High Court case for the right topic.

### Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Under its s51(xxxv) arbitration and conciliation power, the Commonwealth legislated for award wages and conditions. A group of engineers working in a facility owned by the Western Australian government believed their work should come under the Commonwealth award – but there existed at the time a common law doctrine of reserved powers, which said that the Constitution had to be read narrowly for the Commonwealth, with a broad implication being left for the states. The doctrine of reserved powers was based on the fact that the framers of the Constitution intended the majority of powers to be left with the states, so the High Court interpreted the Commonwealth powers to only operate in areas the states could not legislate.

This case overturned the doctrine of reserved powers. Instead, it ushered in a new age of interpreting most specific powers very broadly – to the full extent of their literal reading – rather than deliberately and artificially trying to keep them narrow.

#### **Significance**

- The Commonwealth law was held to be valid.
- The engineers were covered by the award, as were *all* employees across Australia in all the organisations listed in the award.
- The prior common law doctrine of reserved powers was overturned, and rejected as not 'good law'.
- The Constitution began a new era of being read in a more 'natural' and literal light, which has had the effect of favouring the Commonwealth.

In the 1926 Roads Case, for example, the Commonwealth legislated for agreements between the Commonwealth and the states for the states to construct and maintain a number of roads inside state borders, using federal money. If a state chose not to build and maintain the roads the Commonwealth specified, they would not receive the money. Victoria challenged the validity of the Act because the conditions were in the area of residual powers, but the High Court supported the legislation because they read s96 of the Constitution in the broad terms of the precedent from the Engineers Case. There was nothing expressly prohibiting the Commonwealth from making funding conditions in residual areas, so they were allowed to even though it cut into state residual powers. This was only possible as a result of the Engineers Case. Most division of powers rulings since 1920 were only possible because of the Engineers Case.

### Commonwealth v Tasmania (1983) 158 CLR 1

In 1974 Australia signed a treaty in which it committed to list significant areas on the World Heritage List for protection, if they were of natural, environmental or cultural heritage. In the late 1970s the Tasmanian Government started construction on a dam that would have destroyed areas of old-growth forest and flooded caves containing ancient Aboriginal art. The Commonwealth heritage-listed the area of the dam and legislated to prevent construction.

The Tasmanian law was challenged on the basis of its s109 inconsistency with the Commonwealth law. The High Court had to determine whether the Commonwealth law was valid, because it was based on a treaty and not on a specific power covering the environment, culture, or energy production.

The High Court decided that the Commonwealth law was valid, and that treaties permitted the Commonwealth to legislate on matters that were not otherwise in their list of specific powers.

#### **Significance**

- Tasmania was prevented from going ahead with the dam.
- The Commonwealth was able to legislate to implement the terms of the Convention.
- The Court confirmed that the external affairs power included matters covered by treaties, even if those matters might, in other circumstances, be residual powers.
- The test for proportionality that was later laid out more fully in *Lange* and *McCloy*, and that had already been considered in relation to the defence power, was applied to the external affairs power.

- The broad interpretation of *Koowarta* was confirmed: three justices had found in *Koowarta* that the existence of a treaty made any matter ‘external’, while three justices had found that the existence of a treaty was immaterial to whether a matter was ‘external’.

**Exam tip:** The *Koowarta* Case is discussed in the next topic, as it is also relevant to international instruments and the Commonwealth’s ‘external affairs’ power. If you choose to learn *Koowarta* in the next topic, you can use material from it in your discussion here.

- From 1983, the Commonwealth was therefore able to more confidently override conflicting state law in a wider range of areas, pursuant to s109 the inconsistency rule. The states therefore lost some ability to govern themselves in ways contrary to Commonwealth policy.

This decision significantly widened the scope of the external affairs power, increasing the jurisdiction of the Commonwealth Parliament and giving it almost unlimited scope to enter into the residual powers as long as it could show “international concern.”

***Commonwealth v Tasmania (1983) 158 CLR 1***

One of the new members of the High Court bench, William Deane, said:

“The establishment and protection of the means of conducting international relations, the negotiation, making and honouring (by observing and carrying into effect) of international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation’s external affairs and of the power which s51(xxix) confers. They do not, however, cover the whole field of ‘external affairs’ or exhaust the subject matter of the legislative power. The full scope of the power is best left for determination on a case by case basis. [...] On the other hand, [...] a law would not properly be characterised as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute [...] or if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power.”

**[Pape v Commissioner of Taxation and Anor \[2009\] HCA 23](#)**

The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) authorised lump sum payments to be made to every person in Australia who had a taxable income below \$100,000 per year. Brian Pape, a law lecturer and barrister due to receive \$250, challenged the validity of the Act on the basis that that the payments were called a “tax bonus,” but were actually a gift and were therefore not supported by the Commonwealth’s taxation power.

**Significance**

- The Commonwealth law was held to be valid.
- The tax bonus payments could be made.
- The taxation power was given a narrow reading: it only included amounts actually paid in tax, and not any expenditure made with money collected from taxes or payment made to taxpayers.
- Section 81 (the power to spend monies raised by the executive government) was also given a narrow reading, and the existing precedent that suggested it was a separate head of legislative power was overruled.
- Sections 51(xxxix) and 81 were not broadened in their scope, but they were applied to a new situation that gave the Commonwealth increased power in the current case. Their interpretation did not set a broad precedent, though.

The Court found that the taxation power did not support the Act, but that the Act was still valid because of two other sections of the Constitution: the executive power in s61, and the incidental specific power in s51(xxxix).

The *Tax Bonus Act* was enacted in response to a global financial crisis, and the Court held that the executive power in s61 supports action appropriate to a national government in these circumstances; appropriate action includes making a stimulus payment to the people to protect the country’s economy. The incidental power then gives the Parliament the power to authorise the payment through legislation, because it gives the Parliament legislative power over anything “incidental to the execution of any power vested by this Constitution [...] in the Government of the Commonwealth.”

If the executive government has a power under s61, then s51(xxxix) gives the Parliament the power to legislate on what the executive wants to do.

## International instruments and the external affairs power

International instruments can be binding at international law or non-binding.

- An international agreement is a contract between sovereign nation-states or international organisations such as the United Nations ('UN') that is binding at international law.
- A declaration is a statement or belief or intention adopted by an international body that is usually not legally-binding, even at international law.

Even though international agreements are binding at international law, Australia is not governed domestically by them. Instead, it is governed by law passed by Australian parliaments and subordinate authorities, and common law developed by Australian courts. Treaties are not law in Australia, even if Australia has signed and ratified them.

### Definition

Section 51(xxix) of the Australian Constitution gives the Commonwealth Parliament the power to make law in the area of 'external affairs'. The High Court has interpreted 'external affairs' to include any matter covered by international instruments that Australia is a signatory to. Specifically, if the Australian Government enters into a treaty, the Commonwealth Parliament can pass laws to implement that treaty, even if the subject matter of the treaty covers issues of residual power.

Normally, residual powers reside only with the state parliaments, but the Commonwealth's external affairs power gives them law-making ability over any matter covered by a legitimate treaty, including residual matters, if the law is passed to *implement* the treaty.

### Optional Protocol to the Convention against Torture

In December 2017 Australia ratified the Optional Protocol to the Convention against Torture ('OPCAT'), eight years after initially signing the treaty. Australia had signed the 1985 UN Convention against Torture, but, because it had not formally ratified it, it had not consented to being bound under international law. OPCAT requires Australia to establish a "national preventive mechanism" such as an independent watchdog to conduct regular inspections of state institutions such as prisons, immigration detention centres, psychiatric facilities, and child detention centres such as Don Dale in the Northern Territory; all places of detention in Australia will also now be subject to international inspections conducted by the UN Subcommittee on the Prevention of Torture. OPCAT does not apply to institutions located outside Australia, such as the offshore immigration processing centres, even though the Australian Government exercises control over their conditions.

The Northern Territory Royal Commission into the Protection and Detention of Children called for Australia to ratify OPCAT in its final report. It found "shocking and systemic failures" in the child protection and justice systems that could have been identified by random unannounced compliance checks: "Ratification of OPCAT and the introduction of a system of inspection mechanisms will directly address concerns raised by the Commission about the lack of accountability and transparency in youth detention facilities in the Northern Territory." The Australian human rights commissioner, Ed Santow, told a Guardian Australia journalist: "Take a hypothetical example like Don Dale – if OPCAT was in place then an inspector would have gone into Don Dale and asked some serious questions about why spit hoods were used on juvenile detainees."

You do not need to specialise in one case study in detail for this topic; instead, you should aim to illustrate the relationship between international instruments and the external affairs power through one or more relevant, shorter, examples.

**Exam tip:** This is now the *third* category of High Court case you need to learn. There will be a big risk of using the wrong case for the wrong topic in the exam – be very careful.

### Background information

- Instruments can be binding agreements or non-binding agreements (often called 'declarations'). Binding agreements are also called 'conventions', 'treaties' and 'covenants', most popularly.
- Agreements can be bilateral, between two parties, or multilateral, which means between three or more parties.
- Agreements can be conducted in good faith or bad faith. An agreement conducted in good faith (aka '*bona fides*') is one that is sincere as to its intentions and purpose; an agreement conducted in bad faith is one that is not. Current High Court jurisprudence is that the Commonwealth can only rely on *bona fide* agreements to support legislation.

**Exam tip:** If you are confident using the Latin terms *bona fides* and *mala fides*, you should feel free to use them interchangeably with 'good faith' and 'bad faith'.

- The federal government enters into international agreements: the state governments do not. The power to enter into agreements is commonly thought to be found in s61 of the Australian Constitution – the executive power. An alternative view is that the power is given by convention and international law. This difference could be important if argued in a future case, and could change the outcome of the case.
- The federal government consults with the states before entering most international agreements, and usually tables the agreements in federal parliament before formally ratifying them.

The first case to consider the question of whether international agreements had an impact on the Commonwealth's legislative power over external affairs – and, if so, the nature and extent of that impact – was the case of *Burgess* in 1936. Since then, the relationship between external affairs and international agreements has been developed further in cases such as the 1983 Tasmanian Dams Case and the 1982 *Koowarta* case.

The full citation of the Tasmanian Dams Case is *Commonwealth v Tasmania* (1983) 158 CLR 1. A full description of it was given in the previous section, and it can be used here.

Additional case examples include:

**R v Burgess; Ex parte Henry (1936) 55 CLR 608**

Henry Goya Henry had his aviation licence suspended, and two days later he flew his plane around the Sydney Harbour Bridge. He was convicted of breaching the federal air navigation regulations, and appealed to the High Court on the basis that the regulations were unconstitutional. Australia was a signatory to the Paris Convention on International Transport 1919, but the focus of the Convention was on international aviation; also, the subject matter of aviation intruded into the residual powers.

The High Court was asked to decide whether the Convention activated the external affairs power to allow the Commonwealth to legislate in a normally residual area: local aviation.

**Significance**

- The Commonwealth's regulations were held to be invalid on the facts of the case, but a majority of the Court agreed that the external affairs power could cover matters contained in a treaty.
- *Burgess* gave the Court's first interpretation of the external affairs power in relation to treaties and international agreements, and lay the foundation for the later *Koowarta* Case and *Tasmanian Dams* Case.
- *Burgess* established a precedent that the Commonwealth *could* legislate to implement the terms of an international agreement, *even if* the subject was usually a matter of residual power.



The *Burgess* precedent was not clear enough to set binding precedent, as Latham CJ differed slightly in his rationale from the other two majority justices. The Court did not, therefore, return a majority interpretation of 'external affairs'.

The two other majority justices, Evatt and McTiernan, took an extremely broad view of external affairs. They held that the mere existence of a treaty gave the subject matter the character of an international concern, and made it an external affair and therefore a specific power. This was the precedent later set, half a century later, in the *Tasmanian Dams* Case.

**Koowarta v Bjelke-Petersen (1982) 153 CLR 168**

The Queensland Government refused to consent to a pastoral lease for the Aboriginal Land Fund Commission because Government policy opposed the acquisition of large areas of land in the state by Aborigines. *Koowarta*, one of the Indigenous people affected, challenged the Government on the basis of the Commonwealth's *Racial Discrimination Act 1975*, passed in support of the Convention on the Elimination of All Forms of Racial Discrimination 1965. Queensland challenged the validity of the Act on the basis that it was made in residual areas.

## Significance

- The Act was held to be valid.
- On the question of the impact of treaties on the scope of the external affairs power, four justices held that the existence of an international agreement had the power to affect the matters the Commonwealth could legislate on.
- No clear precedent was established, however, because the fourth justice in the majority found that the subject matter of the treaty must be “international in character” on its own merits: the mere existence of the treaty did not make it international. In other words, the *Koowarta* Court decided in a very similar way to the *Burgess* Court.

Three of the majority justices found that the mere existence of a treaty demonstrated the international and ‘external’ character of the subject matter. The mere existence of a treaty therefore gave the Commonwealth the power to legislate on the matters covered by the treaty, even if those matters were otherwise residual. Three justices out of seven is not enough to set binding precedent, though.

The fourth majority justice, Ninian Stephen, had a different *ratio*: he determined that the external affairs power only extended to the subject matter of treaties where the subject matter was international by itself. He said: “But where the grant of power is with respect to ‘external affairs’ an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.”

## REVIEW/APPLICATION QUESTIONS – Changing the Constitution through the High Court

1. What is the key function of the High Court with respect to the Constitution?
2. To what extent can the High Court change the Constitution? Explain your answer.
3. What is an implied right and/or an implied structural protection of rights?
4. Who has the ability to determine that an implied right exists in the Constitution?
5. Explain how ss7 and 24 of the Constitution combine to imply the freedom of political communication and a range of protections to do with a representative democracy.
6. In relation to one case in which the High Court ruled on the meaning and scope of ss7 and 24 of the Constitution:
  - a. Outline the facts of this case.
  - b. Identify the ruling of the Court and the *ratio decidendi* on which that ruling was based.
  - c. What impact did this case have on the scope of ‘representative democracy’ and/or the protection of democratic freedoms in Australia?
7. The implied right of freedom of political communication exists in precedent and is not written expressly into the wording of the Constitution. Does that mean the Commonwealth Parliament is able to pass legislation to amend or override it? Explain.
8. If the High Court gave a narrow interpretation to a specific power, would it benefit the state parliaments or the Commonwealth parliament? Explain your answer.
9. If the High Court gave a broad interpretation to a specific power, would it benefit the state parliaments or the Commonwealth parliament? Explain your answer.
10. In addition to specific powers, what else might the High Court be called on to interpret the meaning of in the Constitution that might affect the division of power?
11. If the Commonwealth Parliament passes legislation that is thought to be outside its powers, what must happen for the High Court to declare the legislation invalid?
12. What happens if a challenged act is *not* declared invalid (ie outside the Commonwealth’s jurisdiction) by the High Court?
13. With respect to one High Court case that altered the constitutional division of law-making powers:
  - a. Briefly summarise the facts of the case.
  - b. Outline the High Court’s ruling in this case and their *ratio decidendi* for that ruling.
  - c. Justify whether this High Court decision reflected a narrow interpretation of the Constitution or a broad interpretation of the Constitution.
  - d. Explain the impact that the High Court’s decision had on the balance of power between the states and the Commonwealth.
14. Outline the usual difference between an international agreement and a declaration.
15. How could you disagree with the High Court and define the ‘external affairs’ power in a way that did *not* include international instruments and allowed the Commonwealth *little* scope for moving into residual areas?
16. Now give a definition of the ‘external affairs’ power that *does* include international instruments and may allow the Commonwealth significant scope for moving into residual areas.
17. Provide one example of a case in which the High Court interpreted the meaning of the external affairs power in light of an international instrument, and comment on the impact of this case.
18. Outline one residual area that the Commonwealth has been able to make laws on, as a result of the government entering into a treaty.

## Evaluation: Changing the Constitution through the High Court

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>Representative government provides fairly broad guarantees that the Commonwealth, the states, the territories and even local government will not abuse the democratic rights of Australians. It is flexible enough to change with changing circumstances, and can be interpreted by the courts on a case-by-case basis. The implied freedom has been developed to be very flexible and practical, and not dogmatic or overly literal.</p> <p>The High Court has the ability to find more implied rights and more structural protections connected to the interpretation of ss7 and 24 – for example, they could expand on the freedom of political participation and the right to vote. We do not need to change the wording of the Constitution for this, so it is a cheaper and much more flexible way of adapting rights and the Constitution to a changing society.</p>	<p>High Court interpretation of ss7 and 24</p>	<p>Broad readings of the Constitution that give additional freedoms are often justified on the grounds that the interpretations are ‘implied’ by the wording. This is intellectual dishonesty, because often the implied readings are achieving the opposite of what the founders wanted, or things they had expressly chosen to leave out. The framers chose not to include any kind of freedom of speech.</p> <p>Because law relating to ss7 and 24 is made in an incremental way, case by case, and can only be made by a majority of the Court arriving at the same legal <i>ratio</i> for the decision, there are many areas of the protection that remain unclear.</p> <p>Parliament and the executive can infringe the protection provided by ss7 and 24 in many ways, and only those laws that are successfully challenged will be struck out. Laws that are not challenged because no-one realises there are grounds for a challenge, or no-one has the time and money to do so, will stay in operation.</p>
<p>The founders adopted short, general phrases for most constitutional provisions for the exact reason that they wanted the High Court to be able to apply them flexibly to changing circumstances. The High Court, by changing the scope of powers over time, is simply fulfilling the role given to it in the Constitution and helping the Constitution endure and remain relevant.</p> <p>High Court justices are not political entities. They are making decisions removed from short-term voter and media interests, which means they can be more objective and determine how the powers should be interpreted according to fair legal rules.</p>	<p>Interpretation affecting the division of powers</p>	<p>Since 1920 and the Engineers Case, the Court has interpreted the Constitution in a way that unfairly increases the power of the Commonwealth and takes too much power away from the states. The specific powers of the Commonwealth should be interpreted with the goal of preserving a ‘federal balance’, in line with the intentions of the framers and the goal of federation.</p> <p>The High Court makes decisions on what the Constitution means – not what it <i>should</i> mean. Decisions can therefore give a broad power to the Commonwealth and, over time, reduce the ability of the states to function; or, they can read the power narrowly and prevent the Commonwealth from enacting nationwide reform.</p>
<p>The current reading of the external affairs power does not allow the Commonwealth to legislate on all matters of international concern. The Commonwealth is still restricted by clear constitutional prohibitions, and there are a range of conditions regarding treaties that limit it.</p> <p>The Commonwealth undertakes a consultation process before almost every action in relation to treaties: ratifying new ones, agreeing to amendments, or withdrawing from existing ones. The treaty or amendment is tabled in parliament at least 15 days beforehand, and the Joint Standing Committee on Treaties then investigates and makes recommendations.</p> <p>Because Australia is treated as one country on the international stage, and other nations do not recognise the sovereignty of each individual state to enter into its own international agreement, it is only appropriate that the Commonwealth be given this power.</p>	<p>Interpretation of the external affairs power</p>	<p>The current broad reading of the external affairs power is a progressive political act that ignores the intentions of the founders. If the Commonwealth was intended to have power over topics such as natural heritage and the rights of children, the founders would have included those items in the enumerated powers. They should not be inserted into the list of specific powers through a back door.</p> <p>A broad reading by the Court changes the meaning of the Constitution in a way that is undemocratic: the people have rejected changes at referendum that have subsequently been implemented through a combination of High Court interpretation and treaties, and the will of the elected parliament has been overridden.</p>

**Application exercise**

For each of the following arguments, work out whether it is a positive point or a negative point. If it is a positive point, find a negative point to balance against it, and say whether the positive aspect is entirely outweighed or only partly outweighed; if it is a negative point, find a positive one to balance against it, and say whether the negative aspect is entirely outweighed or only partly outweighed.

- a. The High Court has not interpreted ss7 and 24 to grant an untouchable individual right. The freedom of political communication is a purposive right only, and it serves to protect the overall system of democracy and representative government. The parliament is therefore allowed to infringe it if the law burdening political communication is overall an appropriate and proportionate protection of democracy.
- b. The founders adopted short, general phrases for most constitutional provisions for the exact reason that they wanted the High Court to be able to apply them flexibly to changing circumstances. The High Court, by changing the scope of powers over time, is simply fulfilling the role given to it in the Constitution and helping the Constitution endure and remain relevant.
- c. The current broad reading of the external affairs power is a political act that ignores the intentions of the founders. If the Commonwealth was intended to have power over topics such as natural heritage and the rights of children, the founders would have included those items in the enumerated powers. They should not be inserted into the list of specific powers through a back door.

## **AOS2: THE PEOPLE, THE PARLIAMENT AND THE COURTS**

### **PARLIAMENT AS A LAW-MAKER**

#### **Factors that affect the ability of parliament to make law**

The Study Design lists four factors that affect the ability of parliament to make law: the roles of the houses of parliament; the representative nature of parliament; political pressures; and restrictions on law-making. As with the previous topic, the Study Design is ambiguous on whether the focus is on Commonwealth Parliament or state parliaments. Therefore, both will be addressed, with the focus on the Commonwealth.

#### **The roles of the houses of parliament**

The roles of the houses of parliament have already been covered in Unit 4 AOS 1. The same roles will therefore be relied upon here, but new material will be limited to indications on how each role might affect the ability of parliament to make law.

#### **Roles of the lower house**

The roles played exclusively or most prominently by the lower house include the formation of government, the initiation of most new bills, controlling money bills, performing responsible government, and acting as the people’s house.

#### **Forming the Government**

<b>ENABLING PARLIAMENT</b>	<b>LIMITING PARLIAMENT</b>
<p>The connection between the Government and the parliament makes law-making more efficient. The parliament is able to make law efficiently because government policy will be supported by the lower house.</p> <p>A minority government can result in bills being the result of cooperation and work-shopping.</p> <p>Most bills are introduced where the ministers responsible for them can be questioned and challenged. This enables the parliament to make law in a more informed way.</p>	<p>As far back as 1971 political scientist L F Crisp observed that the power of government and industry had effectively disempowered parliament: “The initiative and the power of decisions are with the government [...] most decisions of consequence are effectively made elsewhere – in the Prime Minister’s suite, or in Cabinet, in caucus rooms or in party executives and conferences; in the departments [... etc].”</p> <p>The ability of the Government to declare a bill an urgent bill and use the guillotine to cut debate limits the parliament from making law that fully takes into consideration the points of view from parties and independents other than the Government. This diminishes the representative nature of the law, and possibly also its quality.</p> <p>New bills will infrequently be scrutinised or amended properly in their place of introduction, because of the Government majority. This limits the lower house being able to make law that counters executive policy or takes into account a wider range of perspectives. This is made even worse if the Government is skilful at making “back room” deals with the Opposition.</p>

### *Initiating most new bills*

<b>ENABLING PARLIAMENT</b>	<b>LIMITING PARLIAMENT</b>
<p>Debate on bills is usually adjourned after the second reading speech so that members of parliaments can read the bill, consider how it will operate and whether they will support or oppose it in consultation with their parties and electorates. This happens before amendments are proposed, to enable parliament to make the most informed and considered law.</p> <p>Debate in each house begins with the opposing minister making a speech in response to the bill, and then Government, Opposition, minor party and independent members of parliament then take turns to speak on the proposed law. This enables parliament to make the most well-considered and representative law possible, informed by all different parties and points of view.</p>	<p>Since governing parties hold a majority in the lower house, and the lower house can often be the more 'political' house, focused on party squabbles and appealing to the media and mass public, the details of bills can receive less attention.</p> <p>Bills put forward by the Opposition, minor parties or independents have little to no chance of success. This means that half the population is effectively not being represented by the initiation of bills in the lower house.</p>

### *Initiating and amending money bills*

<b>ENABLING PARLIAMENT</b>	<b>LIMITING PARLIAMENT</b>
<p>Money bills are vital for the policy programme set by the Government to be enacted, because they fund government departments and all public works. The Government's control over the lower house can ensure that budgets are tailored to the policy needs of the executive, allowing the country to keep running.</p> <p>The lower house can benefit from the advice and expertise of the upper house, because federal and Victorian upper houses can both refer/recommend changes in money bills. The lower house cannot be overridden by the upper house, but its work can be checked and improvements can be made.</p>	<p>The Legislative Council is unable to check the power of the Government through appropriations, because in 2003 it lost the ability to reject the budget. The Government in the lower house could abuse this monopoly, because it limits the ability of parliament to make careful law in the area of money bills.</p> <p>The Senate still has the power to reject money bills, which can frustrate the government programme decided in the lower house and derail government. It can stop progress on law-making for a time.</p>

### *Performing responsible government*

<b>ENABLING PARLIAMENT</b>	<b>LIMITING PARLIAMENT</b>
<p>In the second reading the member introducing the bill makes a speech outlining the reasons for the new law (that is, its purpose) and the bill's major provisions (what the new law will do). This enables members of parliament to vote with more complete knowledge and context and to judge government policy.</p> <p>For instance, when introducing the proposed paid parental leave legislation in 2010, Minister Jenny Macklin made a long speech (covering six pages in Hansard) about why government should support parents at home with young children, and explaining who would be eligible for the leave and how much financial assistance they would receive. This justified Government policy on the Bill.</p> <p>Most bills are introduced where the ministers responsible for them can be questioned and challenged. This enables the parliament to make law in a more informed way.</p>	<p>In practice, because of the Government majority, the ability of the rest of the House to hold the Government accountable is limited. For example, on 18 March 2015 the proposed data surveillance laws were debated in the lower house of Commonwealth Parliament. On 19 March the Opposition joined the Government in passing the Internet and smartphone surveillance laws, and 30 new pages of law were handed to the rest of the house less than half an hour before the final vote was called. The three dissenting votes were Bandt of The Greens, and Independent members Andrew Wilkie and Cathy McGowan.</p> <p>If the prime minister or premier of the day supports the minister, parliament as a whole may not be able to hold that minister accountable without passing a 'no confidence' motion against the prime minister and entire executive government.</p>

### Acting as the “people’s house”

ENABLING PARLIAMENT	LIMITING PARLIAMENT
<p>Debate on bills is usually adjourned after the second reading speech so that members of parliaments can read the bill, consider how it will operate and whether they will support or oppose it in consultation with their electorates. This happens before amendments are proposed, to enable parliament to make the most informed and considered law in light of what each electorate thinks.</p> <p>The lower house spends most of its time considering bills that will most likely make it into law, and that tend to be supported by the majority. This focus is supported by the popular voting system used in it.</p>	<p>As far back as 1964 academic Donald Horne dismissed Australian parliaments as being “mainly of ritualistic significance” because of how little they focused on representing public concerns and genuinely debating public issues.</p> <p>Petitions do have direct contact with parliament, but parliament is overwhelmed by petitions. This dilutes the effect of any one petition. For example, in 2021 the House of Representatives records having received 765 petitions. The total number of signatures on these petitions was 2,669,213 people, many of whom did not have their wishes followed. The relevant minister only responded to 585 petitions.</p>

### Roles of the upper house

The upper house is usually a check on the lower house, which can lack the time to properly investigate complex issues and can be dominated by the interests of the governing party. Often, lower house interests are interests that favour the majority and the larger states from which most ministers and premiers/prime ministers tend to come.

The roles played exclusively or most prominently by the upper house include acting as a house of review, representing regional interests, scrutinising delegated legislation and the Government, and initiating most new private member’s bills.

### Acting as a house of review

ENABLING PARLIAMENT	LIMITING PARLIAMENT
<p>The lack of Government control usually results in better scrutiny and fewer bills being pushed through without amendment. Crossbenchers often hold the balance of power and can be more responsive to the public’s needs because they don’t have a party machine to support them. The Senate in recent elections has had record numbers of crossbenchers, which has required a great deal of negotiation and cooperation.</p> <p>Historically, there are many instances of upper houses catching poor policy and law. Compared with Queensland, which has demonstrated problems with a unicameral system since it abolished its upper house.</p> <p>The Opposition infrequently has a majority, which means the upper house tends not to be obstructive for no reason or ‘hostile’. This could be a limitation in theory, but it rarely is in practice.</p>	<p>Sometimes, the Government party may control <i>both</i> houses of parliament: this is relatively uncommon, but it is possible and has been the case three times since 1959, with the most recent being from 2005-2007 with the Howard Liberal/National Government. In such cases, the Senate may merely <i>approve</i> the legislation passed by House of Representatives without adequate review and scrutiny.</p> <p>Because debate is usually adjourned after the second reading speech, months can go by before it is scheduled again. Then, after debate, more months can elapse while the bill is in committee or subject to consideration in detail. For example, the 2010 amendment bill to the <i>Juries Act 2000</i> (Vic) proposed to increase jury eligibility by approximately 28,000 people (according to then-Attorney General Rob Hulls’ second reading speech). The Bill passed the Legislative Assembly easily, but was not considered quickly enough in the Legislative Council and it lapsed, despite having bipartisan support.</p> <p>The committee system in the upper house is limited from contributing to law-making. For example, since 2006, only Government senators have been able to chair legislative committees, which means they are less able to do work that might be critical of the Government. The state committees are mostly joint with the lower house, and are therefore more dominated by the Government.</p>

### Representing regional interests

ENABLING PARLIAMENT	LIMITING PARLIAMENT
<p>Members of the lower house have a powerful motivation to only listen to the majority: needing to have over 50% of the votes means candidates often won’t take the risk of standing as an independent or listening to the needs of groups other than the majority. Members of the upper house are elected with a different <i>proportional</i> voting system, so will actually be rewarded if they can unite groups of like-minded people from across their states or regions, thereby listening to more diverse voices.</p>	<p>Too many diverse interests in the upper house can make passing simple legislation unwieldy, slowing down the process and even preventing reform.</p> <p>Upper house members usually have more allegiance to the views of their parties than to the views of their regions or states. In practice, there are few issues determined on the basis of regional needs. Jacqui Lambie negotiating public housing funding for Tasmania in return for her vote in support of the Government’s tax cuts in 2019 was one of the limited examples.</p>

<p>The two largest states can pass bills through the House of Representatives that suit their interests, possibly at the expense of the smaller states. If all MPs from NSW and Victoria vote the same way, it wouldn't matter if every MP from every one of the other four states and two territories voted 'no'. The bill would still pass. The Senate can balance this imbalance.</p> <p>Some issues, such as the Murray Darling Basin water agreement, heavily affect state interests and need to be looked at from a regional perspective. The lower house is unlikely to do this; or, if it does, it will be dominated by NSW and Victoria.</p>	
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### Scrutinising delegated legislation

ENABLING PARLIAMENT	LIMITING PARLIAMENT
<p>Parliamentary committees are more active and numerous in the upper house, leading to more careful scrutiny. Since 1989 the Senate has had a default process of referring bills to committee, and regulations have a specialised committee called the Senate Standing Committee on Regulations and Ordinances and it deals with around 1,200 federal regulations a year.</p> <p>Lower houses have traditionally shown little interest in scrutinising and disallowing regulations, so this is a role performed more notably by the upper houses. In some states the upper house doesn't have independent authority to disallow regulations – disallowance must be agreed on by both houses – but this isn't the case in Victoria and the Commonwealth.</p> <p>In a typical year up to <i>ten times</i> more regulations are issued by subordinate authorities than acts are passed by parliament, so parliament maintains control over law-making by controlling regulations.</p>	<p>The parliamentarians on the Senate Committee only actually review around 250 federal regulations each year of the 1,400-1,600 that are passed. It does not have the time to review every regulation, so a legal adviser recommends a smaller number for parliamentary oversight. In 2021, according to the Committee's Annual Report, 420 were flagged for concern – significantly more than 240 in 2020.</p> <p>Neither the Committee nor the Senate can amend problematic regulations. They can only disallow the regulation if the relevant minister refuses to change it.</p> <p>Delegated legislation can be exempted from parliamentary and committee oversight – 19.7% of regulations were exempted in 2019. In 2021, the Committee raised concerns that 21 instruments made pursuant to the <i>Charter of the United Nations Act 1945</i> in relation to 'anti-terrorism' had been inappropriately exempted from disallowance.</p> <p>Parliamentary committees themselves do not receive much reform or oversight. In its 2018 Annual Report, the Senate Committee wrote: "After 86 years of operation, the committee considered that it would be appropriate to inquire into the adequacy of the parliamentary oversight of delegated legislation." In 2021 the Committee made 11 recommendations to improve parliamentary oversight, and three months later the Senate adopted the three recommendations directed to it.</p>

### Initiating most new private members bills

ENABLING PARLIAMENT	LIMITING PARLIAMENT
<p>Private member's bills give minority interests a chance to be represented and heard, and can fight against the tyranny of the majority – which doesn't always respect the rights of others. Private members don't have to please the media and the masses the same as the Government does, so can sometimes be an important voice for progress.</p>	<p>Private member's bills may represent niche interests that are more about the member's own publicity than about measures the country needs and would benefit from. They can also be seen as a waste of the upper house's time because they are so unlikely to be passed in the lower house – they may not even be scheduled for introduction and may lapse.</p>

## The representative nature of parliament

### Definition

A representative government is one where the people elect representatives to govern in parliament on their behalf. Those members of parliament will usually reflect the needs and values of the majority, and if the majority is unhappy with their performance the representatives will generally be voted out at the next election.

### Detail

Consider the competing aspects of representative government:

- Under ss7 and 24 of the Australian Constitution, representative government is merely a system of indirect democracy. Our representatives perform representative government simply by being elected and making laws on our behalf.
- Under the populist view, our representatives must reflect the views of the majority. Here, an elected representative loses authority to use their own judgment or to protect minority interests.
- Under the modern concept of representation through 'identification', our representatives should give us models to identify with: there should be female representatives for women to identify with; Indigenous representatives for Indigenous people to identify with; representatives with a disability, for people with a disability to identify with. Ideas of diversity and seeing 'someone like us' make up 'representation' – it is not enough that parliamentarians reflect our views, regardless of who they are.

### Medevac implementation and repeal

In February 2019 the Liberal-National Government suffered an historic defeat when the Medevac law was passed in the House of Representatives against its policy: it was the first loss by any government on a major vote in the lower house in decades. The Medevac provisions were supported by Labor, the Greens and crossbenchers, and provided for the transfer of sick refugees and asylum seekers from Manus Island and Nauru if two doctors agreed they had a pressing medical need. It would be a transfer for treatment only, and an independent panel of medical experts was appointed to review any transfer the minister objected to.

In December 2019 the Medevac law was repealed, despite polls suggesting that a majority of Australian voters supported it in either its original state or wanted it to go even further. One quarter of people questioned by the Guardian Essential poll published 25 November 2019 said that the medevac procedures did not go far enough. Only 22% believed the regime actively 'weakened' Australia's borders, and 17% were unsure. The majority was not reflected in the repeal, however, because of internal Liberal-National priorities.

**Exam tip:** Note that representative government is focused on receiving the support of the majority of people. There will therefore be a balance between the representative following her or his party or own opinion, and the representative following majority opinion in the community.

## Political pressures

### Definition

The idea of 'politics' relates to the dimension of law-making that is about individual personality, party loyalty and mutual support, the desire for power, and the optics of marketing and public propaganda. There will be pressure on MPs to support their party's policies, to project a favourable image in the media, and the need to maintain power in parliament – especially for members of the executive government.

### Detail

Political pressures will be different depending on whether the MP is a member of the governing party or the opposition party, or whether they are a crossbencher. Pressures on members of the Government will relate to maintaining power and serving the Government's policies and election mandates; pressures on the Opposition will relate to challenging the performance of the Government and presenting the people with a viable alternative; and pressures on the crossbenchers will relate to negotiating with the major parties and trying to extract compromises in exchange for their support.

The public perception of parties and members of parliament gives another dimension to political pressures. Most parties and members of parliament now have their own websites, active presences on a range of social media platforms, and newspapers or online publications they contribute opinion pieces or comments to. At the very least they make themselves available for television and print media interviews, live media conferences and television shows such as the ABC's Q&A and radio talkback. Most politicians recognise nowadays that staying in power is a lot about getting public exposure, and learning how to speak to the people in a way that resonates with them and convinces them to give their support.

Political pressures can be internal, within the party; they can be parliamentary, between parties in the parliament; they can be domestic, relating to Australian politics and elections; or they can be international, relating to Australia's relationship with other countries.

## Restrictions on law-making

Parliament will also be limited in its ability to make and change law by a number of practical restrictions. Some come from the Constitution; others from logistics such as time and funding.

**Exam tip:** The Study Design doesn't specify whether the focus is federal parliament or the state parliaments. You should therefore be familiar with constitutional restrictions as they relate to both parliaments – logistics such as time and funding are common to both.

### Definition

Restrictions on law-making can come from the Australian Constitution, in the form of partial or complete prohibitions on legislating – both state and federal parliaments are subject to these constitutional restrictions. Other restrictions derive from logistics including time constraints and financial resources, and these are common to all parliaments.

### Detail

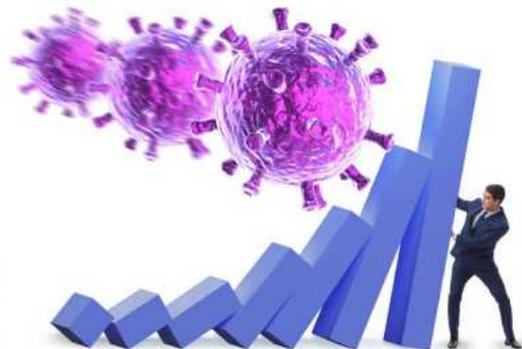
Because parliament is limited in its sitting days, and because it works with a finite amount of funding, it will be limited by the logistics of making every law the community needs, updating every law when it goes out-of-date, and finding the money to pay for all of these changes. The long-term average for parliament sitting is 67 days per year, with fewer in election years such as 2022. If a house is not sitting, it cannot introduce, debate and vote on new bills; committee work and the development of policy can go on in the background, though.

Partly because of the interruption of the federal election, in 2018-19 the House of Representatives in federal parliament sat a total of 39 days. The calendar for 2019 scheduled the House to sit for 58 days between January and December 2019. In 2022 the House sat for 10 days in the first 6 months of the year, but this is low mostly because of the federal election – in 2023 the House is scheduled to sit for 37 days in the first six months. The last five years have seen some of the fewest sitting days for the House in modern history.

The Constitution also restricts parliament from being able to legislate. Firstly, the territories are created by the federal parliament, so the federal parliament retains the power to change the rules of their self-government at any time. Other constitutional restrictions relate to the division of legislative powers between the Commonwealth and the states.

For instance:

- The states cannot legislate in any area of exclusive power.
- The residual powers of the states limit the Commonwealth's law-making power, because the Commonwealth is limited to making laws on matters enumerated in the Constitution.
- In addition to these restrictions by implication, the Constitution also puts a range of express limitations on the powers of the Commonwealth Parliament: s116 restricts the Commonwealth from passing many laws regarding religion; s80 prevents the Commonwealth from removing the right to trial by jury from trials for federal indictable offences.
- Some constitutional restrictions also apply to state parliaments: s114 of the Constitution prevents states from legislating to raise an army or defence force without permission from the Commonwealth; and s92 prevents the states from taxing interstate trade or placing unreasonable restrictions on transactions or movement between the states. For example, in 2020 businessman Clive Palmer unsuccessfully challenged the Western Australian government on the grounds that its Covid-19 border closures were unconstitutional restrictions on the free movement and trade between states, but the High Court found that s92 only prevented *unreasonable* restrictions on movement and the border closures were reasonable responses to Covid-19.



**Exam tip:** Some restrictions on the Commonwealth are, on the flipside, powers of the state parliaments; likewise, some restrictions on the state parliaments are powers of the Commonwealth. If you want to use a power of one parliament as a restriction on the other, go ahead; only, make sure you phrase it in terms of what the second parliament *cannot* do rather than in terms of what the first parliament *can*.

**REVIEW/APPLICATION QUESTIONS – Factors that affect the ability of parliament to make law**

1. The Westminster system is Australia's way of determining the governing party. What is the 'Westminster system'?
- a. In which house of the Victorian Parliament is the executive government formed after an election?
- b. In which house of the Commonwealth Parliament is the executive government formed after an election?
2. What is the rule for which party can form executive government?
3. Could the House of Representatives change executive government between elections, without the people having a say? Explain your answer.
  - a. Can the Legislative Assembly also do this?
4. Could the Senate change executive government between elections, without the people having a say? Explain your answer. Can the Legislative Council also do this?
5. In theory, both houses have virtually equal legislative power. What does this mean?
6. In which house of parliament are most bills introduced?
  - a. Identify two reasons why most bills are initiated in this house.
7. The upper and lower houses of federal parliament do not have exactly the same power as each other when it comes to initiating bills. Outline what the difference is.
8. Why is it appropriate that most scrutiny of Government administration and expenditure occurs in the lower house?
9. The Legislative Council is intended to act as a house of review. Define the phrase 'house of review'.
  - a. Describe the performance of this role by the Legislative Council.
  - b. Discuss when the Legislative Council will be an effective house of review and when it may fail to achieve this role.
10. What does the phrase 'balance of power' mean?
11. Outline two reasons why the Senate is a more effective house of review than the House of Representatives is.
12. What problems may arise from having the same political party in control of both houses of parliament?
13. What problems may arise from having the Opposition party in control of the Senate?
14. How many senators does each state receive?
15. Explain why the lower house is not the states' house or representative of regional interests.
16. In what ways could the make-up, or composition, of the Senate protect state interests?
17. Who represents the Crown in each of the Victorian and Commonwealth Parliaments?
18. Describe the primary role of the King's representatives with respect to law-making.
  - a. Apart from this role, identify two other roles of the Crown in the Australian parliamentary system.
19. Does the Crown have a lot of power in the Australian system, or are they more accurately described as a 'figurehead' or 'dummy'? Give reasons for your answer.
20. Explain how the principle of representative government encourages the views and values of the majority of the people to be listened to.
21. If parliament does not make law that is in line with the majority's views, do we still have a representative government? Explain.
22. Identify three specific 'political' pressures or considerations that the average member of parliament will be influenced by, in addition to strictly legal matters or formal parliamentary business.
23. Parliaments are supreme law-makers, but they do not have unrestricted power. Define the term 'supreme law-maker'.
  - a. Describe in detail one restriction on the power of Commonwealth Parliament that derives from the Australian Constitution, and one that does not.
  - b. Without overlapping with any content from the answer to Q21a, describe in detail one restriction on the power of the state parliaments that derives from the Australian Constitution, and one that does not.



## Evaluation: Factors that affect the ability of parliament to make law

The following strengths and weaknesses have been organised by feature, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
<p>As the 'people's house', the lower house is democratically elected and answerable to the public: members of parliament passing laws that society finds unacceptable are likely to be voted out of office. Furthermore, the public can become involved in parliament's law-making processes through signing and submitting petitions, or lobbying their local member of parliament. This should ensure proposed laws match the values of the majority of society, making them more likely to be accepted and followed.</p> <p>Question Time is televised and streamed online so the public can watch ministers justify policy and departmental actions, and debate the principles behind new bills introduced. In 2015, the Victorian Parliament amended the rules regarding Question Time to make it more effective, and has introduced constituency questions that a member can ask on behalf of their electorate.</p> <p>Each electorate is represented by one member, therefore people have a clear spokesperson for their district to lobby and present petitions to.</p>	<b>Roles of the lower house of parliament</b>	<p>Because the lower house is popularly elected, the fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and equal civil rights often meets opposition, and politicians' fear of outcry may prevent change in the law.</p> <p>Parliament's primary role is to legislate, but only 45% (approx) of its sitting time is devoted to legislation; its recent sitting time averages 600 hours per year (or, less than 16 weeks of full-time work). The lower house cannot introduce and debate unlimited new bills.</p> <p>Single-electorate members don't represent the people more directly or effectively than other systems; if anything, they can discourage members from deviating from party line, and from listening to minority voices.</p>
<p>When the balance of power is controlled by minor parties or independents the upper house is more likely to be an effective house of review. The Government will need to work with these crossbench senators and/or the Opposition to obtain their support to pass legislation, which may involve improving the content of the bill. These non-Government senators may request amendments in return for voting 'yes' on the bill, which means these bills will be further debated, scrutinised and amended before being passed.</p> <p>Upper house members often see themselves as representing the issues belonging to a region or state, which gives them a bigger-picture perspective than just looking at majority opinion in the group of suburbs that make up their electorate.</p> <p>Private members bills give minority interests a chance to be represented and heard, and can fight against the tyranny of the majority – which doesn't always respect the rights of others.</p>	<b>Roles of the upper house of parliament</b>	<p>Parliament may not achieve sufficient review if the upper house is controlled by the Government, like the Senate was under former prime minister John Howard from 2005. Inappropriate laws may be rushed through parliament because the upper house acts as a rubber stamp for Government policy and does not make necessary amendments or engage in proper scrutiny. The stages set out for the passage of a well-considered bill may not be fully utilised.</p> <p>An upper house member elected by less than 5% of the vote and representing a niche, unpopular regional interest has the same power as a member elected with many times those votes.</p> <p>Regional interests are often sidelined in favour of party policy, which is often influenced by the larger states because they have more members in the party.</p>

<p>The principle of representative government means that, in governing on behalf of the people who elected them, laws will probably be made that are consistent with the values and beliefs of the majority of voters – this is because members of parliament must keep the majority in their electorates happy in order to keep their vote and win the next election.</p> <p>The representative nature of parliament allows it to be an efficient law-maker that takes into account a wide range of competing perspectives on law. Representatives are each asked to look for the most appealing ‘synthesis’ of all the different views in their electorate and the supporters of their party.</p> <p>Because parliament is a representative body, the public can become involved in its law-making processes through signing and submitting petitions, lobbying their local member of parliament or making a submission to the Victorian Law Reform Commission when they review a particular law.</p>	<b>The representative nature of parliament</b>	<p>The representative nature of parliament can stop parliament from legislating sometimes. For instance, the fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform on controversial matters. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and civil rights often inspires extreme public reactions, and politicians’ fear of outcry – even if it comes from a very small proportion of society – may prevent change in the law.</p> <p>It is virtually impossible to make laws that match the views and beliefs of all members of our community, though, given the diversity of beliefs, backgrounds and experiences of a diverse society. It may be a practical impossibility for parliament to represent everyone, or even a clear majority.</p> <p>Because of the efficient synthesis of views that results from the representative nature of parliament, many less visible and influential views can be left behind. Parties can also neglect the views of the public if they conflict with the decided party policy.</p> <p>A reliance on representative government may be insufficient to protect the rights of some unpopular minorities – indeed, majorities may actually <i>support</i> the violation of some individuals’ rights. Many voters may choose to re-elect law-makers who pass legislation that harms the rights of unpopular members of society.</p>
<p>When the Government needs to rely on crossbenchers to pass legislation, the parliament is able to make law that is more considered and developed from varying points of view.</p> <p>The media is essential to the law-making function of parliament because it involves the people in the democratic process, and educates them on proposed laws and policy changes. Cultivating a strong media presence helps parliamentarians connect with the people they are representing. This increases public confidence in the system, and keeps law-makers in touch with constituents.</p> <p>Party politics performs a similar function to cross-examination in courts: we can rely on the other party to point out the flaws in the opposition’s case, that they may not see themselves, or want to admit.</p>	<b>Political pressures</b>	<p>If the Government has to gain permission from crossbenchers for every move, they may be hamstrung by people who received just a fraction of the vote.</p> <p>Party solidarity means it can feel like only two people have been elected to parliament – Labor and Coalition – instead of 226 people.</p> <p>The demands of maintaining a positive public presence can lead parliamentarians to focus more on self-marketing than on developing strong policies and laws. The 24-hour news cycle can turn every day into election campaigning, even when the election is several years away, and can discourage the implementation of long-term policies that require years to develop and show results.</p>
<p>The Government has a range of powers to schedule important legislation early, and fast-track the passage of urgent bills.</p> <p>The Government has the ability to choose how it allocates funding in the budget, and can prioritise changes it thinks are the most important.</p> <p>Some restrictions on power are there in order to protect the rights of the people, or the democratic process. For example, the restriction on federal parliament in s128 requires them to get the approval of the people before changing the Constitution.</p>	<b>Restrictions on parliamentary law-making</b>	<p>Because there is not time to consider and debate everything, or even to introduce every bill requested by a private member, many matters will be delayed and some bills will expire without being considered. For instance, the Government can use the limited sitting time to only consider its own priorities and refuse to put other issues on the agenda. In the 45<sup>th</sup> parliament, Government business and House administration occupied 55% of the time the House of Representatives spent sitting.</p> <p>The Commonwealth has been able to overcome many constitutional restrictions through High Court interpretation, the referral of powers and the tied grants power, amongst other things. These have all limited the powers of the state parliaments.</p> <p>Many of the restrictions are written in narrow, specific terms, so fail to comprehensively restrict the parliaments, even if a more comprehensive restriction would be ideal. For example, the s80 right to trial by jury is only for offences the Commonwealth has designated ‘indictable’ in the legislation.</p>

**Application exercise**

The separation of powers is intended as a limitation on parliament. Not only can parliament not make laws that give a judicial power to an executive or legislative body, no parliament can act outside jurisdiction determined by the judicial arm. How the Court interprets this jurisdiction is outside the power of the parliament, and the Court has the authority to invalidate any law that is *ultra vires*, and the parliament cannot ignore or override that finding. In reality, though, this is not a significant restriction on parliament. Historically, the High Court has taken a fairly unrestrictive interpretation of the Constitution – express rights are given mostly narrow interpretations, and only one implied right has been found. The interpretation has also tended to favour the Commonwealth over the states, so this aspect of the separation of powers has had much less impact on the law-making of the federal parliament than on the law-making of the states.

- a. The above answer is a sample of an evaluation of a way in which parliament is limited as a law-maker. Using this as a guide, evaluate one limitation of each of the key ideas covered in the section.

## COURTS AS LAW-MAKERS

Parliament is the primary law-maker, but it is not the only law-maker. In the common law system that Australia inherited from England, the courts actually came before parliament and were making law hundreds of years before parliament even existed. The courts make law indirectly, through the process of hearing cases, and the law made by courts is called ‘precedent’, ‘case law’ or the ‘common law’.

**Exam tip:** You can use the word ‘law’ interchangeably for courts and parliament, but other words such as ‘precedent’ and ‘legislation’ must be used specifically, only for the correct law-maker.

Courts only make or change the common law as a by-product of resolving disputes.

### The role of the Victorian courts and the High Court in law-making

Resolving disputes is the primary role of the courts. Law-making happens as a result of this, according to the following general principles:

- Mostly, courts will consider the facts of a particular case, then apply those facts to the law to determine whether a party’s actions are lawful or unlawful.
- In some circumstances it may be unclear whether, or how, the law that *is* there applies to the facts. In these cases, the courts will need to interpret the law.
- Occasionally there is *no* law to resolve the dispute before the court; there may be law relating to very similar situations, but not covering the exact type of case currently at hand. In these cases, the courts will need to develop new law.

The decision the court makes in each situation will be written throughout the judgment of each justice hearing the case, and will be printed in law books for judges, lawyers, academics, parties and other members of the public to access in the future. When a court makes a decision based on a given set of circumstances, the reason for the decision creates a principle of law: we call this principle of law a ‘precedent’, and it forms a legal rule that must be followed in society. All the precedents gathered together form the ‘common law’, or judge-made law, that works together with the legislation passed by parliament.

### Statutory interpretation

The role of courts in law-making and their willingness to use their common law powers will impact on the way in which they interpret statutes and the interventions they are willing to make into the meaning and application of the words in legislation.

#### Definition

Statutory interpretation is the process of judges giving a more up-to-date or specific meaning to words and phrases in legislation, in order to apply the law to the facts of a dispute. The meaning given will form the *ratio decidendi* and precedent of the case, and will be read with the act in future to determine the complete law.

### ***Namoa v The Queen* [2021] HCA 13**

The High Court was asked to decide whether the word “person” in the Criminal Code was affected by any common law rule that would stop two spouses from being classed as two separate persons, and, therefore, whether two spouses could be charged with conspiracy if it was only between the two of them.

Gleeson J gave the judgment on behalf of Court. The Court held unanimously that the word “person” should be given its ordinary meaning, and that no common law principle existed to change its meaning to exclude spouses: “A code is to be construed according to its natural meaning [...] The common law cannot be used to supply the meaning of a word used in a code except where the word has a well-established technical meaning under the pre-existing law and the code uses that word without definition, or it appears that the relevant provision in a code is ambiguous. The common law cannot be invoked in the interpretation of a code for the purpose of creating an ambiguity.”

### **Reasons for statutory interpretation**

**Exam tip:** The assessor’s report frequently states that students confuse the reasons why laws may need to change with the reasons why judges may need to interpret statutes. This costs them marks as, while some of the reasons are similar, the focus is different for each of them and so the examples and wording ought to be, too.

Broadly speaking, a statute will need to be interpreted when it’s not clear exactly what the words mean *or* how they should be applied to each set of individual facts. There are a wide range of specific reasons why this might be the case.

**Exam tip:** We have covered more reasons here than you will need. You may also have studied some that are not included here. Ultimately, you should choose around three reasons to specialise in – ensure that they are specific, though, and not anything vague such as ‘changing circumstances’ with no clarification. They must also be more detailed than just single sentences.

### **Broad wording**

Most legislation is drafted in broad and general terms, but needs to be applied to specific circumstances. The courts must give a more precise meaning to parliament’s vague terms to determine whether the law has been broken in a particular case.

#### **Examples**

- The Kevin and Jennifer Case querying the meaning of the *Marriage Act 1961* (Cth) could be used here, because the word ‘marriage’ could be taken to mean a range of different things, depending on the cultural sensibilities attached to it – religious, secular, polygamous, same sex, customary, etc. The Family Court determined a narrow definition of marriage: the union, for life, of one woman and one man. Parliament abrogated this definition in 2007.
- The Brislan Case querying the scope of the Commonwealth’s communications power in the Constitution could be used here, because the phrase “other like services” in the Constitution is broad – it doesn’t specify what makes something a “like” or similar service. The High Court determined a broad definition, including one-way broadcast devices as like two-way communication devices.

### **Failure to foresee new technologies**

The legislation may not include new types of technology because they did not exist at the time of drafting, and were not foreseen. The court will need to determine whether a new technology should be included in the meaning of the words.

#### **Examples**

- The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) could be used, because it says that any “disc, tape, sound track or other device” may be accepted as a “document”. Parliament knew that other technologies would be developed, but it didn’t know what they would be – the courts must interpret what a “device” is, within the purpose of the section.
- For the same reason the Brislan Case could be used, with the Australian Constitution’s reference to “other like services” and its ability to encompass new communications technologies such as radios.

### **Changing values**

Society’s values may have changed, and the court may need to re-interpret the meaning of the words to make the law appropriate and acceptable to contemporary society.

### Examples

- The 2021 *Namoa* case may be used here, because by 2021 society's values no longer determined that a wife should be seen as the same legal person as her husband. Both parties to a marriage are considered individuals.
- The unreported NSW Magistrates' Court case of *Police v Shannon Thomas Dunn* (23 August 1999) can be used here. Magistrate David Heilpern wrote about his decision not to find the word f\_\_\_ offensive in the *Alternative Law Journal* Issue 24(5), saying: "The word f\_\_\_ is extremely commonplace now and has lost much of its punch [...] In court, I am regularly confronted by witnesses who seem physically unable to speak without using the word in every sentence – it has become as common in their language as any other word and they use it without intent to offend, or without any knowledge that others would find it other than completely normal."

### Unintended consequences

The wording chosen by parliament when drafting the act may have unintended consequences: it may not fulfil the purpose of the act, and may even result in a situation that is undesirable and unforeseen. The courts will need to interpret the wording to arrive at a more sensible meaning.

### Examples

- The *Crimes Act 1958* (Vic) could be used here, because the definition of theft requires that the accused have the "intention to permanently deprive" the true owner of the goods. The literal meaning of this creates an offence that can be easily defended by an accused saying they intended to return the goods one day.
- The Victorian Parliament abolishing the relatively new crime and defence of 'defensive homicide' in 2014 applies here, because it was used to victim-blame and did not solve the problems of provocation.

### Other reasons

- Ambiguous wording that has multiple possible meanings.
- Parliament's failure to define a word used in the act.
- A word or phrase being used in multiple contradictory ways in the one statute.
- The meaning of words used in the act changing over time.

### Effects of statutory interpretation

The act of a judge giving additional meaning to the words of legislation will have a range of consequences or effects – in other words, what has happened as a result of that interpretation that wouldn't have happened without it?

**Exam tip:** We have covered more effects here than you will need. You may also have studied some that are not included here. Ultimately, you should choose around three effects to specialise in, each with more detail than a single simple sentence.

### The parties will receive a binding resolution

Once the legislation has been interpreted, it can be applied to the facts of the case. This will make it clear whether the defendant acted inside the law or outside it, and whether the party bringing the case has a legitimate allegation. The court will be able to hand down a verdict.

### Examples

- The *Tasmanian Dams Case* could be used here, because the interpretation of 'external affairs' given by the High Court allowed it to rule that the Commonwealth was acting within its jurisdiction.
- The *Studded Belt Case* could be used, because the defendant was found not guilty on the basis of the interpretation that was given to the word 'weapon'.

### The meaning of the law may be expanded

The interpretation given to the words may be more expansive than what was previously applied, and the scope of the legislation may be broadened to cover a wider range of situations than before the precedent was set.

### Examples

- The *Tasmanian Dams Case* may be used here, because the definition given to 'external affairs' in the Constitution expanded its meaning beyond matters that physically occurred outside the country or across the borders of states.
- The *Aubrey* case of 2017 could be used here, because the High Court expanded the meaning of the word "inflicting" harm to include infecting someone with a disease such as HIV – not just causing injury from outside the body.

### Existing precedent on the meaning may be departed from

A pre-existing precedent on the meaning of the same word or phrase may be overruled or reversed, depending on the level of the court hearing the new dispute. A different interpretation may then become part of the common law instead.

#### Examples

- The 2017 case of *Aubrey* could be used here, because the High Court changed the precedent meaning of “inflicting” harm to include infecting someone with a disease – and not just physically injuring them with a weapon.
- The case of *Masson v Parsons* [2019] HCA 21 can be used here, because the High Court departed from precedent to change the meaning of the word ‘parent’ in the *Family Law Act 1975* (Cth). The definition changed from a biological one that limited a child to having two parents, to a more ‘common sense’ definition: “The question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of ‘parent’.”



### Precedent may be set on the meaning of the words

When a court interprets a statute, a precedent may be set for future cases to follow. This precedent will be about what a particular word, phrase or section means. In future cases, the legislation and the precedent regarding the interpretation must be read together to determine the complete law.

#### Examples

- The Studded Belt Case could be used here, because before the Supreme Court’s findings there was no definition of the word ‘weapon’ in the common law, and the *ratio* of the case establishing a new authoritative definition.
- The 1926 Roads Case could be used, because the High Court set a precedent that no implied restriction or limitation should be read into the constitutional power of the Commonwealth to give tied grants to the states.

### Other effects

- Parliament may be motivated to legislate in response to the interpretation, to clarify the legislation.
- The meaning and scope of the law may be narrowed by the interpretation.
- The parties may be motivated to appeal to challenge the interpretation of the court.

#### ***Carr v The State of Western Australia (2007) 232 CLR 138***

Michael Carr was arrested and questioned by Western Australian police in 2003 in connection with an armed robbery. During police questioning in the interview room he made no admissions of guilt and indicated he would not answer questions without a lawyer present. He was returned to a police lock-up (cells in a police station in which arrested suspects are held), where he and police officers had an informal conversation. During this conversation, Carr described his participation in the armed robbery. This conversation was recorded by surveillance cameras in the police lock-up. The police knew that these cameras were in place, but Carr did not know he was being recorded.

This recorded admission in the police lock-up was used as evidence in Carr’s trial and he was convicted of armed robbery. He appealed unsuccessfully to the Western Australian Court of Appeal, arguing the videotaped admission should not have been used as evidence against him. He then appealed to the High Court of Australia.

Section 570D(2)(a) of the *Criminal Code* of Western Australia says: “On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admitted unless the evidence is a videotape on which is a recording of the admission.” Section 570(1) then defines videotape as “any videotape on which is recorded an interview.”

By a majority of 4-1, the High Court decided that ‘interview’ in s570 should be interpreted broadly. The majority of the judges decided the word ‘interview’ did not just include a formal interrogation, but any conversation between police and the suspect. Therefore, the recorded admission by Carr in the lock-up was a videotaped interview as required by the *Code* and could be used as evidence against him. The guilty verdict was confirmed.

**REVIEW/APPLICATION QUESTIONS – Statutory interpretation**

1. Define 'statutory interpretation'.
2. Explain two reasons for statutory interpretation, using examples to illustrate your response.
3. What is meant by saying that legislation may have 'broad or general wording', and why might this require the judge to act?
  - a. How does the Studded Belt Case, or another relevant case, illustrate the issue of legislation having broad or general wording?
4. What is meant by saying that 'specific circumstances may not be included' in legislation, and why might this require the judge to act?
  - a. How does the Brislan Case, or another relevant case, illustrate the issue of parliament failing to specifically foresee and address all future circumstances?
5. What is meant by saying that legislation may have 'ambiguous wording', and why might this require the judge to act?
  - a. How does the Carr Case, or another relevant case, illustrate the issue of ambiguous wording?
6. Describe two effects of statutory interpretation.
  - a. Outline two other effects of statutory interpretation, using an example for each to illustrate your answer.
7. Assume parliament disapproves of an interpretation applied to a phrase in legislation. What can it do to remedy this?
8. Assume parliament approves of an interpretation applied to a phrase in legislation. What can it do to ensure that other courts do not change the interpretation in the future?

**Application exercise**

One effect of statutory interpretation is that in future cases the legislation and the interpretation are read together. Section 6 of the *Control of Weapons Act 1990* says: "A person must not possess, carry or use any regulated weapon without lawful excuse." In *Deing v Tarola* (the Studded Belt Case) the Supreme Court decided a weapon was anything that had a common use as a weapon, and no common use as anything else. Reading these two pieces of law (legislation and precedent) together, have the following breached the *Control of Weapons Act*? Justify your answers.

- a. A woman is arrested for carrying a set of nail clippers the police fear she could use as a weapon.
- b. A man is arrested for carrying a small pistol at Federation Square.
- c. A chef is arrested by police for carrying a machete in the back of her car.
- d. A boy is arrested by police for carrying a small kitchen knife in his schoolbag.

**Evaluation: Statutory interpretation**

The following strengths and weaknesses have been broadly balanced against each other, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS	WEAKNESSES
<p>The ability to alter the meaning of the words in legislation allows the courts to extend the relevance and lifespan of parliament's law, making sure it continues to be appropriate to social attitudes and contemporary circumstances.</p> <p>It would be impossible for parliament to draft every law in a way that expressly related to every single fact situation that could ever arise in society. Giving courts the power to add to the meaning of the law over time by elaborating on specifics allows parliament to legislate only for the general principles or most likely situations.</p>	<p>The courts can use their powers of interpretation to quite radically change the application and meaning of the law from what parliament intended. This is an example of an unelected judiciary overriding the will of an elected legislature.</p> <p>Unlike the creation of most parliamentary legislation, statutory interpretation can only happen retrospectively: after the fact, and after a case has been brought. Statutory interpretation then creates law that applies to acts done in the past. This kind of retrospective law-making can be criticised for being against the principle of natural justice because people don't know what the law is when they are acting.</p>

Application exercise

Statutory interpretation allows the courts to alter the meaning of words in legislation, and to extend its relevance and lifespan. This is necessary, because it makes sure that legislation continues to be appropriate to social attitudes and contemporary circumstances. Sometimes this is considered problematic because the courts can radically change the application and meaning of the law from what parliament intended, and this can result in an unelected judiciary overriding the will of an elected legislature. It would be impossible, however, for parliament to draft every law in a way that expressly related to every single fact situation that could ever arise in society. Parliament is also susceptible to errors in drafting, and the effects of these errors might not be seen until the law is applied in practice – requiring an independent corroborating witness for the sexual abuse of child victims, for instance, was not well-thought-out. Giving courts the power to add to the meaning of legislation over time by elaborating on specifics allows parliament to legislate only for the general principles or most likely situations, and courts can correct the application of statute to better contribute to social cohesion.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences

## Factors that affect the ability of courts to make law

The Study Design lists five factors that affect the ability of courts to make law: the doctrine of precedent; judicial conservatism; judicial activism; the need to bring a case to court; and the requirement for standing. Victorian courts will be the focus; however, the High Court will be included, as it exercises state jurisdiction.

### The doctrine of precedent

**Exam tip:** Even before the altered wording in the new Study Design, the examination had been increasingly focusing on asking students to explain *how* the doctrine of precedent both allows courts to make and change the law and how it limits them – not simply reciting the definition of precedent. Memorising is the start... but not sufficient.

#### Definition

The doctrine of precedent is a common law principle in which the *ratio decidendi* of superior courts of record is binding on courts lower in the same hierarchy, when the material facts of the cases are similar. It is based on the principle of *stare decisis*, which means to stand by things decided.

#### Detail

- The *ratio decidendi* is the legal reasoning given for the decision. This is differentiated from the *obiter dicta*, which are any other comments the judge makes along the way.
- Superior courts of record are those courts that publish full written judgments, and that have the authority to contribute to the common law. These courts are the Supreme Court and above.
- Material facts differ from simply ‘facts’ in that material facts are stripped of unnecessary detail: material facts are only those general facts of the case that are vital to the application of the law.

**Exam tip:** A common examination error is students stating that the verdict itself forms precedent, or that the sanction given forms precedent. Precedent is only made by a *legal* idea present in the case: not by evidence or facts. Only a decision made by the judge on the *law* of the case can change the common law.

The verdict is a result of applying the law to the facts of the case, and the sanction is a result of looking at the offender’s personal situation in relation to their crime. Neither of these is a legal idea, so neither of them is bound by precedent or can form precedent.

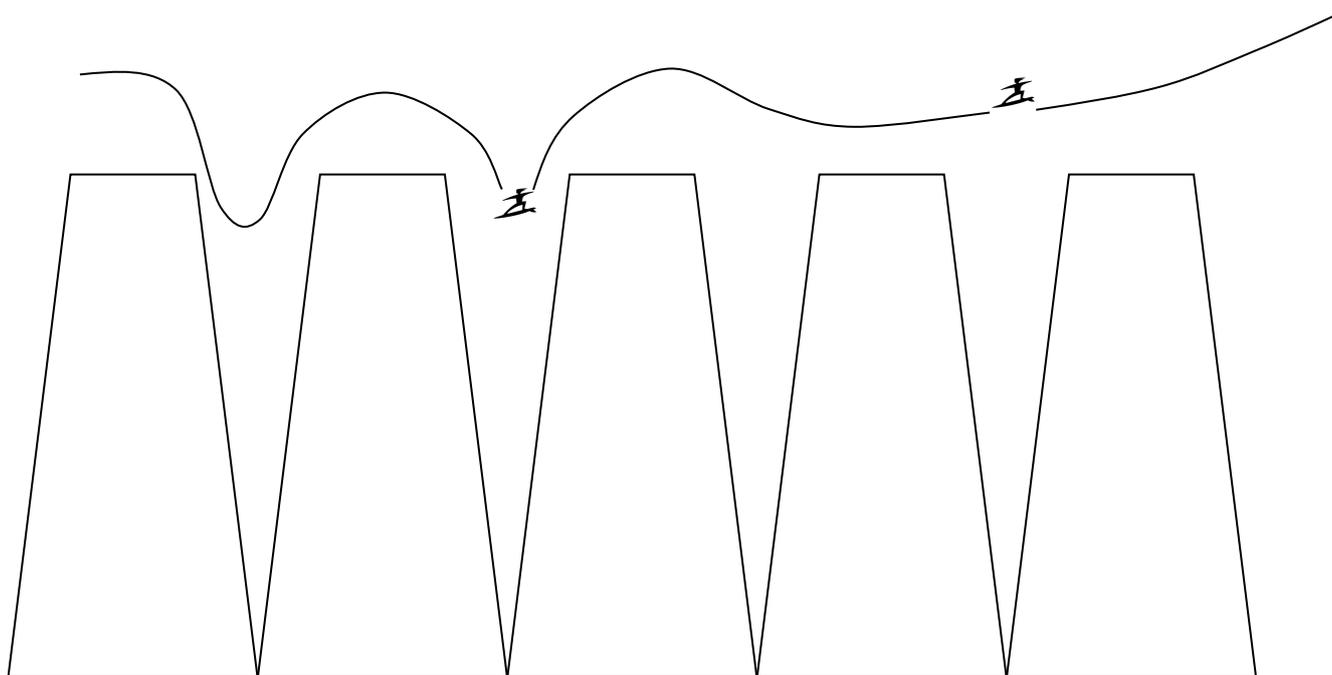
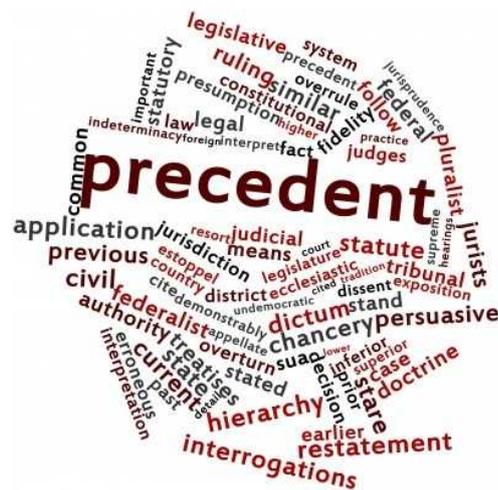
Precedent can be set on the meaning of legislation, if parliament’s wording does not clearly and unambiguously apply to the facts of the case. The definition given to the words forms the *ratio decidendi* of the case and precedent for future cases. Alternatively, precedent can be set on the content of a common law rule, if parliament has not comprehensively legislated in the area and there is a gap in the law.

If a precedent is argued before a court, that court *may* be bound to follow it. A precedent will be applied as a binding precedent if the following applies:

- The later court is lower in the same hierarchy than the precedent court; AND
- The later court is hearing a case on the same area of law and with similar material facts to the precedent case; AND
- The precedent court was a superior court of record and the remarks being argued in the later case come from its *ratio decidendi*.

If any of these conditions is not met, the precedent will be treated as a persuasive precedent only – this means it will be highly influential, but the later court will not be bound to follow it.

Precedent must clear ALL of the hurdles to be binding:



**ALL the elements of a binding precedent must be present for it to be binding.**

**Break the three statements above into their individual requirements, and fill each hurdle above with one of the conditions for binding precedent.**

There are, therefore, a range of instances in which a court will not apply a precedent – it might be argued as a persuasive reference. Alternatively, it might even be *argued* as a binding precedent by one of the parties to the case, but the court may choose to reject the party’s arguments and find the precedent persuasive only. The court might possibly apply a precedent submitted by the opposing party instead.

For example:

- The court may decide that the precedent is not relevant. It may decide that the facts relate to a different area of law, or it may distinguish the material facts of the later case from the material facts of the precedent case and decide they are different – this difference in material facts is called ‘distinguishing’ the precedent.
- The court may decide that the precedent was made in error and, if the later court is higher than the precedent court, it may choose to ‘overrule’ the precedent and invalidate it entirely. If the later case is actually an *appeal* of the precedent case, the term used for this is ‘reversing’ rather than ‘overruling’.

### **Re Nichol; Nichol v Nichol & Anor [2017] QSC 220**

In 2017 the Supreme Court of Queensland was asked to rule on whether an unsent text message a man wrote to his brother before he ended his own life constituted a legal will. The text read:

*Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin \_\_\_\_*

MRN190162Q

10/10/2016

📄 My will 😊

The text included a paperclip on the left-hand-side of “My will” and a smiley face on the right. The question was whether s18 of the Queensland *Succession Act 1981* was satisfied: that the was contained in a “document,” and that the document contained the deceased’s “testamentary intentions.” The persuasive precedent of *Re Yu* [2013] QSC 322, in which an iPhone note was held to be a document, was followed to determine that an unsent text message constituted a document; and the impact of the emojis was considered – specifically, whether they rendered the text so informal as to not properly be evidence of the man’s sincere testamentary intentions.

There are other persuasive precedents on the value of emojis to communication – most of which have been increasingly leaning towards emojis being treated as legitimate and meaningful parts of speech, and courts have been following them. In January 2017 a New Zealand judge determined that a Facebook message saying “You’re going to f\_\_\_ing get it ✈️”, with an airplane emoji, constituted a threat – particularly as the man had booked a plane ticket for the next day. In 2016 a French court found that a man’s text to his ex-partner of a gun emoji amounted to a “death threat in the form of an image.” Similar cases have also been decided in the US.

Alternatively, the court may ‘disapprove’ the precedent by criticising it. They may be required to follow it regardless, or may choose to follow it anyway. Sometimes the court will be lower, and will be bound to follow the precedent, and its only option will be disapproving the principle in its own *obiter* before being compelled to apply it in its *ratio*. At other times the disapproving court will be higher, and will disapprove the precedent before distinguishing it and developing their own precedent.

## Judicial conservatism

### Definition

‘Judicial conservatism’ can also be called strict legalism or judicial restraint. The principle underlying conservatism is that the proper role of judges is to say what the law is and to apply it: not to change it or say what they think it *should* be. Judicial conservatism involves the belief that any changes to the law should be made by parliament.

### Detail

Judicial conservatism often involves looking at the intentions of the law-makers when the law was created. Judicial conservatism is therefore not always a *narrow* reading of the law, because sometimes the precedent or legislation is broad: the conservative approach will then be *not* to change it. Conservatism refers to unwillingness to change, rather than scope of the law.

The term is also used as an insult, when criticising a judge for refusing to adapt, invalidate or interpret a law in the way someone feels ought to have been done, or for interpreting the law to achieve very conservative ends but ‘cloaking’ the interpretation in language that denies it *is* interpretation. This is a political rather than legal use of the term.

### **State Government Insurance Agency v Trigwell (1979) 142 CLR 617**

A well-known example of judicial conservatism is the judgment of the majority in the Trigwell Case. In this case, the High Court *declined* to alter an existing common law rule that gave the owners of livestock immunity if their animals escaped and caused injury.

Justice Ninian Stephen said, for instance, in the judgment of the case:

“I think that if this rule is to be amended, its amendment is not a matter for the court. It is *par excellence* a matter for the Legislature. If Parliament in its wisdom, after hearing every conflicting interest, were to decide that the existing rule was a bad one, and that a better one could be devised, that would be one matter; but it is quite another matter for this Court, hearing only two litigants, without representations from the general body of the community who will be vitally affected, to attempt judicially to legislate.”

## Judicial activism

Judicial activism is thought of as the opposite of judicial conservatism.

### Definition

'Judicial activism' can also be called the "living tree" approach or judicial creativity. The principle underlying activism is that the proper role of judges is to keep the law in good repair as a vehicle for justice and society's contemporary attitudes. Judicial activism involves the belief that the courts have a role in changing and updating the law, particularly in areas where parliament has failed to act.

### Detail

A 'judicially activist' judge will take it upon herself or himself to make judgment calls and be somewhat interventionist. Judicial activism often involves modifying the intention of the law-makers when the law was originally made, and looking at contemporary needs or views.

One well-known example of judicial creativity – labeled activism by critics – is the development of the implied freedom of political communication in the Australian Constitution by the High Court. The framers chose not to entrench a freedom of political speech in any way, and the inclusion of an implied right by reference to the democratic system is the creation of an idea *from* the words that is not express *in* the words.

A less controversial example is the 2021 Dylan Voller case, where the High Court affirmed that the word 'publication' under defamation law included the owners of social media sites if they had *control* over the comments posted on their sites. Even though they did not author the comments, they legally 'published' them if they allowed them to stay up on their page. This adapted the law to changing technology; it was criticised, but not as strongly as the freedom of political communication.

The idea of judicial creativity has legitimate application, but the phrase 'judicial activism' exists almost exclusively as an insult to express personal or political displeasure with the outcome of a case without giving substantive reasons for the criticism. It is almost exclusively used politically rather than legally.

## Bringing a case to court

### Definition

Individuals and governments can ask the courts to develop or clarify the law by initiating a case that raises questions of statutory interpretation or a common law rule. Australian courts do not have the power to issue advisory opinions in matters of precedent without a contested matter being brought to them.

### Director of Public Prosecutions Reference No 1 [2021] HCA 26

In September 2019 the Office of Public Prosecutions asked the Court of Appeal to overturn the current meaning of 'recklessness' in offences other than murder. The DPP argued that the Court should reject the current precedent from the 1985 case of *Crabbe* – that the accused had foresight of the *probability* of serious injury – and that the Court should replace it with the High Court's test from the 2017 case of *Aubrey*, that recklessness only requires foresight of the *possibility* of serious injury.

The Court of Appeal rejected the application, and in 2021 the High Court affirmed this decision. This would have lowered the test, had it been allowed.

### Detail

Because the development of precedent is only a by-product of resolving legal disputes, and not something courts are permitted to do on their own initiative, any developments in the common law must start with someone filing a claim, prosecution, or legal challenge. This requires a person to know that the legal basis for such a dispute exists, and be willing to bring it.

This person will then be responsible for meeting most of the costs of the dispute, often including some costs of the other party if the dispute is unsuccessful, and they must commit the time necessary to prepare evidence and arguments for the matter, attend pre-trial hearings and conferences, and present arguments at court.

- The kinds of costs that parties to the case will have to satisfy include solicitor fees and disbursements, barrister fees, court filing fees, hearing fees, possible jury fees, witness fees and prothonotary fees, depending on the nature of the dispute.
- In terms of timeframes, courts do have the power to fast-track time-sensitive cases, but other matters take at least six months in the Magistrates' Court before being appealed to a court with the power to alter precedent, and up to several years in the higher courts. Most cases involving the evolution of precedent will require several appeals to take them to a court high enough to reconsider the common law.

### **Mabo v Queensland (No 2) (1992) 175 CLR 1**

In 1982 Eddie Mabo and a group of Meriam people initiated proceedings to challenge the common law principle of *terra nullius* on which British Australian government was founded and that formed the basis of contemporary property laws. The High Court's decision was handed down in 1992, ten years after the action commenced and four months after Mabo himself had died, but it overruled the previous common law and created a new common law rule of native title: traditional Indigenous ownership over land that had not been conquered by colonisation.

### The requirement for standing

Only people or organisations whose rights, interests or duties are directly affected by the operation of a law are permitted to bring a dispute before the courts. This direct interest in the outcome is called 'standing' or *locus standi*.

#### Definition

Standing, otherwise known as *locus standi*, is the legal privilege to bring a matter to court for resolution, and it is granted to a person, organisation or state entity because their rights, interests or duties are directly affected by the operation of a law. If a party with standing in the case is not willing or able to spend the time and money required to pursue a challenge, or is unaware that they have the legal ability to do so, the courts will be unable to make law on an area.

#### Detail

Standing can be obtained in a number of ways. For example:

- an individual or organisation being charged with breaking a criminal law
- a state government arguing the Commonwealth has legislated improperly in areas under its jurisdiction
- an individual or organisation being barred from an action they believe they have a right to perform

In Australia it is not permitted to bring an action on behalf of another individual or organisation, but it is permitted to fund that party and provide them with legal representation. The court may also grant a third party *amicus curiae* standing or status as a third-party intervener. An *amicus* does *not* become a party to the matter, but they are permitted to make submissions to the court; a third-party intervener *does* become a party even though they have *not* been directly affected by the law – they are allowed to make submissions because their interests will be materially affected by the case.

### **REVIEW QUESTIONS – Factors that affect the ability of courts to make law**

1. Define the following key concepts:
  - a. Common law
  - b. Binding precedent
  - c. Persuasive precedent
  - d. *Stare decisis*
  - e. Superior courts of record
  - f. *Ratio decidendi*
  - g. *Obiter dicta*
2. Give a comprehensive definition of the 'doctrine of precedent'.
3. Differentiate between binding and persuasive precedent.
4. Which part of the judgment is capable of forming binding precedent?
5. Which part or parts of the judgment are only capable of forming persuasive precedent?
6. Who determines whether a precedent is binding or persuasive in a case?
7. Give two examples of circumstances in which a precedent will be incapable of being applied as binding.
8. What happens when a dispute comes before the courts and there is no law that exactly covers the area?
9. Can courts make and change the common law whenever they want? Explain your answer.
10. Which method of departure is used when a precedent is overturned on appeal?
  - a. Will the original precedent still be good law after this occurs? Explain.
  - b. How does this method of departure allow the courts to change the law?
  - c. How does this method of departure limit the courts in their ability to change the law?
11. What would a court do in its judgment if it wanted to disapprove a precedent?
  - a. What will be the status of the original precedent after this disapproval?
  - b. What will be the state of the common law?
  - c. How does disapproval enable the courts to change the law?
  - d. How does disapproval limit the courts in their ability to change the law?
  - e. How does a lower court expressing their disapproval of a precedent enable them to participate in changing the law?
  - f. How is a lower court expressing their disapproval of a precedent limited in terms of changing the law?
12. Which courts in the hierarchy have the power to depart from a precedent by distinguishing it?
  - a. How is this different from the other methods of departure?
  - b. On what grounds may a precedent be distinguished?
  - c. What will be the status of the original precedent after it has been distinguished?
  - d. How does the ability to distinguish enable courts to change the law?

- e. How does the method of distinguishing limit the courts in their ability to change the law?
- 13. Which courts have the power to overrule a precedent?
  - a. What will be the status of the original precedent after it has been overruled?
  - b. How does the ability to overrule a precedent enable the courts to change the law?
  - c. How does the method of overruling limit the courts in their ability to change the law?
- 14. Provide definitions of the concepts of 'judicial conservatism' and 'judicial activism' that are value-neutral, and address the way in which judges approach the interpretation of words in legislation.
- 15. Explain the relationship between judicial conservatism and parliament.
- 16. Explain the relationship between judicial activism and the 'living tree' analogy.
- 17. Identify how or why the terms 'judicial conservatism' and 'judicial activism' can be used as political criticisms rather than as objective descriptions.
- 18. Who or what in society has the power to bring a case to court?
- 19. Can the courts develop precedent without harm being suffered first? Explain your answer.
- 20. Identify three things that will determine whether someone is able to bring a case to court.
- 21. In what way does the requirement to bring a case to court restrict the development of the common law?
- 22. Define the term 'standing' as it applies in legal disputes.
- 23. Explain the way in which the legal concepts of third-party interveners and *amicus curiae* can modify the application of rules of standing.
- 24. In what way does the concept of standing help with the development of relevant law?
- 25. In what way does the concept of standing restrict the development of the common law?

### Evaluation: Factors that affect the ability of courts to make law

The focus of this evaluation in the Study Design is the impact that each factor – or feature – in the operation of courts has on the ability of courts to effectively contribute to law-making. This is therefore the focus of the strengths and weaknesses chosen.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

ENABLING COURTS		LIMITING COURTS
<p>The High Court is not bound by the decisions of any other court, or even of itself. This enables it to overrule or reverse undesirable principles, or to distinguish them and suggest in its <i>obiter</i> that the precedent should be avoided. It has flexibility – but the unpredictability of changing precedent is limited by it only being one court, and by lower courts not having equal powers.</p> <p>Judges can create new common law when a dispute arises and there is no immediately-relevant law. Because of <i>stare decisis</i>, and the assumption that other judges will stand by that decision, a new principle of law is then settled for similar, future cases.</p> <p>The <i>ratio decidendi</i> is enunciated separately from the facts and the conclusions in most court judgments. This is to allow the law to develop independently of the specific facts in the case, and to help others identify what the law is that they should follow in their cases.</p>	The doctrine of precedent	<p>Rigid adherence to <i>stare decisis</i> can lead to injustice, if courts are more concerned with the procedure of applying the law than with the justice of the outcome once it is applied; it stops us focusing on achieving substantive fairness.</p> <p>Methods of departure such as distinguishing and disapproving do not always, by themselves, change the existing law. Often a court is bound by a law they criticise, regardless of their disapproval; often a court will distinguish one rule in order to be free to follow another existing one.</p> <p>The <i>ratio</i> in a judgment is by its nature very narrow. Courts can only make rulings on the narrow legal issues presented to them by counsel, and cannot comprehensively research and review or make sweeping changes to the area of law as a whole.</p>
<p>Judicial conservatism doesn't prevent judges from developing the common law – it merely discourages them from branching it out into new areas that parliament has chosen not to legislate on, or that seem contrary to the wishes of parliament. Instead, the development of significant new legal principles is left to parliament, and the main role of the courts is to elaborate what those laws mean and provide interpretation that embodies the intentions of the legislators.</p> <p>Judges using individual judgment and their own perception of 'values' threatens the independence of the judiciary and makes the law arbitrary and unpredictable. Conservatism makes the private opinions of individual judges secondary to the publicly-debated policies of the parliament, and respects the intentions of legislators in drafting laws.</p>	Judicial conservatism	<p>It is impractical to expect that legislation will always be applied in accordance with the intentions of its framers. Take the Australian Constitution, for example: it is the product of many drafters, each with different intentions; there are incomplete records of the intentions behind each section; and one reason it has endured for over a century is because the High Court has been able to keep it relevant by evolving its meaning.</p> <p>The desire of judges to stay within the 'proper' role of courts as bodies that apply the law rather than make and change the law may prevent them from evolving legal principles or definitions to suit the needs of cases and changing society.</p>

<p>Judicial activism is an important way in which the courts communicate with parliament on the state of the law. Creative and progressive decisions can signal to parliament that an area of law is outdated, and that things happening in the community require the law to be changed.</p> <p>Some laws including the Constitution are drafted with the intention of courts using judgment and 'policy' considerations to interpret them and help them evolve over time: judicial creativity is factored into law-making. Policy includes everything outside the scope of the words and drafting of the law – it includes community values and the social impact of the law, for instance. Judicial creativity is frequently an intended and appropriate use of judicial discretion.</p> <p>A belief in activism and creativity where necessary and appropriate is not inconsistent with a judge being otherwise quite faithful to the doctrine of precedent and the values of consistency and the impartial distribution of the law.</p>	<b>Judicial activism</b>	<p>Courts have had a law-making function for longer than parliament has had one. Criticisms of being 'activist' shouldn't deter judges from exercising what has always been their power, and what they have been applauded for in different political environments. The phrase 'judicial activism' puts inappropriate pressure on courts, politicises them and jeopardises the independence of the judiciary when it is used as a criticism.</p> <p>The principles of the separation of powers and representative government may deter judges from developing the common law or the interpretation of statutes because they want to avoid being seen as 'activist' and stepping outside the proper role of the judiciary.</p> <p>Judges who are too activist may limit the effectiveness of the courts as law-makers by changing the law to suit short-term trends or values that are argued before them convincingly, but which do not produce good case outcomes in the long term.</p>
<p>Matter-based adjudication is empowering for the community because any person is able to bring a matter to court and be involved in the development of the law.</p> <p>If a judge is confronted with a real dispute that requires a decision to be made that affects the rights and responsibilities of real people, and that has been brought by a party willing to invest the time and money to bring the case, they cannot postpone their decision or refuse to make one because it is too hard or too controversial. They have an obligation to decide what the law is, and what the law means.</p> <p>Demanding that parties to the case invest time and money into the resolution of the dispute is a kind of filtering system for the types of law that are important to society and need immediate attention.</p>	<b>Bringing a case to court</b>	<p>Demanding that a matter be brought to the courts before the law can be developed or clarified means that members of the public or injured parties have to go to the time and expense of making a claim. This can take years to travel up to a court high enough to change precedent, and can cost up to or well over a million dollars, and law that affects people who don't have significant time and financial resources won't be changed.</p> <p>Preventing the courts from clarifying the law without a matter being brought to them can limit their ability to clarify the law. Laws can operate for many years without the public knowing for sure what they mean or whether they are even constitutional.</p> <p>A case must lend itself to the creation of precedent – many cases don't. It must have material facts that allow the judge to consider the desired area of law, and there must be no binding precedent or clear legislation relevant to the case. The court must be willing to take on a creative role and, even then, the judges are limited to the facts and arguments in dispute: they cannot reform a whole area of law.</p>
<p>Laws will be made and clarified in relation to the best possible legal arguments, and the widest range of them, because people who have standing have 'skin in the game' and a vested interest in presenting the strongest points.</p> <p>Australia does have some rights advocacy organisations that are able to bring legal challenges on behalf of a named plaintiff. They will then bear the cost and preparation time for the case, even though they themselves do not have standing.</p> <p>The courts recognise that judgments set law that affects people and organisations other than the parties to the case. In the interests of fairness, these people should have the ability to be heard, and the court should be able to take their interests into account when determining the outcome. This is taken into account by the law permitting the courts to add third-party interveners to a matter.</p>	<b>The requirement for standing</b>	<p>Courts are unable to clarify or develop the law in areas where there is no-one with enough knowledge, time, experience and money to bring the case in their own name. Even if an involved party has legal and financial support, it is still extremely stressful and time-consuming to be the named plaintiff in a test case or class action – not everyone will be willing to put her or his life on hold to do this.</p> <p>There are very few instances in Australia of the law being challenged as a result of a case being brought by a third-party advocacy organisation or individual: most matters are brought by a government or a large company.</p> <p>The courts in Australia tend to be unwilling to add <i>amici</i> and interveners. Partly because of the courts' unwillingness to permit them, and also because of a lack of funding, most rights-protection organisations and advocacy groups in Australia do not have test case litigation as part of their strategic plan. The theory of third-party standing is rarely put into practice.</p>

## REVIEW QUESTIONS – Factors that affect the ability of courts to make law: evaluation

### Application exercise

Adopting some judicial conservatism is important for the integrity of the courts, because they are not the supreme law-makers, they are not democratically elected, and they are not the authors of the laws they are interpreting and applying. If courts took it upon themselves to radically alter the meaning and scope of the legislation in cases before them, they would be usurping the role of the representative parliament and damaging the public's confidence in democracy. However, there is still an important role to be played by statutory interpretation and over-enthusiastic use of the phrase 'judicial conservatism' can inhibit this. Laws do not expressly mention every possible situation of fact, and sometimes the original intentions of the parliament that drafted the statute are unknown – or outdated and unacceptable. Public confidence would be even more damaged by courts that applied laws the majority

found inappropriate to contemporary situations, technology or values, for instance. The courts should not be scared of interpreting legislation in a way that ensures its continued relevance.

- a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key factors in the section.

## The courts and parliament

### Features of the relationship between the courts and parliament in law-making

Parliament is the supreme law-maker, but the courts also have the power to create and change legal rules in the absence of legislation, and in gaps between the provisions of the statute. Because two law-makers are working at the same time, they will interact in a range of ways: what the courts do in law-making will affect parliament, and vice versa.

These interactions are called features, elements, or aspects of the relationship between courts and parliament. The focus in the Study Design is on these features specifically in relation to law-making. The Study Design lists five features of the relationship between courts and parliament as law-makers: the supremacy of parliament; the ability of the courts to influence parliament; the interpretation of statutes by courts; the codification of common law; and the abrogation of common law.

**Exam tip:** The Study Design expressly lists the five features covered below. This means that the examination can include questions explicitly on any or all of them.

### The supremacy of parliament

Parliament is the supreme law-maker. This means its primary responsibility is to make law, it has the power to override law made by other arms of government (eg. the courts), and no other arm of government (including the courts) can override law made by parliament that is *within* that parliament's jurisdiction. Parliament also has the power to make its laws operate either retrospectively or prospectively, and can cover entire areas of law or make very specific statutes relating to narrow fact situations.

#### Examples

- The courts have the power to interpret the law made by parliament, but they do not have the power to ignore or change it.
- The High Court and Federal Court can invalidate law as being on a matter outside the jurisdiction of the parliament – for being unconstitutional or *ultra vires*. But they cannot override constitutional law that is *intra vires*.
- The parliament can legislate to amend or repeal any common law created by the courts, including both interpretation of statute and independent common law rules.

### The ability of the courts to influence parliament

If parliament supports precedent, this can be a trigger for it to develop its own law along the same lines; if it disapproves of it, on the other hand, this can be a motivation to legislate in the opposite direction. Parliament being influenced to legislate may take the form of abrogating the common law, codifying the common law, or legislating alongside the common law and other judicial decisions. In addition, sometimes courts will use their *obiter dicta* comments to ask that parliament consider an issue or reform an area of law.

#### Examples

- Abrogating the common law involves overriding it with legislation. Parliament will generally do this when it disagrees with the precedent.
- Codifying the common law involves confirming it with legislation. Parliament will generally do this when it agrees with the precedent.
- Legislation can also cover a range of matters surrounding the precedent without touching the precedent itself; the two sources of law may be intended to work together.
- *Obiter dicta* do not form precedent, but courts can use *obiter* to communicate what they think future developments in the law should be, or to criticise an existing law they believe they are bound to follow.

***Esso Australia Pty Ltd v Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd [2017] HCA 54***

In 2017 the High Court found in favour of Esso Australia in relation to protected industrial action such as strikes and the conditions of enterprise agreements. During negotiations for a new enterprise agreement, the AWU organised a range of industrial action measures that it believed were protected under s408(a) of the *Fair Work Act 2009* (Cth) – Esso challenged a number of them, saying they were “coercive” and unlawful.

Section 413(5) of the Act says that employees must not contravene any orders from the Fair Work Commission when organising industrial action, but the Court said the section was “poorly drafted” and had significant ambiguity because it was written with changing tenses – past tense *and* present tense. The Court decided that the legislative history, the context of the section and its perceived purpose suggested it applied broadly. According to this interpretation, if a union wants to organise any industrial action, it has the burden of ensuring that there are no breaches of orders in the present *or* ever in the past relating to that enterprise agreement period. The Court said industrial action was not a “right,” but a privilege conditional on s413(5).

Australian Council of Trade Unions secretary Sally McManus said that employees had to “jump through myriad hoops and cashed-up employers can use lawyers to make that more difficult. [...] There is urgent change that is needed.” Federal Labor committed, if it won government, to reversing the Fair Work Commission’s 2017 decision to reduce penalty rates, and said in relation to the *Esso* decision: “We are carefully considering the High Court case and its implications for collective bargaining.” It did not win the 2019 election, but after the 2022 election the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 was introduced and received royal assent in December. It does not either restore penalty rates or expressly abrogate the *Esso* decision, but it makes a raft of changes that Labor argues will improve worker conditions and bargaining across the board.



**The interpretation of statutes by courts**

Through the interpretation of the words in legislation, courts can either narrow or widen the scope of what the statute covers. This will alter the effect of parliament’s law on society, and may be more or less faithful to what the original drafters of the statute in parliament intended.

**Examples**

- Statutory interpretation may give the law an effect that parliament approves of.
- Statutory interpretation may provide a meaning that runs counter to parliament’s intentions.
- The intentions of the current parliament may differ from the intentions of the original drafters of the law, so the interaction with the current parliament as a result of the interpretation may be different from what the interaction with the original parliament would have been if the same interpretation had been delivered then.

***The Attorney General for the Commonwealth v “Kevin and Jennifer” and Human Rights and Equal Opportunity Commission [2003] FamCA 94***

In the case of Kevin and Jennifer the couple asked the Family Court to issue a declaration of validity for their marriage, on the basis that Kevin was female but lived in the world with a typically masculine gender presentation. The couple argued that Kevin was therefore in a heterosexual marriage with Jennifer, for the purposes of social and legal classification. The federal *Marriage Act 1961* included no definition of ‘marriage’, so the Court had to make a decision regarding the meaning of marriage: the couple argued that marriage was the union of one man and one woman, and asked the Court to find that Kevin was legally a man for the purposes of marriage; if the Court decided marriage was sex-neutral or gender-neutral, the second question would be irrelevant.

The Court decided that marriage for the purposes of the Act was a heterosexual union, and this was in line with the wishes of the federal parliament and governing party of the time. It then determined that legal sex for the purposes of marriage was determined by the individual’s legal gender at the time of their marriage, and not the sex on their birth certificate or their chromosomes.

## The codification of common law

'Codification' is when laws are collected and arranged into a statutory code, backed by legislative authority. In other words, codification is when parliament puts an existing legal principle into legislation. If parliament decides that a precedent or a collection of precedents have established effective and desirable law, it may choose to take those precedents and arrange their legal principles and ideas in a more organised statement of law. Parliament can then pass that as an act, and the law will have legislative force.

### **Detail**

Codification is rarely a simple substitution of legislation for the exact wording of precedent. Usually, the legislation will have wording changed slightly from the wording of the majority judgment – if indeed there is a single accepted majority wording in the precedent. Other times the legislation will adopt some aspects of the common law but change other details; overall, however, we would say that the most important parts of the precedent have been accepted.

The Kevin and Jennifer Case noted above is an example of codification: the year after the decision, federal parliament codified the definition of marriage as the union of one woman and one man. This definition was altered by legislation in 2007.

## The abrogation of common law

Parliament has the power to abrogate the common law, by overriding precedent in legislation. 'Abrogation' is when an existing law is officially canceled in some way, and may otherwise be called annulling something, overriding it or abolishing it.

Abrogation can be express or implied. An express abrogation is when the new law specifies that the common law is being replaced or removed; on the other hand, an implied abrogation is when the new law includes provisions that are incompatible with the old precedent.

### **Detail**

Reasons why parliament might abrogate a precedent include the following:

- The community may protest the application of the precedent and a majority may demand that parliament act. This was the case after 'marital immunity' was applied to the rape of a woman by her husband, for instance, as a complete defence for him.
- The governing party may not believe that the precedent reflects the values or attitudes they want the public to have. This was what motivated John Howard's LNP Government in 2004 to attempt to abrogate the definition of 'man' given in the Kevin and Jennifer Case, for instance – his government drafted a bill to abrogate the principle that a person could be classified as a gender other than their chromosomal sex for the purposes of marriage.
- Parliament may feel that the precedent places unreasonable demands on government resources or on a particular industry. This was the case after the *Wik* decision, for instance, when the Howard LNP Government felt that more security needed to be given to holders of pastoral leases in relation to Indigenous native title claims.

### ***Wrongs (Animals Straying on Highways) Act 1984 (Vic)***

In 1984 the Victorian Parliament amended the state *Wrongs Act 1958* to abrogate the common law principle of owner immunity for straying animals. This immunity was developed in the 1947 English case of *Searle v Wallbank*, and was applied by the High Court in the 1979 *Trigwell* case and the Victorian Supreme Court in the 1978 case of *Brisbane v Cross*, where a motorcyclist had been injured by an escaped steer.

The inserted section was clear in its abrogation, reading as follows: "So much of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take reasonable care to see that damage is not caused by animals straying on to a highway is hereby abolished."

## **REVIEW/APPLICATION QUESTIONS– The relationship between the courts and parliament in law-making**

1. Using one case to illustrate your answer, explain how parliament is the supreme law-maker and the courts are not.
2. Compare the courts and parliament in terms of their democratic or representative natures.
3. Explain why the High Court was unwilling to change the law in the Trigwell Case, even though it had the power to do so.
4. What influence do courts have over the meaning of legislation?
5. How might common law influence parliament to update or otherwise change the law?
6. Compare the courts and parliament in terms of the extent to which each is bound by previous law made by *itself*.
- a. Compare the courts and parliament in terms of the extent to which each is bound by previous law made by *each other*.
7. Compare the concepts of codifying and abrogating common law, considering at least one similarity and at least one difference.
8. Describe an example of parliament codifying a principle of common law.
9. Describe an example of parliament abrogating a principle of common law.

## Evaluation: Features of the relationship between the courts and parliament

The following strengths and weaknesses have been broadly balanced against each other, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

FAVOURING PARLIAMENT	FAVOURING COURTS
<p>The parliaments can choose whether or not they agree with the laws created by other bodies including the courts, and can legislate to confirm or abrogate those laws. This means that the other bodies are not supreme law-makers and do not have the final say on their own laws, but it also means that the final version of the law is agreed upon by a majority of our elected representatives.</p> <p>Precedent develops in an <i>ad hoc</i> way, piece by piece. Good laws can be developed in a disorganised and incomplete way, and bad laws can be overridden in a disorganised and incomplete way. Parliament has the ability to see this in the big picture, and make comprehensive changes.</p> <p>Parliament has virtually unfettered ability to word a statute the way it likes. This wording can be extremely narrow, and can limit the scope of interpretation quite significantly.</p> <p>The parliament has the power to override court-made law that it feels has served its purpose and is now outdated. It is particularly important that parliament be able to do this in situations where the courts refuse to, because they have decided that the area is too complex for the common law to reform.</p>	<p>The parliament will always be constrained by the Constitution and the division of powers. The High Court has the power to interpret these restrictions and enforce them.</p> <p>The parliament has the power to determine most of what the law is, but it will never have complete power over what the law means or how it is enforced. Regardless of how parliament responds, the courts retain the subsequent powers of statutory interpretation and development of precedent. If parliament chooses to respond through legislation, the courts can interpret that legislation.</p> <p>Courts can narrow the scope of legislation, broaden the scope of legislation, fix a definition in time according to what the original intentions of the drafters are thought to be, or change a definition continually according to the attitudes of the community.</p> <p>Parliament may not always expressly abrogate the law. Depending on how comprehensive the wording of the statute is, parts of the common law may therefore continue to operate in the gaps.</p>

### REVIEW/APPLICATION QUESTIONS – Courts and parliament as law-makers: evaluation

#### Application exercise

Explain the following strengths of courts as law-makers, and discuss the extent to which parliament interacts with the law-making of courts in relation to that feature:

- a. Common law provides consistency and predictability by being developed through precedent.
- b. Courts can fill in the gaps in the law.
- c. Judges make law as cases come before them needing resolution.
- d. Courts are independent and impartial law-makers, unelected and apolitical.



## LAW REFORM

Changing the state of the law involves repealing or abrogating an existing law; amending an existing law, but keeping the body of it intact; or introducing a bill on a new area that has not been legislated on before.

### Reasons for law reform

Broadly speaking, most reasons come down to the law either not working as originally intended, or the existing state of the law becoming outdated as society changes. These two reasons are too general, though, and can be broken into a number of more specific problems.

**Exam tip:** Ultimately, you should choose around three reasons to specialise in – ensure that they are specific, and not anything vague such as ‘changing circumstances’ with no clarification. They must also be more detailed than single sentences.

### Changes in technology

Changes to technology, such as the growth of the Internet and social networking, lead to new issues and sometimes an increased risk of harm to some people. Law-makers must alter legislation to take into account these changes to stop people using technology to find new ways to harm others or infringe rights.

#### **Copyright Act 1968 (Cth)**

In 2011 Optus had its request for leave to be heard in the TV Now Case rejected by the High Court. It wanted to challenge the interpretation of the copyright legislation that allowed people to record television programmes on devices such as DVDs and video cassettes, but did not allow Optus to allow them to store those same programmes in cloud storage and then stream them on their mobile devices.

Parliament had only finally legislated to allow personal taping of television shows in DVD and video cassette format in 2006 – an amendment that had come eight years after the introduction of DVD players and 26 years after the parliament first acknowledged the use of VCRs. Because it did not refer to mobile devices, however, the law was already out-dated – it did not even provide an exemption to copyright to permit people to transfer DVD or video cassette recordings to a more convenient format, if one emerged. Teachers, for instance, are not able to use resources in online courses that they are allowed to use in an in-person classroom.

The Productivity Commission made formal recommendations in 2017 that these laws be changed. The *Copyright (Disabilities and Other Measures) Act 2017* was passed on 15 June 2017 and allows greater flexibility with educational institutions using copyright materials in online assessment – but did not address the other issues identified above.

**Exam Tip:** Remember to keep defining terms and ideas by using *other* words. For instance, ‘attitudes’ below has been defined in terms of values, beliefs, principles and morals.

### Changes in society’s attitudes

‘Attitudes’ are the values and beliefs, principles and morals shared by a group of people or society — these ideals are reflected in the way that people in society behave, their priorities, and the way they treat others. Laws must match community values, or they won’t be accepted and followed. So, as society’s attitudes change, laws should change to reflect the new ideas.

#### **Examples**

- The 2017 legalisation of assisted dying by the Victorian Parliament can be used, because the law was changed in response to changing social debate over the protection of life versus the ability of a person to make a decision to end their own life.
- The 2018 introduction of safe injecting rooms can be used, because it reflects a change in attitude away from punitive responses to drug use and towards the value of medicalised treatment.

### A desire to generate changes in attitudes

Parliament may pass new laws to encourage greater tolerance and cohesion within society. In other words, the legislation is ‘setting the example’ the parliament wants us to follow rather than responding to a pre-existing majority call for change.

## Examples

- The Commonwealth's *Racial Discrimination Act 1975* can be used, because its goal was to formally discourage bigotry and harmful treatment of others on the basis of perceived race.
- The 2014 introduction of the carbon pricing regime can be used, because it tried to encourage a move towards less carbon-intensive industry by putting a price on carbon use and incentivising cleaner production methods.



## Amending poorly considered laws

Laws are often made in response to extreme events or emotionally-heated public debate. In these situations, the law can be developed as a knee-jerk reaction, and can be rushed through without proper consideration. Once this becomes apparent, the parliament will have to decide whether to repeal or alter the law.

## Examples

- The 2016 changes to the Victorian bail laws can be used, because they responded to the attack in Bourke Street mall without properly taking into account the evidence regarding deterrence and rehabilitation, the limited powers of bail justices to decide bail matters, and the impact of remand on natural justice.
- The introduction of defensive homicide laws in Victoria in 2005 was called “poorly considered” by anti-violence campaigners because the wording failed to properly take into account some of the reasons why provocation was abused in the courtroom in the first place. Defensive homicide was therefore hijacked in the same ways and it itself needed to be reformed.

## Responding to new threats

New ways in which people can cause harm or newly-emerged and harmful social trends can influence a change in the law because parliament seeks to address the specific behaviour or movement. Sometimes the law is expressly outlawing the behaviour, while at other times the law is creating new ways to protect society from the threat or receive assistance after being harmed by it.

### ***Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth)***

In April 2019 the Commonwealth Parliament passed the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act* to criminalise the behaviour of platforms who allow extremely offensive, violent material to remain on their web platforms and sites. The federal attorney-general, Christian Porter, said he believed the law was a “world first”: it was passed in response to the Christchurch attack, in which the perpetrator livestreamed his assault and it was shared on social media such as Twitter.

Content service providers and Internet hosting services can now be prosecuted for failing to notify Australian federal police about the existence of material showing “abhorrent violent conduct,” or failing to remove it in an ‘expeditious’ manner. The eSafety Commissioner can also notify social media companies that their platform is hosting this material, giving them an obligation to act quickly to take it down. The law defines “abhorrent violent material” as anything that shows murder, torture, rape, kidnap, or terrorist acts.

The law has been criticised for failing to give a specific timeframe for what removal would be considered “reasonable” or “expeditious,” but Porter said that would be up to a jury to decide based on the individual circumstances of the case. In his opinion, he said, “every Australian would agree it was totally unreasonable that it [the Christchurch material] should exist on their site for well over an hour without them taking any action whatsoever.” The law has also been criticised for failing to clarify who in a company would be the person prosecuted and why.

## Individuals influencing law reform

If individual people or groups in society believe that a change in the law is required they do not have the power to change it themselves, but there are a range of strategies they can use to try to persuade law-makers to take the action for them.

The Study Design requires that you consider both the ability of people to participate in the following methods, but also the ability of the method itself to effectively influence parliament.

**Exam tip:** The Study Design expressly includes references to petitions, demonstrations and use of the courts – questions can be asked explicitly on any one of them. The Study Design also expressly requires knowledge of examples in relation to these methods of influence.

## Petitions

### Definition

A petition is a written request for a change in the law (or in some cases, a request *not* to change a particular law if the parliament is considering doing so), signed by those who support the change.

### Detail

A group or individual who organises a petition can submit the petition to a member of parliament, who – if they are prepared to endorse it – may then present the petition to the house of parliament of which they are a member. Alternatively, if the house has a standing committee dedicated to petitions, as the House of Representatives has, the petition may be presented to the committee and the committee will table it.

While each house of the Victorian and Commonwealth Parliaments has slightly different rules for the formatting and submission of petitions, in most cases a petition must follow rules such as making a specific and unambiguous request for action, being presented to one house of parliament only, and including the signatures of petitioners in their own handwriting or stored on the parliament's own e-petition website.

### Examples

- In 2015 Victorian a Victorian man with cancer, Shane Raisher, started a petition to have the melanoma drugs Keytruda included on the government's Pharmaceutical Benefits Scheme to make it affordable for cancer patients. It was too late for him, but the petition ended up having 172,000 signatories and did achieve its goal.
- In October 2019 an e-petition asking the federal government to declare a climate emergency was presented to the House of Representatives. It was supported by Labor and the Greens, and was the largest e-petition ever presented to an Australian parliament with over 400,000 signatories, but it was not acted on by the Government. It was presented to the House of Representatives by the Member for Warringah, Zali Steggall. In presenting the petition, she said, "I rise to present a historic petition signed by 404,538 fellow Australians, who are calling on their parliament to take urgent action on climate change." It was surpassed in 2020 by the e-petition calling for a royal commission into media diversity, sponsored by former Labor prime minister Kevin Rudd, which received more than 500,000 signatures. This petition was also unsuccessful (even the Labor party did not support it), although it triggered a year-long Senate committee inquiry into the issue.

## Demonstrations

### Definition

A demonstration, also known as a protest, usually involves a group of individuals gathering in a public place to express desire for a change in the law. The protesters aim to attract public attention, which may lead to getting parliament's attention, and they may do this through causing disruption or inconvenience.

### Detail

Demonstrations can take a range of different forms, including strikes by employees, boycotts of products, and marches progressing along major thoroughfares.

### Examples

- In October 2017 a national day of action was held to protest the Adani mine set to open in Queensland. Two thousand people gathered in Melbourne, and demonstrators in Sydney used their bodies to create a '#STOP ADANI' sign on Bondi Beach.
- In April 2019 around 100,000 workers and union members marched in what was called a "peaceful assembly" for increased wages and job security, organised by the Australian Council of Trade Unions. The Change the Rules rally began at Trades Hall in Carlton, and progressed down Swanston St and along Bourke St to Parliament House. State premier Daniel Andrews marched with protestors.



## Use of the courts

### Definition

Any member of society or professional or community organisation has the right to take a matter to court that challenges the validity of a law, tests the scope of a law, or asks the courts to consider the appropriateness of a law. The court decision may itself change the law, or it may send a powerful message to parliament that the law needs to change through legislation.

### Detail

The person bringing the matter must show standing in the case, and once they present their legal arguments they lose a great deal of control over the impact that their influence will have. The courts may decide that the judiciary lacks the authority or role to effect change, and may decline to change the law so they can leave the matter for parliament; or, the courts may rule in a way that the applicant doesn't want. The outcome of the case will also be affected by the facts in the case – it will not depend entirely on the law and the legal arguments made.

Complainants may also have to deliberately break the law in order to gain standing. This is a significant disincentive, as it comes on top of having to invest the time and money required to run the case.

#### ***Gaynor v Chief of the Defence Force [2017] FCAFC 41***

In August 2017 the High Court refused to hear an appeal by former Australian Defence Force reservist and conservative Catholic Bernard Gaynor against his dismissal from the Army Reserves on the basis of anti-gay and anti-Islam statements he made online. The statements breached the Army Reserve's online commentary rules.

Gaynor argued that his comments were protected speech because of the freedom of political communication derived from the wording of the Australian Constitution, and that the Army Reserve's policy was an unlawful burden on that freedom. Gaynor brought an action to have the policy declared invalid: he won at first instance before a single Federal Court justice, but lost on appeal in the Full Court of the Federal Court.

The Court found that "implied freedom does not involve, nor does it recognise or confer, any personal rights on individuals"; instead, it was a freedom from government action or laws that restricted or burdened the freedom, and that were not rescued by being appropriate and proportionate ways to protect the large democratic system. Rejection of his request to appeal by the High Court means the decision of the Full Court stands. The Army Reserve policy was therefore found to be "suitable, necessary, and adequate in balance with respect to any burden it imposes" on political communication.

### Examples

- In 2017 former leader of the Greens, Bob Brown, won his challenge to the Tasmanian Government's anti-protest laws. He had joined with another protestor, nurse Jessica Hoyt, to challenge the validity of the laws in terms of their relationship with the constitutional freedom of political freedom – both applicants had standing because they had been arrested under the legislation.
- In 2019 the High Court ruled on the Timber Creek native title case, in which the Ngaliwurru and Nungali Peoples had asked the Court to review the compensation payable by the Northern Territory government to the traditional owners of an area of land in the town of Timber Creek. The Court developed precedent on the general principles for calculating native title compensation claims and confirmed the value placed by the Federal Court on the loss of 'spiritual attachment' to the land. The Court confirmed that a two-step process should be used when calculating native title compensation: first, the economic value of the native title rights should be calculated, followed by an estimate of the non-economic and cultural loss caused by a decrease in "connection to country." The NT Government had argued against calculating for loss of spiritual connection.

## Role of the media

### Definition

Groups and individuals can use paid media to launch advertising or lobbying campaigns, can try to harness news media by attracting current affairs programs or newspapers to cover their story, and can raise awareness themselves by putting out social media messages and hoping they are shared. The media can be used by itself to inform and persuade other people in society about need to change the law, but it can also be used to encourage, publicise or assist other types of political action such as protesting, gathering support for petitions and lobbying members of parliament.

**Exam tip:** The Study Design expressly notes the use of social media in the general topic of the role of the media in influencing reform. Your definition and discussion of the role of the media must include social media, therefore, and it can be explicitly required in an examination question.

### Detail

- Groups and individuals can pay media providers and owners of public space to host campaign materials such as television, radio and print media advertisements, Internet advertising panels and public space billboards and posters. This allows the person or organisation to decide the content and presentation of the material, and to have control over the target audience and placement of the media.
- Groups and individuals can try to harness the existing news media to spread their campaign message in a way that is free to them, but that can reach all the people that the media provider has already subscribing to their newspaper, magazine, or radio or television channel.



## Role

The VLRC conducts research into existing legislation, assessing whether it is effective and then recommending changes to the law to the Victorian Parliament. It may also be asked to research a proposed *new* law in order to gauge whether it is likely to be effective, appropriate and accepted by the majority of the community.

Although the VLRC can initiate its own review of minor laws, the majority of its work is reviewing laws that the attorney-general asks it to examine. The VLRC usually has the resources to look into one or two referred issues at a time, plus one minor community law reform issue without referral.

## Process

The VLRC will be referred a matter for investigation, or it may self-refer a minor matter of community concern. It will then undertake a rigorous process of consultation, which usually lasts anywhere from six months to three years. Finally, it prepares a final report, commonly with specific recommendations for the parliament, and submits it to the state attorney-general to table in Victorian Parliament.

## General examples

- In June 2017 the Commission's report on the *Adoption Act 1984* (Vic) was tabled in state parliament. The VLRC had been referred the matter in 2015, and was asked to investigate the questions of access to adoption information and eligibility of people to register themselves to adopt children. The Commission made one major recommendation: that there be a new Adoption Act passed in its entirety. It made a number of smaller recommendations in addition, such as that the law should make it a priority that siblings are adopted together if possible. This was a matter referred by the attorney-general, but the Government has not implemented it.
- On 12 March 2020 the Commission began a community law reform investigation into the experience of potential jurors with hearing or vision impairments: 'Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision'. The VLRC will consider what changes to legislation and court practice should be made to enhance access for people who wish to serve as jurors, but who experience impairments. Currently, people with these impairments are functionally excluded from jury service because the *Juries Act 2000* makes ineligible any person who has "a physical disability that renders [her or him] incapable of performing the duties of jury service," and support persons such as interpreters are precluded from the jury room.

The Commission will develop a range of recommendations based on the practice in comparable Australian and international jurisdictions, available statistics on the excusal and exclusion of hearing-impaired and vision-impaired jurors in Victoria, the common law rule (known as the 'thirteenth person' rule) that bars non-jurors from the jury room, and the impact of discrimination and human rights law, among other things.

The Commission's final report was delivered to the Attorney General on 30 July 2022 and will be published once it has been tabled in Parliament. As at the end of 2022 it had not yet been tabled.

## VLRC case study

**Exam tip:** The Study Design expressly requires that you know one "recent" example of a recommendation the VLRC has made in relation to law reform. The Study Design defines 'recent' as within the last four years – this is a hard-line definition.

## Litigation Funding and Group Proceedings

The last year this recommendation will be considered 'recent' is 2024, based on the 2020 date of partial implementation.

### Referral

On 16 December 2016 the state attorney-general asked the VLRC to examine the way in which representative proceedings were funded, including by litigation funders and other possible options such as contingency fees, and the way in which they were managed by the Supreme Court. The Government referred three questions to the Commission for inquiry:

1. Whether there was scope for the powers of regulators and courts to be increased in relation to litigation funders.
2. Whether lifting the prohibition on contingency fees would decrease the problems present in litigation funding.
3. Whether there should be additional management of class actions filed in the Supreme Court.

The VLRC said that all three of its referred questions had the ability to impact on access to justice: "Litigation funding reduces the risks to litigants of taking proceedings; removing the ban on contingency fees could introduce another means of doing so; and class actions take advantage of economies of scale."

### Inquiry

As part of its consultation, the VLRC published a consultation paper in July 2017 and called for public submissions. The consultation paper noted that eighty class actions have been conducted in Victoria since the commencement of the 2000 regime,

and that ten involved the use of litigation funders. The others were mostly funded by ‘no win no fee’ arrangements – but not as a fixed percentage of the final payout, as these arrangements are known as contingency fees, and are prohibited at state law.

The inquiry received 36 submissions, and the Commission also conducted roundtable discussions with lawyers, academics, regulators, litigation funders and class action members.

### Report

In March 2018 the VLRC submitted its report into class actions and litigation funding, *Access to Justice – Litigation Funding and Group Proceedings*, finding that “Each of the three components – litigation funding, contingency fees, and class actions (group proceedings) – does, or has the potential to, contribute to access to justice.” It found specifically that litigation funding and contingency fees could reduce the risk to litigants of taking action. A key recommendation was that the law be changed nationally to permit contingency fees, and to govern their operation; a second was that the Supreme Court’s power to case manage aspects of class actions be strengthened. It said: “The Supreme Court of Victoria has a crucial role in ensuring the just, efficient, timely and cost-effective resolution of the real issues in dispute. In class actions, it has additional broad powers that can be used to protect the interests of class members.”



### Response

The Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) was introduced on 26 November 2019; and in June 2020 the Victorian Parliament passed the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) to partly implement the recommendations. The Act creates an order called a ‘group costs order’, which permits the Court to allocate a percentage share of the final settlement or damages to the plaintiff’s law firm in return for the firm being responsible for costs and any potential adverse costs award. Group costs orders are very similar to contingency fees, except that the Court sets the percentage rather than the firm. This can also be contrasted with the ‘no win no fee’ arrangement, which only allows law firms to charge for actual costs and places the responsibility of an adverse costs award on the named plaintiff.

The Court is directed to make group costs orders in situations where it believes it is necessary to promote access to justice. This is one of the case management powers given to the Court, but no other case management changes were made at this time.

### Role of government investigations

Parliament has many research bodies feeding into its legislative process, which is one reason why it is an effective law-maker. Committees composed of members of parliament, gathered into smaller, specialised groups, are one part of this process. Another part is the calling of a royal commission, what the Australian Government website, [Australia.gov.au](http://Australia.gov.au), calls “the highest form of inquiry on matters of public importance.”

You must learn the role of one parliamentary committee *or* one royal commission: it is not required to know both committees and commissions, and no exam question will require both of them.

**Exam tip:** You should also focus on just one example of a committee or commission; you do not need to know extensively about committees or commissions in general, because there are a number of different types and they differ from each other.

**Exam tip:** The Study Design expressly requires that you know one “recent” example of a recommendation that one government investigation has made in relation to law reform. The Study Design defines ‘recent’ as within the last four years – this is a hard-line definition.

## Parliamentary committees

### Definition

A parliamentary committee is a group of parliamentarians from the lower house, the upper house, or a combination of both, who are appointed to conduct special research into an issue or area of legislation. They are given ‘terms of reference’ by either or both houses that set out the scope of the inquiry and any deadlines along the way, and their investigations must stay within their terms of reference.

### Detail

Committee investigations can be into any area considered worthy of detailed and careful review. Sometimes this will be an issue with proposed legislation; sometimes this will be alleged misconduct within government; sometimes this will be a category of laws, such as money bills or regulations, that simply requires dedicated attention; sometimes it will be parliamentary procedure – sometimes it will be another matter. Parliamentary committees have few constraints on their subject matter.

Virtually all members of parliament, except ministers, sit on at least one committee. Membership of committees is spread across parties, so that no party has absolute control over committee investigations and reports – usually about half of the members come from the governing party, and the other half come from the opposition and minor parties. Alternatively, party membership is divided to reflect the number of seats each party has in the house.



Committees may be select, standing, statutory or domestic, among other kinds. The type of committee constituted will depend on the subject matter it is meant to investigate. An investigation into a statutory authority exercising executive power would be best conducted by a statutory committee, for instance, given powers and created by a specific piece of legislation; while an investigation into parliamentary procedure would be best conducted by a domestic committee.

## Parliamentary committee case study

### Plastics ban

The last year this recommendation will be considered ‘recent’ is 2025, based on the 2021 date of partial implementation.

### Referral

On 17 August 2017, following a Four Corners report into the waste and recycling industry, ‘Trashed’, the Senate asked the Senate Standing Committee on Environment and Communications to establish an Inquiry into Waste and Recycling. The Committee was chaired by Greens senator Peter Whish-Wilson. On 1 January 2018 new conditions on recyclable materials meant that China stopped accepting 99% of the 1.27 million tonnes of recyclable materials Australia previously sent there. Unsold recycling began piling up in collection centres or being dumped in landfill. In response, the Inquiry was extended until 26 June 2018.

### Inquiry

The Committee received 63 public submissions from organisations such as the National Waste and Recycling Industry Council in Melbourne; held public hearings in three states and Canberra; and conducted an onsite visit to the REMONDIS Swanbank Renewable Energy and Waste Management Facility in Brisbane.

### Report

The Final Report, *Never waste a crisis: the waste and recycling industry in Australia*, was released in June 2018, and made 18 recommendations. Recommendation 11, for instance, was that “The committee recommends that the Australian Government implement a national container deposit scheme.” The Committee also recommended that all single-use plastics should be banned by 2023, that a national container deposit scheme should be established, and that a “circular economy” be created in which Australia created and used products made of recyclable materials – instead of just creating materials to be recycled. ‘Single-use plastics’ includes things such as takeaway containers, chip packets, plastic bags and coffee cups with plastic lining.

Whish-Wilson called it “a rare display of political consensus” from Labor and Liberal Parties and the Greens. The report commented that: “It appears Australians are most likely to be enthusiastic recyclers than they are at seeking to avoid waste generation.” Gayle Sloan, chief executive of the Waste Management Association of Australia, told the Senate committee that “For every one job involved in landfill and 10,000 tonnes of waste, over four are created by resource recovery.”

### Response

From 1 November 2019, the *Environment Protection Amendment Act 2019* banned all single-use plastic bags from being distributed by retailers. In 2022 the Victorian Government introduced a ban on single-use plastics and polystyrene items such as straws, cutlery, plates and cotton bud sticks, starting on 1 February 2023. The Government has expressed an intention to work with medical, aged care and disability sectors to develop appropriate exemptions.

## Royal commissions

### Definition

A royal commission is a major public inquiry into a matter of public importance, established by the Crown on advice of the Government, and formally appointed by the writing up of letters patent, supported by legislation. It operates outside the power of the government of the day, and, once an inquiry has been established, the government cannot stop it.

### Detail

The scope and length of the inquiry are set by terms of reference, and independent commissioners are appointed to run the investigation. The chairperson of the commission is frequently a distinguished lawyer or former judicial officer. The terms of reference will usually include deadlines for the conclusion of the inquiry and the delivery of the final report. Interim reports may also be required periodically. These reports are often published under the name of the chair of the commission.



The powers of a commission include the power to summon witnesses and take evidence; to order the arrest of witnesses who fail to appear; and to apply for search warrants and authorise the Australian Federal Police to execute search warrants. The powers given to a commission go beyond the powers given to other bodies, as commissions can even request classified information, hold private hearings *in camera*, compel government officials to aid the investigation, and offer witnesses indemnity for giving evidence. Penalties for refusing the order of a commission include fines of \$1,000 and six months' imprisonment.

Royal commissions can either be investigatory or focused on policy development. An investigatory, or inquisitorial, commission inquires into the causes and response to a catastrophic event or series of events; or, into allegations of impropriety, government misconduct or abuse. A commission established to assist with policy development has less of an inquisitorial focus, and instead reviews the law in an area and provides well-researched policy options to government. Both investigatory and policy inquiries will provide clear recommendations for the government to act.

## Royal commission case studies

### Institutional child sex abuse

The last year this recommendation will be considered 'recent' is 2026, based on the 2022 date of final implementation.

### Referral

On 11 January 2013 the Royal Commission into Institutional Responses to Child Sexual Abuse was established. Justice Peter McClellan was appointed chairperson, assisted by five other commissioners because of the volume of work anticipated. The Commission was tasked with investigating the way in which institutions such as churches, schools, sporting clubs and government organisations have responded to reports and allegations of child sex abuse, and uncover where systems and attitudes have failed to protect children and hold offenders accountable.

### Inquiry

The Commission held over 6,500 private sessions, made 2,562 referrals of abuse to authorities and handled almost 40,000 phonecalls. 16,953 people contacted the Commission and 7,981 survivors of sexual abuse gave evidence. Hearings were conducted in every capital city and many regional centres.

### Report

The final report was published in December 2017. Due to the scope and size of the inquiry, reports were published progressively as each stage of the investigation concluded. The final report consisted of 17 volumes plus an executive summary, with 409 recommendations in total. In addition to reform recommendations, 2,562 matters were referred to police for criminal prosecution.

### Response

In June 2018 the Australian Government published its official response to the findings in four chapters spanning 137 pages. Since 50 of the recommendations made by the Commission required state and federal governments to work together, the Victorian Government also tabled a response, in July 2018. It accepted 128 of the recommendations in full, and a further 165 in principle, where the intent of the recommendation was supported, but not the method of achieving it.

Implementations include, in 2020, the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), which introduced new third party grooming offences, and increased maximum penalties and

introduced compulsory minimum sentences for the most serious Commonwealth child sex offences as well as for repeat offenders.

An Annual Progress Report has been published each year since the report, to track the progress made by government and institutions in implementing or otherwise responding to the recommendations. The fifth and final annual Progress Report was released on 14 December 2022, announcing that all 206 recommendations pertaining to the Commonwealth have been implemented or are in progress of being implemented: in 2022, for instance, the National Centre for Action on Child Sexual Abuse was established, and the *Online Safety Act 2021* commenced to give the eSafety Commissioner enhanced powers to remove access to online child exploitation material. A 10-year review is scheduled for 2027.

Some recommendations were directed at religious orders rather than the Government. For example, that religious ministers be forced to report information confided to them in confessional, if that information pertains to child sexual abuse, or that celibacy be voluntary for clergy.

### Financial services misconduct

The last year this recommendation will be considered 'recent' is 2026, based on the 2022 date of partial implementation.

#### **Referral**

In December 2017 the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established, with a sole commissioner, former High Court justice Kenneth Hayne, being appointed.

#### **Inquiry**

The Commission conducted seven rounds of public hearings, heard evidence from more than 130 witnesses, and received 10,323 individual submissions.

On the second day of public hearings, Justice Hayne said: "The industry is a large industry, large participants, lots of people. Things go wrong. It's a human system, therefore things go wrong. Sometimes things go wrong through dishonesty. Sometimes things go wrong because of neglect, carelessness, or just sheer coincidence. I understand all of that. There is a whole raft of law up there governing this industry. One thing that I may have to look at, I think, is what the attitude, either of the industry generally, if there were such a thing, participants in the industry, is to the notion of obedience to the law. Obedience to the law that governs the way they conduct their affairs."



#### **Report**

The *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* was tabled in parliament in February 2019. It spanned three volumes – one entire volume comprised of case studies – and made 76 total recommendations.

#### **Response**

In February 2019 the Treasurer released the Government's response to the Final Report. The Government agreed to all recommendations it had the power to implement, and supported the implementation of other recommendations by applicable bodies such as the Australian Securities and Investments Commission ('ASIC').

In March 2019 the federal government announced the extent of its pre-election budget response. In the budget it allocated \$400m in additional funding to ASIC to oversee the banks, an additional \$150m to the Australian Prudential Regulation Authority ('APRA'), and \$35, to the Federal Court in anticipation of cases brought by the regulator based on findings from the royal commission. The Federal Court was projected to appoint two new judges and eleven registry staff, and build new facilities.

In addition to extra funding being allocated to existing bodies, it committed to establishing an industry-funded compensation scheme for consumers and small businesses; establishing an independent financial regulator oversight authority to assess and report on the effectiveness of ASIC and APRA; and paying compensation owed to consumers and small businesses from old unpaid external dispute resolution determinations (totaling \$30.7m as of 2019-20).

One of the 2021 implementations, for instance, was removing the 'grandfathering' of financial products. Grandfathering is where clients are kept on old, outdated financial products, even where the newer products are better and more affordable. In September 2022 the Government introduced bills into Parliament to implement the two major outstanding recommendations in the Final Report, and provided the Government response to the final 24 recommendations that had not yet received a response. One of the recommendations in the proposed bills is the establishment of a Financial Accountability Regime that, amongst other things, imposes civil penalties on financial institutions that do not meet their accountability obligations.

## REVIEW/APPLICATION QUESTIONS – Law reform through parliament

1. Describe a contemporary example of a change in the law due to changed community values *or* changes in technology.
2. Identify two recent changes in the law designed to protect members of the community *or* designed to encourage a change in values and attitudes. In your response, identify the people or group whom each law is designed to protect or benefit.
3. Laws change due to changes in community values. Describe two other reasons why laws need to change, using contemporary examples to illustrate your response.
4. What is a petition?
5. Outline three conditions that a petition must fulfil in order to be considered by parliament.
6. How does a petition inform and influence law-makers regarding the need to change the law?
7. Provide one contemporary example of a petition that was used to try to influence parliament.
8. How might a demonstration inform and influence law-makers regarding the need to change the law?
9. Outline three factors that could have a positive impact on the likely success of a demonstration.
10. Outline two factors that could have a negative impact on the outcome of a demonstration.
11. Provide one contemporary example of a demonstration that was used to try to influence parliament.
12. Identify two forms of traditional media that can be used by individuals and groups to inform law-makers of the need for a change in the law.
13. Identify two forms of social or free media that can be used by individuals and groups to inform law-makers of the need for a change in the law.
14. Explain how a demonstration relies on the media for it to have a greater impact on parliament.
15. Explain how the effectiveness of a petition could be affected by use of the media.
16. Using one contemporary example to support your answer, explain the media as a means by which groups and individuals can influence parliament to change the law.
17. The VLRC usually reviews legislation in response to a reference:
  - a. What is a 'reference'?
  - b. From whom does the VLRC receive its references?
18. How does the VLRC's process ensure that recommendations it makes to parliament match the values and expectations of the community?
19. Outline a range of processes that the VLRC might go through in the course of investigating a possible change to the law.
20. Why might the recommendations made to parliament by the VLRC carry more weight than the message conveyed by a public demonstration?
21. Does the VLRC have the power to change the law? Outline the authority that the body has.
22. Using one example of an issue that has been researched by the VLRC, outline its role in assessing the need for change in the law.
23. Outline the difference between a parliamentary committee and a royal commission.
24. Name two types of parliamentary committees, and what their functions are.
25. Identify three ways in which parliamentary committees go about investigating matters, using one specific committee to illustrate your answer.
26. Identify one specific parliamentary committee, and outline an inquiry that it recently recommended reform regarding.
  - a. Explain the recommendation(s) given to parliament.
  - b. Outline the Government's response to the committee's report.
27. Explain the nature of the two different types of royal commission that can be called.
28. Identify three ways in which royal commissions go about investigating matters, using one specific commission to illustrate your answer.
29. Identify one specific royal commission, and outline an inquiry that it recently recommended reform regarding.
  - a. Explain the recommendation(s) given to parliament.
  - b. Outline the Government's response to the commission's report.

## EVALUATION: INFLUENCING LAW REFORM THROUGH PARLIAMENT

The following strengths and weaknesses have been organised by feature of parliamentary influence, to help with paragraph organisation.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
<p>It is possible to convince a member to approach their party about changing or adopting a policy. If the party changes its position, the change will have a far greater chance of success.</p> <p>Because we are governed by a representative democracy, numbers will always matter. Members of parliament want to keep a majority in their own electorates, and parties will want to keep the support of a majority of electorates and the country as a whole. Amassing large numbers of people in support of an issue may appeal to this.</p> <p>Influence can be most effectively exerted when members of the public do their research and personally lobby members of parliament with influence over a certain area of law, or interests that align with the reform being encouraged. Members of parliament are often receptive to being individually spoken to.</p>	<p>Influencing parliament to reform law</p>	<p>Most members of parliament will be guided by their party’s platform on an issue. Influencing reform will often involve influencing the party’s position, and not just the position of one individual member.</p> <p>There are some things that can speak louder than majorities: things like human rights, party donors, tradition, personal beliefs and press coverage. Unless the majority is overwhelming and there is genuinely little public opposition, majority opinion can be overridden by these other things. Some of them are positive, and benefit the community; others, such as party donors, are less beneficial to the people in general.</p> <p>Mobilising the average person to act on a reform issue is difficult. People have busy lives, and limited time, money and emotional energy; many people are apathetic unless it is an issue that affects them personally, or deny there is a problem unless it affects them personally.</p>
<p>A petition is relatively easy to organise, and the rules about how a petition must be written and submitted are published on the Victorian and Commonwealth Parliaments’ websites.</p> <p>Petitions encourage a feeling of community and participation. Studies of petitions and political engagement agree that they “foster a sense of unity and purpose within a community which is then publicly demonstrated when the petition is presented to the House.”</p> <p>The petitions that tend to be the more successful ones are the ones addressing very specific issues. This is because they do not usually contradict entire planks of the Government’s policy platform, and they are easier to legislate on.</p>	<p>Petitions</p>	<p>Asking someone to sign a petition, especially if it simply appears in their Facebook feed or their email, is unlikely to get them invested in the issue. Laws do not change because of a once-off petition: they change because groups of people engage in sustained campaigns across many fronts.</p> <p>Petitions do have direct contact with parliament, but parliament is overwhelmed by petitions: in the 45<sup>th</sup> parliament between 2016 and January 2019, the APH website reports that the federal parliament received 838 e-petitions and 389 paper petitions. 26 of these had only one signature, and only three had 40,000 signatures or more. This volume dilutes the effect of any one petition.</p> <p>There is no guarantee that parliament will discuss or respond to a petition after it is presented. The appropriate minister may respond to a petition presented that is relevant to their portfolio, but they are not required to. In the UK parliament, any petition with more than 10,000 signatures is considered in parliamentary debate, but in Australia there is no such rule.</p>

<p>Many forms of protest are seen as an inconvenience to the public. This can be part of their effectiveness, though, because many groups believe traditional methods of campaigning are inadequate and too-easily ignored. Causing significant public disruption is a risky strategy, but can force people to pay attention.</p> <p>Some members of the public care so much about an issue that they are willing to put their own safety on the line by defying the law. This can have an impact on others because it is powerful when you see someone so heavily invested, and it sends a message to the community that the issue is important.</p> <p>A protest that is large and receives a lot of publicity can draw parliament’s attention to the need for change in the law.</p>	<b>Demonstrations</b>	<p>Many people believe that it is inappropriate to cause public disruption or to break the law, regardless of how important the issue is, and they look down on this choice. Given that parliaments have legislated against many forms of protest in recent years, having to stay within the law can be a significant limitation.</p> <p>A protest is not easy to organise. Any group seeking to hold a demonstration needs good communication, publicity and organisation to get large attendance – without these, the protest may have a limited impact. Permits and police permission may also be required in some situations.</p> <p>Members of parliament are usually willing to make short appointments with constituents, but many are not willing to be targeted by organised protests – even peaceful ones.</p>
<p>Bringing a case to court is one of the few ways in which a member of the community can be directly involved in changing the law. If their claim is successful, the law will be changed to reflect the arguments they chose to make.</p> <p>Because of the requirement for standing, only people who have direct investment in the state of the law can bring a case to court. They have their own rights or interests on the line, and will therefore be committed to making the most persuasive arguments they can.</p> <p>Unless it invalidates the law, a court’s judgment does not directly communicate with parliament; it is highly persuasive, though, because it affects the way the parliament’s law operates in practice.</p>	<b>Use of the courts</b>	<p>Many members of the community are shut out from bringing a court case because they are not directly involved enough. It is not sufficient to simply be an interested party.</p> <p>Bringing a test case costs a lot of money, and complainants need to be prepared to donate potentially years of their lives to the cause. This is a significant disincentive.</p> <p>Courts are secondary law-makers, and therefore have limited ability to change the law. When bringing a case, the direct contact is with judges, and not members of parliament.</p>
<p>Paid campaigns generally have very clear messages that have been honed and subjected to market research. They are as powerful and memorable as possible.</p> <p>Almost all forms of the media are practised at reducing issues to simple statements and attention-grabbing headlines. This draws the interest of the public and helps them understand the content.</p> <p>Social media campaigns launched by special interest groups generally have very clear messages that have been honed and subjected to market research. They are as powerful and memorable as possible, and can use algorithms specially designed to target the people most likely to be receptive to their messages.</p> <p>Some studies have suggested that greater media coverage increases the likelihood of the public supporting the change, which can lead to increased pressure on law-makers.</p>	<b>Role of the media</b>	<p>Studies suggest that media campaigns are only effective in the short-term at raising awareness; in order to change laws and behaviours, they must be complemented by other strategies.</p> <p>Social media campaigns can be launched by a variety of different groups, each supporting a different view. It can be difficult to determine which direction for reform is the most popular or valid, because anyone can open a social media account – and this is exacerbated by evidence that emerged in 2017 that social media campaigns relevant to the 2016 US election had been hijacked by Russian intelligence officers and paid trolls.</p> <p>Collectively, all the forms of media show such a diversity of opinions there is no clear direction for change to the law. Parliament often fears backlash when law-making on controversial issues, and it is impossible for law-makers to please all groups.</p> <p>Most forms of media have a policy of reducing issues down to simplistic grabs that aren’t convincing to people who know about the topic in any detail, and that do little to actually educate people on the topic.</p>

<p>The Commission has the capacity to conduct thorough research on law reform issues so the recommendations it passes to parliament are well-founded and reflective of expert opinion, and of documented and statistical evidence.</p> <p>The Commission has access to law reform measures and outcomes from a range of other jurisdictions: it has direct access to law reform commissions in other states, and employs legal professionals who know how to research case law and statutory amendments. This means it can make informed recommendations based on what has worked in other states or countries, and provide evidence to substantiate them.</p> <p>The Commission was created by the parliament and receives both funding and commissions from them. In other words, the Commission is paid by parliament to make (unbiased and independent) recommendations on issues about which the Government wants to hear. This means its advice will be likely to be taken seriously.</p>	<b>Role of the VLRC</b>	<p>The Commission’s investigative processes are much more time-consuming than the average protest, petition or media report. The average report takes between 6 and 24 months to complete – and it is not uncommon for them to take longer. The community law inquiry on inclusive juries lasted for 28 months, from March 2020 until July 2022.</p> <p>The public has limited access to the Commission, and individuals or groups may be disappointed that their opinions do not carry more weight. The VLRC will call for submissions, but submissions will be summarised and grouped together in most cases in the final report. They will also be taken into account along with expert evidence and a host of other data points such as similar reforms in other jurisdictions.</p> <p>The Commission does not have the power to make any changes to the law itself. This means that years of time and tens of thousands of dollars can be spent on comprehensive investigation and reporting, and parliament may shelve or discard the findings – especially if the governing party has changed.</p>
<p>There are anywhere up to thirty or more committees operating in each parliament at any given time. Each has its own area of expertise, and conducts indepth research in a relatively specialised field, but all the committees together covers a wide scope of topics.</p> <p>Committees frequently spend months scrutinising a bill in detail before reporting back to the relevant house.</p> <p>Because committees are smaller groups, they can conduct more indepth research than is possible in the larger venue of the parliament. More time is spent in committee investigation than on the floor of parliament.</p>	<b>Role of government investigations: parliamentary committees</b>	<p>Research can be compromised by party politics. For example, Senate references committees are chaired by non-Government members, but the paired legislation committee is always chaired by a Government member.</p> <p>Committees are expected to cover too much ground to do proper research on everything in their field. For example, in 2000 the Senate Standing Committee on Regulations and Ordinances handled 1,194 federal regulations and 68 explanatory statements according to the Committee’s 2020 Annual Report. It needed to complete this review work across 14 private committee meetings, and produced 22 notices of motion to disallow.</p> <p>Committees sometimes conclude an inquiry with the recommendation that the Government launch a royal commission. This can be seen as handballing the issue and delaying resolution. For example, the conclusion of the Senate Standing Committee on Economics’ 2014 inquiry into the Australian Securities and Investment Commission and the Commonwealth Bank was to hold a further royal commission into the banking sector.</p>
<p>Commissions can compel participation and have the flexibility to engage with stakeholders and experts in person, in writing, over the telephone or online; in private or in public.</p> <p>Commissions can take broad, systemic approaches to issues, and look into matters of huge public importance.</p> <p>Commissions are more accessible than parliament on the whole is, and go to special lengths to hear the views of stakeholders – especially stakeholders with any disadvantage or disability. This gives individuals and organisations with less power more opportunities to meaningfully contribute.</p>	<b>Role of government investigations: royal commissions</b>	<p>Very few commissions operate at any one time, and years can go by without a commission being appointed. The number of matters they can research is small.</p> <p>The quality of research conducted by commissions is at the cost of time and money, and extensions of both midway through the inquiry are common – as seen recently with the investigation into institutional responses to child sexual abuse.</p> <p>The results of commissions are published in enormous, multi-volume reports. These are difficult to find online, and must often be purchased in hardback print copy. They are also frequently known by the surname of the chairperson of the inquiry, so can be confusing to locate.</p>

## REVIEW/APPLICATION QUESTIONS – Influencing law reform through parliament: evaluation

### Application exercise

For each of the following arguments, work out whether it is a positive point or a negative point. If it is a positive point, find a negative point to balance against it, and say whether the positive aspect is entirely outweighed or only partly outweighed; if it is a negative point, find a positive one to balance against it, and say whether the negative aspect is entirely outweighed or only partly outweighed.

- a. Because we are governed by a representative democracy, numbers will always matter, so the people have numbers on their side when trying to influence parliament to change the law. Members of parliament want to keep a majority in their own electorates, and parties will want to keep the support of a majority of electorates and the country as a whole. Amassing large numbers of people in support of an issue may appeal to this.
- b. Petitions are good tools for law reform because they encourage a feeling of community and participation. Studies of petitions and political engagement agree that they “foster a sense of unity and purpose within a community which is then publicly demonstrated when the petition is presented to the House.”
- c. Protests are often ineffective because many people believe that it is inappropriate to cause public disruption or to break the law, regardless of how important the issue is, and they look down on this choice. Given that parliaments have legislated against many forms of protest in recent years, having to stay within the law can be a significant limitation.
- d. Individuals don’t in practice have the ability to change the law through the courts because bringing a test case costs a lot of money, and complainants need to be prepared to donate potentially years of their lives to the cause. This is a significant disincentive.
- e. The media can be more effective at educating the public on law reform issues than things such as VLRC consultation papers because almost all forms of the media are practiced at reducing issues to simple statements and attention-grabbing headlines. This draws the interest of the public and helps them understand the content.
- f. The Victorian Law Reform Commission does not have the power to make any changes to the law itself. This means that years of time and tens of thousands of dollars can be spent on comprehensive investigation and reporting, and parliament may shelve or discard the findings – especially if the governing party has changed.
- g. There are anywhere up to thirty or more parliamentary committees operating in each parliament at any given time, so they can have an enormous impact on the direction of law reform. Each committee has its own area of expertise and conducts indepth research in a relatively specialised field; a wide scope of topics is covered across all committees.
- h. Very few royal commissions operate at any one time – usually between none and two – and years can go by without a commission being appointed. The number of matters commissions can research is therefore very small.

## THE ABILITY OF PARLIAMENT AND THE COURTS TO RESPOND TO THE NEED FOR LAW REFORM

To summarise and conclude the Unit 4 study, you need to review the features of parliament and the courts that make them more or less able than each other to respond to the need for law reform. The following table helps bring those various features together, and summarises the strengths and weaknesses of each law-maker in an attempt to compare common points.

Only a relatively small selection of sample points has been included here, compared with the number covered in AOS 2. In your notes, you should include any additional arguments you believe you can explain clearly and that you would like to focus on learning for the examination. These points have also been drawn from the preceding content on parliament and the courts, so there is already a great deal of source material that can be used.

**Exam tip:** Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

PARLIAMENT	FEATURE	COURTS
<ul style="list-style-type: none"> <li>✓ Parliaments can make law virtually without limit, as long as the matter is within their powers: laws can be made prospectively or retrospectively, they can be made regarding things they are being lobbied on or things parliament decides itself, and laws can be on narrow issues or entire areas.</li> <li>✓ Parliament can choose whether or not it agrees with the laws created by other bodies including the courts, and can legislate to confirm or abrogate those laws.</li> <li>✓ Parliament can make laws <i>in futuro</i>, meaning laws are made proactively for the future in anticipation of society's future needs.</li> <li>✗ It is not possible for law-makers to anticipate all future issues. Society's values, behaviours and technology can change rapidly, creating new and unforeseen problems. As this occurs there will be gaps in the law, which will need to be filled no matter how hard the parliament tried to legislate in advance.</li> <li>✗ The process of passing legislation can be very time-consuming, meaning law-reform can be slow, even if society's needs are changing. This is especially so if there is a hostile upper house, controlled by the opposition and blocking bills introduced by the government; or, if an independent MP holds the balance of power and makes unreasonable demands on bills in return for their vote.</li> <li>✗ Limited funds means that non-priorities for the Government will not be allocated any money.</li> </ul>	<p style="text-align: center;"><b>The power to effect reform</b></p>	<ul style="list-style-type: none"> <li>✓ In some areas, such as constitutional law, history has shown test cases and statutory interpretation to be the easiest way to achieve change, and therefore it is the most powerful and effective.</li> <li>✓ Courts can make nuanced and incremental changes over time and in response to real cases that adapt to changing needs and problems. Case law is not a "blunt instrument."</li> <li>✓ Creative and progressive decisions can signal to parliament that an area of law is outdated, but that things happening in the community require the law to be changed. The courts can also use strong language in their <i>obiter</i> to urge parliament to act.</li> <li>✗ Courts cannot determine what the law is, or alter existing common law, until a case is brought before a superior court of record by someone with standing, and who makes the right legal arguments. Courts cannot initiate a change in the law by themselves, even if society's values or law-making needs have changed, and inferior courts (ie the Magistrates' Court and the County Court) cannot set or develop precedent, even if an appropriate case does come before them.</li> <li>✗ A case must lend itself to the creation of precedent. It must have material facts that allow the judge to consider the desired area of law, and there must be no binding precedent or clear legislation relevant to the case.</li> <li>✗ The process of bringing and hearing a case is not always quick – it takes time to appeal to higher courts and for superior courts to reach and deliver their decisions.</li> </ul>
<ul style="list-style-type: none"> <li>✓ Parliament's primary role is to make laws and it has therefore developed a special process to consider and create new laws, including three readings, the consideration-in-detail or committee stage, and debate – all of which allow for differing views to be considered and possible oversights or flaws in the bill to be discovered and remedied.</li> <li>✓ Parliament has access to resources it can use to research the need for reform, and bodies that will recommend changes to the law. Organisations such as the VLRC, government departments and parliamentary committees provide access to expert knowledge to inform how the law should change.</li> <li>✓ The lack of Government control in the upper house usually results in better scrutiny and more amendments, resulting often in more effective law. Historically, upper houses have demonstrated an ability to catch poor policy and law.</li> <li>✗ Parliament's primary role is to legislate, but only 45% (approx) of its sitting time is devoted to legislation; its sitting time averages 625 hours per year (or, less than 16 weeks of full-time work).</li> </ul>	<p style="text-align: center;"><b>The capacity for research and investigation</b></p>	<ul style="list-style-type: none"> <li>✓ Courts can hear a wide range of arguments from parties to each case, as well as evidence from witnesses and experts called by the parties. This helps them to base their judgments on proper research from outside the law.</li> <li>✓ Courts have the power to see how a law operates in practice, and where its faults are, and to interpret in such a way as to achieve the most effective results in line with the aims of the law.</li> <li>✓ The ability for each judge to issue her or his own <i>ratio</i> allows a sophisticated and nuanced development of the law, considered from many perspectives.</li> <li>✗ When considering a new law, the courts can't research solutions to problems in society and they have no resources available to canvas expert opinions. They cannot debate society's best interests from a range of viewpoints before deciding what the law ought to be, and their role is not to do that in any case: it is to make strictly legal decisions.</li> <li>✗ Because judges must always operate within the bounds of existing law (unlike parliaments, which can ignore the decisions of previous parliaments and amend or repeal any act) there is limited ability to develop the law.</li> </ul>

<ul style="list-style-type: none"> <li>✘ Because debate is usually adjourned after the second reading speech, months can go by before it is scheduled again. After debate, more months can elapse while the bill is in committee or subject to consideration in detail.</li> <li>✘ Parliamentary and independent investigations can be very time-consuming and expensive. This means law-reform can be slow, despite society changing quickly, and parliament may be forever trying to 'catch up' and react to changes in society.</li> </ul>		<ul style="list-style-type: none"> <li>✘ Methods of departure such as distinguishing and disapproving do not always develop the law. Often a court is bound by a law they criticise, regardless of their disapproval; often a court will only distinguish one rule in order to be free to follow another existing one.</li> </ul>
<ul style="list-style-type: none"> <li>✓ The principle of representative government means that, in governing on behalf of the people who elected them, laws will probably be made that are consistent with the values and beliefs of the majority of voters.</li> <li>✓ Because parliament is a representative body, the public can become involved in its law-making processes through signing and submitting petitions, lobbying their local member of parliament or making a submission to the Victorian Law Reform Commission when they review a particular law.</li> <li>✓ Each electorate is represented by one member; therefore, people have a clear spokesperson for their district to lobby and present petitions to.</li> <li>✘ Political parties are each beholden to different interest groups. Sometimes parties may back policies that suit the interests of their supporters, rather than what could be seen as suiting the interests of the country as a whole or future generations.</li> <li>✘ A representative parliament does not mean the wishes of the majority will always be reflected in law. Sometimes the party that wins government did not win the majority of votes at the ballot box, and sometimes the Government follows its own agenda and hopes that the public will forget or change their minds before the next election.</li> <li>✘ A reliance on representative government may be insufficient to protect the rights of some unpopular minorities – indeed, majorities may actually <i>support</i> the violation of some individuals' rights.</li> </ul>	<p><b>The ability to be responsive and representative</b></p>	<ul style="list-style-type: none"> <li>✓ Courts have the benefit of judicial independence: the judiciary is not a political body, and it does not have a vested interest in the outcome of any of its cases. This is unlike parliament and the executive government, which always have agenda and a vested interest. Courts therefore have a unique ability to protect the people – especially the powerless – and check the power of the other arms of government.</li> <li>✓ Courts may also be quicker than parliament to respond to controversial or divisive needs for reform because they are appointed rather than elected, and have security of tenure.</li> <li>✓ If a judge is confronted with a real dispute that requires a decision to be made that affects the rights and responsibilities of real people, she or he cannot postpone the decision the way that parliament can, or refuse to make one because it is too hard or too controversial.</li> <li>✘ Courts are not elected bodies and the public is not involved in their law-making. They are not representative law-makers. This may result in common laws that are not consistent with society's values, and laws like this may not be accepted or followed by the community.</li> <li>✘ Courts can only develop law when a party brings a matter before them. This means that members of the public or injured parties have to go to the time and expense of making a claim. This can take years to travel up to a court high enough to change precedent, and can cost up to or over a million dollars.</li> </ul>

Application exercise

In theory, parliament will always be the more responsive law-maker because it is a representative body and is answerable to the people at regular elections. The courts are independent and judges enjoy security of tenure, so in theory there is little incentive for them to try to reflect the wishes of the people when developing the common law. This is true to some extent, but it is overly simplistic. Parliament is accessible to the people through influences such as petitions and in-person lobbying of MPs, but it is also dominated by the party system and parties are beholden to their donors and supporters. Often party donors do not represent the wishes or best interests of the majority of people – the mining industry, for example, has a vested interest in encouraging laws that subsidise fossil fuels and discourage investment in clean energies. This is not in the best interests of the people, especially future generations who will suffer more powerfully the ravages of climate change. Judges, because they do not need to stand for election, are actually more able to take a wider range of views into account, and do not have the same financial motive when deciding which views to support in their decisions. It is true that judges are making legal decisions rather than subjective decisions, and they are also limited in their judgments to the arguments that counsel put before them, but every decision is to some extent a policy one: there will always be competing opinions and arguments submitted to the highest courts, and choosing which one to find in favour of will always go beyond the letter of the law. We saw this, for example, with the granting of native title in the *Mabo* decision. In practice, therefore, we may have greater everyday access to parliament, but it would not be fair to say that parliament always represents the wishes of the people and the courts do not.

- a. The above answer is a sample of a paragraph evaluation in an extended discussion. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths
  - weaknesses
  - introductory or topic sentences
  - concluding or summary sentences
  - examples
  - segues or linking sentences
  - integration of parliament vs courts
  - order of moving between parliament and courts
- b. Using the answer above as a sample, write a paragraph analysis of two other aspects of parliament and the courts as law-makers.

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## MINI-EXAM NO 3: UNIT 4

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

The mark and time allocation has been calculated on the basis of the examination average of 1.5 minutes per mark. The time allocation has been rounded up to an easy figure.

### Question 1

What is an express right? Outline one example of an express right in the Australian Constitution. (2 marks)

### Question 2

Describe one role of the High Court of Australia with respect to the Australian Constitution. (2 marks)

### Question 3

The Australian Constitution establishes the structure of the Commonwealth Parliament and outlines its roles and responsibilities.

Distinguish between exclusive and concurrent powers, providing an example of each. (3 marks)

### Question 4

The division of constitutional law-making power in the Australian Constitution no longer operates in the way it was intended in the 19<sup>th</sup> century when the Constitution was drafted.

- a. Comment on the impact of section 109 of the Australian Constitution. (3 marks)
- b. The division of law-making powers between the Commonwealth and the states can be altered by High Court interpretation of the Constitution. Describe one other method by which the division of powers may be changed. (2 marks)

### Question 5

The Prime Minister today announced her intention to put a referendum to the Australian people to increase the Commonwealth's law-making power with respect to public hospitals. The Leader of the Opposition suggested his party would be unlikely to support the move.

Discuss the significance of one referendum that protected or altered the Australian Constitution. (4 marks)

### Question 6

Source 1

No lawyer will need to be told that in these proceedings the Court is not called upon to decide whether the Gordon below Franklin Scheme ought to proceed. It is not for the Court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and expediency of the two competing courses are matters of policy for the governments to consider, and not for the Court. We are concerned with a strictly legal question — whether the Commonwealth regulations and the Commonwealth statute are within constitutional power.

Chief Justice Gibbs in the Introduction to his judgment in *Commonwealth v Tasmania* ('Tasmanian Dams Case')  
[1983] HCA 21 at p456

- a. Discuss the impact of one High Court case involving the interpretation of the Australian Constitution, with respect to its impact on the division of law-making powers between the Commonwealth and the states. (4 marks)
- b. Explain how the principle of representative government, as established in the Australian Constitution, impacts on the ability of parliament to act as a law-maker. (5 marks)

## MINI-EXAM NO 4: UNIT 4

Total marks = 30

Reading time: 10 mins

Writing time: 45 mins

*The mark and time allocation has been calculated on the basis of the examination average of 1.5 minutes per mark. The time allocation has been rounded up to an easy figure.*

### Question 1

#### Source 1

The following extracts are from the Victorian Law Reform Commission's page on its Medicinal Cannabis inquiry.

In December 2014, the Attorney-General asked the Commission to review the law to allow people to be treated with medicinal cannabis in exceptional circumstances.

The Commission's March 2015 issues paper identified two areas of investigation:

- How to define the exceptional circumstances in which a person should be allowed to use medicinal cannabis
- How the law could be amended to enable patients to obtain medicinal cannabis while continuing to prevent unauthorised access.

Our subsequent investigation drew on nine public consultations in metropolitan and regional Victoria and 99 public submissions.

#### Implementation

6 October 2015 – The Victorian Government announced that it fully accepted 40 of the Commission's recommendations and accepted two in principle. It announced that it would legalise access to medicinal cannabis in exceptional circumstances from 2017.

Source: <https://www.lawreform.vic.gov.au/all-projects/medicinal-cannabis>

- a. Explain the role of the Victorian Law Reform Commission in influencing a change in the law, with reference to an appropriate recent example. (3 marks)
- b. Describe one way in which individuals and groups can influence a change in the law, and discuss one weakness of this method of influencing legislative change. (5 marks)

### Question 2

Describe two features of the relationship between courts and parliaments as law-makers, using examples to illustrate your answer where appropriate. (4 marks)

### Question 3

“Most of the work of modern courts consists of applying and, where necessary, interpreting acts of parliament.”  
(The Hon Murray Gleeson, former Chief Justice of the High Court of Australia)

- a. What is statutory interpretation? (1 mark)
- b. Describe two reasons why statutes need to be interpreted, using examples. (4 marks)

### Question 4

Discuss the extent to which the doctrine of precedent allows courts to make and change the law. (5 marks)

### Question 5

“Without parliament to take the lead, courts are thoroughly ineffective law-makers and do not have the capacity to meet the law-making needs of our changing society.” Evaluate the truth of this statement and justify your conclusions. (8 marks)

## YOU BE THE ASSESSOR: UNIT 4

In this section, you are required to assess the responses presented for each of the questions. You should award the responses a score and justify your decision. Once complete, compare your assessment to that of the author (provided at the end of the Study Guide).

### Question 1

Explain one reason why laws may need to change. (2 marks)

*Sample answer 1:*

Laws may need to change for many reasons. One of these is changes in values. When the values of the community change, the laws that relate to that value may also need to change so that the law remains respected and followed. One example of this is the law relating to puppy farming, which was a change pursued by the Andrews Labor Government in 2016. In October 2016 the Government introduced the Domestic Animals Amendment (Puppy Farm and Pet Shops) Bill, which reduced the number of fertile female dogs a breeder can keep – among other changes.

Score out of 2: \_\_\_\_\_

Justification:

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*Sample answer 2:*

Laws may need to change because of changes in technology. As research and scientific knowledge improve, new ways may be found to infringe the rights of others or harm people; to continue protecting the public, new laws may need to be implemented to cover emerging threats. ‘Upskirting’ laws were introduced in 2008, for example, to criminalise intimate photos being taken of people in public places, using new technologies such as mobile phones and hidden cameras.

Score out of 2: \_\_\_\_\_

Justification:

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### Question 2

Identify one way in which individuals and groups could influence the Victorian Parliament to change the law, and evaluate one weakness of this method of persuasion. (4 marks)

*Sample answer 1:*

A petition is a request for a parliament to change a law within its jurisdiction, signed by members of the community. The petition must conform to the standing rules of the house in which it is being tabled, and petitions must usually be paper-based – although both houses are now able to accept online petitions, called e-petitions. Petitions can be supported by only one person, or they can be signed by tens or hundreds of thousands; each house of parliament can also receive many petitions on the same issue, arguing for contradictory measures to be taken. Petitions are usually easy to organise, and inexpensive, although the rules for them can be strict and can prevent many of the signatures from being counted in the final tally. This is one weakness of petitions as methods for influencing change. The benefit to these strict rules, though, is that the parliament will always know clearly what the petitioners want it to do regarding the law, as the request must be stated in clear and specific language, and it is very difficult for signatures to be falsified or obtained on fraudulent grounds – because, for instance, signatures must be original, and the request to parliament must be stated on every page of the petition.

Score out of 4: \_\_\_\_\_

Justification:

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*Sample answer 2:*

The media can be used by individuals and groups to influence the Victorian Parliament to change the law. One weakness of the media is that it unfairly privileges the point of view of powerful and wealthy interests in society, such as big business and individuals such as Gina Rinehart and Rupert Murdoch. A strength is that media can reach a wide audience in a very short space of time, simultaneously persuading people and communicating the wishes of the people to members of parliament.

Score out of 4: \_\_\_\_\_

Justification:

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**Question 3**

Why might a precedent established in the Victorian Supreme Court (Court of Appeal) not have to be followed by the Victorian Supreme Court (Trial Division)? (3 marks)

*Sample answer 1:*

The precedent would not have to be followed because the Court of Appeal is higher than the Trial Division in the Victorian hierarchy. The precedent would therefore be persuasive only, and only binding precedents need to be followed, in future cases with similar material facts.

Score out of 3: \_\_\_\_\_

Justification:

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*Sample answer 2:*

The Court of Appeal and the Trial Division are both part of the Supreme Court and are therefore equal in authority: neither can make a binding precedent for the other. This means that the precedent would only be persuasive, and the Trial Division would not need to follow it.

Score out of 3: \_\_\_\_\_

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*Sample answer 3:*

The Trial Division might determine that some part of the material facts of the case is not sufficiently similar to the original precedent case from the Court of Appeal, and might therefore distinguish the precedent.

Score out of 3: \_\_\_\_\_

Justification:

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*Sample answer 4:*

The precedent set by the Court of Appeal might be on an area of law that is entirely irrelevant to the case before the Trial Division. If this is the situation, the Trial Division will be under no obligation to apply it to the case. Alternatively, it may be on a relevant area of law but counsel for neither party might argue it to the judge in their submissions; or, parliament may have abrogated the precedent since it was made.

Score out of 3: \_\_\_\_\_

Justification:

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**Question 4**

The doctrine of precedent limits the role of the courts as law-makers. However, the courts can still make significant changes to the law.

Evaluate the extent to which the doctrine of precedent allows the courts to change the law. (8 marks) *2008 VCAA Legal Studies exam question*

*Sample answer 1:*

The doctrine of precedent is the system by which courts make law: courts can make law through either precedent or statutory interpretation. It is based on the principle of *stare decisis*, which means to stand by things decided – this ensures the law is applied with predictability and consistency, and is therefore fair to all people coming before the courts. The precedent is contained in the *ratio decidendi* of the court’s judgment, which is the reasoning behind the decision, and is a principle of law. That principle will be binding on all courts lower in the same hierarchy, but only when they are hearing a case with similar material facts. In addition, only superior courts of record (the Supreme Court and above) can set precedent, because they are the courts with greater authority and, unlike the County and Magistrates’, they publish their judgments in written form. Any comments made ‘by the way’ in the *obiter dicta* will not be binding; they will only be persuasive, and will therefore not be law and will not need to be followed. One example of binding precedent in action is the *Donoghue v Stevenson* case, otherwise known as the Snail in the Bottle case. In this case Donoghue sued Stevenson for negligence in the manufacture of a bottle of ginger beer, as she had been made sick by drinking one that had a partly-decomposed snail inside it. At the time there was no law of negligence, and Donoghue and Stevenson were not joined by a contract. The Privy Council in the UK was therefore asked to create a new legal principle: negligence. They did so, and four years later in Australia the same precedent was argued in the case of the Itchy Underpants, where Grant argued that Australian Knitting Mills was negligent because they failed to wash bleach out of their underpants before selling them. The Snail in the Bottle precedent was applied and AKM was found to be negligent. Courts have four ways to depart from precedent that is argued to the judge in the case: distinguishing, disapproving, reversing and overruling. Distinguishing is when the material facts of the cases are not sufficiently similar, so the court decides that the precedent is persuasive only. Disapproving is when a judge criticises the existing precedent in the *obiter dicta*. Reversing is when the precedent case is heard on appeal and the appellate judge determines that the legal principle was decided incorrectly, so they reverse it. And overruling is when a precedent is argued in a later case, to a higher court, and that court decides the legal rule was decided incorrectly at the time – they replace it with a new one. One example of a case in which precedent was overruled was the Mabo case, in which the High Court

overruled the existing precedent of *terra nullius* and replaced it with the new law of native title. Eddie Mabo had argued that the old precedent of *terra nullius* was incorrectly applied in Australia from the start, because the Aboriginal people lived on the land and had a complex system of social relations and property and land recognition. Australia was therefore not land ‘belonging to no-one’, and the British could therefore not claim it as their own. The High Court agreed, and overruled the precedent.

Score out of 8: \_\_\_\_\_

Justification:

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*Sample answer 2:*

The doctrine of precedent lends itself to incremental law changes, specifically when a gap has been left either deliberately or inadvertently by parliament, and when the courts have been requested to consider the area of law by a government or someone affected by it in the community. Outside of this, it quite strictly limits them. Firstly, the most important factor is that precedent can only be set when a case comes before the courts on a matter that is not already settled law: this is why the courts are called opportunistic law-makers, because the nature of precedent does not allow them to take the initiative and create law *in futuro* or without a case requiring resolution. Also, there must usually be something novel about the facts, someone with standing must have the money and time to bring the case forward, and it must usually be able to be appealed up to a court high enough to alter the existing law or set precedent if no law does exist. This is because precedent can only be set by superior courts of record (ie. the Supreme Court and above), and courts will also be prevented from creating or changing law if they are bound by the existing law. Precedent will be binding when it has already been set by a court higher in the same hierarchy than the current court, as long as the current court is hearing a case with similar material facts. Therefore, it will often be only the High Court, or at lowest the Court of Appeal, that will have the ability to alter existing precedent; or, at minimum the Trial Division of the Supreme Court, if the matter involves setting new precedent. An example of this is the Studded Belt case, in which the Magistrate’s Court had to follow the existing regulations that defined what a weapon was, even though the regulations were arguably outside the scope of the law they were relating to. It was only once the case was appealed to the Supreme Court that the court had the power to interpret the *Control of Weapons Act*, give meaning to ‘weapon’, and set precedent on its interpretation that invalidated that part of the regulations. All of these conditions mean that precedent is restricted to a narrow set of circumstances, which limits courts as law-makers. This is further complicated, too, by the fact that higher courts usually have panels of three or more judges sitting on the one case, and each of these judges can give her or his own separate judgment. Not only must lawyers and the public sift through sometimes hundreds of pages of judgment to figure out which part is the *ratio decidendi* – legal reasons for the decision – something that is difficult and confusing anyway; but sometimes the judges do not agree on the *ratio* for the case, even if they agree on the ultimate verdict. They might have slightly different legal reasons for that verdict. If every judge has a different *ratio* then the case as a whole cannot set precedent. Therefore, a similar legal principle needs to be present in the majority of judgments delivered by the court in order for any law to be created or changed. Judges can also be reluctant to take this step in their judgments, preferring to disapprove ineffective or outdated law in *obiter dicta* comments ‘by the way’, arguing that any actual change is more appropriately made by parliament, because parliament is the elected law-maker given the main job of making law by the Constitution and the separation of powers. Justice Dawson dissented in the Mabo case for this reason, and a majority of the High Court rejected the Trigwell claim on the basis that parliament should use its resources to research whether owners should be liable for their animals – not the courts. In the few cases that remain, though, as long as the court is willing to take more of an ‘activist’ role, the doctrine of precedent has many features that enable law to evolve. The Mabo case illustrated the power of the High Court to overrule past precedent that was considered to have been wrongly applied from the very beginning, when it invalidated the principle of *terra nullius* as it was originally applied to the “settlement” of Australia, and replaced it with the law of native title that required the British and Australian governments to have physically conquered any Aboriginal land they wanted to claim title to. This was a radical change in the law that arguably was only possible through the courts – parliament may never have considered it as a legal option, given MPs are not the legal experts that judges are, and the protection of minority rights in this way might have been considered too controversial for parliament to want to champion it. The rules of precedent and the nature of courts therefore do restrict law-making, but they do not entirely prevent it.

Score out of 8: \_\_\_\_\_

Justification:

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**Question 5**

A referendum proposal was voted on by the electors of Australia. Fifty-six percent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal.

Was the referendum passed? Justify your answer. (3 marks) *2016 VCAA Legal Studies exam question*

*Sample answer 1:*

This referendum was not passed. It failed because it failed to achieve a double majority 'yes' vote: only three states voted in favour of the proposal, which is not the majority of four minimum that is required.

Score out of 3: \_\_\_\_\_

Justification:

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*Sample answer 2:*

The referendum proposal passed because it achieved the required double majority outlined in s128 of the Constitution. A double majority requires that a nationwide majority of voters must say 'yes' to the proposal, in addition to a majority of voters in a majority of states. Here, 56% is a nationwide majority, and five out of eight states voted in favour, as well. Thus, it would receive royal assent and the wording of the Constitution would be changed.

Score out of 3: \_\_\_\_\_

Justification:

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**Question 6**

How are powers divided by the Constitution between state and federal parliaments? In your answer, explain the mechanism used to resolve conflicts between state and federal law. (5 marks)

*Sample answer 1:*

The Constitution contains a division of law-making power that allocates powers to each of the state and federal parliaments. Specific powers are divided into concurrent and exclusive powers: concurrent powers are powers shared between the parliaments, such as marriage and education; exclusive powers are powers that can only be exercised by the federal parliament, such as immigration and terrorism, and on which no state can pass law. Most exclusive powers are made exclusive by a second section of the Constitution that takes the power away from the states, although some are expressly stated to be exclusive in the Constitution and others have been found to be exclusive in nature by the High Court. Residual powers are all powers that were left with the states at federation, such as healthcare and roads. If there is an inconsistency between a law of a state and a law of the Commonwealth, the latter will prevail and the former will be invalid. In other words, the federal law will override the state law on that area.

Score out of 5: \_\_\_\_\_

Justification:

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*Sample answer 2:*

The constitutional division of power lays out the areas in which the state and federal parliaments can each make law. The specific powers of the Commonwealth were given to it at federation, and were listed in the Constitution – mainly in s51, and known as heads of power. They include topics such as marriage and taxation, and can be held either exclusively by the Commonwealth or concurrently with the states. Exclusive powers were those matters given to the Commonwealth and simultaneously taken away from the states, and include expressly exclusive matters such as customs and excise, as well as exclusive powers by implication such as coining money. Concurrent powers such as taxation were given to the Commonwealth but also retained by the states, giving them both law-making power, and it is here where conflict can occur between laws. If a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail and the state law will be invalid – overridden by the federal one – to the extent of the inconsistency. This is provided for in s109, which is called the inconsistency rule. Residual powers are the final category, and these are the law-making areas left with the states at federation; they include areas such as education, are not listed in the Constitution, and only the states can make laws regarding them.

Score out of 5: \_\_\_\_\_

Justification:

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# EXAMINATION ADVICE

## RECOMMENDED ADMINISTRATION

Legal Studies is a content-heavy subject. If students want to perform at the top end, then organising notes and developing a revision programme from the first day will be invaluable in the long run.

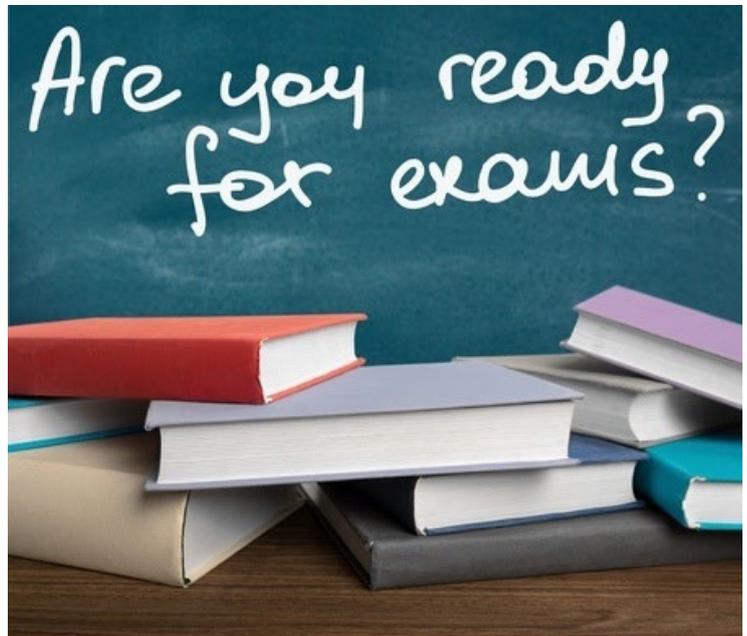
### Notes organisation

#### Class folder

For instance, you don't need to take your years-worth of notes and work to every class. In the final years of high school students should ideally move to a model of working in which their private study space – usually at home – is their focus, and they only take to class, lectures, tutes etc what they need for that day.

- Lined paper.
- Plastic pockets for new handouts.
- Only the current notes.
- Textbook if required for that lesson.

For many students, the textbook will be used more at home than at school. After all, more study and revision ought to be done at home than there is time for during scheduled classes. Many students will therefore be able to bring no more than a small display folder or ring-binder to class.



#### Revision folder

Every piece of new material should then be brought home and integrated into the existing notes. The goal of the year is to produce, by the end, a personal 'textbook' with a uniquely-tailored set of notes: the best material from class, combined with the best material from the textbook, combined with the best material from tutes, lectures, and any other sources. This material should include a combination of required subject keywords/definitions and wording that makes sense to you, the student; it should be edited to include only what you might reasonably need in the examination (plus a touch extra, just in case); and it should be laid out clearly with headings and sub-headings, in a way that helps you remember it.

It is recommended that you keep a large ring-binder folder at home, with five dividers: one for each Area of Study, plus a fifth for examination revision. Before the dividers should be a sheet with task word definitions.

Within each AOS:

- A one-page outcome summary, noting every topic for that outcome.
- A glossary of special terminology for that outcome.
- Topic summaries: your notes, in which you write *your* version of the course. These will often be prepared on the computer, but can be printed out once they are completed – hard copies are often easier to use for memorising.
- Past exam and practice SAC questions for that outcome.
- Sample answers and your own practice answers for that outcome.
- Lists of reminders to yourself about common mistakes in that outcome.

The examination section will hold copies of sample examinations and practice examinations, along with any feedback or lists of things you need to work on.

## Task words

Your task word definition sheet should ideally be split into four categories, because there are four basic types of task word.

The following is a summary:

CATEGORY	APPROX MARKS	EXAMPLES	MEANING
Category 1 Basics	1-2 marks	Define Outline Identify "Would" something happen or be true/false: yes or no "Could" something happen: yes or no	Just give the answer, usually in a full sentence with at least one synonym of the answer to demonstrate knowledge.
Category 2 Details	2-4 marks	Explain Describe Illustrate	Give the answer, as in Category 1. Then supplement the answer with detail and/or an example.
Category 3 Connections	3-8 marks	Compare Contrast Differentiate Synthesise	Show very clearly the connections between two or more things or topics – often these will come in the form of similarities and differences.
Category 4 Opinions	4-10 marks	Discuss Analyse Evaluate Critically examine To what extent... "Should" something happen	Engage thoughtfully with arguments relating to an opinion. Sometimes you will be asked to give that opinion; other times it will be given to you in the question.

## ENGAGE IN CONSTANT REVISION

Revision should start from Day 1. Each and every week you should add to and edit your own notes, keeping detailed Topic Summaries. It will be much easier to review and remember the course if it is split logically into headings and sub-headings in your own words than if it is still in the textbook (no matter how great that textbook is), and *especially* if it's otherwise split across a few jumbled sources such as the textbook, class notes and worksheets, online forum conversations and private notes.

Your notes should use many detailed headings and sub-headings, and should avoid large blocks of text. You should consider, when writing them, how the information will probably be structured in an exam answer, and how many marks you could reasonably expect to get from it – this will help you decide if it's too wordy. You can also annotate your own summaries with common questions for that topic and a likely allocation of marks, to make them even more exam-focused.

You may also want to consider the following:

- Prepare a diagram or a flow chart so you have a visual representation of a topic. Colour-coding information is also helpful.
- Identify cases and examples that are appropriate for each topic area, and identify opportunities to use the same case study in more than one topic.
- Prepare a table of cases with brief factual summaries, the legal impact of each and the topics in which they can be used.
- Prepare a table of acts with brief content summaries and the topics in which they can be used.
- Maintain a continually-updated list of recent changes to the legal system, linked with the topics where they are relevant. The four Legal Updates published by CPAP each year can help with this: check if your school has a subscription.

These items should be prepared as early in the year as possible, so that maintaining them takes minimal effort – they should be revised and updated bit-by-bit each week. The ability to cite from cases, mention acts of parliament and use correct legal terminology (and Latin phrases) demonstrates a deeper understanding of the topics, and can be the factor that separates a 6/6 answer from a 5/6 answer.

## Practice questions

You should see a number of Legal Studies examinations and practice SACs. There are three excellent reasons to do practice questions:

1. To help you remember the material.
2. To perfect your reading and understanding of questions, and how the marks are broken down within them.
3. To perfect your answering of questions: the clarity of your wording, the accuracy of your content, the clarity of your structure and your time management.

### Remembering

- Jumping to practice questions doesn't work until you know the material roughly 75% well. If you don't remember the content yet, you risk writing dozens of terrible answers. Instead, use other memory techniques – one of which may be doing questions *with* your notes, moving back and forth between your notes and your answer, seeing how much you can remember each time.
- Once you remember most of the material, however, you can drill it into your brain and muscle memory through practice and repetition.

### Processing

- Read as many questions as possible, and ask yourself what they are asking for in response.
- Identify the task word used: for example, do they want you to outline, describe, explain, evaluate or compare? Know what each type of task word requires you to do.
- Identify the content that is connected to that task word: for example, are you outlining two sanctions; describing the impact one High Court case had on the division of legislative power; explaining one reason why laws may need to change; evaluating the effectiveness of the jury system; or comparing mediation and arbitration as dispute resolution methods? Limit yourself to what the question asks for and don't include material that isn't allocated marks.
- Do dot-point breakdowns of each question, identifying where each mark comes from. Task words such as outline and identify will have fewer marks allocated to them than task words such as compare and evaluate, for example, if multiple task words are together in one larger question. Within a task word such as 'define' you should also think about whether the first mark comes from the definition and the second mark comes from detail or an example, too.
- You can use your Topic Summaries for these tasks, because the focus is reading the question properly rather than memorising the content.

### Responding

- Sit down and answer, in handwriting, as many questions as possible.
- If you are answering an entire exam, allocate reading time of 15 minutes, during which no marks may be made on the paper at all. Then allocate a writing time of 120 minutes: don't give yourself extra time, don't take a break, don't have music or the TV on, and turn your mobile off. Allocate your time as you would in the examination.
- Find out what the examiners are looking for by reading assessment reports and answer schemes or suggested answers from external examinations – CPAP examinations, for example, all come with broken-down mark allocations, suggested answers and feedback from past exams.
- Mark your own questions from your Topic Summaries, swap examinations with a friend to peer-mark them, and give practice questions to your teacher for feedback.
- You don't need to sit entire examinations every time – just make sure that, before you start, you count up how many marks you are doing and multiply the marks by 1.5 minutes to find out the total time you have for writing. Giving yourself 5-10 minutes reading time for a shorter writing session is standard.

## THE FINAL EXAMINATION

### Overview

#### Description

The examination will be set by a panel appointed by VCAA. All the key knowledge and key skills from all outcomes in Units 3 and 4 are examinable, and students will not be given a choice regarding which questions or topics they wish to answer.

The *VCE Legal Studies Study Design 2018-2023* is the document for the development of the examination. All outcomes of Units 3 and 4 of the Study Design will be examined, and any content specifically listed in the Study Design can be the direct focus of a question.

## **Format**

The following information is up-to-date as of January 2023.

- The examination paper will remain in its current format as a question-and-answer booklet, with lines provided for each question and extra space given at the back of the booklet.
- The examination will consist of a balance of short answer, multiple-part and extended response questions.
- The paper will be divided into two sections of equal marks. All areas of study can be assessed in either section, and the questions and task words will be similar across both sections.
- The total marks allocated for the examination will be 80.
- Approximately 40 marks will come from Unit 3, and approximately 40 will come from Unit 4.
- All questions in the examination will be compulsory. There will be no choice given as to which questions to answer – unlike in the examinations from 2010 and before.
- There will be one extended response question worth 10 marks at the end of Section A of the examination. There will be no choice of topics for students. This question will be drawn from Unit 3 or 4, or both.
- The examination paper may include questions that refer to stimulus materials such as newspaper articles, extracts from reports or case study materials. Section B will be entirely scenario-based.

## **Conditions**

Duration: 15 minutes reading time, followed by two hours writing time. During reading time no marks may be made on the page or on any loose paper. These conditions have been confirmed for the 2018-2023 Study Design.

Length: 80 marks. This means that students have approximately 1.5 minutes to answer each mark, although more time per mark should be spent on longer questions that require detail and elaboration, with less time per mark spent on shorter questions that require only rote-learning or definitions.

Date: This date is published annually by the VCAA, and an up-to-date version of the examination timetable will be found on the VCAA website once it is published: always refer to this rather than trusting any timetable printed out by someone else. The Legal Studies examination *in 2022* was held on the Wednesday afternoon two weeks after the written English examination – it may change slightly, but the timing has been fairly consistent over the years.

VCAA examination rules will apply. Details of these rules are published annually in the *VCE and VCAL Administrative Handbook*. Examples of these rules for Legal Studies are that no calculators, dictionaries or study notes may be taken into the examination. VCAA publishes specifications for all VCE examinations on the VCAA website. Examination specifications include details about the sections of the examination, their weighting, the question format/s and any other essential information.

The examination will be marked by assessors appointed by VCAA – not by your teacher. Your examination will be marked by at least two independent assessors, and up to five independent assessors. The focus of these multiple assessments will be on reaching agreement on your mark and ensuring you have received every opportunity to be awarded marks.

## **Contribution to the final assessment**

The examination will contribute 50% to your final Study Score.

How well your school performs in the examination will also be used to calculate your Study Score, however, as it is used to moderate your SAC scores. In other words, if your school performs very well in the examination, your SAC scores *may be* increased to reflect that. They may also be lowered, if your school cohort in general does *not* perform as well on the examination as they did in their SACs.

## **VCE Examination Papers**

Examination papers for all studies are published on the VCAA website, and the Legal Studies ones can be found at: <https://www.vcaa.vic.edu.au/assessment/vce-assessment/past-examinations/Pages/Legal-Studies.aspx>

Students should read through past papers and assessment reports to get a feel for the types of questions that are asked, the task words (such as 'explain' and 'evaluate', etc) used, and the marks that are commonly allocated to each topic.

When studying past examinations, it is important to keep in mind that before 2011 (ie. from 2010 and earlier) the examination was only worth 60 marks, and a choice of the final 10-mark question was given. There will also be some content on exams prior to 2018 that is no longer examinable on the current Study Design, such as the jurisdiction of courts.

If students sit old examinations – which is highly recommended – questions on old content should be replaced by similar questions worth the same number of marks, and students should answer *both* 10-mark questions in pre-2011 exams to bring the total marks up to 70 – 15 minutes can be removed from the writing time if students wish to retain the 1.5 minutes per mark standard, but answering two 10-mark questions is challenging enough that this may not be necessary.

## MINI-EXAM NO 1: UNIT 3 – MARKING GUIDE

### Question 1

Outline two advantages of having a court hierarchy for criminal disputes. (2 marks)

- 1 mark Name one advantage and outline it in one good sentence.  
1 mark Name a second advantage and outline it in one good sentence.

The following are examples of answers that might be given:

- ✓ A court hierarchy allows for appeals to occur. If one party is unhappy with an element of their case they can have the issue examined by a more experienced judge in a higher court.
- ✓ A court hierarchy allows for specialisation. Each level of courts develops expertise in cases assigned to its jurisdiction, which should result in consistency in decisions and allow court personnel to be more familiar with law and procedure relevant to their cases.
- ✓ A court hierarchy allows for the doctrine of precedent to operate. Common law principles established by higher courts will be binding on lower courts, promoting consistency and predictability in the application of law.

Answers do not necessarily need to refer to *criminal* disputes specifically, but the best ones will. For full marks, answers must not refer to civil disputes, however.

### Question 2

Jane is 19 years of age and has been charged with committing a robbery of goods to the value of \$15,000. Her lawyer is seeking to have the case heard summarily, as it is a minor indictable offence.

Explain one benefit to Jane of having her case settled summarily. (2 marks)

- 1 mark A demonstrated understanding of what it means to have an offence settled summarily: having an indictable offence heard summarily means a person is seeking to have an indictable offence dealt with as if it were a summary offence and held in the Magistrates' Court – not in the County Court.  
1 mark Identifying one benefit *relevant to Jane* of having a case heard summarily.

Sample answers for benefits to Jane that could be used include:

- ✓ Having the matter heard in the Magistrates' Court means Jane will have it dealt with more quickly than in the County Court because of limited pre-trial procedures and a lack of full trial procedures such as jury empanelment and cross-examination of witnesses. The Magistrates' Court also has shorter waiting time for matters coming before it.
- ✓ Having the matter heard in the Magistrates' Court means Jane will benefit from having it heard more cheaply than in the County Court, as she can easily be represented by a solicitor so does not need to pay for an experienced barrister in addition to their solicitor. The shorter hearing also reduces legal costs.
- ✓ Having the matter heard in the Magistrates' Court means that no jury will be used and the verdict will be handed down by the judicial officer (ie, the magistrate) alone. The magistrate, unlike the jury, will give Jane reasons for their verdict, and is an experienced professional well-trained in law and understanding evidence.
- ✓ Having the matter heard in the Magistrates' Court means that the maximum penalty Jane may receive will be less than the penalty that may be applied by the County Court. The Magistrates' Court cannot hand down a sentence of longer than two years, for example – while the County Court can hand down life sentences.

The question uses a specific factual scenario, therefore the answer must make reference to this in some way.

### Question 3

The jury is the "heart and lungs of liberty." (John Adams, 2<sup>nd</sup> President of the United States, 1774)

Outline one responsibility of the jury in criminal trials. (2 marks)

- 1 mark An outline of one responsibility of the jury during trial.  
1 mark Further detail or elaboration on this one responsibility.

Responsibilities could include:

- Listening carefully to all the evidence presented by both sides.
- Deliberating carefully to reach a verdict.
- Trying to understand the law as explained by the judge, and asking any questions of the judge that are necessary for this understanding.
- Limiting access to outside opinions and information, including not conducting any private research.
- Remaining impartial at all times and not taking sides – other than on an objective assessment of the evidence.

Note that one responsibility could be elaborated on with reference to other responsibilities. Students should be careful that they do not write in such a way as to be listing multiple responsibilities, however. Note also that 'responsibilities' can relate to a single juror or the entire jury panel, and that they are broader than simple 'role' of the jury.

### Question 4

Explain what the legal system is aiming to achieve through imposing sanctions in criminal cases. In your answer use two examples of sanctions. (4 marks)

- 2 marks An outline of two or more aims of criminal sanctions. All five aims do not need to be addressed, as lists of names without any descriptions are not appropriate answers. It is better to provide fewer, but with some context or description.  
2 marks The content of two criminal sanctions, linked with one or more of the aims. Merely naming them is not enough. Merely naming two should receive one mark out of the 2 marks.

The aims of criminal sanctions are to:

- Punish the offender by causing her or him to suffer some hardship.
- Deter others from committing the offence, or to discourage the offender themselves from reoffending.
- Rehabilitate the offender by helping them to learn from their mistakes and improve their behaviour.
- Denounce the behaviour by sending a message to society that the behaviour is unacceptable.

- Protect the community by making it difficult for the offender to commit further crime.

Sample material that could be provided on criminal sanctions includes:

- ✓ Imprisonment is where an offender is detained in jail for a period of time, called a 'sentence'. They lose their liberty and other freedoms. This is considered the most serious sanction and is called the 'sanction of last resort'.
- ✓ Fines are monetary penalties, where the offender pays a sum of money to the court fund. Fines are calculated in 'penalty units', with one penalty unit being equal to \$184.92 (from 1 July 2022 until 30 June 2023).
- ✓ Community corrections orders are sentences that are mainly served in the community, but that may be combined with up to 1 year imprisonment. A wide range of conditions can be imposed, including rehabilitation programmes, unpaid community work or restricted movement.

#### Question 5

a. *Discuss to what extent the committal proceedings contribute to an achievement of the principles of justice. (4 marks)*

- 0 marks An opinion in response to the question that clearly states to what extent they contribute. Answers cannot receive full marks without this.
- 1 mark References made to two or more principles of justice.
- 1 mark One or more arguments in support of the opinion given.
- 1 mark Relevant use of the source(s).
- 1 mark Further detail and/or arguments in response to the opinion given; these may be arguments that counterbalance and relate to the opposite side of the opinion.

Arguments that could be made include:

- ✓ The hearing protects the defendant's right to be presumed innocent, by forcing the prosecution to prove they have sufficient evidence to justify trial. The OPP references this priority in their Policy Paper.
- ✓ The hearing enables the defendant to prepare properly for trial by allowing them to see the evidence against them. This levels the playing field a little – which is necessary, as it is one individual against the state. The OPP acknowledges that magistrates play an "essential role" in disclosure of evidence.
- ✓ The DPP has the power to override the magistrate's findings, and push a case to trial even if the magistrate dismisses it at the committal. This undermines the role, authority and independence of the magistrate and the committal.
- ✓ The committal does not promote a fair and equal hearing, as the defendant does not need to show any of their evidence: they therefore receive an advantage.

Note that the opinion on 'to what extent' is required material for full marks, but it itself is not allocated any marks. Many students will write something fairly vague such as "to a significant extent" – this alone does not convey enough knowledge or argument to receive independent marks.

b. *Comment on the desirability of the criminal justice system's focus on facilitating guilty pleas. (3 marks)*

- 0 marks An opinion in response to the question that clearly states a position on the desirability. Answers cannot receive full marks without this.
- 1 mark Correct factual detail on the use of guilty pleas.
- 2 marks A demonstrated ability to use factual information and material from the source(s) in subjective arguments and comments.

A sample answer might read:

- ✓ Allowing the sentencing judge to reduce sentences in response to guilty pleas can permit a sophisticated offender or legal representative to 'play' the system and obtain a lower sentence for ticking procedural boxes – even if the crime was committed with malice and had a serious negative impact on the victim and society. The OPP's Policy Paper acknowledges that one purpose of a committal is to encourage a resolution pre-trial, so offenders can negotiate early guilty pleas that even avoid jail time, despite not having any remorse. The leading precedent on mitigating factors instructs judges to reduce the sentence in response to a guilty plea "regardless of whether or not it reflects or is accompanied by evidence of remorse or contrition." We have accidentally created a system that pushes innocent people to plead guilty and guilty people to avoid full responsibility.

Note that the opinion on desirability is required material for full marks, but it itself is not allocated any marks. Many students will write something vague such as "fairly desirable" – this alone does not convey enough knowledge or argument to receive independent marks.

c. *Identify two problems that can affect the achievement of the principles of justice by the criminal justice system. For each problem identified, provide one change or proposed change, and explain how that change or proposal has improved, or would improve, the legal system. (8 marks)*

- 1 mark An outline of one problem. The problem must be fairly specific, or be a general problem that is supported by some specific evidence; merely stating 'expensive' or 'time-consuming' is not enough.
- 1 mark An outline of one solution. The solution must be fairly specific, or be a general change that is supported by one or more specific examples. It must also relate in some way to the problem identified.
- 1 mark An explanation of how that solution would, or did, improve the legal system.
- 1 mark Further detail on the problem, the solution, or both. Use of the source(s) should also be considered here. This mark will differentiate mid-range answers from top-tier answers.
- 4 marks Repeat the above for a second problem and solution.

Note that no marks are allocated for use of the sources, because they do not need to be used in both parts of the answer, and could be used in either the 'problem' section or the 'improvement' section. The answer *overall* must use at least one of the sources, however.

Reference must be made in each section to one or more principles of justice, however the reference does not need to be extensive and the principle itself does not need to be defined.

Problems outlined may include:

- ✓ The high cost of legal proceedings due to court filing fees and legal representation.
- ✓ Unequal legal representation resulting in a lack of equal opportunity for parties to effectively present their cases.
- ✓ The procedure of oral examination and cross-examination intimidating witnesses and making it more difficult for them to give evidence effectively.

- ✓ Lack of reasons given by the jury making it difficult to appeal a jury verdict and correct possible errors made.
- ✓ Lack of reasons given by the jury making it difficult to see if the verdict was based on an accurate understanding of the law and evidence.
- ✓ The adversarial nature of trial destroying ongoing relationships between parties and making compromise difficult.
- ✓ Extensive pre-trial procedures lengthening the duration of the dispute, especially if they include a committal in which the magistrate initially dismissed the charges.
- ✓ Strict rules of procedure making it difficult to cater to the needs to different cultures or people with varying disabilities or special needs.

Changes will need to be selected so that they relate to the problem outlined. Proposed solutions will also need to be selected so they relate to the problem outlined. It will not be sufficient to simply name or describe a reform without explaining how it would address, at least in part, the problem identified.

## MINI-EXAM NO 2: UNIT 3 – MARKING GUIDE

### Question 1

a. Explain the main purposes of one civil remedy. (3 marks)

- 1 mark An identification of one remedy.
- 1 mark An identification of two or more purposes. This may be woven into a definition of the remedy but, if so, there must still be enough written to warrant both marks being given.
- 1 mark Relevant use of the source.

A sample answer might read:

- ✓ In civil cases, including class actions, the courts will often award compensatory damages. Compensatory damages are payments of money designed to reimburse the plaintiff and group members for a specific loss (eg medical bills, loss or income) or a general loss (eg loss of enjoyment of life, pain and suffering). The purpose of awarding damages is to attempt to make up for – compensate – that loss; oftentimes the loss cannot be *restored* by money alone, which is why compensatory damages give general compensation by awarding the plaintiff money that is of roughly equal value.

b. Describe the meaning of the burden and standard of proof as they apply to civil trials. (4 marks)

- 1 mark An explanation of the burden of proof: that it is the responsibility of the plaintiff to bring evidence to support the claims made.
- 1 mark An explanation of the standard of proof: that the plaintiff will need to bring a certain level, weight or quality of evidence to the court before they have discharged their burden and proved their case.
- 1 mark Detail on what that standard is: specifically, that the standard of proof is on the balance of probabilities.
- 1 mark Relevant use of the source, such as that the plaintiff and group members will bear the burden of proof if the class action goes to trial.

Material on civil trials must be included. Any material on criminal trials in addition to this should be disregarded.

c. Comment on the extent to which two pre-trial procedures involved in a civil trial in the Supreme Court achieve the purposes of pre-trial procedures. (4 marks)

- 1 mark A subjective comment on how or whether one procedure achieves one purpose of pre-trial procedures, using material from the procedure to illustrate.
- 1 mark Relevant use of the source.
- 2 marks Repeat the above for a second procedure.

A sample answer for one procedure might include the following:

- ✓ Discovery works to increase party knowledge of the dispute and transparency in relation to the strength of each side. Parties, once they have seen the evidence held by the opposition, are able to go into the trial with full knowledge of what they must defend against or argue, and there are no surprises if disclosure has been frank and done in good faith. This can cost many thousands of dollars in solicitor fees and disbursements, and discovery in class actions can be limited in that not all group members participate in full discovery, so the defendant can feel like there is an element of surprise.

The challenge in this question will be for answers to link content and purpose/argument. Answers that focus only on the content of the procedures but do not link this content to purposes cannot receive full marks; answers that focus only on purposes but do not illustrate these purposes with any detail from the procedures also cannot receive full marks.

### Question 2

Differentiate between the responsibilities of the parties in the civil justice system and the responsibilities of the parties in the criminal justice system. (3 marks)

- 1 mark That the parties to a civil case have equal and statutorily-defined responsibilities and rules that govern their conduct, whereas the parties to a criminal matter do not have these defined duties in legislation and do not have equal rules. Students may illustrate this with a small amount of detail on the paramount duty and ten overarching obligations, or they may name the *Civil Procedure Act 2010* (Vic). Note that this is *not* the same as saying that parties to a criminal matter have no duty to the court: they do. Legal representatives for both parties in every type of case have a general primary duty to the court and to justice.
- 2 marks At least one additional difference, which may include the role of the prosecution as representing the state and the public at large, which is different from the role of the plaintiff in representing themselves.

### Question 3

Michael was defamed by an article in a local newspaper. He commenced legal action in the Supreme Court. "I will be glad when this is all over. It took months to come to trial and cost me tens of thousands of dollars. I wish there was a better way to achieve justice," he said. Recommend two non-judicial ways Michael might have chosen to resolve his dispute instead of going to trial. (4 marks)

- 0 marks A clear recommendation of two ways. Answers cannot receive full marks without this.
- 1 mark Naming one way and outlining key features regarding the aim and/or process of the way. The role of the third party is usually important here.
- 1 mark Providing at least one advantage of this choice for resolution. This advantage must reference Michael's case in some way.
- 2 marks Repeat the above for a second way.

The word 'way' has been used deliberately here because it is a very open term: it includes both methods and venues. Answers may therefore focus on methods of dispute resolution, or on places and organisations Michael may have gone to.

Sample answers could include:

- ✓ Mediation is a cooperative method of resolving disputes. It involves a joint problem-solving process utilising one or two independent third parties. The mediator will not interfere or give legal advice, but will allow Michael and the newspaper to have control of their dispute, which may increase party satisfaction and encourage a resolution that both are happy with going forward. The mediator's role is to ensure that both parties are being heard – this is not always the case in court hearings, where the newspaper may have a better understanding of rules of procedure than Michael.
- ✓ Arbitration is not as formal as judicial determination, which may make Michael happier that the truth and different perspectives on the dispute have been examined. The role of the third party is to listen to the facts of the dispute and encourage the parties to reach a settlement, which the arbitrator will confirm. If a settlement is not forthcoming, the arbitrator will make a decision on behalf of Michael and the newspaper, which gives the best of both worlds.

Note that the recommendations are required material for full marks, but are not themselves allocated any marks. Simply choosing two non-judicial options does not convey enough knowledge or argument to receive independent marks, however it is a prerequisite for answering the question fully. Note also that Michael's scenario must be used in the answer in some way.

The use of arbitration will usually only be permitted if the defamation relates to an existing contract with an arbitration clause. The scenario doesn't give enough information to judge whether or not this is the case, so there is nothing to exclude it as a possibility.

### Question 4

Critically examine the accessibility of justice in the civil justice system, and provide one recent or recommended reform that addresses the question of accessibility. (5 marks)

- 0 marks A clear opinion in response to the question, giving a position on how accessible civil justice is.
- 1 mark One or more arguments that support accessibility, regardless of whether the overall opinion is negative.
- 1 mark One or more arguments that criticise accessibility, regardless of whether the overall opinion is positive.
- 1 mark Information on one reform that goes beyond merely providing its name.
- 2 marks Further detail on any part or parts of the answer.

Arguments on accessibility may be taken broadly from any aspect of the civil justice system. For instance:

- ✓ Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it, will affect their ability to meaningfully access justice.
- ✓ Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can't afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.
- ✓ Whether or not someone has access to locations where dispute resolution can occur will affect their ability to access justice. If this location is a physical place or building, the layout and design of the place may help or hinder individual access. For instance, whether it uses ramps or stairs.
- ✓ Each place where justice is administered will have its own environment and culture. This is created by the design of the location, the way in which people are treated when they are there, the rules people are expected to follow, and the procedures that occur during the resolution. If these are compatible with someone's expectations and what they already understand and feel comfortable with, they will have better access to justice; if someone doesn't understand the rules or feels confused, intimidated or offended by them, they will have comparatively reduced access.

Reforms must be linked back to the question of accessibility but, based on the wording of the question, they do not need to specifically relate to the exact aspects of accessibility mentioned in the first part of the answer.

Note that the opinion is required material for full marks, but it itself is not allocated any marks. Many students will write something fairly vague such as "to a limited extent" – this alone does not convey enough knowledge or argument to receive independent marks.

## MINI-EXAM NO 3: UNIT 4 – MARKING GUIDE

### Question 1

What is an express right? Outline one example of an express right in the Australian Constitution. (2 marks)

1 mark A definition of 'express rights'. This definition must include the fact that the right is explicitly written in the Constitution.

1 mark An outline of one of the five express rights. It must be more than merely named, but extensive detail does not need to be provided.

The five express rights are:

- ✓ Right to trial by jury for Commonwealth indictable offences (s80).
- ✓ Right to receive just terms when property is compulsorily acquired by the Commonwealth (s51(xxxi)).
- ✓ Freedom from Commonwealth legislation establishing a state religion, banning a religion, forcing a compulsory religious observance, or setting a religious test for a Commonwealth government job (s116).
- ✓ Freedom from discrimination based upon out-of-state residence (s117).
- ✓ Freedom of interstate trade – particularly from taxes or restrictions on the flow of goods or movement (s92).

### Question 2

Describe one role of the High Court of Australia with respect to the Australian Constitution. (2 marks)

1 mark The identification of one role.

1 mark Further detail on this role OR an example of it being performed.

Sample answers might read:

- ✓ The Court can change the meaning and scope of the rights in the Constitution by changing their interpretation of them. For example, prior to 1988 and the *Cole v Whitfield* decision, the s92 right to free "intercourse among the states" had a much broader meaning that included a person's right to freedom of movement.
- ✓ The Court can force the executive government to change its policy, if the application of that policy infringes constitutionally protected express or implied rights or structural protections for the community.
- ✓ The Court can use its s76 power to interpret the meaning of words in the Australian Constitution, and this interpretation might narrow or broaden the scope of the statute. One example of this is in the Court's interpretation of the Commonwealth's powers.

### Question 3

The Australian Constitution establishes the structure of the Commonwealth Parliament and outlines its roles and responsibilities.

Distinguish between exclusive and concurrent powers, providing an example of each. (3 marks)

1 mark Identifying the fact that exclusive powers can only be exercised (legislated on) by the Commonwealth Parliament, whereas concurrent powers can be exercised by both state and Commonwealth parliaments.

1 mark An example of an exclusive power.

1 mark An example of a concurrent power.

Note: 'Distinguish' requires students to do more than merely list two concepts – responses must emphasise and clearly state the difference between them.

A sample answer might read:

- ✓ Exclusive powers only belong to the Commonwealth, whereas concurrent powers are shared. Exclusive powers are those specific powers of the Commonwealth that only the Commonwealth Parliament may exercise, such as power over currency and the defence forces. By contrast, concurrent powers are those law-making powers, mainly in s51, that are shared between the Commonwealth and the states, such as the power to make laws about taxation.

### Question 4

a. Comment on the impact of section 109 of the Australian Constitution. (3 marks)

1 mark Answers must identify that laws passed by state parliaments can be declared invalid (either wholly or in part).

2 marks At least two further relevant content items or arguments.

Further points could include:

- ✓ An explanation of how s109 is limited to areas of concurrent power.
- ✓ A case example used to illustrate the answer.
- ✓ The various ways in which an inconsistency in laws could occur.

b. The division of law-making powers between the Commonwealth and the states can be altered by High Court interpretation of the Constitution. Describe one other method by which the division of powers may be changed. (2 marks)

1 mark The identification of one other method.

1 mark Further detail on that method; an example may be used to provide that detail.

A sample answer might read:

- ✓ The division of law-making powers can be changed from what it was believed to be by the Commonwealth ratifying an international agreement that allows it to legislate in an area previously thought to be residual. For instance, in the *Koowarta Case* the treaty permitted the Commonwealth to take some jurisdiction over racial discrimination.

The people changing the wording of the Constitution and adding or removing a specific power through referendum would also be an appropriate choice.

### Question 5

The Prime Minister today announced her intention to put a referendum to the Australian people to increase the Commonwealth's law-making power with respect to public hospitals. The Leader of the Opposition suggested his party would be unlikely to support the move. Discuss the significance of **one** referendum that protected or altered the Australian Constitution. (4 marks)

- 1 mark An identification of the topic of the referendum.
- 1 mark Whether that referendum changed the wording of the Constitution or whether it was rejected by the people.
- 2 marks One or more comments on the impact or significance of the outcome.

A sample answer might read:

- ✓ The Aboriginal Advancement, or "race power," referendum changed the division of power by deleting wording and removing a Commonwealth restriction from the Constitution. Prior to the referendum, the s51(xxvi) 'race power' empowered the Commonwealth to make laws for all races of people *other than* the Aboriginal race; this was an express restriction on Commonwealth power. In 1967 the people approved the change, which had the impact of giving the Commonwealth additional concurrent powers that it could then use to challenge inconsistent state laws in the federal courts. The Commonwealth could use this power to pass laws that protected the rights of Indigenous people expressly, but it could also use it to pass laws that targeted Indigenous people and arguably worked against recognition of First Nation rights – such as the intervention in the Northern Territory.

### Question 6

a. Discuss the impact of **one** High Court case involving the interpretation of the Australian Constitution, with respect to its impact on the division of law-making powers between the Commonwealth and the states. (4 marks)

- 1 mark An outline of the facts of one relevant case.
- 1 mark A description of the legal issue in that case.
- 1 mark Relevant use of the source(s).
- 1 mark An explanation of the impact of the decision: how the interpretation of the Court gave more power to one parliament and how it took power away from the other.

Note: Students must not merely describe the facts of the cases discussed. It is critical to emphasise how the High Court's decision altered the law-making powers of the Commonwealth and the states – below, this is described as the impact of the decision. Most commonly since federation this has been giving a broad interpretation to the words in the Constitution, increasing the power of the Commonwealth.

If students choose an inappropriate case to discuss, no marks can be awarded for that case – even if the information on it is correct. Inappropriate cases include the Studded Belt Case, the Mabo Case, the Kevin and Jennifer Case, *Donoghue v Stevenson* and *Grant v Australian Knitting Mills*.

Sample answers for appropriate cases include:

- ✓ In the Tasmanian Dams Case the Tasmanian Government intended to dam the Franklin River, however the Commonwealth intervened because they had signed an international treaty pledging to protect world heritage sites. They passed legislation protecting the Franklin River area from any development. As Gibbs CJ explains, the issue in the case was whether the Commonwealth laws were valid. Tasmania believed the Commonwealth had entered into its area of residual law-making responsibilities, because there was no specific power in s51 that gave the Commonwealth the power to make laws about the environment. The High Court decided the Commonwealth law was valid, as the 'external affairs' power in s51(xxix) of the Constitution gave the Commonwealth the ability to enter international treaties AND pass laws that give effect to those treaties – even if the Commonwealth had no specific power in the area. This is because treaties demonstrate a matter of international concern, which is how the Court defined 'external affairs'. The impact of this decision is that the external affairs power allows the Commonwealth to pass laws on any matter within a treaty it has signed, even if that law then enters into the states' residual powers. This broad interpretation of the external affairs power significantly increased the law-making powers of the Commonwealth at the expense of the states because the Commonwealth could make laws about things that were covered by a treaty in addition to their normal specific powers. This intrusion into residual powers decreased the power of the states.
- ✓ In the Federal Roads Case the Commonwealth Parliament passed legislation making a grant of money to Victoria, but attached compulsory conditions to that grant that related to building and maintaining roads. Victoria disputed the validity of these conditions, because roads were a residual power. The issue in the case was whether Commonwealth was able to make a grant that included conditions in areas where it did not have any specific powers. In other words, could the Commonwealth attach conditions for things it could not legislate on itself? The High Court decided the grant was valid, as s96 allowed the Commonwealth to make grants to a state on any conditions the Commonwealth saw fit. It did not limit the conditions to areas of specific power only, seeing that decision as reading into the Constitution beyond the wording, and making the kind of political decision that Gibbs CJ rejects in the source extract. The impact of this decision was that s96 allowed the Commonwealth to make grants to the states that instructed the state how to use the grant, even if these instructions entered into residual powers. States can (in theory) reject grants, but – given their financial dependence on the Commonwealth – will often have to take them and follow the 'instructions' they contain, even if they enter into residual powers. This reduces the power of the states to do what they like with their residual powers, and increases the power of the Commonwealth to control residual powers.

b. Explain how the principle of representative government, as established in the Australian Constitution, impacts on the ability of parliament to act as a law-maker. (5 marks)

- 1 mark One argument that relates to representative government enhancing parliament's law-making ability or, at the least, not standing in its way.
- 1 mark One argument that relates to representative government restricting parliament's law-making ability.
- 1 mark Relevant use of the source(s).
- 2 marks A minimum of one more argument, plus additional detail and elaboration. Examples may be used here to help with elaboration, but one case example will not suffice as an answer by itself.

Note: The wording of the question does not demand that a clear opinion or answer be given. Also, the source does not need to be used in all arguments made, but no argument can actively contradict the source.

Arguments that may be used include:

- ✓ As Gibbs CJ refers to in the source extract, it is not the role of the courts to represent the people. Instead, it is the role of the parliament. The parliament is the elected body, and must therefore weigh up the “wisdom and expediency” of whatever course of action it chooses to take, in light of what the members of the public are telling it – or, at least, a majority of them.
- ✓ The principle of representative government means that, in governing on behalf of the people who elected them, laws will probably be made that are consistent with the values and beliefs of the majority of voters – this is because members of parliament must keep the majority in their electorates happy in order to keep their vote and win the next election.
- ✓ The representative nature of parliament allows it to be an efficient law-maker, that takes into account a wide range of competing perspectives on law. Representatives are each asked to look for the most appealing ‘synthesis’ of all the different views in their electorate and the supporters of their party.
- ✓ Because parliament is a representative body, the public can become involved in its law-making processes through signing and submitting petitions, lobbying their local member of parliament or making a submission to the Victorian Law Reform Commission when they review a particular law.
- ✓ The representative nature of parliament can stop parliament from legislating sometimes. For instance, the fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform on controversial matters. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and civil rights often inspires extreme public reactions, and politicians’ fear of outcry – even if it comes from a very small proportion of society – may prevent change in the law.
- ✓ It is virtually impossible to make laws that match the views and beliefs of all members of our community, though, given the diversity of beliefs, backgrounds and experiences of a diverse society. It may be a practical impossibility for parliament to represent everyone, or even a clear majority.
- ✓ Because of the efficient ‘synthesis’ of views that results from the representative nature of parliament, many less visible and influential views can be left behind. Parties can also neglect the views of the public if they conflict with the decided party policy.
- ✓ A reliance on representative government may be insufficient to protect the rights of some unpopular minorities – indeed, majorities may actually *support* the violation of some individuals’ rights. Many voters may choose to re-elect law-makers who pass legislation that harms the rights of unpopular members of society.
- ✓ Parliament and the executive can infringe the protection provided by ss7 and 24 in many ways, and only those laws that are successfully challenged will be struck out. Other laws, that are perhaps not challenged because no-one realises there are grounds for a challenge or has the time and money to do so, will stay in operation.

## MINI-EXAM NO 4: UNIT 4 – MARKING GUIDE

### Question 1

- a. Explain the role of the Victorian Law Reform Commission in influencing a change in the law, with reference to an appropriate recent example. (3 marks)

- 1 mark A clear statement that the VLRC submits a report of recommendations *only*; it does not have the power to change the law itself.  
1 mark Relevant use of the source(s).  
1 mark Inclusion of a relevant example. This may be added by itself at the end, or used throughout the answer.

A sample answer might read:

- ✓ The VLRC is an independent, government-funded organisation that conducts research into, and makes recommendations for, changes to the law in Victoria. The VLRC consults with experts and interested parties, and takes submissions from the public – like the 99 submissions received for medicinal cannabis. The VLRC will present to the Attorney-General (who tables in parliament) a report including recommendations for changes to the law. Parliament reviews these recommendations and decides if or how to change the law in response to some or all of these recommendations. The Commission supported contingency fees more broadly in its Report into class action funding, but the Parliament chose instead to introduce an order called a ‘group costs order’, which permits the Court to allocate a percentage share of the final settlement or damages to the plaintiff’s law firm in return for the firm being responsible for costs and any potential adverse costs award.

Note: Students must include an example from the last four years, as this is the meaning of the word ‘recent’. The example does not need to be the one given in the source, but students must still integrate the source in some way if they use a different example.

- b. Describe one way in which individuals and groups can influence a change in the law, and discuss one weakness of this method of influencing legislative change. (5 marks)

- 1 mark Naming and outlining one method apart from protests or demonstrations.  
1 mark Providing further detail on this method or outlining an example of it in practice. Since the follow-up question is an evaluation, this detail should not be strengths and/or weaknesses that will be used in response to part (b).  
1 mark An outline of one weakness of this method. Alternatively, this weakness may be phrased as a reason why this method may fail.  
1 mark A counterbalancing point to that weakness. Students may include this as a corresponding strength.  
1 mark Relevant use of the source(s).

Note: Students do not have to select ‘making a submission to the VLRC’, although this would be the easiest option. As long as they integrate the source and answer the question, they can receive full marks.

Sample ‘ways’ could include:

- ✓ A petition is a written request for a change in the law (or a request not to change a particular law), signed by those who support the change. It must include a specific request for action that is within the power of that parliament to legislate on, and can only be tabled in parliament by an MP. In theory, the greater the quantity of signatures, the greater the impact on law-makers – petitions may not carry the same weight as formal reports from bodies like the VLRC, as shown in the source, but they can make up for this in size and representation.
- ✓ The media can be used to inform and persuade other individuals in society about need to change the law. It can also be used to encourage other types of political action such as protesting and lobbying members of parliament, or distributing information about VLRC inquiries that are open to public submission, like the source inquiry on medicinal cannabis. Information and/or pressure about changing in the law can appear in traditional media (such as talk-back radio, opinion pieces in newspapers and television advertisements) and/or social media (such as Twitter, Facebook and YouTube).

Weaknesses of petitions to influence legislative change include:

- ✓ Petitions with very few signatures are unlikely to influence law-making, as parliament usually wishes to make laws that represent the views of the majority of society.
- ✓ The Victorian and Commonwealth Parliaments receive many, many petitions – they cannot respond to (and act upon) them all. There is no guarantee parliament will consider and debate the legislative changes referred to in any petition they receive.
- ✓ Submitting a petition is not 'visible' (unlike a protest or lobbying parliament through the media) and is therefore unlikely to generate further public support for change on a large scale.

Corresponding strengths of petitions to influence legislative change include:

- ✓ Petitions are relatively easy to organise and submit. The rules are simple to follow and are published on the Internet.
- ✓ The greater the number of signatures, the more pressure is put on parliament, as MPs usually wish to make laws that represent the majority's beliefs.
- ✓ The process of gathering signatures raises awareness in society of the need to change the law.
- ✓ Petitions provide a means by which individuals can make personal contact with law-makers, as members of parliament can hear in the petitioner's own words what law they think needs to be changed, how and why.

Weaknesses of the media to influence legislative change include:

- ✓ The traditional media may not publish the views of all groups – especially unpopular minority groups who want laws changed.
- ✓ Traditional media tends to be dominated by rich businesses and interest groups who can afford to pay for television and radio advertising, such as businesses opposed to the carbon price in 2011. It may not be an accessible method of influencing change for individuals and not-for-profit organisations.
- ✓ The media may present such a diversity of opinions on an issue it results in no change to the law. Law-makers may be less likely to act if there is vocal opposition to legislative change in the media.
- ✓ The media may give unreasonable airtime to only one point of view in the debate, particularly if that point of view makes good news or is supported by groups or individuals with influence. This may cause the public or parliament to think that there is only one side to the issue.

Corresponding strengths of the media to influence legislative change include:

- ✓ Individuals and groups can inform and persuade a very large number of people about the need to change law (especially via social networking and talk-back radio). Parliament will often be pressured to act if widespread support for change is established.
- ✓ Other methods of influencing change in the law can be bolstered by the media. For example, a protest is much more effective if covered by radio or TV news, to inform and persuade a larger group of the need to change the law.

Weaknesses of bringing a test case include:

- ✓ Many members of the community are shut out from bringing a court case because they are not directly involved enough. It is not sufficient to simply be an interested party.
- ✓ Bringing a test case costs a lot of money, and complainants need to be prepared to donate potentially years of their lives to the cause. This is a significant disincentive.
- ✓ Courts are secondary law-makers, and therefore have limited ability to change the law. When bringing a case, the direct contact is with judges, and not members of parliament.

Corresponding strengths of bringing a test case include:

- ✓ Bringing a case to court is one of the few ways in which a member of the community can be directly involved in changing the law. If their claim is successful, the law will be changed to reflect the arguments they chose to make.
- ✓ Because of the requirement for standing, only people who have direct investment in the state of the law can bring a case to court. They have their own rights or interests on the line, and will therefore be committed to making the most persuasive arguments they can.
- ✓ Unless it invalidates the law, a court's judgment does not directly communicate with parliament; it is highly persuasive, though, because it affects the way the parliament's law operates in practice.

Note: Students must ensure they stick to the question and choose only one weakness.

## Question 2

Describe two features of the relationship between courts and parliaments as law-makers, using examples to illustrate your answer where appropriate. (4 marks)

- 1 mark An outline of one feature. Merely naming it is not enough, although extensive detail is not required.
- 1 mark An outline of a relevant example. Students should not include all of the facts of the example case, but should instead select just the most important information to show how and why the example is relevant.
- 2 marks Repeat the above, for a second feature.

Note: Do not identify more than two features of the relationship – students must stick to the question. No marks should be awarded to a third feature, if given.

The following are sample answers for features that students may choose to explain:

- ✓ Courts interpret the legislation made by parliament when resolving disputes, giving a more specific meaning to words in legislation to be applied in future cases. For example, the Supreme Court gave a clearer meaning to the word 'weapon' in the Studded Belt Case, deciding that it had to be something with a primary use as a weapon, and no primary use as anything else.
- ✓ Courts tend to be conservative law-makers, reluctant to change the law because they see this as parliament's role; they will therefore prompt parliament to legislate by using comments in their *obiter dicta*. For example, Justice Mason used his *obiter* in the Trigwell Case to draw parliament's attention to the issue when the Court refused to alter an existing common law principle.
- ✓ Court decisions and written judgments may highlight flaws or gaps in the law, which may encourage parliament to alter the law. For example, the Coroner's Court may suggest changes to legislation after investigating a particular death. Parliament may heed these recommendations and change the law.

### Question 3

“Most of the work of modern courts consists of applying and, where necessary, interpreting acts of parliament.”  
(The Hon Murray Gleeson, former Chief Justice of the High Court of Australia)

a. What is statutory interpretation? (1 mark)

1 mark A definition that includes the general information that it is the process of judges giving meaning to the words and phrases in legislation, to apply the legislation to the facts of a dispute.

b. Describe two reasons why statutes need to be interpreted, using examples. (4 marks)

1 mark An outline of one reason. Merely naming it is not enough, although extensive detail is not required.

1 mark An outline of a relevant example. Students should not include all of the facts of the example case, but should instead select just the most important information to show why the example is relevant to the reason.

2 marks Repeat the above, for a second reason.

Note: Do not identify more than two reasons – students must stick to the question. No marks can be awarded to a third reason, if given.

The following are examples of answers that might be given:

- ✓ Legislation is drafted in broad, general terms but judges need to give the wording a more specific meaning so they can apply it to individual circumstances. For example, in the Studded Belt Case, the broad term ‘weapon’ needed to be given a narrower meaning so the judge could decide whether an item of clothing should be included.
- ✓ Parliament may not foresee all future circumstances and so a court must interpret the purpose of the statute to ‘fill the gaps’ in the law and see if a situation that was not explicitly included should be covered. For example, in the Kevin and Jennifer Case, marriage laws failed to foresee the possibility of a person claiming a gender identity different from their sex and therefore didn’t explain whether a post-operative transsexual could marry someone of the same sex. A court needed to interpret the words in the legislation to fill the gap in the law.
- ✓ Words in legislation may be ambiguous; that is, having multiple potential meanings. Judges must decide which potential meaning is the most sensible to fulfil the purpose of the legislation when it is applied to a particular set of facts. For example, in Carr’s case the High Court had to decide whether the word ‘interview’ meant an informal discussion, or whether it only meant a formal question-and-answer procedure.

### Question 4

Discuss the extent to which the doctrine of precedent allows courts to make and change the law. (5 marks)

1 mark A clear opinion in response to the question; the exact phrase ‘the extent to which’ does not need to be used. Answers cannot give opinions 100% in favour or 100% against for this question, because it would be factually incorrect to say either that the courts *cannot* make and change the law, or that they *always* can with no restriction.

1 mark One argument in favour of the doctrine of precedent enabling the courts to act as law-makers.

1 mark One argument against the doctrine of precedent enabling the courts to act as law-makers.

2 marks A minimum of one additional argument, plus detail and elaboration on the arguments given; examples may be used to assist this elaboration.

Arguments that might be used include:

- ✓ The High Court is not bound by the decisions of any other court, or even of itself. This enables it to overrule or reverse undesirable principles, or to distinguish them and suggest in its *obiter* that the precedent should be avoided. It has flexibility – but the unpredictability of changing precedent is limited by it only being one court, and by lower courts not having equal powers.
- ✓ Judges can create new common law when a dispute arises and there is no immediately-relevant law. Because of *stare decisis*, and the assumption that other judges will stand by that decision, a new principle of law is then settled for similar, future cases.
- ✓ The *ratio decidendi* is enunciated separately from the facts and the conclusions in most court judgments. This is to allow the law to develop independently of the specific facts in the case, and to help others identify what the law is that they should follow in their cases.
- ✓ Rigid adherence to *stare decisis* can lead to injustice, if courts are more concerned with the procedure of applying the law than with the justice of the outcome once it is applied; it stops us focusing on achieving substantive fairness.
- ✓ Methods of departure such as distinguishing and disapproving do not always, by themselves, develop new law. Often a court is bound by a law they criticise, regardless of their disapproval; often a court will distinguish one rule in order to be free to follow another existing one.
- ✓ The *ratio* in a judgment is by its nature very narrow. Courts can only make rulings on the narrow legal issues presented to them by counsel, and cannot comprehensively research and review or make sweeping changes to the area of law as a whole.

### Question 5

“Without parliament to take the lead, courts are thoroughly ineffective law-makers and do not have the capacity to meet the law-making needs of our changing society.” Evaluate the truth of this statement and justify your conclusions. (8 marks)

1 mark A clear opinion in response to the question.

1 mark One argument in favour of the effectiveness of courts.

1 mark One argument against the effectiveness of courts.

1 mark One argument in favour of the effectiveness of parliament, in relation to courts.

1 mark One argument against the effectiveness of parliament, in relation to courts.

3 marks A minimum of one further argument, plus detail and elaboration on the arguments given; examples may be used to assist this elaboration.

Points that might be used include:

- ✓ In some areas, such as constitutional law, history has shown test cases and statutory interpretation to be the easiest way to achieve change, and therefore it is the most powerful and effective.
- ✓ Courts can make nuanced and incremental changes over time and in response to real cases that adapt to changing needs and problems. Case law is not a “blunt instrument.”
- ✓ Courts can hear a wide range of arguments from parties to each case, as well as evidence from witnesses and experts called by the parties. This helps them to base their judgments on proper research from outside the law.
- ✓ Courts have the power to see how a law operates in practice, and where its faults are, and to interpret in such a way as to achieve the most effective results in line with the aims of the law.
- ✓ A case must lend itself to the creation of precedent. It must have material facts that allow the judge to consider the desired area of law, and there must be no binding precedent or clear legislation relevant to the case.

- ✓ The process of bringing and hearing a case is not always quick – it takes time to appeal to higher courts and for superior courts to reach and deliver their decisions.
- ✓ Because judges must always operate within the bounds of existing law (unlike parliaments, which can ignore the decisions of previous parliaments and amend or repeal any act) there is limited ability to develop the law.
- ✓ Methods of departure such as distinguishing and disapproving do not always develop the law. Often a court is bound by a law they criticise, regardless of their disapproval; often a court will distinguish one rule in order to be free to follow another existing one.
- ✓ Parliaments can make law virtually without limit, as long as the matter is within their powers: laws can be made prospectively or retrospectively, they can be made regarding things they are being lobbied on or things parliament decides itself, and laws can be on narrow issues or entire areas.
- ✓ Parliament can choose whether or not it agrees with the laws created by other bodies including the courts, and can legislate to confirm or abrogate them.
- ✓ Parliament can make laws *in futuro*, meaning laws are made proactively for the future in anticipation of society's future needs.
- ✓ It is not possible for law-makers to anticipate all future issues. Society's values, behaviours and technology can change rapidly, creating new and unforeseen problems. As this occurs there will be gaps in the law, which will need to be filled no matter how hard the parliament tried to legislate in advance.
- ✓ The process of passing legislation can be very time-consuming, meaning law-reform can be slow even if society's needs are changing. This is especially so if there is a hostile upper house, controlled by the opposition and blocking bills introduced by the Government; or, if an independent MP holds the balance of power and makes unreasonable demands on bills in return for their vote.
- ✓ Parliament has access to resources it can use to research the need for reform, and bodies that will recommend changes to the law. Organisations such as the VLRC, government departments and parliamentary committees provide access to expert knowledge to inform how the law should change.
- ✓ The lack of Government control in the upper house usually results in better scrutiny and more amendments, resulting often in more effective law. Historically, upper houses have demonstrated an ability to catch poor policy and law.
- ✓ Parliament's primary role is to legislate, but only 45% (approx) of its sitting time is devoted to legislation; its sitting time averages 625 hours per year (or, less than 16 weeks of full-time work).
- ✓ Because debate is usually adjourned after the second reading speech, months can go by before it is scheduled again. After debate, more months can elapse while the bill is in committee or subject to consideration in detail.
- ✓ Parliamentary and independent investigations can be very time-consuming and expensive. This means law-reform can be slow, despite society changing quickly, and parliament may be forever trying to 'catch up' and react to changes in society.

## YOU BE THE ASSESSOR: UNIT 3 – FEEDBACK

### Question 1

Describe one method of dispute resolution that could be used to resolve a civil dispute. (3 marks)

#### Sample answer 1:

One method of dispute resolution that could be used in either courts or the Victorian Civil and Administrative Tribunal (VCAT) is mediation. Mediation is a cooperative method of dispute resolution in which two parties sit down with each other in an informal environment and talk about the problem. There are no rules of evidence or procedure, and the role of the third party is to keep the conversation flowing and make sure everything stays positive. They are not allowed to give any advice or say anything while the parties are talking together. The decision reached in a mediation is not legally binding, which is good because neither party will feel threatened or pressured into making a decision, and if the verdict isn't fair to one of them they won't have to follow it. This can be bad, though, because it could mean the dispute has to progress to conciliation, arbitration or even judicial determination next, wasting time and money.

#### Feedback:

- ✓ Some reasonable information about mediation has been provided: for instance, that the focus is on conversation and cooperation, and that the third party tries to keep communication flowing.
- ✗ Other than that, this is not a very good answer. It has factual inaccuracies, falls into the trap of repeating common misunderstandings, and has a number of vague or overly-casual statements that are not helpful in communicating legal knowledge.
- ✗ The opening sentence repeats the question and is not required.
- ✗ It is not technically correct that there are no rules of evidence and procedure. There are no rules of evidence because evidence is not the point of a mediation; there are rules of procedure, but they are not the same as rules in court.
- ✗ The role of the third party is expressed too colloquially and vaguely. It is also incorrect to say in such a dogmatic way that they are not allowed to give advice or say anything – they do help parties explore possible solutions.
- ✗ The answer does not say how the final decision is reached or who makes it.
- ✗ It is incorrect to say that mediated decisions are not legally binding; if they are conducted through courts or VCAT they will be put into a deed of settlement or order.
- ✗ It is not logical to argue that a non-binding decision is good for the reasons given; also, the question did not ask for strengths or weaknesses.
- ✗ It is incorrect to say that a dispute progresses from one method of dispute resolution, to another, to another, in this way.

This answer might not receive more than 1 mark or 2 marks, depending on how much credit was given material that was "close enough."

#### Sample answer 2:

One method is conciliation. Conciliation is like mediation, except that the third party is allowed to give advice to the parties about what outcome should be reached. The decision made by the parties is not legally binding, but it can be enforced by VCAT if the parties choose to put it into a contract. Conciliation is mostly used for industrial or employment-related disputes.

#### Feedback:

- ✓ This answer contains some correct material about conciliation. It is also more clear how the final decision is reached.
- ✗ Other than that, this is not a very good answer. It is too short, it misses out key information and it contains inaccuracies.
- ✗ Stating that conciliation is like mediation is both irrelevant and unhelpful – it tricks the student into thinking they don't need to write down all the specific features of conciliation.
- ✗ The statement about conciliation not being legally binding is incorrect in the same way as the above statement on mediation was. It is also incorrect to say that negotiated settlements are enforced by VCAT: like all other VCAT orders, they would be enforced by the Magistrates', County or Supreme Courts. Finally, discussion of contracts is irrelevant and incorrect in this context because this would apply to private conciliations.

This answer might not receive more than 1 mark.

*Sample answer 3:*

Arbitration is an inquisitorial method of dispute resolution in which parties present arguments and evidence to an independent and impartial third party who weighs up the strength of each case and awards the claim to one party. The third party is often legally-trained, but is not sitting as a judicial officer even if they do work as a judge or magistrate. When hearing the dispute they have the ability to apply flexible rules of evidence and procedure, tailored to the needs of the individual case, and can ask parties or witnesses questions – or even encourage parties to negotiate right in the hearing room. Arbitration is often open to the public, and the award made by the arbitrator is legally-enforceable through the courts: it is binding on both parties.

Feedback:

- ✓ This answer provides accurate information about arbitration with a good amount of detail, and it covers important features such as the role of the third party, the application of evidence and procedure to the process, how the outcome is reached and the role of the parties.

This answer would likely receive full marks.

**Question 2**

Discuss the operation of courts and the Victorian Civil and Administrative Tribunal ('VCAT') in the hearing of legal disputes. In your answer, justify the use of tribunals such as VCAT in addition to the court system. (5 marks)

*Sample answer 1:*

VCAT exists in addition to courts to provide people engaged in relatively simple civil disputes the option to have them resolved generally more cheaply and efficiently than would happen in court. Court hearings involve a level of formality and expense, and not all cases with law and evidence that is straightforward need the scrutiny and laboured legal argument that courts supply. There are many similarities between courts and VCAT despite this overall difference, though. Both hear civil disputes between individuals, government agencies and corporate entities, and both apply the law in the area to the facts of the case to come to a decision on behalf of the parties. Both employ people to sit as independent and impartial third parties, and many of these people are legally-trained and qualified – courts use judges, and VCAT uses judges, too, sitting as the president and vice-presidents. Both have avenues of appeal that are open to parties who are dissatisfied with the outcome of their case; if either party believes that an error has been made on a question of fact or law, they can appeal their case to a higher court with a more experienced judge and have the error remedied. VCAT and courts also provide parties with options for resolution in addition to the hearing: VCAT and courts will both resolve matters at a mediation conference instead of a hearing if the dispute is of an appropriate type, or they can use a conciliation conference or a less formal hearing (such as early neutral evaluation in courts). None of these alternative options use strict rules of evidence and procedure. Finally, both VCAT and courts give binding outcomes, which gives finality to the disputes and ensures that people can move on with their lives even if they are not able to compromise and come to an agreement themselves.

Feedback:

- ✓ This answer responds to both parts of the question, and spends more time on the part that will be worth more marks.
- ✓ This answer explains the type of disputes that are likely to benefit from the existence of VCAT: this is an appropriate way to argue for VCAT's operation.
- ✓ This answer gives at least six different points in response to the comparison part of the question. This is a good number for the allocated marks, and there is a satisfactory amount of detail for each point.
- ✗ The response has not necessarily given any specific differences, though – and at least one difference is required, because of the task word. Without addressing difference as well as similarity, full marks cannot be awarded.
- ✗ There is a factual inaccuracy: VCAT orders cannot be appealed on a question of fact. It is also unclear whether the statement on mediation is incorrect, because the wording is ambiguous. The statement "will both resolve" isn't clearly an accurate expression of how mediation works. The answer also seems to suggest that informal hearings are alternatives to the normal process at VCAT: they *are* the normal process.

This answer might not receive more than 3 marks or 4 marks.

*Sample answer 2:*

There are many similarities and differences between the operation of courts and the operation of VCAT. One similarity is that both can hear civil disputes. One difference is that only courts can hear criminal disputes. One similarity is that both have third parties that are independent of the parties to the dispute. One difference is that only courts use juries. One similarity is that all court decisions in cases will be binding on the parties, whereas VCAT decisions are not binding on the parties and parties may therefore end up in court anyway, wasting valuable time and money. Other differences include that VCAT uses many more methods of alternative dispute resolution than court, including mediation and conciliation. Also, VCAT orders cannot be appealed on questions of fact; they can only be appealed on questions of law. VCAT members are also not judges and they have no legal training. Instead, they are experts in the area of law the dispute covers, so they bring more common-sense and practical experience to the hearing of the dispute. VCAT also is much cheaper than courts, as well as faster and less intimidating. This is why it is important to have VCAT as an option for people in society as well as courts, because court resolution would be too expensive and formal for the average person to want to take their dispute there and defend their rights.

Feedback:

- ✓ This answer addresses both similarities and differences (but focuses on them like a list).
- ✓ This answer makes at least nine different points in response. It does also address, to some extent, the second part of the question.
- ✗ There are a number of factual inaccuracies: for instance, it is wrong to say that VCAT decisions are not binding; it is wrong to say that parties will go to court if VCAT fails at resolution; it is wrong to say that VCAT uses more non-judicial methods of dispute resolution (the phrase "alternative methods of dispute resolution" is also outdated and ambiguous now that non-judicial methods are standard, and VCAT hearings do not use these methods anyway). The description of VCAT members is also too much of a generalisation, and the wording is vague: "experts in the area of the law"?
- ✗ Overall, the discussion makes a lot of points but is not strong on either accuracy or detail, and doesn't seem to be interacting with the points on operation in a proper 'discussion'.
- ✗ The final response, to the second part of the question, is partly double-counting material that has been used in the comparison: it reads as though it is tacked on the end.

This answer might not receive more than 3 marks.

### Question 3

Sam, 23, has prior convictions and drug and alcohol addictions. Sam has been charged with three indictable offences, including armed robbery. The prosecution alleges that Sam was in possession of high-heeled shoes when committing the armed robbery and, therefore, possessed an 'offensive weapon' within the meaning of the *Crimes Act 1958* (Vic).

Provide one sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purposes. (5 marks)

#### Sample answer 1:

Community corrections orders ('CCOs') came into effect in 2012, replacing combined custody and treatment orders, home detention, intensive correction orders and community-based orders. Sentences are mainly served in the community, but may be combined with up to one year imprisonment, and a wide range of conditions can be imposed, including rehabilitation classes or counseling, unpaid community work or restricted movement. CCOs aim to rehabilitate the offender, because the conditions attached are tailored to the circumstances of the individual and the crime; they also aim to provide specific deterrence, because negative consequences such as potential jail time are attached to encourage the offender to want to avoid these punishments in the future. General deterrence may also be achieved if other people in the community see conditions such as jail or unpaid volunteer work and decide against committing a similar crime because they want to avoid those consequences.

#### Feedback:

- ✓ This answer addresses a good number of aims, and does give some explanation for each aim as to how or why the sanction might achieve it.
- ✗ This answer takes too long at the start explaining the sanction, though, and this was not asked for in the question.
- ✗ This answer fails to properly address the task word of 'discuss'; instead, it gives a list of positive statements. This is not the same as looking at something from multiple, often competing, points of view.

This answer might receive no more than 3 marks.

#### Sample answer 2:

A drug treatment order could be given to Sam, because of her or his history with substance abuse. This achieves rehabilitation, because the jail sentence is suspended while the offender undergoes treatment and supervision. This gives the offender the opportunity to learn from their mistakes; here, Sam might overcome her or his problems with drugs and alcohol, and not want to commit crimes again in the future. The conditions attached to the order, such as having urine tests, counseling sessions and submitting to rules regarding restricted movement, can also help rehabilitate, because they are squarely focused on the reasons contributing to the offending and not merely on the criminal behaviour: often, this behaviour is just a symptom of a larger problem, anyway. The main problem with the success the order has with rehabilitation, though, is that it could be criticised for failing to achieve any of the other aims. The fact that it can't be given in situations of sexual or violent crimes is an admission by parliament that it fails to protect society, and, because the prison sentence is deferred, the public could think it looks too soft on crime and therefore believe it doesn't punish enough or publicly denounce the offender's actions.

#### Feedback:

- ✗ This answer is incorrect. The Drug Court operates on the same level as the Magistrates' Court, so it would not hear this dispute: the question states that it involves indictable offences.
- ✓ The discussion on the aims is actually done very well – unfortunately, it cannot be counted.

Because Legal Studies generally does not award follow-on marks, this answer should receive zero marks.

#### Sample answer 3:

A prison sentence could be given to Sam. A period of time in jail would punish Sam for her wrongdoing because it would remove her from her friends and family, prevent her from working, and stop her from living as an independent person and making a wide range of decisions about her everyday life. Losing privacy and freedom is difficult. Prison therefore deters both Sam and other members of the community because of this hardship: specific deterrence may be achieved because Sam would not want to go back to jail afterwards, so might stop committing crime; general deterrence might be achieved because other people would look at what Sam has lost and not want to lose it themselves. Also, for the time that Sam is locked up, the community will be protected from future harm being caused. Because prison is the sanction of last resort it is the strongest message of denunciation the court can give to the community. One aim that is not achieved, though, is rehabilitation. Even though prisons nowadays have options for counseling and educational or employment programmes, prisoners are surrounded by other criminals so are given little incentive to be a different person, the way that non-offending family members might give them. Also, statistics show that around half of the prison population have been incarcerated before, which shows that rehabilitation does not seem to be working.

#### Feedback:

- ✓ This answer identifies the sanction without wasting time on an unnecessary, lengthy definition of it.
- ✓ It then covers a good number of aims (specifically, all of them, even though this is not required), and looks at both strengths and weaknesses of the sanction.
- ✗ The aims discussed aren't explained with any synonym, usually. This weakens the overall quality of the answer.
- ✗ The aims are also discussed in a slightly 'list-like' way, which feels slightly more like checking them off than like a proper discussion of them.

This answer might not receive more than 4 marks.

### Question 4

Evaluate how effectively the jury performs one of its responsibilities in a criminal trial. (4 marks)

#### Sample answer 1:

The jury system relies on untrained members of the community looking at the case from a layperson's point of view and bringing common sense and contemporary values into their judgment. This allows non-legal members of the community to be educated in the law, but it also means their verdicts could be based on prejudice and emotion rather than the law. Untrained people in the community do not have experience looking at evidence dispassionately and objectively; in a way this is why we use them, because otherwise it would be the same as having a panel of judges, but it can mean the parties don't receive a fair trial. An example of this happening was in the Lindy Chamberlain case, where comments from the jurors after the trial (and the fact that Chamberlain was later pardoned) suggests that the test used in deliberations was whether the jurors could picture a dingo taking a baby and not whether the prosecution had provided proof of murder beyond reasonable doubt.

Feedback:

- ✓ This answer gives a good explanation of the question of untrained members of the community judging a case.
- ✓ The case example used is appropriate to the argument and illustrates it well. It is also not weighed down by unnecessary background detail.
- ✗ The structure of the evaluation is good, but some assessors might feel it lacks a clear opinion or conclusion.

This answer might receive no more than 3 marks, if an opinion is thought to be lacking.

*Sample answer 2:*

One weakness of the jury system is that a lot of evidence we have suggests that coercion goes in the deliberation of a verdict, so the verdict reached is not as reliable as we might think it is. Even though each juror votes as an individual, a verdict can only be delivered if all jurors independently come to the same conclusion – or, in cases where majority verdicts are allowed, all but one. This can place an enormous amount of pressure on jurors to conform to the group, especially if there is someone with an assertive personality on the jury, someone with prior legal experience, or if deliberations are approaching a holiday or a weekend. People currently involved in the justice system such as police officers and lawyers are ineligible for jury duty to minimise this, but coercion and pressure still occur. A NSW juror study in 2011 found significant juror concern over influence and pressure – specifically, that coming from other jurors. Judges can even exacerbate it by refusing to accept a hung jury, and telling the jury repeatedly to go back and try to all come to agreement. Often it may just be the less assertive jurors caving in. It is difficult to think of a reform that would fix this entirely, but replacing a layperson jury with a jury of experts might help.

Feedback:

- ✓ This answer considers arguments on both sides.
- ✗ This answer reads well, but no strength is given to counterbalance the weakness. One or more strengths were required here. This also means that the student has no opportunity to weigh the strengths against the weakness and come to an opinion on the gravity of the weakness. This was required for the task word 'evaluate'.
- ✗ The answer reads more like a description of one weakness than an evaluation of effectiveness that is focused on one responsibility.

Because of these fundamental errors, this answer might receive no more than 2 marks.

### Question 5

How does the provision for representative proceedings help enhance the effective operation of the civil justice system? (4 marks)

*Sample answer 1:*

Representative proceedings are civil claims in which the party bringing the action belongs to a larger group of seven or more people and litigates on behalf of that group. Group members are not listed by name in the pleadings, and they play a largely passive role. The linking factor between them is that all members of the class share a common characteristic or interest, even if the precise harm they suffered is slightly different. Damages will therefore be allocated differently across members of the class, based on the individual damages each person suffered. Group members are not required to instruct lawyers or pay legal fees: their interests are protected and pursued by the named plaintiff in the representative proceeding.

Feedback:

- ✓ This answer contains a lot of correct information about representative proceedings.
- ✗ It fails, however, to answer the question. Rather than explaining how proceedings can enhance the system, it merely recounts memorised information.

This answer might receive no more than 2 marks, but it could reach a (generous) 3 marks because of the detail.

*Sample answer 2:*

Representative proceedings enhance the civil justice system because they help achieve the principles of justice. They achieve fairness because it is fair for people to be compensated for harm; they achieve equality because every person in the class action has an equal opportunity to have their harm compensated; and they achieve access because it is cheaper for a class action than for every person to sue individually.

Feedback:

- ✓ This answer tries to answer the question by responding with the principles of justice.
- ✗ It is lacking in detail, and doesn't adequately explain how the principles are achieved.

This answer might receive as little as 1 mark because of its lack of content, but could also receive 2 marks because it includes a little of both principles and content.

## YOU BE THE ASSESSOR: UNIT 4 – FEEDBACK

### Question 1

Explain one reason why laws may need to change. (2 marks)

*Sample answer 1:*

Laws may need to change for many reasons. One of these is changes in values. When the values of the community change, the laws that relate to that value may also need to change so that the law remains respected and followed. One example of this is the law relating to puppy farming, which was a change pursued by the Andrews Labor Government in 2016. In 2017 the Government passed the *Domestic Animals Amendment (Puppy Farm and Pet Shops) Act* through parliament, which reduced the number of fertile female dogs a breeder can keep – among other changes.

Feedback:

- ✓ The answer gives a correct reason and a correct example. This is appropriate for the mark allocation.
- ✓ The justification of laws needing to be "respected and followed" is good and makes sense when talking about values.
- ✗ The answer takes too long to get to the point: the first sentence is useless and should be deleted, and the second sentence should be combined with the third.
- ✗ There is no definition of 'values': instead, the same word is repeated over and over again. This is potentially the biggest flaw and risk concerning marks.
- ✗ The example has too much useless background information included: it only needs enough to identify it, and then it should be linked back to what it is illustrating. Here, no link to values has been made.

This answer might not receive more than 1 mark, but it might receive 2 marks for being competent.

*Sample answer 2:*

Laws may need to change because of changes in technology. As research and scientific knowledge improve, new ways may be found to infringe the rights or others or harm people; to continue protecting the public, new laws may need to be implemented to cover emerging threats. 'Upskirting' laws were introduced in 2008, for example, to criminalise intimate photos being taken of people in public places, using new technologies such as mobile phones and hidden cameras.

Feedback:

- ✓ The answer gives a correct reason and a correct example. This is appropriate for the mark allocation.
- ✓ The answer shows an understanding of 'technology', and links this with laws changing.
- ✓ The example doesn't include unnecessary information, and is linked with technology.

This answer might receive full marks.

**Question 2**

Identify one way in which individuals and groups could influence the Victorian Parliament to change the law, and evaluate one weakness of this method of persuasion. (4 marks)

*Sample answer 1:*

A petition is a request for a parliament to change a law within its jurisdiction, signed by members of the community. The petition must conform to the standing rules of the house in which it is being tabled, and petitions must usually be paper-based – although both houses are now able to accept online petitions, called e-petitions. Petitions can be supported by only one person, or they can be signed by tens or hundreds of thousands; each house of parliament can also receive many petitions on the same issue, arguing for contradictory measures to be taken. Petitions are usually easy to organise, and inexpensive, although the rules for them can be strict and can prevent many of the signatures from being counted in the final tally. This is one weakness of petitions as methods for influencing change. The benefit to these strict rules, though, is that the parliament will always know clearly what the petitioners want it to do regarding the law, as the request must be stated in clear and specific language, and it is very difficult for signatures to be falsified or obtained on fraudulent grounds – because, for instance, signatures must be original, and the request to parliament must be stated on every page of the petition.

Feedback:

- ✓ The answer identifies one method for change, and does provide a subjective discussion on the method's effectiveness.
- ✗ The definition of petitions is too long, especially given the task word 'identify' requires very little information. It is also unclear where the definition ends and where the 'evaluation' begins.
- ✗ There is no clear evaluation of one weakness. Multiple weaknesses are addressed throughout the answer, but there is no identification of which one is the focus of the answer, and there are no strengths clearly attached to this weakness. There is also no conclusion on whether that weakness is significant or not.

This answer might not receive more than 2 marks.

*Sample answer 2:*

The media can be used by individuals and groups to influence the Victorian Parliament to change the law. One weakness of the media is that it unfairly privileges the point of view of powerful and wealthy interests in society, such as big business and individuals such as Gina Rinehart and Rupert Murdoch. A strength is that media can reach a wide audience in a very short space of time, simultaneously persuading people and communicating the wishes of the people to members of parliament.

Feedback:

- ✓ The answer identifies one method for change, and does provide one very clear weakness with a strength following it.
- ✓ The answer uses specific examples to illustrate its weakness.
- ✗ The task word 'identify' requires very little information, but the answer does nothing more than name the method; instead, it repeats the question. The answer should not repeat the question – instead, perhaps a few words on what 'media usage' means could be included to play it safe.
- ✗ The weakness and strength section may be a bit short to receive 3 marks (which would be the mark allocation for this section of the question).
- ✗ The task word of 'evaluate' has also not been met: the strength doesn't clearly relate to the weakness that is being evaluated, and there is no final conclusion on the weakness.

This answer might not receive more than 3 marks.

**Question 3**

Why might a precedent established in the Victorian Supreme Court (Court of Appeal) not have to be followed by the Victorian Supreme Court (Trial Division)? (3 marks)

*Sample answer 1:*

The precedent would not have to be followed because the Court of Appeal is higher than the Trial Division in the Victorian hierarchy. The precedent would therefore be persuasive only, and only binding precedents need to be followed, in future cases with similar material facts.

Feedback:

- ✓ This answer is succinct and there is a good amount of legal terminology.
- ✗ The content is factually incorrect because the student has gotten mixed-up: if the Court of Appeal is higher, the precedent would be *binding* not persuasive.

Because the answer is factually incorrect as a whole, this answer would most likely receive zero marks.

*Sample answer 2:*

The Court of Appeal and the Trial Division are both part of the Supreme Court and are therefore equal in authority: neither can make a binding precedent for the other. This means that the precedent would only be persuasive, and the Trial Division would not need to follow it.

Feedback:

- ✓ This answer is succinct and there is a good amount of legal terminology.
- ✗ The content is factually incorrect: the two are not on the same level. The Court of Appeal is higher.

Because the answer is factually incorrect as a whole, this answer would most likely receive zero marks.

*Sample answer 3:*

The Trial Division might determine that some part of the material facts of the case is not sufficiently similar to the original precedent case from the Court of Appeal, and might therefore distinguish the precedent.

Feedback:

- ✓ This answer is factually correct.
- ✓ The term 'distinguish' is given a subtle definition in the first half of the answer.
- ✗ Some assessors may want, for 2 marks, a slightly more clear explanation of the impact of distinguishing: ie that it makes the precedent persuasive, such that it does not have to be followed.

This answer may receive either 1 mark or 2 marks.

*Sample answer 4:*

The precedent set by the Court of Appeal might be on an area of law that is entirely irrelevant to the case before the Trial Division. If this is the situation, the Trial Division will be under no obligation to apply it to the case. Alternatively, it may be on a relevant area of law but counsel for neither party might argue it to the judge in their submissions; or, parliament may have abrogated the precedent since it was made.

Feedback:

- ✓ This answer is factually correct. It approaches the answer from an unexpected direction and does not include the more obvious answer of distinguishing, but the wording of the question allows multiple responses so this should be absolutely fine.
- ✓ There is a good amount of detail and, to be safe, the student has included two separate points for 2 marks.

This answer would most likely receive full marks.

**Question 4**

The doctrine of precedent limits the role of the courts as law-makers. However, the courts can still make significant changes to the law.

Evaluate the extent to which the doctrine of precedent allows the courts to change the law. (8 marks) 2008 VCAA Legal Studies exam question

*Sample answer 1:*

The doctrine of precedent is the system by which courts make law: courts can make law through either precedent or statutory interpretation. It is based on the principle of *stare decisis*, which means to stand by things decided – this ensures the law is applied with predictability and consistency, and is therefore fair to all people coming before the courts. The precedent is contained in the *ratio decidendi* of the court's judgment, which is the reasoning behind the decision, and is a principle of law. That principle will be binding on all courts lower in the same hierarchy, but only when they are hearing a case with similar material facts. In addition, only superior courts of record (the Supreme Court and above) can set precedent, because they are the courts with greater authority and, unlike the County and Magistrates', they publish their judgments in written form. Any comments made 'by the way' in the *obiter dicta* will not be binding; they will only be persuasive, and will therefore not be law and will not need to be followed. One example of binding precedent in action is the *Donoghue v Stevenson* case, otherwise known as the Snail in the Bottle case. In this case Donoghue sued Stevenson for negligence in the manufacture of a bottle of ginger beer, as she had been made sick by drinking one that had a partly-decomposed snail inside it. At the time there was no law of negligence, and Donoghue and Stevenson were not joined by a contract. The Privy Council in the UK was therefore asked to create a new legal principle: negligence. They did so, and four years later in Australia the same precedent was argued in the case of the Itchy Underpants, where Grant argued that Australian Knitting Mills was negligent because they failed to wash bleach out of their underpants before selling them. The Snail in the Bottle precedent was applied and AKM was found to be negligent. Courts have four ways to depart from precedent that is argued to the judge in the case: distinguishing, disapproving, reversing and overruling. Distinguishing is when the material facts of the cases are not sufficiently similar, so the court decides that the precedent is persuasive only. Disapproving is when a judge criticises the existing precedent in the *obiter dicta*. Reversing is when the precedent case is heard on appeal and the appellate judge determines that the legal principle was decided incorrectly, so they reverse it. And overruling is when a precedent is argued in a later case, to a higher court, and that court decides the legal rule was decided incorrectly at the time – they replace it with a new one. One example of a case in which precedent was overruled was the Mabo case, in which the High Court overruled the existing precedent of *terra nullius* and replaced it with the new law of native title. Eddie Mabo had argued that the old precedent of *terra nullius* was incorrectly applied in Australia from the start, because the Aboriginal people lived on the land and had a complex system of social relations and property and land recognition. Australia was therefore not land 'belonging to no-one', and the British could therefore not claim it as their own. The High Court agreed, and overruled the precedent.

Feedback:

- ✓ This answer has a great deal of information on precedent, and a very good amount of legal terminology and specific content.
- ✓ The answer has a clear structure and makes a decent number of individual points.
- ✓ There are relevant case studies used in the answer, and this is a good approach for longer answers in particular.
- ✓ Handwriting size varies, but an 8-mark question is usually answered over 1-2 pages; this answer would, in most sizes of handwriting, only just make 1.5 pages.
- ✗ There are small factual errors. For instance, statutory interpretation is not a separate process to precedent: statutory interpretation is set *using* precedent, so it is part of precedent. Also, disapproving is not a method of departure – it is simply a criticism, and can be followed by either departure or adherence.
- ✗ The case examples are used poorly. They are far too detailed when it comes to unnecessary facts, but have not been properly linked with the answer to show how they are relevant or what argument they are being used to illustrate.
- ✗ Overall, however, potentially the biggest problem is that the task word has been ignored. This is not a 'to what extent' answer: it is simply a description. The question has not actually been answered.

Since this answer would be globally-marked and there would be no fixed marking scheme for it, its overall strengths would have to be weighed against its overall weaknesses. This would likely introduce some variation into the allocated mark. This answer might not receive more than 5 marks, and might receive as few as 3 marks.

**Sample answer 2:**

The doctrine of precedent lends itself to incremental law changes, specifically when a gap has been left either deliberately or inadvertently by parliament, and when the courts have been requested to consider the area of law by a government or someone affected by it in the community. Outside of this, it quite strictly limits them. Firstly, the most important factor is that precedent can only be set when a case comes before the courts on a matter that is not already settled law: this is why the courts are called opportunistic law-makers, because the nature of precedent does not allow them to take the initiative and create law *in futuro* or without a case requiring resolution. Also, there must usually be something novel about the facts, someone with standing must have the money and time to bring the case forward, and it must usually be able to be appealed up to a court high enough to alter the existing law or set precedent if no law does exist. This is because precedent can only be set by superior courts of record (ie. the Supreme Court and above), and courts will also be prevented from creating or changing law if they are bound by the existing law. Precedent will be binding when it has already been set by a court higher in the same hierarchy than the current court, as long as the current court is hearing a case with similar material facts. Therefore, it will often be only the High Court, or at lowest the Court of Appeal, that will have the ability to alter existing precedent; or, at minimum the Trial Division of the Supreme Court, if the matter involves setting new precedent. An example of this is the Studded Belt case, in which the Magistrate's Court had to follow the existing regulations that defined what a weapon was, even though the regulations were arguably outside the scope of the law they were relating to. It was only once the case was appealed to the Supreme Court that the court had the power to interpret the *Control of Weapons Act*, give meaning to 'weapon', and set precedent on its interpretation that invalidated that part of the regulations. All of these conditions mean that precedent is restricted to a narrow set of circumstances, which limits courts as law-makers. This is further complicated, too, by the fact that higher courts usually have panels of three or more judges sitting on the one case, and each of these judges can give her or his own separate judgment. Not only must lawyers and the public sift through sometimes hundreds of pages of judgment to figure out which part is the *ratio decidendi* – legal reasons for the decision – something that is difficult and confusing anyway; but sometimes the judges do not agree on the *ratio* for the case, even if they agree on the ultimate verdict. They might have slightly different legal reasons for that verdict. If every judge has a different *ratio* then the case as a whole cannot set precedent. Therefore, a similar legal principle needs to be present in the majority of judgments delivered by the court in order for any law to be created or changed. Judges can also be reluctant to take this step in their judgments, preferring to disapprove ineffective or outdated law in *obiter dicta* comments 'by the way', arguing that any actual change is more appropriately made by parliament, because parliament is the elected law-maker given the main job of making law by the Constitution and the separation of powers. Justice Dawson dissented in the Mabo case for this reason, and a majority of the High Court rejected the Trigwell claim on the basis that parliament should use its resources to research whether owners should be liable for their animals – not the courts. In the few cases that remain, though, as long as the court is willing to take more of an 'activist' role, the doctrine of precedent has many features that enable law to evolve. The Mabo case illustrated the power of the High Court to overrule past precedent that was considered to have been wrongly applied from the very beginning, when it invalidated the principle of *terra nullius* as it was originally applied to the "settlement" of Australia, and replaced it with the law of native title that required the British and Australian governments to have physically conquered any Aboriginal land they wanted to claim title to. This was a radical change in the law that arguably was only possible through the courts – parliament may never have considered it as a legal option, given MPs are not the legal experts that judges are, and the protection of minority rights in this way might have been considered too controversial for parliament to want to champion it. The rules of precedent and the nature of courts therefore do restrict law-making, but they do not entirely prevent it.

**Feedback:**

- ✓ This answer has accurate content and a good amount of specific legal information and terminology.
- ✓ This answer has a more discursive (less black-and-white) structure, but this is because the arguments are logically integrated with each other and the points are being linked back to the question. The more fluid structure should therefore be fine, and could be read by assessors as more sophisticated – especially as it begins with a clear response to the question.
- ✓ Case examples are used more succinctly than in the previous sample response; here, they are shorter, and are related back to the point they are illustrating.
- ✓ The length of this answer is on the upper end of what any student should be able to manage for an 8-marker, as it is around 800 words. It would be around two pages of writing, depending on handwriting size, and this may leave the student with inadequate time to spend on other questions. The length is good – but timing would need to be watched carefully.

This is a strong response, and might receive full marks.

**Question 5**

A referendum proposal was voted on by the electors of Australia. Fifty-six percent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal.

Was the referendum passed? Justify your answer. (3 marks) 2016 VCAA Legal Studies exam question

**Sample answer 1:**

This referendum was not passed. It failed because it failed to achieve a double majority 'yes' vote: only three states voted in favour of the proposal, which is not the majority of four minimum that is required.

**Feedback:**

- ✓ This answer provides a clear response and a clear justification. The clarity of structure makes it easy to mark.
- ✓ The reason for failure is correct: three states is insufficient.
- ✗ This answer ought to have stated that 56% nationwide was sufficient for the other part of the double majority vote, however. At the very least, the mark allocation suggests this; substantively, however, this would have explicitly shown that the student knew which part of the hypothetical was correct/successful.

This answer might not receive more than 2 marks because of omission of the other half of the double majority.

**Sample answer 2:**

The referendum proposal passed because it achieved the required double majority outlined in s128 of the Constitution. A double majority requires that a nationwide majority of voters must say 'yes' to the proposal, in addition to a majority of voters in a majority of states. Here, 56% is a nationwide majority, and five out of eight states voted in favour, as well. Thus, it would receive royal assent and the wording of the Constitution would be changed.

**Feedback:**

- ✓ This answer provides a clear response and a clear justification.

- ✓ Naming s128 is desirable, although not required by the question.
- ✓ This answer addresses both calculations of the vote, the nationwide and the state-based, and it links both of these parts of the double majority back to the detail in the scenario.
- ✗ The response relating to the nationwide majority is correct, but the one relating to the state votes is not: there are only six states, therefore three states voting 'no' would result in a failed proposal. Therefore, the overall answer to the question is incorrect. If no follow-on marks are awarded (and they often aren't in VCAA Legal Studies), this response would receive zero marks as a result.
- ✗ The final sentence on royal assent is unnecessary and should be deleted.

This answer could receive zero marks, but might receive 1 mark (for the nationwide vote comment) if follow-on marks are awarded.

### Question 6

How are powers divided by the Constitution between state and federal parliaments? In your answer, explain the mechanism used to resolve conflicts between state and federal law. (5 marks)

#### Sample answer 1:

The Constitution contains a division of law-making power that allocates powers to each of the state and federal parliaments. Specific powers are divided into concurrent and exclusive powers: concurrent powers are powers shared between the parliaments, such as marriage and education; exclusive powers are powers that can only be exercised by the federal parliament, such as immigration and terrorism, and on which no state can pass law. Most exclusive powers are made exclusive by a second section of the Constitution that takes the power away from the states, although some are expressly stated to be exclusive in the Constitution and others have been found to be exclusive in nature by the High Court. Residual powers are all powers that were left with the states at federation, such as healthcare and roads. If there is an inconsistency between a law of a state and a law of the Commonwealth, the latter will prevail and the former will be invalid. In other words, the federal law will override the state law on that area.

#### Feedback:

- ✓ This answer gives responses in the order in which the topics are asked in the question. This is certainly not required, but it is one appropriate way to structure.
- ✓ The use of examples is good.
- ✓ There is accurate detail on exclusive powers.
- ✓ The opening sentence identifies what content is going to be explained in the answer: the constitutional division of powers. This was mostly given in the question, though, so could have been omitted.
- ✗ The answer fails to define specific powers.
- ✗ The phrase "shared between the parliaments" is ambiguous. It is not clear that it means both state and federal parliaments can exercise law-making ability on those areas. Which parliaments? What does 'shared' mean exactly?
- ✗ Education is not a concurrent power. For various reasons the Commonwealth exercises control over tertiary education, but primary and secondary education are residual powers.
- ✗ Terrorism is not an exclusive power. The power to justify the Commonwealth law regarding terrorism was referred to the Commonwealth by all six states, but that is a limited referral of a residual power, and it remains residual.
- ✗ There is arguably too much detail on exclusive powers. If the student has time to complete the rest of the answer, though, there is no reason why it couldn't remain.
- ✗ The explanation of residual powers is missing content: it should say that only the states can legislate on these areas, and would be better if it also said that residual powers are not listed in the Constitution.
- ✗ The explanation of the s109 inconsistency rule at the end should include some version of the phrase 's109 inconsistency rule'. It *must* say, also, that the state law is only invalid to the extent of the inconsistency.

Because of the many errors and omissions, this answer might not receive more than 2 marks. Possibly 3 marks, but only if some were overlooked in favour of the content that is present.

#### Sample answer 2:

The constitutional division of power lays out the areas in which the state and federal parliaments can each make law. The specific powers of the Commonwealth were given to it at federation, and were listed in the Constitution – mainly in s51, and known as heads of power. They include topics such as marriage and taxation, and can be held either exclusively by the Commonwealth or concurrently with the states. Exclusive powers were those matters given to the Commonwealth and simultaneously taken away from the states, and include expressly exclusive matters such as customs and excise, as well as exclusive powers by implication such as coining money. Concurrent powers such as taxation were given to the Commonwealth but also retained by the states, giving them both law-making power, and it is here where conflict can occur between laws. If a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail and the state law will be invalid – overridden by the federal one – to the extent of the inconsistency. This is provided for in s109, which is called the inconsistency rule. Residual powers are the final category, and these are the law-making areas left with the states at federation; they include areas such as education, are not listed in the Constitution, and only the states can make laws regarding them.

#### Feedback:

- ✓ This answer integrates the second part of the question into the first response, where it is logical to do so. This is another appropriate way to structure the answer.
- ✓ The use of examples is good.
- ✓ The opening sentence is of a similar quality to that of the first sample.
- ✓ All four categories of power are defined accurately. There is also a good level of specific detail; eg that the specific powers are mainly in s51 and are called the heads of power.
- ✓ Section 109 is both named and defined, and the impact on the state law is made clear.

This answer would be likely to receive full marks.

# BONUS PRACTICE EXAMINATION

## CPAP Study Guide to VCE Legal Studies

Reading time: 15 minutes

Writing time: 2 hours

### STRUCTURE OF EXAM

Section	Number of questions	Number of questions to be answered	Number of marks
A	7	7	40
B	2	2	40
Total			80

Note that suggested answers to this practice examination can be downloaded from [www.commpap.com](http://www.commpap.com)

#### PART A

##### Question 1

Outline one role played by the upper house of federal parliament, and comment on the extent to which it contributes to the effectiveness of the house. (4 marks)

##### Question 2

“Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.” John Adams, 2<sup>nd</sup> president of the United States of America, 1774

- How does the principle of representative government protect the people of Australia and limit the power of parliament? (4 marks)
- Outline two express rights that protect the people from the power of the parliament in the Australian Constitution. (2 marks)

##### Question 3

Explain the impact that section 109 of the Australian Constitution can have on the division of constitutional law-making powers between the federal and state parliaments. (2 marks)

##### Question 4

Using an example to illustrate your answer, explain how a public referendum can either change or protect the words of the Australian Constitution. (5 marks)

##### Question 5

Mark has supplied Jane with building materials for years, but he has a history of breaking agreements and of fighting dirty. Jane doesn't know why she has kept contracting with him, but he has broken another agreement worth half a million dollars and once she sues him she plans never to use him again.

- Explain the purpose of one civil pre-trial procedure that might be conducted before a trial in the County or Supreme Courts. (4 marks)
- Suggest a remedy that you think would be appropriate in this case, and advise Jane on the purposes it would fulfil. (3 marks)

##### Question 6

“Courts, the Victorian Civil and Administrative Tribunal (‘VCAT’) and Consumer Affairs Victoria (‘CAV’) are similar in that they have the ability resolve a range of civil disputes and use many of the same adjudication and negotiation methods to do so. But the experience of dispute resolution can still be very different depending on which avenue is used.”

Discuss the above statement, and comment on which one you believe is the most effective avenue. (6 marks)

##### Question 7

Analyse the differences between the way in which parliaments make law and the way in which the courts make law. Giving reasons, explain which you believe is the more effective law-maker. (10 marks)

## PART B

### Question 1

Rashid left his handbrake off and his car crashed into the wall of Jesse's house. The car was left at top of the very steep driveway, and Jesse had recently broken up with Rashid. Since then, Rashid says he has been having trouble concentrating, and has been found wandering around outside Jesse's house at night. Jesse was struck by debris from the crash, but does not believe at this stage that he suffered any long-term injury.

- If Jesse wanted to take a civil action against Rashid, how might the limitation of actions affect the case? (2 marks)
- If Rashid was charged with a crime resulting from this, how would he be protected by the presumption of innocence? (3 marks)
- What would be involved in Jesse submitting a victim impact statement to the court in Rashid's case, and what impact might this statement have? (4 marks)
- Comment on the appropriateness of a possible plea negotiation from Rashid's perspective and from Jesse's. (5 marks)
- If Jesse sues Rashid and if Rashid is also charged with offences for this wrongdoing, explain two differences Jesse might experience between the civil and criminal dispute resolution processes. (8 marks)

### Question 2

#### Source 1

"It's the attitude of judges like these which has eroded any trust that remained in our legal system. Labor's continued appointment of hard-left activist judges has come back to bite Victorians. Our judiciary should focus more on victims and the safety of our society, and less on the rights of terrorists who don't respect our society, its laws or our people.

This government can put up the best laws in the world but our efforts are undermined unless the courts use them for the purpose they were designed – as a penalty for acts of terrorism and a deterrent for those that might be planning them."

Michael Sukkar MP, Federal Member for Denison, Liberal Party  
June 2017

#### Source 2

Extract from 'Three federal ministers to apologise to Victorian court to avert possible contempt charges' by Paul Karp, published in The Guardian, 22 June 2017.

Three federal ministers will apologise to the Victorian supreme court to head off possible contempt of court charges against them for comments in which they criticised the leniency of its sentences for terrorism offences.

[...]

The comments concerned an appeal being heard by the chief justice, Marilyn Warren, and judges Mark Weinberg and Stephen Kaye over the sentencing of two Melbourne teenagers – Sevdet Besim and a teen known only as MHK – which the commonwealth director of public prosecutions argued had been too lenient.

Warren said the remarks had left the court in the "invidious position" of the integrity of the appeal judgment being questioned, no matter how properly it was arrived at by the court.

"On the one hand, if we don't allow the appeal then we will be accused of engaging in an ideological experiment of being hard-left activist judges," Warren said. "On the other hand, if we increase the sentences, the respondents would be concerned that we were responding to the concerns raised by three senior commonwealth ministers."

The three Victorian ministers, who all have bachelor degrees in law, face possible contempt of court charges. Convictions for contempt can lead to fines or even imprisonment, which could make them ineligible for parliament under section 44 of the Australian Constitution.

Warren said the comments by the ministers "failed to respect the doctrine of separation of powers, breach the principle of sub judice and reflect a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government".

- Other than deterrence, outline two aims of sanctions that might be appropriate in the above terrorism cases. (4 marks)
- Explain one reason for the existence of a court hierarchy. (3 marks)
- Explain the role played by the judge in the resolution of criminal disputes, and analyse the extent to which this role contributes to the achievement of justice. (6 marks)
- Using one example of a case where the High Court used its powers of statutory interpretation to interpret the Constitution and change the balance of powers between state and Commonwealth parliaments, comment on the relationship between the judicial and the legislative arms of government. (5 marks)

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