

THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES



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TABLE OF CONTENTS

VCAA STUDY DESIGN 2024-2028	5
Unit 3 – Rights and justice	5
Area of Study 1: The Victorian criminal justice system	5
Area of Study 2: The Victorian civil justice system	7
Unit 4 – The people, the law, and reform	8
Area of Study 1: The people and the Australian Constitution	8
Area of Study 2: The people, the parliament, and the courts	10
UNIT 3 – RIGHTS AND JUSTICE	12
Introduction to dispute resolution in Australia	12
Criminal law	12
Civil law	12
Resolution of disputes	12
AOS1: THE VICTORIAN CRIMINAL JUSTICE SYSTEM	14
PART 1: KEY IDEAS IN CRIMINAL LAW	14
The distinction between summary and indictable offences 14	
Evaluation: The distinction between summary and indictable offences	15
Key principles in the Victorian criminal justice system	15
The burden of proof	16
The standard of proof	16
The presumption of innocence	17
Rights of stakeholders in a criminal case	18
Rights of the accused	19
Rights of victims	24
PART 2: THE PRINCIPLES OF JUSTICE DURING A CRIMINAL CASE	29
The principles of justice	29
Fairness	29
Equality	29
Access	30
Institutions to assist the accused and victims of crime	31
Victoria Legal Aid	31
Community legal centres	33
Court-based resolution	36
Guilty pleas	36
Reasons for a court hierarchy	40
Roles of key personnel in a criminal case	43
The need for legal practitioners in a criminal case	47
Factors that affect achievement of the principles of justice 50	
Costs	50
Time	51
Cultural differences	52
PART 3: SENTENCING	53
Criminal consequences	53
Purposes of sanctions	53
Types of sanctions	56
Sentencing hearings	60
Factors considered in sentencing	60
AOS2: THE VICTORIAN CIVIL JUSTICE SYSTEM	66
PART 1: KEY IDEAS IN CIVIL LAW	66
Key principles in the Victorian civil justice system	66
The burden of proof	66
The standard of proof	66
Factors to consider before initiating a civil claim	68
Costs	68
Limitation of actions	69
Enforcement issues	70
PART 2: THE PRINCIPLES OF JUSTICE DURING A CIVIL DISPUTE	72
The principles of justice	72
Fairness	72
Equality	72
Access	73
Ways to resolve civil disputes	74
Methods used to resolve civil disputes	74
Resolution through the courts	80
Reasons for a court hierarchy	80
Roles of key personnel in a civil dispute	82
The need for legal practitioners in a civil dispute	87
The use of class actions	89
Institutions used to resolve civil disputes	91
Non-judicial venues	91
Judicial venues	94
Evaluation: Institutions used to resolve civil disputes	97
The impact of costs and time	100
Costs	100
Time	101
PART 3: CIVIL CONSEQUENCES	102
Remedies	102
Purposes of remedies	102
Types of remedies	103
Evaluation: Civil consequences	105
UNIT 3 PRACTICE ASSESSMENT	106
MINI-EXAM NO 1: UNIT 3	106
MINI-EXAM NO 2: UNIT 3	107
YOU BE THE ASSESSOR: UNIT 3	108
UNIT 4 – THE PEOPLE, THE LAW, AND REFORM	112
Introduction to government in Australia	112
Democracy	112
The Australian Constitution	112
Parliament	112
Government	113
AOS1: THE PEOPLE, THE LAW, AND REFORM	115
PART 1: PARLIAMENT AND THE AUSTRALIAN CONSTITUTION	115
Parliament and its law-making powers	115
The roles of the Crown and the houses of parliament in law-making	115
The allocation of law-making powers	123
The impact of High Court interpretation on law-making powers	128
Factors that affect the ability of parliament to make law ..131	
The bicameral structure of parliament	132
International pressures	135
The representative nature of parliament	138
The Constitution as a check on parliament in law-making 140	
The role of the High Court in protecting representative government	140
The separation of legislative, executive and judicial powers	143
The express protection of rights	144
Evaluation: The Australian Constitution as a check on parliament	146
PART 2: THE VICTORIAN COURTS AND THE HIGH COURT IN LAW-MAKING	147
Statutory interpretation	148
Reasons for statutory interpretation	149
Effects of statutory interpretation	150
Evaluation: Statutory interpretation	152
The doctrine of precedent	153
Binding and persuasive precedent	153
Developing precedent	155
Factors that affect the ability of courts to make law	157
The doctrine of precedent	157
Judicial conservatism and judicial activism	158
Costs and time in bringing a case to court	160
The requirement for standing	161
Evaluation: Factors that affect the ability of courts to make law	162
The courts and parliament	163
Features of the relationship between the courts and parliament in law-making	163
AOS2: THE PEOPLE AND REFORM	167
PART 1: LAW REFORM	167

Reasons for law reform	167	Referendum.....	188
Changes in technology	167	The alteration requirements of s128	188
Changes in society's attitudes.....	167	Factors affecting the success of a referendum	189
A desire to generate changes in attitudes	168	Evaluation: Referendum	192
Amending poorly considered laws.....	168	Constitutional reform case studies.....	193
Responding to new threats.....	168	The significance of the 1967 referendum about First Nations people.....	193
Law reform influence from individuals and groups.....	169	Possible future constitutional reform .. Error! Bookmark not defined.	
Petitions.....	169	UNIT 4 PRACTICE ASSESSMENT.....	200
Demonstrations	170	MINI-EXAM NO 3: UNIT 4.....	200
Use of the courts.....	171	MINI-EXAM NO 4: UNIT 4.....	202
Evaluation: Law reform influence from individuals and groups.....	172	YOU BE THE ASSESSOR: UNIT 4	203
Role of the media in reform	173	EXAMINATION ADVICE.....	208
Traditional media.....	173	Recommended administration.....	208
Social media	173	Notes organisation.....	208
Evaluation: Role of the media in law reform	175	Engage in constant revision.....	209
Formal law reform bodies	175	Practice questions.....	209
Role of the Victorian Law Reform Commission.....	175	The final examination	210
Role of government investigations in influencing law reform	177	MINI-EXAM NO 1: UNIT 3 – MARKING GUIDE.....	211
Evaluation: Formal law reform bodies.....	182	MINI-EXAM NO 2: UNIT 3 – MARKING GUIDE.....	215
Evaluation: Law-makers	184	MINI-EXAM NO 3: UNIT 4 – MARKING GUIDE.....	220
PART 2: CONSTITUTIONAL REFORM.....	186	MINI-EXAM NO 4: UNIT 4 – MARKING GUIDE.....	225
Reasons for constitutional reform.....	186	YOU BE THE ASSESSOR: UNIT 3 – FEEDBACK.....	229
Changes for democracy	186	YOU BE THE ASSESSOR: UNIT 4 – FEEDBACK.....	231
Rights and values	186	BONUS PRACTICE EXAMINATION.....	236
Structural changes	187		
INDEX.....	239		

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VCAA STUDY DESIGN 2024-2028

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 2024 a sample exam question published by VCAA asked: “Explain two features of the role of a magistrate in a criminal case that differ from those of a County or Supreme Court judge in a civil dispute..” (4 marks) This combined knowledge of Unit 3 AOS 1 criminal law with Unit 3 AOS 2 civil law, and the role of a magistrate with the role of a judge in a higher court.

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.

The Victorian justice system, which includes the criminal and civil justice systems, aims to protect the rights of individuals and uphold the principles of justice: fairness, equality and access. In Unit 3, students examine the methods and institutions in the criminal and civil justice system, and consider their appropriateness in determining criminal cases and resolving civil disputes. Students consider the Magistrates’ Court, County Court and Supreme Court within the Victorian court hierarchy, as well as other means and institutions used to determine and resolve cases.

Students explore topics such as the rights available to an accused and to victims in the criminal justice system, the roles of the judge, jury, legal practitioners and the parties, and the ability of sanctions and remedies to achieve their purposes. Students investigate the extent to which the principles of justice are upheld in the justice system.

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 purposes of the Victorian criminal justice system are to determine whether an accused person is guilty beyond reasonable doubt of an offence for which they are charged, and to impose sanctions when a person is guilty of committing a crime. The system includes the courts (the Magistrates’ Court, County Court and Supreme Court) and institutions such as Victoria Legal Aid and community legal centres available to assist an accused and victims of crime.

In this area of study, students explore the criminal justice system, key personnel, and the use of plea negotiations 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. They consider the impact of time, costs and cultural differences on 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 ideas

- The distinction between summary offences and indictable offences
- Key principles of the criminal justice system, including:
 - the burden of proof
 - the standard of proof
 - the presumption of innocence
- The rights of an accused, including
 - the right to be tried without unreasonable delay
 - the right to silence
 - the right to trial by jury
- The rights of victims, including:
 - the right to give evidence using alternative arrangements
 - the right to be informed about the proceedings
 - the right to be informed of the likely release date of the offender

The principles of justice during a criminal case

- The principles of justice:
 - fairness

- equality
- access
- The role of Victoria Legal Aid and Victorian community legal centres in assisting an accused and victims of crime
- The purposes and appropriateness of plea negotiations
- The reasons for the Victorian court hierarchy in determining criminal cases, including:
 - specialisation
 - appeals
- The responsibilities of key personnel in a criminal case, including:
 - the judge or magistrate
 - the jury
 - the parties
- The need for legal practitioners in a criminal case
- The impact of costs, time and cultural differences on the achievement of the principles of justice

Sentencing

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

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, using, 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 justifying, discussing, interpreting, and analysing are listed explicitly for the following Key Knowledge points:

- Legal principles and information
- The roles of key personnel in a criminal case
- The reasons for the Victorian court hierarchy
- The appropriateness of plea negotiations
- The impact of costs, time, and cultural differences on the achievement of the principles of justice
- The ability of sanctions to achieve their purposes
- 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 point:

- Legal principles and information

Exam tip: The skill word ‘synthesise’ means ‘to combine’. It is an underlying skill rather than a task word. 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 practical example, 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, or 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:

One of the aims of the Victorian civil justice system is to restore a wronged party to the position they were originally in before a breach of civil law occurred. There are a range of institutions in Victoria that aim to help parties resolve a civil dispute, including courts (the Magistrates' Court, County Court and Supreme Court), Consumer Affairs Victoria, and the Victorian Civil and Administrative Tribunal.

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 the impact of time and costs on 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 ideas

- Key principles in the Victorian civil justice system, including:
 - the burden of proof
 - the standard of proof
- Factors to consider when initiating a civil claim, including:
 - costs
 - limitation of actions
 - enforcement issues

The principles of justice during a civil dispute

- The principles of justice:
 - fairness
 - equality
 - access
- The purposes and appropriateness of methods used to resolve civil disputes, including:
 - mediation
 - conciliation
 - arbitration
- The reasons for the Victorian court hierarchy in determining civil disputes, including:
 - administrative convenience
 - appeals
- The roles of key personnel in a civil dispute, including:
 - the judge or magistrate (including the role of case management)
 - the jury
 - the parties
- The need for legal practitioners in a civil dispute
- The use of class actions to resolve civil disputes
- The purposes and appropriateness of institutions used to resolve disputes, including:
 - Consumer Affairs Victoria
 - the Victorian Civil and Administrative Tribunal
 - the courts
- The impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute

Remedies

- Type of remedies and their specific purposes:
 - damages
 - injunctions

Key Skills

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

The skill of ‘compare’ is used in relation to the following Key Knowledge point:

- The roles of key personnel in criminal and civil cases

Exam tip: Note that this foreshadows questions on the exam that will explicitly require similarities and differences between criminal roles and civil roles. A number of practice comparisons can be found in the VCAA 2024 sample exam questions.

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

- Legal principles and information
- Factors to consider when initiating a civil claim
- The reasons for the Victorian court hierarchy
- The appropriateness of class actions, methods and institutions used to resolve a civil dispute
- The impact of costs and time on the achievement of the principles of justice
- The ability of remedies to achieve their purposes
- 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 point:

- Legal principles and information

Exam tip: The underlying skill of ‘synthesis’ can be applied to all Unit 3 AOS 2 content, combined with any Key Knowledge and task word.

UNIT 4 – THE PEOPLE, THE LAW, AND REFORM

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.

The study of Australia’s laws and legal system includes an understanding of institutions that make and reform our laws. In Unit 4, students explore how the Australian Constitution establishes the law-making powers of the Commonwealth and state parliaments, and how it protects the Australian people through structures that act as a check on parliament in law-making. Students develop an understanding of the significance of the High Court in protecting and interpreting the Australian Constitution. They investigate parliament and the courts, and the relationship between the two in law-making, and consider the roles of the individual, the media and law reform bodies in influencing changes to the law, and past and future constitutional reform.

Area of Study 1: The people and the Australian Constitution

AOS 1 (or ‘Outcome 1’) makes up 60% 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. 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 examine the ways in which the Australian Constitution acts as a check on parliament in law-making, and factors that affect the ability of parliament and courts to make law. They explore the relationship between parliament and courts in law-making and consider the capacity of both institutions to make law.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Parliament and the Australian Constitution

- The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making
- The law-making powers of the state and Commonwealth parliaments, including:
 - exclusive powers
 - concurrent powers
 - residual powers
- The significance of section 109 of the Australian Constitution
- One High Court case which has had an impact on state and Commonwealth law-making powers
- Factors that affect the ability of parliament to make law, including:
 - the bicameral structure of parliament
 - international pressures
 - the representative nature of parliament
- The means by which the Australian Constitution acts as a check on parliament in law-making, including:
 - the role of the High Court in protecting the principle of representative government
 - the separation of the legislative, executive and judicial powers
 - the express protection of rights

The Victorian courts and the High Court in law-making

- The reasons for statutory interpretation
- The effects of statutory interpretation
- Features of the doctrine of precedent including:
 - binding precedent
 - persuasive precedent
 - the reversing, overruling, distinguishing, and disapproving of precedent
- Factors that affect the ability of courts to make law, including:
 - the doctrine of precedent
 - judicial conservatism and 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 codification of common law
 - the abrogation of common law

Key Skills

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

The ‘lower-order’ skill of using examples is listed expressly for the following Key Knowledge point:

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

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

- Legal principles and information
- The relationship between parliament and courts
- The significance of one High Court case which has had an impact on state and Commonwealth law-making powers
- The ability of parliament and the courts to make law
- The means by which the Australian Constitution acts as a check on parliament in law-making

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 point:

- Legal principles

Exam tip: The underlying skill of ‘synthesis’ can be applied to all Unit 4 AOS 1 content, combined with any Key Knowledge and task word.

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

AOS 2 (or 'Outcome 2') makes up the other 40% of Unit 4. The Outcome summary from the Study Design reads:

Laws should reflect the needs of society, but they can become outdated. Individuals and groups can actively participate to influence change to laws, and law reform bodies (including the Victorian Law Reform Commission, parliamentary committees, and Royal Commissions) can investigate and make recommendations for change. Laws can be changed by parliament and the courts, while constitutional reform requires a referendum.

In this area of study, students investigate the need for law reform and the means by which individuals and groups can influence change in the law. Students draw on examples of individuals, groups and the media influencing law reform, as well as examples from the past four years of inquiries of law reform bodies. Students examine the relationship between the Australian people and the Australian Constitution, the reasons for and processes of constitutional reform, the 1967 referendum about First Nations people and the 2023 referendum about an Aboriginal and Torres Strait Islander Voice.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Law reform

- Reasons for law reform
- The means by which individuals or groups can influence law reform including:
 - through petitions
 - through demonstrations
 - through 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 Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system
- The role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- One recent Royal Commission inquiry or one recent parliamentary committee inquiry

Constitutional reform

- Reasons for constitutional reform
- The requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum
- Factors affecting the success of a referendum
- The significance of:
 - the 1967 referendum about First Nations people
 - the 2023 referendum about an Aboriginal and Torres Strait Islander Voice

Key Skills

'Lower-order' skills such as explaining, using, 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 reasons for law reform
- The reasons for constitutional reform
- The role of the media in law reform
- The means by which individuals or groups can influence law reform
- The ability of law reform bodies to influence a change in the law

Note that the examples used in relation to the ability of law reform bodies to influence a change in the law must be *recent* – in other words, from the four calendar years prior to the exam.

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 2024 examination, no example before 2020 should be used as a 'recent example'.

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

- Legal principles and information
- Factors affecting the success of a referendum
- The role of the media in law reform
- The means by which individuals or groups can influence law reform

- The ability of the Australian people to change the Australian Constitution, including in relation to past and future constitutional reform
- The ability of law reform bodies to influence a change in the law

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 point:

- Legal principles and information

Exam tip: The underlying skill of 'synthesis' can be applied to all Unit 4 AOS 2 content, combined with any Key Knowledge and task word.

REVIEW QUESTIONS – Advice

The Review questions are different from the sample examination questions scattered throughout this Study Guide because they are focused on 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 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.

APPLICATION EXERCISES – Advice

The Application exercises are different from the Review questions because they are focused on practising higher-order skills and task words. The Application exercises will rely on your understanding of factual content, but will ask you to *do* something with that content.

- If you want to work on COMPREHENSION, use the Application exercises as model sentences and answers. Look at the structure of the information given to you, and try to model your own answers on this breakdown of content + argument + application.
- If you want to work on MEMORISATION, take arguments from the Application exercises and put them into your notes. You may need to modify them based on the wording of the question you are given or the source material attached to it, but this will build up a bank of options for you to start using.

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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 ('OPP'), 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 party 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. They cannot be used for civil cases.

Criminal cases begin with a wrongdoing that is against a criminal law. 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.

The power of each court to hear criminal matters is determined by how serious the crime is, and how serious the consequences are – such as the maximum jail sentence. Tribunals cannot resolve criminal disputes, no matter how minor.

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 'allegations' 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. You do not receive full marks if your answer confuses criminal and civil language.

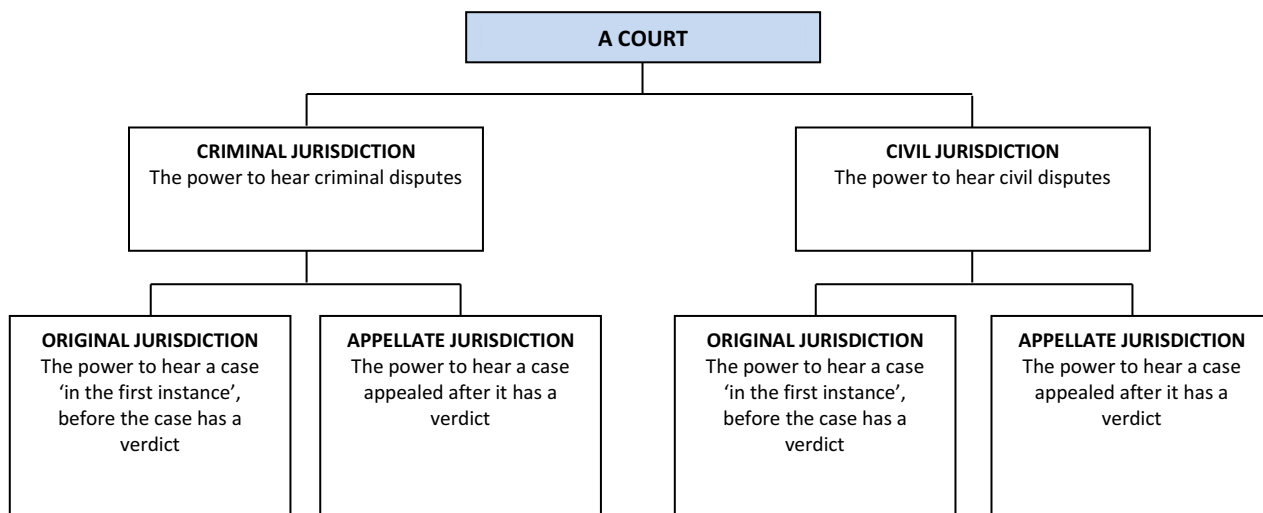
The power of each court or tribunal to hear civil matters is determined by how complex the case is: how much money is being asked for, or how complicated the law and/or evidence are. More complex matters are heard in higher courts.

Resolution of disputes

The most common means of resolving disputes has traditionally been 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 the jurisdiction of each court. 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.

A court may have original criminal jurisdiction; original civil jurisdiction; appellate criminal jurisdiction; and/or appellate civil jurisdiction.



Tribunals are not courts: they are government bodies, given the power to resolve civil disputes in less complex areas. Any appeals or legal challenges allow the courts to check the work of tribunal, however, to ensure they are held accountable.

Where relevant, the ability of the individual to take her, his or its own action outside the official dispute resolution bodies will also be studied. For instance, individuals may try to resolve civil disputes privately without going to any court or official government tribunal. Criminal disputes cannot be resolved privately.

REVIEW QUESTIONS – Introduction to dispute resolution

1. Identify the names of the parties in a criminal case, versus the names of the parties in a civil case.
2. What is the difference between who the prosecution party represents versus who the plaintiff party represents?
3. Does the victim prosecute a crime?
4. Does the victim bring a civil lawsuit?
5. Can tribunals resolve criminal disputes?
6. What is a synonym for 'jurisdiction'?
7. Would a court use its original or its appellate jurisdiction to decide a verdict in a case?
8. Would a challenge to an error made in the original trial be heard using the original jurisdiction or appellate jurisdiction of a court?
9. Would a retrial be conducted in the original jurisdiction or the appellate jurisdiction of a court?

Fill out the following table as it relates to a comparison of criminal and civil terminology:

CRIMINAL TERMINOLOGY	CIVIL TERMINOLOGY
	Civil wrong
Prosecuted	
Guilty	
	Defendant
Prosecution or OPP	

APPLICATION EXERCISE – Introduction to dispute resolution

Niamh's friend is driving her home one night, and the car crashes into a streetlight while her friend is checking her phone at the same time as driving. Niamh sues her friend for \$210,000 to compensate for injury caused as a result of the accident.

- a. Advise Niamh on whether she is considering bringing a criminal case or a civil case against her friend.
- b. Which bodies might have the jurisdiction to hear disputes regarding these facts, considering both criminal and civil elements? Explain to Niamh where the disputes might be resolved.
- c. Draw up a list of dispute resolution terminology you might use when discussing the case being brought by Niamh.
- d. Draw up a list of terminology you would need to avoid when discussing the case being brought by Niamh.

AOS1: THE VICTORIAN CRIMINAL JUSTICE SYSTEM

Part 1: Key ideas in criminal law

Key ideas in the criminal justice system are the distinction between summary and indictable offences, the burden of proof, the standard of proof, and the presumption of innocence. Rights of participants are also studied, including rights of the accused and rights of the victim.

THE DISTINCTION BETWEEN SUMMARY AND INDICTABLE OFFENCES

Keyword: Seriousness

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 Courts.

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'.

THE MOST SERIOUS INDICTABLE OFFENCES	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.
SERIOUS INDICTABLE OFFENCES	Dealt with in the County Court before a County Court judge and a jury.
MINOR INDICTABLE OFFENCES	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.
INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY	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.
SUMMARY OFFENCES	Dealt with in the Magistrates' Court before a magistrate alone – there is NO jury at any time. There <i>is</i> 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 mid-range 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.

In 2023-24 the County Court remitted approximately 10% of minor indictable matters back to the Magistrates' Court after committal to be finalised summarily.

REVIEW QUESTIONS – The distinction between summary and indictable offences

1. Outline the difference in seriousness between a summary offence and an indictable offence.
2. Which type of offence is heard with a jury?
3. Which type of offence is eligible for potentially unlimited fines or imprisonment?
4. Can imprisonment be ordered for both types of offences, indictable and summary?
5. Are guilty pleas allowed for both types of offences, indictable and summary?
6. Explain what it means to say that an indictable offence can be heard summarily.
7. What would be two advantages of having an indictable offence heard summarily?
8. Which court will a minor indictable offence be heard in if the accused chooses *not* to have it heard summarily, and which court will a minor indictable offence be heard in if the accused *does* choose to have it heard summarily?

Evaluation: The distinction between summary and indictable offences

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 and 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.

STRENGTHS	WEAKNESSES
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 – eg a witness subpoena is \$44.10 compared with \$65.30 in the Supreme Court. This all helps reduce legal expenses for representation, and increase access for accused. 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 due process.	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 reflect the gravity of the wrongdoing. Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases access. For example, the average timeframe for resolution through the Magistrate's Court is 6 months (67% within 6 months in 2023-24); through the County Court it is 12-24 months (53% within 12 months and the Court estimates trial commencement between 12-14 months for any criminal matter filed on 01 July 2024).

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is

KEY PRINCIPLES 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) – if the prosecution can score enough points according to the rules of the game, they win. The job of the defence is to stop the prosecution scoring points.

Under this system the parties to the case are adversaries, or opponents, who each battle the other; 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 burden of proof

Keyword: Bring evidence

Definition

The burden of proof is the responsibility borne by the party bringing the case to show sufficient evidence to prove the accused guilty of the charges. In a criminal hearing or trial, the burden will be on the prosecution to bring evidence to prove the allegations it has made against the accused.

This burden must be satisfied before the accused has any responsibility to defend herself or himself.

Detail

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

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 prosecution means that the accused should win by default.

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

- In 2005 offences relating to the trafficking of drugs were added to the Commonwealth *Criminal Code*. For instance, when the defendant is in possession of a 'trafficable' quantity of a controlled drug, they will be presumed *without evidence* to have the intention to traffic, or the intention to cultivate or manufacture for a commercial purpose. The onus will then be placed on the defendant to prove they did not.

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

- ✗ It is *not* a reversal of the burden of proof when the accused argues a defence. They do *not* have the legal burden to prove themselves innocent – they are merely introducing reasonable doubt to make the prosecution evidence less convincing, and they only need to prove the defence to a much lower 'standard' of proof.

REVIEW QUESTIONS – The burden of proof

1. Give a synonym of the word 'burden'.
2. Give a synonym of the word 'proof'.
3. Which party has the burden of proof in criminal trials?
4. Why does this party have the burden?
5. Is it a reversal of the burden of proof when the accused argues the elements of a defence?

The standard of proof

Keyword: Amount of evidence

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 criminal hearing or trial, the standard of proof is the quality of evidence required for the prosecution to demonstrate that the accused is guilty of the charges.

The precise criminal standard is 'beyond reasonable doubt', meaning that it must be beyond any rational or reasonable doubt that the accused is legally and criminally responsible for the offence.

Detail

It is generally accepted that the high standard of proof in criminal trials lessens the risk of wrongful convictions, and this is an important principle in the justice system.

Current Australian interpretation by courts defines 'beyond reasonable doubt' as a phrase that each juror should understand for themselves. Jurors should disregard only those doubts that are "far-fetched or fanciful", but they do not need to be convinced beyond *any* doubt.

The prosecution must prove *all* the elements of the offence beyond reasonable doubt, and must also *disprove* all *defences* beyond reasonable doubt, as long as those defences have been raised as issues in the trial or hearing.

REVIEW QUESTIONS – The standard of proof

1. Give a synonym of the word 'standard'.
2. Can you use the same synonym of the word 'proof' as you did for the 'burden of proof'?
3. Which party has to satisfy the standard of proof?
4. What is the precise standard of proof in criminal trials?
5. Is there an official definition of the meaning of the standard of proof in legislation or precedent?
6. What kinds of doubts can be ignored in a guilty verdict?

The presumption of innocence

Keyword: Default

Definition

The presumption of innocence is the assumption that the party against whom allegations are being made is innocent of all allegations unless, and until, the party bringing the case shows a sufficient weight of evidence to the contrary. The default rests with the accused unless and until the prosecution disproves it.

Detail

The presumption of innocence is protected by s25 of the Victorian Charter and is closer to absolute innocence than to a verdict of 'not guilty': a verdict of 'not guilty' only means the charges have not been proved by the prosecution. Because of the presumption of innocence, the accused does not have the responsibility to prove that she or he is innocent, or even likely or probably innocent. The defendant does not need to prove anything – except that the prosecution has not discharged its burden of proof.

Arguing a defence does not mean the accused is waiving her or his right to the presumption of innocence. Instead, a defence is a strategic argument made because it is possible or likely that the prosecution will have enough evidence to win the case. The presumption of innocence is only overturned once that 'guilty' verdict is entered.

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 QUESTIONS – The presumption of innocence

1. Which party is protected by the presumption of innocence?
2. Is the accused presumed innocent when they are arguing a defence?
3. Is the presumption of innocence the same as the presumption of 'not guilty'?
4. At what point in a trial is the presumption of innocence overturned?
5. Provide two examples of ways in which the legal system tries to protect the presumption of innocence.

Evaluation: Key principles 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 and 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.

STRENGTHS	PRINCIPLE	WEAKNESSES
The accused will have access to the evidence against them before they will be expected to defend themselves. It would not be fair to ask the accused to defend against claims they did not know the details of. 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. Not having proper grounds to put an individual through the ordeal of a prosecution would be abuse of state power.	The burden of proof	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. In terms of evidence and legal arguments, equality 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.

The accused cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the fairness of the trial, because it would be unfair to prosecute someone if there was little to no evidence justifying it and they were sure to be found not guilty at the end. 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 fair, because a person's freedom may be on the line.	The standard of proof	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 equal in the trial process. For example, studies from the United Kingdom, New Zealand, Queensland and New South Wales all show consistently that jurors have difficulty with the concept of 'beyond reasonable doubt' and fail to apply it consistently or interpret it in the same way. This makes accused in different cases unequal to each other in terms of how they are treated, and does not give them the same access to justice.
The presumption of innocence is upheld by procedures such as bail. This protects human rights and fairness 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 a meaningful ability to defend themselves and increases the equality between them and the prosecution. The accused should be protected from arbitrary arrest and punishment before they have had a chance to hear the accusations made against them, and defend themselves from those charges.	The presumption of innocence	In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. The accused can be brought back to trial even though they were presumed innocent the first time and found not guilty; it also decreases access 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. Procedures such as holding suspects on remand unfairly deny the defendant the right to the presumption of innocence, and jeopardise their access to justice because they are much less able to prepare for their defence and cannot earn money in the meantime.

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

APPLICATION EXERCISE – Key principles in the criminal justice system: evaluation

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 gives an unfair benefit to the accused and may prevent justice from being done.

- 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

Parties to a criminal case are the accused and the prosecution, but 'stakeholders' is broader: stakeholders include any person with an interest in the case, including witnesses and victims.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') 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 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 Victorian *Victim's Charter Act 2006* (Vic) performs a similar role for victims in the criminal justice system.

These Charters are not legally-enforceable with fines or orders. Instead, they affect policy and factual or procedural decisions. Courts and tribunals must interpret all Victorian laws in a way that upholds Charter rights, where possible.

Rights of the accused

The right to be tried without unreasonable delay

Keyword: Timely

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. Resolution should be finalised in a timely manner: not rushed, but not unnecessarily delayed.

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.

Victorian Charter

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.*

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:

- Most 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 silence

Keyword: Refusal

Definition

Any person who believes on reasonable grounds that she or he is suspected of having been a party to an offence, or who is on trial for an offence, is entitled to remain silent and refuse to answer questions or give evidence. No adverse inferences can be drawn from that refusal.

Exam tip: The right is one to *refuse* to respond – questions may still be asked. The accused may also *choose* to give information if she or he wishes.

Detail

The phrase 'right to silence' is a group of rights, with three main parts:

1. No person under suspicion of criminal responsibility can be compelled to answer questions from a police officer or any person in a similar position of authority.
2. No person on trial for a criminal offence can be compelled to give evidence.

3. No 'adverse inferences' can be drawn at trial from a failure to answer questions before trial, or to give evidence during trial.

The rights continue to exist at common law, but have been supplemented by statute such as the *Crimes Act 1958* (Vic) and the *Evidence Act 2008* (Vic).

Crimes Act 1958 (Vic)

Section 464J – Right to remain silent etc not affected

Nothing in this subdivision affects—

- (a) *the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act*

Evidence Act 2008 (Vic)

Section 89 – Evidence of silence

- (1) *In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused —*
(a) *to answer one or more questions; or*
(b) *to respond to a representation —*
put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
- (4) *In this section, “inference” includes —*
(a) *an inference of consciousness of guilt; or*
(b) *an inference relevant to a party’s credibility.*

The Victorian Director of Public Prosecutions found that 7–9% of suspects refuse to answer police questions.

The privilege against self-incrimination

The origin of the right to refuse to answer questions is Sir Edward Coke’s 17th century challenge to the church courts and their practice of putting people under oath for questioning *before* they even knew what they were being accused of. It was a protection against potential self-incrimination, and was based on the Latin principle *nemo tenetur se ipsum accusare*, ‘no man is bound to accuse himself.’ This principle is also protected in Article 14(3)(g) of the International Covenant on Civil and Political Rights, which states that no person may be “compelled to testify against himself or to confess guilt.”

The privilege against self-incrimination is waived when an accused chooses to give evidence in their own defence, after hearing the evidence against themselves. The *Crimes Act* provides that, in the event that an accused chooses to testify in court, they lose their right to selectively choose which questions they want to answer.

The rule against adverse inferences

‘Adverse assumptions’ include assuming things like guilty knowledge from silence. The right against adverse inferences was established in Australia in *Petty v The Queen* (1991) 173 CLR 95. The High Court held that allowing the judge or jury to draw adverse inferences would erode the value of the right to remain silent, and render it worthless, because it would effectively turn a refusal to answer into an answer that worked against the accused.

Verdicts have been overturned on appeal because judges gave directions to juries that implied an adverse inference, or the prosecution suggested guilt by silence to the jury.

- ✱ The prosecutor told the jury to ‘ask themselves why an accused had remained silent’ in *R v Stavrinou* (2003) 140 A Crim R 594.
- ✱ In *King v R* (1986) 15 FCR 427 the judge said that the police “gave the accused the opportunity to explain” his whereabouts.
- ✱ In *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63 the judge told the jury that the accused’s failure to respond to certain questions was not the “sort of response one would expect” from a person telling the truth.

Exceptions

In Victoria, there is a requirement that a person provide their name and address when asked for a valid reason by the police, or their driver’s licence when they are pulled over by police while driving. Valid reasons include being on public transport property, in licensed premises, or if the police believe you can assist with an indictable offence.

Other statutes abrogate the right in specific cases: in the area of bankruptcy; for witnesses testifying before a Royal Commission; in federal anti-terrorism laws; and in Victorian organised crime laws such as the *Major Crime (Investigative Powers) Act 2004* (Vic).

In Victoria, some limitations have been placed on the right of silence by the pre-trial disclosure requirements of Part 5.5 of the *Criminal Procedure Act 2009* (Vic). For example:

- If the prosecution has served on the accused a summary of its opening statement, the accused must give the prosecution and the court a response to the summary that identifies the acts, facts, matters and circumstances with which they disagree and the reasons why, per s183.
- If the accused intends to call an expert witness at the trial, they must file a copy of the witness’s statement with the court and the prosecution, per s189.
- If the accused intends to give evidence of an alibi, they must notify the Director of Public Prosecutions of that fact, per s190.

This could work against the accused. For instance, the prosecution would ask the police to investigate the claimed alibi. In addition to gaining an insight into the defence being mounted, the police would be given additional information in the investigation phase. If the accused fails to comply with the pre-trial disclosure requirements, they may be prevented from giving or calling certain evidence, and their response to the prosecution's opening address may be restricted.

The right to trial by jury

Keyword: Peers

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.

The accused cannot, therefore, elect to be tried without a jury. This right is not one they can choose to waive.

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 only until 26 April 2021.

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, and is not necessary to discuss in Unit 3 because the name of the Area of Study is the *Victorian* criminal justice system.

REVIEW QUESTIONS – Rights of the accused

1. Can the courts ignore the Victorian Charter and the Victim's Charter when hearing cases?
2. How might the Charters have an effect on Victorian cases?
3. What section of the Victorian Charter protects the right to be tried without unreasonable delay?
4. What is the difference between 'reasonable' delay and 'unreasonable' delay?
5. When in each dispute does the right to be tried without unreasonable delay start?
6. Provide two examples of ways in which the criminal justice system tries to avoid delay.
7. Name the two main pieces of legislation in Victoria that protect the right to silence.
8. Do witnesses to a crime have the right to silence?
9. Does an accused have the right to silence when being questioned by people outside the legal system?
10. Can an accused waive the right to silence and choose to give information to the police?
11. If an accused gives evidence at trial, can they choose only some questions to answer and still be protected by the right to silence?
12. What is the meaning of 'adverse inferences'?
13. How is telling the jury to 'ask themselves why an accused remained silent' a breach of the right to silence?
14. Outline one exception to the right to silence in Victoria.
15. How many people sit on a criminal jury?
16. What category of charges give rise to the right to trial by jury?
17. Will an accused be tried by jury if she or he pleads guilty?
18. What legislation provides for trial by jury for Victorians being prosecuted for state offences?
19. Can an accused waive the right to trial by jury and elect a trial by judge alone?
20. What legislation provides for trial by jury for Victorians being prosecuted for federal offences?

Evaluation: Rights of the accused

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

STRENGTHS	RIGHTS	WEAKNESSES
The courts have been given the power to oversee case management to help ensure that unreasonable delays in proceedings do not occur. Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude, and reduces the costs to the accused of briefing a lawyer to represent them through pre-trial, trial, and potentially appeals. The right is enforced on a case-by-case basis, as per the <i>Barbaro</i> precedent. This means that courts can be flexible, and take the circumstances into account.	The right to be tried without unreasonable delay	If cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. Since the right runs from the time of the wrongdoing, police may be pressured to lay charges before they have fully investigated all angles of a crime. Some evidence may remain untested, or alternative suspects may not be investigated. 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.
The protection of the accused is much greater than for a civil defendant. If a defendant failed to give evidence to rebut the plaintiff's case, the court is permitted to more readily accept the plaintiff's claims and assume that the defendant would have rebutted them if they could. The accused is not vulnerable to the same risk if they stay silent. Society has an interest in not having innocent people convicted of crimes because they misspoke to police or unwittingly contradicted the story given by another witness. The right against adverse inferences was introduced in Australia in 1991 because there was seen to be a need for it to protect the purpose of the right to silence. This has made the right broader in scope and more powerful. The right protects those accused whom the lawyer is concerned would perform poorly as a witness, because of their intellect or verbal skills, or how they present visually. These people might be innocent. It is the responsibility of the prosecution to prove the case – the defence does not need to give them information to help them discharge the burden of proof.	The right to silence	The right is not absolute: there are exceptions in statute where the right is abrogated for a purpose the parliament has decided is more important – for instance organised crime – and indirect exceptions where procedure denies the accused the right. For instance, giving notice of an alibi. Since the 1980s there has been an increasing reliance on undercover officers, informers, and surveillance technologies. The accused cannot make an informed decision to exercise their right to silence in these cases. Society and victims of crime have an interest in offences being solved and the rightful accused being brought to justice. The right to silence is a barrier to this if the accused has material information that would assist. The right does not apply in conversations with people other than government authorities. For instance, in <i>R v Alexander</i> [1994] 2 VR 249, the accused was suspected of murdering his wife, and failed to protest his innocence in conversations with his friends. The court allowed an inference of guilt to be drawn because the conversation was not with a person in authority. In 1985 and 1987 the Australian Law Reform Commission recommended that adverse inferences be drawn from silence, because they argued that "reasonable inferences" are in the interests of fairness. They said: "If accused persons can avoid giving evidence, and being subject to cross-examination, without any adverse consequences, then there is a risk that guilty persons would escape conviction." In 1999 the Law Reform Commission of Western Australia made the same recommendation. The Parliament has not made these reforms.

Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures fairness 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. The jury judges the accused from the perspective of the common person. This provides greater equality between the parties because it minimises the power of the state. 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 verdict. 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.	The right to trial by jury	For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective access for an accused person to sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions. 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 fairness of the criminal justice system. 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 1,200 former jurors demonstrated that 55.4% of them believed the standard meant they needed to be "sure," while 10.1% of them believed the standard meant only that guilt was "pretty likely."
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APPLICATION EXERCISE – Rights of the accused: evaluation

The accused has a right to trial by jury that they cannot waive, but juries are not trained in giving the accused a fair trial. 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; the fact that we have laws ensuring that all deliberations are kept secret provides no check on this. The benefit is that increased finality is brought to each case, because appeal courts are reluctant to overturn a jury's findings without having clear grounds. 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, so the trade-off for finality is occasional concern that the jury 'got it wrong'.

- 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 the accused covered in the section.

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 are implemented in other legislation, such as the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic). These principles are then legally enforceable.

The right to give evidence using alternative arrangements

Keyword: Vulnerable

This right is available to only a small class of victim – not every victim has this right.

Definition

Part 8.2 of the *Criminal Procedure Act* gives courts the power to order alternative arrangements for the giving of evidence by witnesses the law considers particularly vulnerable, due to giving evidence in offences involving sexual and family violence, and obscene public behaviour.

Detail

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 of secondary harm through the justice system. 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

Exam tip: The *Evidence Act 2008* used to give alternative arrangements to children and witnesses with a cognitive impairment. Since 2018, these witnesses have not been eligible for alternative arrangements unless they are in one of the above matters.

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 or dog 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, ss366 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.

Protected witnesses

The class of ‘protected witnesses’ exists in addition to the above class of vulnerable witnesses, and protected witnesses receive additional arrangements. 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 Division 3 of Part 8.2 of the *Criminal Procedure Act*.

The right to be informed about the proceedings

Keyword: Progress of the case

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 or stakeholder 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 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 and the progress of the case.

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.
- Plea negotiations undertaken and their outcome.
- 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 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 – same-day sentencing does not provide them with enough time.

The right to be informed of the likely release date of the offender

Keyword: No surprises

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 if they choose to put their name on the Victim's Register.

Definition

Section 17 of the Victims Charter allows a victim of a criminal act of violence in Victoria to include themselves on the Victim's 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

Ensuring the victim has the choice to know the likely release date ensures they will not be taken by surprise when the offender is released back into the community. They will be able to prepare themselves, and make arrangements to not see the offender in person if they fear that.

Victims may also make a submission to the Adult Parole Board about the effect of the offender's potential release on them. 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 QUESTIONS – Rights of victims

1. What piece of legislation outlines many of the rights of victims in criminal trials?
2. What types of crimes give victims the right to alternative arrangements?
3. Identify three ways in which the judge might amend normal court procedure to protect a vulnerable witness.
4. What kind of witness will fall into the category of 'protected witness'?
5. What special arrangement is made for the giving of evidence by protected witnesses?
6. Is the victim a party in a criminal case?
7. What legislation gives victims the right to be informed about proceedings?
8. How quickly does the prosecution need to relay information to the victim?
9. Provide two examples of matters that a prosecutor should inform the victim of.
10. If the offender is sentenced to a term of imprisonment, what additional right does the victim in the case gain?
11. What is the relevance of the Victim's Register to this right?
12. What role is the victim permitted to play with regard to the offender receiving parole?
13. What general position in relation to the role of victims did the Victorian Law Reform Commission take in its 2016 report?

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Evaluation: Rights of victims

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

STRENGTHS	RIGHTS	WEAKNESSES
Accommodating the special needs of witnesses such as those involved in an alleged sexual offence or family violence ensures that vulnerable people have appropriate access to give evidence in court. It ensures they are treated fairly by legal procedures such as cross-examination. 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. Alternative arrangements have been found to have made trials run more smoothly and evidence to be given with more clarity and fewer breaks. Former attorney-general Martin Pakula reported that witnesses could give their evidence more efficiently when they were calmer, requiring fewer breaks in court proceedings: "It means that the process can be done more quickly and it means that witnesses are in a better frame of mind."	The right to alternative arrangements	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 fairness of a trial unless carefully managed by the presiding judge. 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, and the category was limited to a very narrow range of matters. Alternative arrangements that limit the ability of the accused to examine witnesses may prevent the accused from receiving a fair trial. If a witness gives evidence through a pre-taped audio recording, for instance, the jury may not be able to properly assess their manner and the accused may not be able to effectively challenge their evidence. The courts do not always have the facilities needed for alternative arrangements. For example, in the 2019 committal hearing for actor Craig McLachlan (on charges of indecent assault) one witness requested a screen for giving evidence in court. She had to be shielded by a portable whiteboard, because the screen was being used in another courtroom for a family violence case.
The obligation to inform victims about proceedings ensures that the prosecution considers the role of victims in a criminal trial. This enhances access and understanding for victims to criminal legal procedures, even though they are not technically parties. Victims are able to choose whether closure and recovery would be best served by avoiding confronting experiences such as trial, or by attending. They can also make decisions about how to handle possible media coverage. Since the views of the victim can be taken into account by the court during sentencing, it makes sense for the OPP to take them into account during plea negotiations, because the charges and plea decided on will affect sentencing.	The right to be informed about the proceedings	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 access. Many victims report not being kept informed in a timely manner. Victims may be informed of plea negotiations after they have concluded, or trial dates immediately before the trial commences. The August 2021 survey by Engage Australia found most victims had not received an opportunity to prepare a Victim Impact Statement.

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 told when the offender may be released. Even though the wrongdoing is in the past, the effects on the victim can linger for decades. The victim may wish to speak about ongoing trauma, or potentially forgiveness of the offender, and this being given respect by the parole board may help them with closure. Victims can choose whether to stay informed or to move on without continual reminders, because the right is 'opt in': only those victims who choose to record their contact details on the Victim's Register will be updated.	The right to be informed about the likely release date of the offender	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 the right of the accused to equal treatment under the law. The ability of the victim to influence parole may infringe the right of the offender to natural justice, because their sanction is being influenced by matters other than their guilt and the gravity of the offence. The victim can influence it based on their feelings potentially decades after the offence. Since there is no obligation to inform the victim if they are not on the Victim's Register, any victim who does not realise this procedure or who allows their details to become outdated will not be informed and no search will be made for them to confirm.
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APPLICATION EXERCISE – Rights of victims: evaluation

The right of the victim to be informed about proceedings is merely aspirational, and is not a protection that operates as a 'right'. Section 9B of the Victim's Charter, for instance, allows the prosecution to not inform victims of some decisions if "it is not practical to contact the victim given the speed or nature of the proceeding." This means that victims may not be aware of charges being dropped or plea agreements being made. The 2021 Engage Australia study showed that over 50% of victims could not prepare an Impact Statement because matters resolved too quickly. This shows how the right is hollow in practice: it is an emotional statement of inclusion, intended to acknowledge the victim, but that gives them no legally-actionable power.

- a. The above answer is a sample of an explanation of a weakness. Using this as a guide, explain one weakness and one strength of each of the rights of victims covered in the section.

Part 2: The principles of justice during a criminal case

The Study Design identifies the principles that indicate justice has been achieved: fairness, equality, and access.

The way that features of the criminal justice system work to achieve these principles in the resolution of a criminal case include government-funded institutions outside the court system, such as Victoria Legal Aid and community legal centres; and the operation of the court system itself, such as its arrangement into a hierarchy, the roles of participants, and the ability of the accused to avoid trial with a guilty plea.

These features are assessed according to how they achieve 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.

Fairness

Keyword: Natural justice

Definition

A fair hearing requires a level of impartiality and a lack of bias. All parties who come before the courts ought to be treated equally, each party ought to have a real opportunity to present its evidence and arguments, 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: 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*. This is something that will come up with every single definition you provide, in every single topic.

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 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 apply for leave to appeal – for instance, to 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

Keyword: Sameness

Definition

‘Equality’ is the idea that every person or organisation that has a dispute to be resolved is valued the same 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 an immutable characteristic: 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 narrow, as formal or procedural equality, or broad, as substantive or ‘opportunity-driven’ equality:

- ✓ Procedural equality focuses on 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, to achieve more equal outcomes or opportunities.

Detail

The Victorian Charter protects the rights of people in the state to equality in the legal system in a range of ways. For example, s8 of the Charter provides procedural equality in 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 equality of opportunity, 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, and whether someone’s first or most fluent language and ways of communicating match the system.
- 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

Keyword: Meaningful use

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 about the ability, in real life, of different people to use the system 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 ability to use the systems and places chosen.

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.
- Wealth. 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 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 – for instance, the accused may feel confident requesting summary finalisation of a minor indictable offence. A court hierarchy also allows for administrative convenience, as the prosecution knows which court deals with which type of dispute and does not have to complete forms and pay fees that are not relevant to the offence charged.
- 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 QUESTIONS – The principles of justice

1. Give a synonym for '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. Give a synonym for 'equality'.
5. Differentiate between procedural equality and equality of opportunity.
6. Identify three things that have the ability to compromise equality.
7. Outline two ways in which the legal system attempts to achieve equality in dispute resolution.
8. Give a synonym for 'access'.
9. Physical location is one aspect of access. Name two others.
10. Identify three things that have the ability to compromise access.
11. Outline two ways in which the legal system attempts to achieve access in dispute resolution.

INSTITUTIONS TO ASSIST THE ACCUSED AND VICTIMS OF CRIME

According to the Public Understanding of Law Survey of 6,008 Victorians, published in 2023 by the Victoria Law Foundation, 42% of all Victorians will experience at least one legal problem in any given year. Criminal problems are the third-highest frequency after consumer law problems and housing.

There are some institutions, both government-funded and privately-funded, that provide public information on legal rights and the operation of the legal system. They also give limited legal representation and advice. The focus of these institutions is criminal charges and prosecution, but they also interact with victims of crime and witnesses.

Victoria Legal Aid

Keyword: Advice, advocacy and funding

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 to accused.

Detail

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

- Provide legal aid and representation in the most effective, economic and efficient manner possible. This is directed towards accused people.
- Provide improved access to justice and legal remedies to the Victorian community. This is directed towards accused people, but also includes advising victims of victim compensation and support services.

VLA does this by providing four main types of services:

- i. The provision of free legal information through pamphlets and fact sheets, its website, its telephone helpline, its online Legal Help Chat service, its Victims Legal Service, and its duty lawyers stationed at court. This legal information is general, and is not representation or advice specific to a particular case. It is given to all members of the community, including accused and victims of crime.
- ii. The provision of free legal advice and representation. VLA has some inhouse lawyers who can advise accused on their case and act on their behalf, and the VLA duty lawyers stationed in courts can give limited personal advice and

representation for hearings happening that day. The VLA Victims Legal Service can give advice to victims accessing financial assistance and compensation.

- iii. Funding for outside lawyers to represent accused.
- iv. Advocacy and reform work in the legal system as a whole.

Funding and service delivery

VLA services are funded jointly by the Victorian and Commonwealth governments and the Victorian Legal Services Board and Commissioner. Its services are vulnerable to government funding cuts, and the funding arrangements mean that governments control what VLA can give advice on and what it cannot. For instance, VLA does not assist with consumer law matters, employment law, fencing and tree disputes, and most migration matters.

From 1997 to 2017, Commonwealth contributions to the VLA budget fell from 50% to 25%. In 2022-23 VLA received \$284.4 million, with \$55.3 million in general funding from the Commonwealth, \$130.7 million from Victoria and \$24.3 million from the Victoria Legal Services Board and Commissioner – the rest of VLA's income came from special project grants and private contributions by accused who could pay in part for their lawyer. VLA consistently reports needing more general funding and not only specific-purpose grants.

In the 2023-24 financial year, according to the Victoria Legal Aid Annual Report:

- 82,606 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.
 - 14% of clients were from culturally and linguistically diverse backgrounds, down from 28% in 2022-23.
 - 25% had no income and 53% were recipients of some form of government benefit.
 - 8% were homeless or at risk of homelessness. This is an increase of almost 25% from 2014-15.
 - 12% were younger than 19yo.
 - 37% disclosed having a disability or mental illness.
 - 8% were in custody, detention, or inpatient psychiatric care.
- Many of the above numbers are lower than in 2022-23. This suggests that Covid-19 lockdowns hit the most vulnerable the hardest, but also that more people outside the most vulnerable groups are unable to fund their own representation and require Legal Aid to help them.
- 136,507 requests were responded to through the Legal Help service, which includes telephone advice and online chats. 10% of these services involved giving specific legal advice to the client, while 90% involved general information only.

In their Annual Report, VLA noted that they were seeing “steady increases” in the level of disadvantage experienced by their clients, and in its 2023-24 Annual Report it cited the 2023 ‘Justice on the Brink’ report by National Legal Aid, which found that an additional \$484 million in funding each year is needed for VLA to meet currently unmet need for legal aid services.

Assistance for accused

Much of VLA's assistance is provided free online. For instance, the Legal Help Chat operates between 8am and 6pm Monday to Friday. In 2022 VLA also began a new programme called ‘Help Before Court’. Using a free online form, 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. The form can be seen at: <https://hb4c.vla.vic.gov.au/>

In 2023-24, 6,281 services were provided through Help Before Court. This was 34% fewer services than in 2022-23, because of funding shortfalls. VLA research suggests that Help Before Court has resulted in 20% fewer adjournments, however.

Legal aid

‘Legal aid’ is the provision of legal advice and representation to people involved in a criminal matter who are unable to pay for their own legal representation. Some legal aid is provided on the day in courts, by duty lawyers, but other aid is provided by inhouse VLA lawyers or outside lawyers in private practice or community legal centres who are paid with funding provided by VLA.

Where a person needs 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. People who can afford part of their own defence but not all of it may also receive grants of money that subsidise their legal fees.

VLA will consider the following:

- i. The merit test. This concerns 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. They see whether the case has the kind of merit that VLA is designed to fund.

- ii. The means test. If an applicant 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. The means test requires applicants to earn significantly under the poverty line in Australia to be eligible.

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. 80% of 40,458 total criminal law grants were assigned to private legal practitioners in the 2023-24 financial year, totalling 32,366 grants. 17% of clients were represented by VLA inhouse lawyers, and 3% were represented by a community legal centre lawyer with VLA funding. In 2023-24, \$30.1 million was spent on payments for external barristers in legally-aided matters.

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 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.

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 other courts such as the Children's Court.

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 2023-24, a total of 111,474 duty lawyer services were provided, with 14% delivered by private practitioners and 15% provided by community legal centre lawyers. VLA lawyers provided the remaining 71% of duty lawyer services.

Assistance for victims

Victims Legal Service

In March 2023, VLA launched a Victims Legal Service. This is Australia's first dedicated legal service for victims of crime. The Service provides free legal advice and assistance to people who have suffered injury or loss as a result of a violent crime, and is run by VLA jointly with a number of community legal centres, the Women's Legal Service Victoria, Djirra Aboriginal legal service, and the Victorian Aboriginal Legal Service.

The Victims Legal Service can assist victims with matters including:

- Applying for compensation through the Financial Assistance Scheme, which commenced on 18 November 2024 and replaced the Victims of Crime Assistance Tribunal. The FAS provides funding to help with costs that arise from being a victim of crime, such as counselling, medical expenses, and loss of earnings.
- Applying for Restitution and Compensation Orders through the courts to obtain compensation directly from the offender.

The Victims Legal Service runs a telephone helpline, and makes referrals to partners such as the Equality Law Program if casework is required. Between March and June 2023 the Service responded to 682 enquiries through the helpline and made 162 referrals to VLS partners.

Community legal centres

Keyword: Advice and advocacy

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 legal assistance and information to members of their local community or Victorians involved in a specialist area of law. They do this by providing three main types of services:

- i. The provision of free legal information through pamphlets and fact sheets, websites, telephone helplines, online chat services, in-person drop-in clinics, and duty lawyers stationed at court to assist the VLA programme. This legal information is general, and is not representation or advice specific to a particular case. It is given to all members of the community, including accused and victims of crime.

- ii. The provision of free legal advice and representation. CLCs have some inhouse lawyers who can advise accused on their case and act on their behalf, and the CLC duty lawyers stationed in courts as part of the VLA programme can give limited personal advice and representation for hearings happening that day. Some CLCs can also give advice to victims accessing financial assistance and compensation, or appearing in court as witnesses.
- iii. Advocacy and reform work in the legal system as a whole.

Note that CLCs do not give individuals funding for outside lawyers, the way that the VLA grants programme does. Instead, some CLC lawyers are funded *by* the VLA grants programme to represent clients: 407 grants for criminal representation were given to CLCs in 2015-16, compared with 827 in 2022-23.

As of the 2023-24 VLA Annual Report, 38 of the CLCs located in metropolitan Melbourne and around Victoria received \$68.9 million of 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.

Generalist and specialist CLCs

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.

Fitzroy Legal Service

Fitzroy Legal Service ('FLS') is an example of a generalist CLC. It was established in 1972 to provide free legal advice to all comers from its catchment area, in what was then the poorest suburb in Melbourne. It operates a free legal advice service by appointment that operates every weeknight: volunteer lawyers provide legal advice on criminal matters, and are available in person or through the national telephone interpretation service. It also has inhouse lawyers that can take on a limited number of clients for representation and casework.

FLS explains the difference between its services in the following way:

The difference between 'legal advice' and 'legal representation'

Legal advice means advice and information about the law that applies to your particular case or situation, including discussion of your options and priorities, and recommendations about how best to achieve your goal. We can also draft a letter for you, but it will be written under your own name. In some circumstances, we can draft court or tribunal documents for you; again, they will be written under your name. You remain responsible for your case. Our assistance ends once you leave the building (though you can return for further advice).

Legal representation means providing legal advice and we become 'your lawyer' for your case. We become responsible for filing documents, corresponding with the other party and going to court or tribunal with you (or arranging for a barrister to appear for you) to put forward your case.

FLS has a range of specialist service, including a family law clinic, a prison advice line, and a Drug Outreach Lawyer program, and it publishes the authoritative Fitzroy Legal Handbook, which is available for free online. The FLS publishes its legal information in seven languages, including Arabic and Chinese.

Villamanta Disability Rights Legal Service

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 no matter where in Victoria they live. It offers a free telephone service, as well as legal assistance, assistance with the National Disability Insurance Scheme, and limited appeals representation and casework.

Victims Assistance Program

The Department of Justice and Community Safety funds the Victims Assistance Program, which is run by a network of community-based agencies and CLCs delivering support services to victims of crime across Victoria. These services help victims of crime to manage the effects of experiencing a violent crime and to recover.

Victims Assistance Program services include:

- Providing emergency home security
- Help communicating with police and making a report
- Organising counselling, transport and medical services
- Assistance to get ready for court as a witness
- Help to prepare a Victim Impact Statement
- Assistance with applying for financial assistance

CLCs working as part of the Victims Assistance Program include the Villamanta Disability Rights Legal Service, the Women's Legal Service Victoria, Youthlaw, the Victorian Aboriginal Legal Service and the Mental Health Legal Centre. VLA and the VLA Victims Legal Service also work with the Program.

REVIEW QUESTIONS – Institutions to assist the accused and victims of crime

1. Is Victoria Legal Aid a private for-profit business?
2. Identify two ways in which VLA provides free legal information.
3. What is the difference between legal information and legal advice?
4. What is the relationship between legal representation and casework?
5. How does VLA help an accused to receive representation by a non-VLA lawyer?
6. How are the 'merit' test and the 'means' test used by VLA?
7. Where are duty lawyers stationed?
8. Identify two types of hearings a duty lawyer could assist with.
9. What category of person is assisted by the VLA Victims Legal Service?
10. Identify two issues the Victims Legal Service could assist with.
11. Are community legal centres run by the Government, private business, or non-profit community groups?
12. How does a CLC differ from VLA?
13. Identify two connections between CLCs and VLA.
14. Explain the difference between a generalist CLC and a specialist CLC.
15. Outline two ways that Fitzroy Legal Service provides assistance.
16. How does Villamanta differ from FLS?
17. Who runs the Victims Assistance Program?
18. Identify two issues the Victims Assistance Program could assist with.

Evaluation: Assistance institutions

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

STRENGTHS	INSTITUTION	WEAKNESSES
VLA funding to private practitioners ensures that a person who is granted legal aid can choose their legal representative. This allows the accused to have some control over their expert assistance, and their case being better presented helps to achieve a fair hearing. VLA's experience with people who suffer particular personal, social and cultural disadvantage enables them to specialise in understanding the issues facing many accused parties who need a service like VLA. VLA funding can also include assistance from interpreters and barristers, if the merits of the case and the means of the accused qualify them. VLA provides a wide range of services to give legal information and advice, and most of them do not apply the merit test and the means test. Services such as the Legal Help Chat are available to every person in the community. VLA does reform and advocacy, actively working to improve the system. The establishment of the Victims Legal Service was the result of research into the experience of victims in the criminal justice system, and the difficulty of accessing justice without being a party to the case or having funds for a lawyer.	Victoria Legal Aid	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. VLA services are vulnerable to government 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 or allocate funding to only specific projects, access to all the services provided by VLA will be compromised. 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. VLA requires accused applicants to earn under the poverty line to be eligible for funding. The baseline cut-off for the means test is earning less than \$360pw, but the Australian poverty line is \$489pw (as of 2023-24). This limits access to only the most impoverished, and prevents low-income earners from having

		representation because they do not qualify but still cannot afford it.
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. CLCs are able to service a large number of clients because almost all CLCs provide basic advice and administrative assistance at regular free sessions; some CLCs have sessions once or twice a week, while others hold them daily on weekdays. At each session, up to a dozen volunteer lawyers can be rostered on to see clients, providing equality to all people in the catchment area.	Community legal centres	The funding allocated to CLCs do not match the demand for their services or guarantee access. Many people wait for over an hour at drop-in sessions to speak to a lawyer, or wait for weeks on a waiting list for an appointment. Most CLCs are reliant on volunteer lawyers working outside their normal jobs. Advice and information sessions are the primary way in which CLCs provide legal advice, but this is not the same as representation. The CLC budget for actual representation is very small, and only a few clients will receive VLA funding. True access to justice is not achieved if inexperienced people have to present their own cases in court. Because most clients are seen by volunteer lawyers, CLC lawyers are frequently not specialists in the area of law concerning their clients. Some smaller CLCs have combined to form larger centres that cover wider areas – for example, Darebin Community Legal Centre merged with Fitzroy Legal Service in 2019. This makes the physical location further away for most people to access, and it prevents the CLC from being as closely integrated with its local community. The catchment area of Inner Melbourne Community Legal covers 129,000 residents, and one fifth of all government and community housing residents in the state.

APPLICATION EXERCISE – Assistance institutions: evaluation

VLA focuses on assisting people who suffer some kind of social, economic or physical disadvantage. VLA representation is prioritised for people who can pass a strict 'means' test and earn income below the poverty line, and prioritises accused held in remand, children, and accused with cognitive disabilities. This helps them target their resources to the most vulnerable, and assist people most at risk of unfair dispute resolution. Unfortunately, people outside those groups are still entitled to a fair trial, but have limited support to get it. A person earning below the poverty line, at \$400pw, would fail to obtain funded legal assistance from VLA but would still be unable to afford a solicitor at \$400ph. VLA tries to compensate by giving opportunities for broader legal information through free Legal Help Chat and duty lawyers, so that anyone attending court that day can receive support if their matter falls within an appropriate field, but this is not the same as having an expert handle your entire defence.

- 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

COURT-BASED RESOLUTION

Guilty pleas

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

Guilty pleas are encouraged by the process of 'plea negotiations' between the prosecution and accused.

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.

The purposes achieved by plea negotiations include:

- To give the accused more complete information about the progress of their dispute and the choices available to them. This allows them to make better-informed decisions about a proceeding that is likely to have a significant impact on their life.
- To encourage guilty defendants to 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, but also the witnesses, the courts, parties to other disputes and the tax-paying public.
- To encourage guilty accused 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

Keyword: Trade deal

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. The OPP may offer fewer charges, less serious charges, or an amended statement of facts in return for a guilty plea to one or more charges.

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

A plea negotiation may involve discussion about the appropriate charges, the reliability and relevance of any evidence in the case, and the *likely* sentencing by the judge or magistrate if the accused pleads guilty. The judge or magistrate retains the power to accept or reject the plea deal.

The OPP says that at every stage the prosecutor 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 police
- 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
- whether the accused will give evidence for the prosecution after pleading guilty, taking into consideration the value of the accused's evidence

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.
- Whether the prosecution is prepared to reduce or substitute any existing charges for charges on a lesser offence.
- Whether the prosecution is prepared to take an aggravating factor, such as possession of a weapon, out of the statement of facts in return for a guilty plea.
- 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.

Zirilli v The Queen [2014] HCA 2

Zirilli pleaded guilty to a range of Commonwealth drug trafficking offences. Following plea negotiations, Zirilli was sentenced in the Supreme Court of Victoria to 26 years jail, with a non-parole period of 18 years. Zirilli appealed his sentence to the High Court of Australia. Zirilli claimed that the prosecution accepted that he had expressed remorse for his crimes, but trial judge Justice King found in sentencing that Zirilli was not remorseful.

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

Before agreeing to a plea deal, the accused may ask the judge or magistrate to confirm the maximum sentence they would receive on the offered charges. This is called asking for a sentencing indication, and may only be done once and before the start of trial. If the accused is satisfied with the maximum sentence indicated, they may choose to plead guilty. In 2022-23 the County Court received 245 applications for sentencing indication, and rejected only 6% of them. 90% of accused who received an indication plead guilty.

According to the OPP’s 2022-23 Annual Report, 72.6% of all indictable matters are resolved by the accused entering a guilty plea. If they do not plead guilty, the accused proceeds to trial. In 2022-23, 28.7% of trials ended in acquittal.

Sentence discount

Any guilty plea must result in the offender receiving a sentence discount: this is a reduction in their criminal consequences, in recognition of the fact that they did not force the court to come to a verdict. The offender receives this discount regardless of whether they demonstrate remorse.

Section 6AAA of the *Sentencing Act 1991* (Vic) does not tell judges and magistrates how much to reduce the offender’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. In all but the most minor summary offences, the judge or magistrate must impose a less severe sentence, but tell the offender what they *would* have received had they persisted with a ‘not guilty’ plea but been found guilty following trial.

REVIEW QUESTIONS – Plea negotiations

1. What is the opposite of a guilty plea?
2. How is the outcome of the trial or hearing decided if the accused *doesn’t* plead guilty?
3. Identify two benefits that the criminal justice system believes guilty pleas give to the wider community.
4. Identify the benefit that the criminal justice system believes guilty pleas give to the parties in the trial.
5. Identify the benefit that the criminal justice system believes guilty pleas given to witnesses and victims.
6. Which two stakeholders are involved in plea negotiations?
7. What power does the judge or magistrate have over plea negotiations?
8. Can plea negotiations negotiate the sentence received by the accused?
9. What can the prosecution offer to the accused in exchange for a guilty plea?
10. Identify three matters that the prosecutor must take into account when deciding whether to enter into plea negotiations with the accused.
11. What is meant by a ‘sentence discount’?

Evaluation: Plea negotiations

Exam tip: Note that strengths and weaknesses must always include *what* the point is, something factual you are basing your argument on, 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 plea negotiations, but you could also be asked to discuss whether they are appropriate and desirable in a particular *case* and the facts of the case may turn a strength into a weakness *for those facts*. Arguments have been modified accordingly in the table below, to illustrate.

STRENGTHS	WEAKNESSES
Plea negotiations help the accused to understand the case against them. They enable them to make decisions about defending charges vigorously or pleading guilty for a reduction in sentence. ➤ If the accused feels empowered by this information, the plea negotiation may be appropriate. ➤ If the accused feels pressured into pleading guilty by this information, the plea negotiation may not be appropriate. Witnesses and victims benefit by not having to appear and give evidence under cross-examination at a contested trial. ➤ If the witnesses <i>do not</i> want to give evidence, the plea negotiation may be appropriate. ➤ If the witnesses <i>do</i> want to give evidence, the plea negotiation may not be appropriate. Plea negotiations and sentence discounts encourage the accused to take responsibility for her or his choices and actions. ➤ If the accused engages in negotiations in good faith or out of remorse, the plea negotiation may be appropriate. ➤ 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. If a plea negotiation results in a guilty plea, the time and resources of the courts, the accused, and other waiting parties will be saved. For example, in 2014 the County Court estimated that one day of plea hearing saved 10 days of trial time. ➤ If this allows the accused, victims and other waiting parties to resolve trauma and save expense, the plea negotiation may be appropriate. ➤ If the plea deal is based on saving time rather than properly charging the accused according to the gravity of their wrongdoing, the plea negotiation may not be appropriate.	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. ➤ If the victim does not want the details being made public, or there is little public interest in the case, the plea negotiation may still be appropriate. ➤ If there is public interest in seeing justice be done in the case, the plea negotiation may not be appropriate. A 2007 Sentencing Advisory Council study of offenders found that receiving a shorter sentence was the number one factor in pleading guilty, and doing what was best for the victim was the second lowest. Plea negotiations may be motivated by self-interest rather than justice or remorse. ➤ If this allows the victims and other waiting parties to resolve trauma and save expense, the plea negotiation may still be appropriate. ➤ If the plea deal is based on saving time and escaping proportionate consequences, the plea negotiation may not be appropriate. 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. ➤ If the prosecution has negotiated a fair set of charges and the court sentences according to the facts and evidence in the case, the plea negotiation may still be appropriate. ➤ 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 with reduced charges or altered statements of facts that do not reflect the wrongdoing, the plea negotiation may not be appropriate. Judges and lawyers interviewed in the 2018 Flynn and Freiberg 'Plea negotiations' report to the Criminal Research Advisory Council said that many accused accept plea deals because the process of defending themselves is too difficult and they feel the pressure of a 'good deal'. One judge said he thought "there are hundreds of people who plead guilty in the Magistrates' Court who would have beaten it if they'd fought it." A lawyer said, "you get this poor person who just goes, 'oh look, I'll plead guilty just to get rid of it. It's absolutely awful.'" ➤ If the accused is genuinely guilty, the plea negotiation may still be appropriate. For instance, the Victorian study showed judges and lawyers thinking that actual innocence was "pretty rare." ➤ If pleas are entered because of pressure rather than guilt, the plea negotiation may not be appropriate.

APPLICATION EXERCISE – Plea negotiations: evaluation

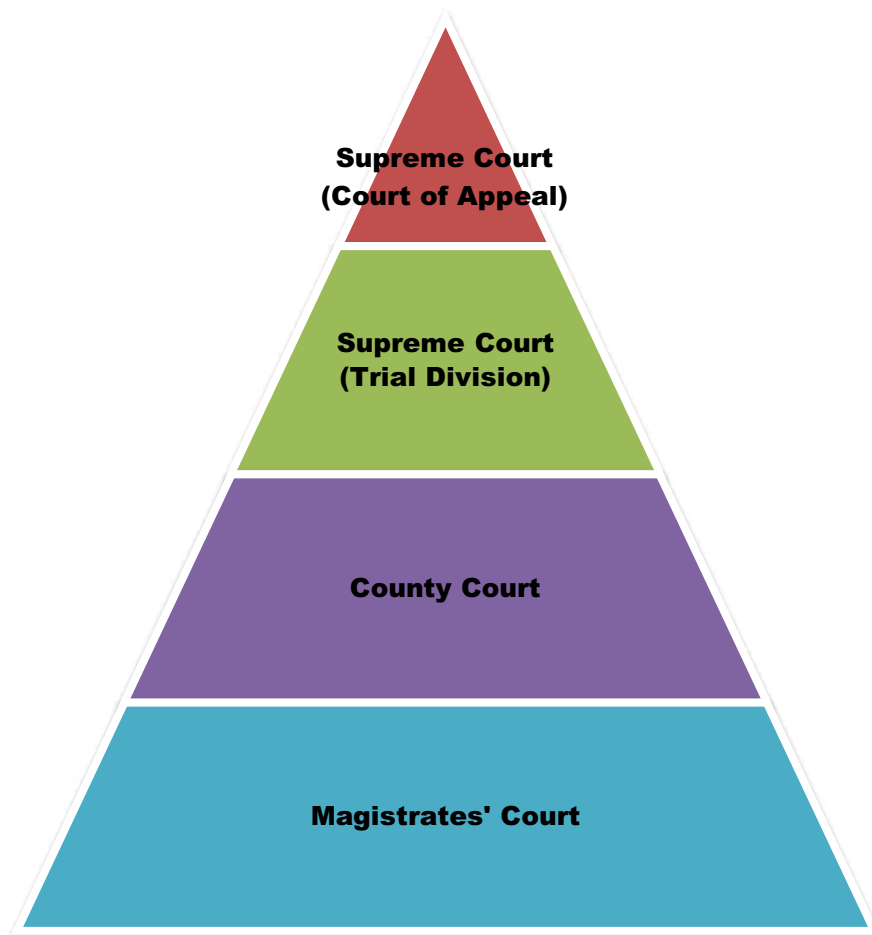
In 2015 the Sentencing Advisory Council published research into guilty pleas and sentencing discounts in the higher courts given during the period from 1 July 2009 until 30 June 2014. The report can be accessed on the Council's website at: <https://www.sentencingcouncil.vic.gov.au/publications/guilty-pleas-higher-courts-rates-timing-and-discounts>

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

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 highest courts with the most senior justices and judges sit at the top, and hear the most serious and complex disputes; the lower courts with the least senior judges and magistrates sit at the bottom, and hear the least serious and complex disputes. This is how jurisdiction distributes power across the hierarchy.



- The lowest court, the Magistrates' Court conducts hearings rather than trials, and is 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 trials, and sits with a jury of 12 if the trial is for an indictable criminal offence.
- The highest state court, the Supreme Court, has two divisions: the Trial Division and the Court of Appeal. The Trial Division conducts trials before a single justice, and will sit with a jury of 12 if the trial is for an indictable criminal offence. The Court of Appeal only conducts hearings for appeals before three justices. It never sits with a jury.

The High Court of Australia 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 ability for greater specialisation, and the provision of appeals.

Specialisation

Keyword: Expertise

Definition

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

Examples

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

Appeals

Keyword: Review

Definition

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 review 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.

Examples

- Criminal appeals on alleged errors of law can be made from the Magistrates' Court to the Supreme Court (Trial Division) where a justice will review the reasoning of the lower magistrate.
- 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 from the Magistrates' Court to the County Court with a single judge, because errors of fact are not as complex as errors of law.

Note that an appeal is not a rehearing or a retrial, because the evidence is not heard again. A rehearing or retrial may be ordered as a result of an appeal if the verdict is vacated and the case is sent back down to a court with original jurisdiction.

Exam tip: Use the legal term 'leave' when talking about the permission that the highest courts such as the High Court need to give before any person is able to have their case heard there. No-one has an automatic right to have their appeal heard by the High Court, and the Court of Appeal may refuse to hear some appeals.

Extension material: The operation of precedent

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 doctrine of precedent relies on the principle of *stare decisis*, which means 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 on lower courts.

- 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.

REVIEW QUESTIONS – Reasons for a court hierarchy

1. What is the relationship between jurisdiction and a hierarchy?
2. What is meant by the term 'flat court hierarchy' or 'one-court system'?
3. Which is higher: the Court of Appeal or the Trial Division of the Supreme Court?
4. Give a synonym for 'specialisation'.
5. Name one area that the Magistrates' Court specialises in that the Supreme Court Trial Division does not.
6. Name one area that the Court of Appeal specialises in that the Magistrates' Court does not.
7. How does specialisation lead to efficiency?
8. Give a synonym for 'appeal'.
9. Outline the difference between an appeal and a rehearing or retrial.
10. Why would appeals not be possible in a flat hierarchy?
11. Do appeals go up or down the hierarchy?
12. How do appeals lead to fairness?

Evaluation: Reasons for a court hierarchy

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

STRENGTHS		WEAKNESSES
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, because they do not have to learn it fresh for each case. If the law and procedure are understood in detail, they are more likely to be applied equally across every case of the same type.	Specialisation	The vertical hierarchy is made with 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 low in reality. 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.
Parties have largely equal rights to appeal the 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 fairness and the level of confidence the public has in the system.	Appeals	In reality, there is not equal 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. 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 equality.
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 fairness in the resolution of disputes. The application of binding precedent increases the efficiency of the resolution and therefore enhances access for the parties to the case as well as for the parties of other cases waiting for an available courtroom.	The operation of precedent	The vast majority of cases will not be heard by a court that can alter or set precedent because they are too low in the hierarchy or they hear matters with a jury: 98% of matters will be finalised below the Supreme Court (based on 2022-23 ABS figures) and the Magistrates' Court resolves 92% of criminal matters. This decreases the access 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 significant time and expense. Regardless of their place in the hierarchy, most courts are reluctant to disturb existing precedent, even if it is only persuasive.

APPLICATION EXERCISE – Reasons for a court hierarchy: evaluation

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.

Roles of key personnel in a criminal case

The roles of key personnel such as the judge or magistrate, the jury, and the parties can be asked for as a general overview, or a specific number of smaller roles may be requested. All roles can be broken chronologically into pre-trial roles, hearing or trial roles, and post-verdict sentencing and appeals.

Judge or magistrate

Keyword: Impartial umpire

General role

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.

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 roles

- 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 before a jury. Hearings focus more on submissions made by the parties 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, and ensure that no bias skews proceedings in favour of one side.
- In the courtroom the presiding officer will listen to the submissions and evidence given by each party, and use this evidence to reach a final verdict in all matters where there is no jury.
- Because their role is to be impartial, the judge must recuse themselves if they cannot, or if there is a 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, because there was 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 – and 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 or enters a guilty plea, the judge will conduct 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.
- A sentencing court has special duties when dealing with an unrepresented accused, because of the gravity of the consequences. The sentencing judge must ask the defence about their good character, lack of previous offences and any other potentially mitigating factors if the offender does not submit them to the court, expressly to investigate whether there is the basis for a more "merciful" sentence – this precedent was established in *Bridges v Police* [2017] SASC 35.
- The judge or magistrate will have to apply the "instinctive synthesis" of sentencing to balance factors such as sentence discounts, mitigating factors and aggravating factors, guideline judgments, proportionality, and the purposes of sanctions. This will lead them to order a sanction such as imprisonment or a fine.

REVIEW QUESTIONS – Role of the judge or magistrate

1. What is the difference between a judge and a magistrate?
2. Identify two adjectives that could be used to describe the role of the judicial officer in the criminal justice system.
3. What rules are the judge or magistrate responsible for enforcing in court?
4. Outline two specific things that the judge will do as part of her or his role.
5. What is the judge or magistrate meant to do if they do not think they can act impartially?
6. When will the judicial officer be responsible for the verdict?
7. Does the judicial officer or the jury determine the sentence?

Jury

Keyword: Verdict by peers

A jury is a group of 12 women and men randomly selected from the community, outside the criminal justice system.

General role

Each juror individually, as well as the jury as a whole, plays the role of listening 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 jury delivering a verdict *must* be included in any answer on the overall role of the jury. Unless the question asks specifically for only a set number of smaller roles, it cannot be left out of an overall 'role' question because it is so central.

Detail on specific roles

- 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 role in appeals and are not used.

In addition to the primary role of using the evidence and the law to reach a verdict, juror roles 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 a special role 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 must rely only on the evidence introduced at trial. 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 role 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.
- Each juror is responsible for deciding whether she or he is personally satisfied that the charges have been proved beyond reasonable doubt, and casting a vote on their decision. They are not meant to ignore their personal decision in favour of 'going along with' the majority of the jury room. In *Profilio v R* [2004] NSWCCA 219 the Court of Appeal found a "fundamental miscarriage of justice" because the judge directed the jury that they "must reach a unanimous verdict" and this suggested that jurors should give in to the views of the majority or the trial would never end.
- Jurors have the role of respecting the secrecy of jury deliberations. 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).

REVIEW QUESTIONS – Role of the jury

1. Who sits on a jury?
2. What do we mean by the terms 'peers' and 'laypeople'?
3. When will a criminal dispute be heard by jury?
4. Which courts in the Victorian hierarchy can conduct jury trials?
5. Will juries ever be called on to decide an appeal? Justify your answer.
6. What role does the jury play in relation to the verdict?
7. Does the jury have a role if a plea deal is struck between the prosecution and the accused?
8. Identify two specific things that the jury, or each individual juror, will do as part of their role.
9. How does the role of the judge change in a trial by jury?
10. Who or what is the 'foreperson' of the jury?
11. Explain the difference between a unanimous verdict and a majority verdict.
12. If neither a unanimous nor a majority verdict can be agreed upon, what will be the outcome of the case?
13. Is a juror permitted to look something up if evidence or legal procedure is unclear in trial?
14. Does the jury play a role in sentencing?

Parties

Keyword: Control

Remember that the victim is not a party to the case. The parties are the prosecution, representing the community and the interests of the victim, and the accused.

General role

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.

Detail on specific roles

- The prosecution must decide whether to bring the matter to trial, while the defence must decide how to plead.
- The accused must decide whether to have legal representation or be self-represented.
- The parties work together to play a role outside the courtroom by engaging in plea negotiations.
- Each party must decide what evidence to present and what legal arguments to submit in order to argue or defend the case. This will involve researching legislation and precedent, interviewing witnesses and experts, and preparing questions to ask witnesses in the courtroom.
- The precedent set in the *Getachew* case in 2012 gives parties the clear role 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 role to direct the jury on anything not brought into trial by the parties.
- In criminal matters the prosecution has roles 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 cannot withhold evidence just because it helps the other side.
- Each party owes a primary duty 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.

REVIEW QUESTIONS – Role of the parties

1. Who are the parties in a criminal case?
2. What is the relationship of the victim to the parties?
3. Identify two adjectives that could be used to describe the role of the parties in the criminal justice system.
4. Outline two specific things that the parties will do as part of their role.
5. Which party is responsible for deciding the charges?
6. Which party is responsible for deciding the plea?
7. Explain what is meant by the parties' 'paramount duty'.
8. What role do parties play in relation to witnesses in the case?

Evaluation: Roles of key personnel

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

STRENGTHS		WEAKNESSES
The judge is 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 equally and fairly, and that natural justice is preserved. 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 access and ensuring that neither party uses bad faith strategy to disadvantage its opposition. Prior to the implementation of criminal case management, 42% of guilty pleas occurred on the first day of trial or during trial. Since 2020, this has decreased to 8-10%, with the rest being entered before trial starts.	Judge	The judge 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 assist unrepresented accused. Judges can only make decisions based on evidence and arguments put to them, can only direct the jury on matters raised by the parties, and the outcome is based on the best arguments rather than whom the court thinks is right.
Jurors must be unbiased, and random selection 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 fairness. Jurors look at the case from the perspective of a layperson. Jurors being 'regular' people requires that legal jargon be kept to a minimum, which stops lawyers and judges from unintentionally overcomplicating the system, and allows parties and the viewing public to better understand the case. Jurors must 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. The role of jurors to listen carefully to all evidence and argument and refrain from doing any private research stops the verdict being based on potentially incorrect information, or material that one side is not able to cross-examine.	Jury	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. Many prejudices are common across different groups in society, so parties from minority groups in particular can fail to be treated as equals before the law. 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 unfair decisions based on a mistake. They then publish no reasons for their verdict, so review is not possible.
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 access, and may encourage confidence in the fairness of the outcome. Parties are experts in their own cases, and know the facts the best. They also have a vested interest in presenting their side as effective as possible. Giving them control is therefore arguably the most effective and efficient way of deciding how their side should be argued. Parties must advocate for themselves as well as fulfil a duty to the court and to law. This ensures that they do not mislead the court out of a desire to win. The role of the prosecution is more onerous than the role of the defence, which produces equality of opportunity due to the superior resources and experience of the prosecution and the presumption of innocence protecting the accused.	Parties	Party control puts a lot of responsibility and stress on individual parties, and most accused are not experienced in arguing at trial. This increases party reliance on legal representation, which increases the costs of trial and reduces equality between parties if the prosecution has greater financial resources than the accused. 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 and the risk that the accused could not receive a fair trial. Parties have a vested interest in arguing only the side of the case that is beneficial to them, and not helping to discover the truth. The inquisitorial system of the Coroner's Court or European criminal courts might more efficiently uncover the full set of facts.

APPLICATION EXERCISE – Roles of key personnel: evaluation

A trial judge is an independent 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 rather than personal connections or benefit to the judge. Structural independence doesn't prevent bias or prejudice, however. 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 counsel. Fairness of outcome also relies on both parties having equal access to legal knowledge and evidence, but an individual prosecuted by the government cannot be assisted or protected by the judge. This may permit inequality, but it is still vital that the judge remain neutral, at the very least to protect the appearance of fairness, because 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.

The need for legal practitioners in a criminal case

Keyword: Effective defence

Definition

Because the rules of evidence and procedure are quite complex, the judge does not actively manage the presentation of the accused's case, and the accused has responsibility for understanding what law to argue, what evidence to lead and how to navigate the procedure and court's rules, most people could not effectively defend charges without legal representation.

- ✓ The importance of legal representation is recognised in domestic law and international law.
- ✓ There is no enforceable right to legal representation.

Detail

Most accused will be represented by one or more solicitors and one or more barristers. The solicitor is the lawyer the accused will meet with in pre-trial and who will run the accused's case on their behalf, and the barrister is the in-court advocate the solicitor will brief on behalf of the accused to present the case to the judge or magistrate. Both solicitors and barristers must have recognised legal qualifications and be listed on the Supreme Court roll of practising lawyers with the training and character necessary to uphold the law.

Legal practitioners must adequately advise their clients on both legal rights and duties, advocate for their clients' interests, present the best case possible based on the law and the evidence in the case, 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. These responsibilities are not only complex and require knowledge of the law and practical experience, they also provide a buffer between the accused and the legal system: lawyers give the accused necessary personal support, and can do difficult tasks on their behalf such as enforce the right to silence without the accused feeling pressured or accidentally presenting themselves in a negative light.

- ✓ The importance of legal representation exists in the common law: in the *Dietrich* case the High Court held that if an accused, through no fault of their own, cannot obtain legal representation in a trial for a serious indictable offence, the judge may 'stay' (delay) the trial if satisfied the accused could not receive a fair trial. This precedent does not apply to summary offences or any indictable offence other than the most serious, and does not apply in committals for indictable offences according to the High Court in *Fuller & Cummings v DPP (Cth)* (1994) 68 ALJR 611. It also gives no right to receive publicly-funded legal representation – only to have trial adjourned until a lawyer can be found.
- ✓ The importance of legal representation exists in statutory law: s25 of the Victorian Charter protects the rights of the accused in a criminal case "to have legal aid provided if the interests of justice require it." This is a qualified right, however – it depends on how the "interests of justice" are interpreted. The Charter is also a *guide* for policy and statutory interpretation rather than a legally-enforceable bill of rights.

Rules of evidence and procedure

Criminal trials must be conducted fairly to ensure that neither the prosecution nor the defence has any advantage over the other. Consequently, there are a number of rules of evidence and procedure that the parties must follow to ensure that the trial is fair.

Rules of evidence are outlined in legislation such as the *Criminal Procedure Act 2009*, the *Evidence Act 2008*, and the rules of procedure for each court, such as the Supreme Court (Criminal Procedure) Rules 2008. For instance, hearsay evidence may be

objected to and excluded – this is testimony given by a witness of what others have said to them, and the accused is unable to cross-examine the other party to the conversation. Technical distinctions such as these are best spotted by a lawyer.

Judges can assist an unrepresented accused with the rules, but they cannot take the place of a lawyer. In *MacPherson v R* (1981) 147 CLR 512 the High Court said there was a difference between “telling the players how to play and telling them the rules of the game.” In *R v White & Piggitt* [2003] VSCA 174 the court allowed a judge to choose not to strictly apply the rules of evidence and procedure to an unrepresented accused, even though the same rules continued to apply to the Crown prosecution. The judge must perform a balancing act, doing this “without effectively *advising* him or her of what course should be followed, or unduly interfering with the Crown’s case as if the judge were the accused’s counsel.” The Judicial College of Victoria Criminal Proceedings Manual provides a list of the types of things a judge may need to explain: for instance, the elements of the offence, the conduct and purpose of different types of hearings, and the proper way to formulate questions for witnesses – but not what the wording of any question should be.

‘Unrepresented accused in the Magistrates’ Court of Victoria’

Final report, October 2021, Australasian Institute of Judicial Administration

The AIJA observed 757 criminal matters and interviewed 11% of the magistrates in Victoria. Data suggests that 40-50% of criminal matters in the Magistrates’ Court are conducted with self-represented accused and a smaller number in higher courts where consequences are greater and legal aid is more available.

51% of magistrates interviewed said their time was taken up by explaining matters to unrepresented accused, and unrepresented accused need more hearings and adjournments on average, but the total time spent before the court is similar to the time for represented accused.

The Report found: “Without legal representation, an individual is seriously inhibited from effectively participating in the criminal justice system, and their rights may not be adequately protected or exercised. [...] An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown.”

Unrepresented accused were disadvantaged in the following areas:

- ✱ Less able to participate in plea negotiations and bargain on their own behalf.
- ✱ Less able to strategically trade guilty pleas for reductions in charges and statements of facts. UK research found that 86% of unrepresented accused plead guilty compared with 49% of represented defendants, and at their first or second court appearance rather than their fourth or fifth. A 2002 Canadian study found unrepresented accused pleading guilty at an early stage without strategic negotiation because they want to “get it over with.” The Canadian research showed accused did not often understand the impact that the criminal record would have on their employment, travel, volunteering, and even child custody.
- ✱ Less able to have charges withdrawn, or receive low-level consequences such as diversion programs and adjournments without conviction.
- ✱ According to a 2009 NZ study, less favourable outcomes in terms of both verdict and sentencing because of procedural and strategic mistakes, and being unaware of what information would be most effective for them to present in court.

Mostly, a self-represented accused can do whatever a legal representative could do, if they have the knowledge and ability – however, an exception to this is cross-examining the complainant in certain sexual offences. For this, representation will be legally necessary, and VLA has a dedicated programme to supply lawyers for this cross-examination if the accused is unrepresented.

Ethical duty

Legal representation is also necessary to help the accused balance their desire to win with legal ethics and rules. Lawyers have a double duty: a duty to their clients, to give the client effective representation and 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. Any argument or defence must be compatible with the evidence held by counsel and admissions made by the accused. Many accused believe they have good reasons for their actions, but these reasons are not always legal defences and their culpability cannot be misrepresented. 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.

REVIEW QUESTIONS – The need for legal practitioners in a criminal case

1. Identify synonyms for ‘legal practitioners’.
2. Outline the difference between a solicitor and a barrister.
3. Identify matters that a lawyer will advise the accused on.
4. Which case set precedent on the importance of legal representation for a fair trial?
5. What are two limitations of the precedent on the right to legal representation?

6. What Victorian legislation recognises the 'right' to legal aid?
7. Does Victorian legislation give all accused a right to have legal representation provided by the state?
8. What are the 'rules of evidence and procedure'?
9. Identify one rule of evidence.
10. Identify one court procedure.
11. What have cases such as *McPherson* and *White & Piggin* allowed judges of unrepresented accused to do?
12. Why did the AIJA find that unrepresented accused were disadvantaged?
13. Identify one area in which the AIJA found unrepresented accused did not receive the same benefit as represented accused.
14. What does the ethical duty to the court require lawyers to do?
15. Why might an accused need their lawyer to uphold the duty to the court?

Evaluation: The need for legal practitioners in a criminal case

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

STRENGTHS	WEAKNESSES
Experienced representatives use their expertise to present the accused's case in the best possible light – the 2021 AIJA study found that unrepresented accused received worse outcomes. Lawyers gives the accused confidence in the system, and a better chance at a fair and just trial. Expert practitioners save the courts time and money, because they know the correct way to prepare documents, make legal submissions and elicit evidence from witnesses, and the best arguments to allow the court to home in on significant issues. This efficiency increases overall access to the system. Qualified practitioners can level the playing field across accused of different backgrounds, ages, classes and levels of education. For example, in <i>The Truth Hurts</i> (2020) barrister Andrew Boe writes that "Criminal justice systems are not designed to seek the truth. In places like Australia, court proceedings remain an adversarial blood sport at times distorted by smoke and mirrors or failed by individual shortcomings. [...] Simply put, the most vulnerable among us are unfairly exposed to unjust outcomes." A lack of legal representation slows down a trial, and adds to the responsibilities of the judge. For example, a sentencing court has special duties when dealing with an unrepresented accused, because no lawyer is there to discharge their responsibilities. The 2021 AIJA study reported 51% of magistrates feeling this was a burden. Because practitioners are not personally involved, they are better able to make strategic, objective decisions regarding the evidence and law than an accused who is emotionally invested. The experience and training of legal practitioners assists the court with the administration of justice. For example, in their 2008 research into barrister funding by VLA, Pricewaterhouse Coopers found that "the more adequately prepared and experienced a barrister the higher the likelihood that they will bring forth defence evidence and the perspective necessary to resolve cases fairly. This assists the judiciary in making better quality decisions."	'Justice' may belong to accused people who can afford the better legal representatives, rather than accused people on the basis of their innocence. For instance, the 2019 trial of George Pell used Robert Richter KC, whose fees were estimated at \$30k per day of trial, and the successful 2020 High Court appeal used one of the other most famous barristers in Australia, Bret Walker AO SC. In 2021 The Australian published a total fee estimate of \$3m for all lawyers involved in Pell's case. According to the ABS, in 2023 the average full-time weekly earnings in Australia was \$1838.10. Criminal solicitors in Victoria range from \$100-800 per hour (average \$350ph), and criminal barristers from \$5000 per day to \$25,000 per day. 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. Inadequate counsel can be responsible for poor advice and delays. For instance, the Law Institute of Victoria said: "Inadequate representation results in miscarriages of justice. It results in the interruption of trials. It has the capacity to completely disrupt the administration of criminal justice." Lawyers themselves can be influenced by personal biases and agendas that can impair their ability to analyse the strengths of the case and make strategic decisions to help expose the truth. For example, in 2019 Melbourne criminal defence barrister John Desmond was interviewed by The Age. He argued in favour of challenging jurors on the basis of stereotype, and expressed a prejudiced view of complainants in sexual offence cases: "There's nothing better than having a good grandmother on a jury. She knows what little missy gets up to and how she behaves." The burden on individual counsel is too great. The outcome can come down to whether a single barrister asked a witness the right or wrong question, or made one particular legal argument. For example, in <i>R v Bajic</i> [2005] VSCA 158 the accused successfully appealed his convictions for sexual offences because the prosecution barrister repeatedly asked him "Why would she lie?" under cross-examination.

APPLICATION EXERCISE – The need for legal practitioners in a criminal case: discussion

Legal representation is key to providing an accused the strongest defence possible, according to rules of evidence and procedure that are too complex for most unrepresented accused to navigate without expert advice. The 2021 AIJA report found that unrepresented accused were disadvantaged because they could not effectively negotiate pleas with the OPP, and often plead guilty at the earliest opportunity to 'get it over with'. Unfortunately, the most vulnerable accused are also likely to be the ones who cannot afford effective representation. Cardinal Pell was acquitted by the High Court after an estimated \$3m in legal fees, but the average Australian earning less than \$2,000 a week is unlikely to be able to afford the \$350ph for a solicitor, before a barrister is even briefed. This condemns the average accused to a likely harsher sentence, because the *Dietrich* precedent does not cover pre-trial or minor offences.

- a. The above answer is a sample of a paragraph discussion in an extended answer on the importance of legal representation. 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 discussion for another aspect of legal representation, such as rules of evidence or the ethical duty.

FACTORS THAT AFFECT ACHIEVEMENT OF 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 to go beyond a few examples of costs, time, and cultural norms. Be prepared to explain why the situation is undesirable, and how exactly it prevents fair, equal and effective 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

Keyword: User pays

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. Criminal justice is vulnerable to a 'user pays' system, where any accused who wants expert witnesses, expert representation, hearing time before a court, and review of decisions on appeal, must be able to pay for it.

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 stop them working to pay for these on top of normal life expenses.

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 solicitor instructors \$463 for summary matter daily appearance fee from 1 January 2024, for instance, or \$3415 for the first day of a County Court hearing. 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 \$41.80 per email (as of the 1 January 2024 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. VLA senior barristers receive \$417ph regardless of whether the matter is before the Supreme Court or the Magistrates' Court.

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

Keyword: Timely

Definition

Timely resolution means resolution that is fast enough for the accused to afford and endure the process, but slow enough for the evidence and arguments to be properly researched and prepared.

- ✱ Delays can affect the ability of people to gain closure and 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%

According to 2022-23 ABS data, Victoria has a mean average resolution time of 32.8 weeks across all courts (this average includes the very many minor summary matters that resolve quickly), while NSW has a time of 16.3 weeks from filing.

The concern with inappropriate delays is reflected in the oft-quoted statement from British politician, William Gladstone (1809-1898): "Justice delayed is justice denied." The ABC has interviewed people involved to delayed matters and they call the process of waiting like "being suspended in mid-air" and say that the court system can be more exhausting than the event that triggered the dispute.

- The busiest court in the state is the Magistrates' Court. According to the 2023-24 Annual Report, there were 660,315 criminal listings including summary hearings, bail hearings, committal hearings and guilty pleas, with 147,917 matters finalised. The Court finalised 67% of matters within six months, and finished the year with only 7,011 matters that had been ongoing for more than 12 months (down from 28,802 during lockdowns in 2020-21).
- 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 2023-24 County Court Annual Report, 3,612 criminal matters were commenced (including appeals) and 3,807 were finalised. 71% of these were finalised within 12 months. Only 260 (7%) of the resolved matters were resolved by a verdict: 52% resolved in guilty pleas or a discontinuance, and 41% were appeals from the Magistrates' Court. Because of additional resources provided to cope with the Covid-19 backlog, the Court's projected time to trial has decreased from 18-22 months in 2021 to 13 months in 2024. The importance of encouraging guilty pleas can be seen here, because waiting times would blow out if more disputes were contested in the courtroom.
- In the 2023-24 Supreme Court Annual Report, 71.8% of matters in the Trial Division were finalised within 24 months, with only 32.9% taking less than a year.

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 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, and accused with inadequate counsel or who are self-represented will on average require a greater number of hearings.
- Access is compromised because delays can encourage criminal defendants to plead guilty; the accused may also exhaust their funds or VLA grant before the end of the case, and lose their ability to properly defend themselves.

Cultural differences

Keyword: Background

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 to accommodate differences in language, ethnicity, religion, socio-economic status and cultural norms, but is a system founded primarily on a culture of western English-speaking 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 an inability to understand proceedings based on a lack of education or proficiency in English. 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."
- A 2021 Australian Human Rights Commission fact sheet noted that, based on population, Aboriginal and Torres Strait Islanders are 12 times more likely to be in prison than non-Indigenous Australians, and the Royal Commission into Aboriginal Deaths in Custody in 1991 found that "the high rates of Aboriginal deaths in custody was directly related to the underlying factors of poor health and housing, low employment and education levels, dysfunctional families and communities, dispossession and past government policies." The Legal Services Commission of South Australia provides a 2017 special guide to duty solicitors working with Indigenous defendants, in which advice is given that a range of legal concepts including 'rights' are untranslatable into the Pitjantjatjara language, and lawyers are informed about 'gratuitous concurrence': "Gratuitous concurrence is when a person appears to assent to every proposition put to them even when they do not agree. For many indigenous people, using gratuitous concurrence during a conversation is a cultural phenomenon, and is used to build or define the relationship between the people who are speaking. For example, it may indicate respect towards a person, cooperation between people, or acceptance of a particular situation." This creates the impression of 'confession' in police interviews and courtroom questioning.

- The hierarchy of a courtroom can make accused feel nervous about speaking for themselves – this has been observed with various groups such as young people, women, and Aboriginal accused. For instance, the 2021 AIJA report into unrepresented accused included a case study of a young woman appearing in a bail hearing after being held on remand for the first time. The magistrate informed her that she needed to show “exceptional circumstances” to receive bail, but she seemed not to understand: she said that she broke the law because she “was cold,” and then lapsed into silence, shaking her head, looking down, and not responding to the magistrate’s questions. She was denied bail.
- Interpreters are not provided for free in the County or Supreme Courts. Even with paid interpreters, there are a lack of qualified interpreters in less popular languages, and most interpreters do not have specialised legal training to understand and translate technical legal terms and procedures. 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 the charges were reduced and the offender was released on a good behaviour bond. In its 2021 report the AIJA found that in some matters “it was clear that the accused was having trouble understanding the process, due to language or cognitive difficulties,” and this both delayed the resolution and made proceedings more complicated.

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.

REVIEW QUESTIONS – Factors that affect achievement of the principles of justice

1. Provide two specific examples of costs involved in defending a criminal charge.
2. Give two data points to illustrate these costs.
3. Outline two examples of things that would be made more difficult in defending a criminal charge if the accused could not afford the cost.
4. How will costs impact on a wealthy defendant or corporation differently from an impecunious or not-for-profit defendant?
5. Provide two specific examples of things that take time when defending a criminal charge.
6. Give two data points to illustrate the time required.
7. Identify one concern with resolution being rushed, and one concern with resolution being delayed.
8. Outline two examples of things that would be made more difficult in defending a criminal charge if there were delays.
9. How will delay impact the prosecution compared with the accused compared with the victim?
10. Provide two specific examples of culture affecting the resolution of a criminal charge.
11. Give two examples to illustrate these differences.
12. Outline two examples of things that would be made more difficult in defending a criminal charge if the accused was of a different class, ethnicity or religion.
13. How might being unrepresented exacerbate differences in culture between the accused and the criminal justice system?

Part 3: Sentencing

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 plead guilty to one or more criminal offences. The sanction is decided on and ordered by the sentencing judge or magistrate.

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.

Purposes of sanctions

Keyword: Justification

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, depending on the nature of the crime and the circumstances of the offender.

A sentencing judge or magistrate will carefully consider each sentencing type, 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, 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, etc. You must define a term using a synonym – a term that means the same thing, but that uses different wording.

Rehabilitation

Keyword: Improvement

Definition

'Rehabilitation' means that it is in society's best interests that the offender *learns from their mistake* and improves 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.

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

Keyword: Hardship

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 (general and specific)

Keyword: Discouraged

Definition

Deterrence is being discouraged from committing crimes because you want to *avoid* the negative consequences that are 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

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

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

Keyword: Disapproval

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

Keyword: Safety

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 because the offender is physically locked away from them.

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.

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.”

REVIEW QUESTIONS – Purposes of sanctions

1. Provide a synonym for 'rehabilitation'.
2. Using this synonym, explain how a compulsory substance abuse course might achieve rehabilitation?
3. Provide a synonym for 'punishment'.
4. Using this synonym, explain how a sentence of imprisonment might achieve punishment?
5. Provide a synonym for 'specific deterrence'.
6. Using this synonym, explain how paying money in a fine might specifically deter an offender?
7. Provide a synonym for 'general deterrence'.
8. Using this synonym, explain how seeing an offender pay money in a fine might generally deter members of society?
9. Provide a synonym for 'denunciation'.
10. Using this synonym, explain how a sentence of imprisonment near the maximum might achieve denunciation?
11. Provide a synonym for 'protection'.
12. Using this synonym, explain how a community corrections order with a curfew attached might achieve protection?

Types 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 because it feels obvious.

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 physically 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

Keyword: Money

Definition

Fines are monetary penalties imposed on the offender, where the offender pays a sum of money to the court fund.

Detail

A court can impose a fine with or without recording a conviction.

Fines are calculated in 'penalty units', with one penalty unit being equal to \$197.59 (from 1 July 2024 until 30 June 2025). 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. According to 2022-23 ABS figures, 49% of guilty defendants who went to court in Victoria received a fine as their main penalty. The median fine amount was \$629. This is in the context of 35% of all criminal matters being for traffic and regulatory offences.

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, "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 June 2020 the WA Parliament passed reforms to make imprisonment a last resort for fine defaults, and introduced 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

Keyword: Conditions

Definition

Community corrections orders (CCOs) are flexible orders involving sentences that are served in the community but that may be served after a fine is paid or one year imprisonment is served. 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
- 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 that relates to the risk and needs of the offender and the severity of the offence. Conditions include undertaking medical treatment or rehabilitation programmes, completing unpaid work up to 600 hours, staying away from nominated places, or paying a bond that is forfeited if the offender breaches the CCO. Offenders may also be given a curfew to stay at a nominated place for between two and 12 hours a day.

In the Magistrates' Court, a CCO can be imposed for a maximum of two years for one offence, up to five years for three or more offences. In the Supreme and County Courts, a CCO can be imposed for up to five years. Breach of a CCO may result in the offender being resentenced for the original offence, plus an additional three months' imprisonment for breaching the order.

CCOs cannot be imposed for certain serious offences, including murder and rape, committed on or after 20 March 2017. Under the *Sentencing (Community Corrections Order) and Other Acts Amendment Act 2018* (Vic), 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.

In 2022-23 a CCO was given in 14% of cases in the County and Supreme Courts, and in 6.9% 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

Keyword: Detention

Definition

Imprisonment is where an offender is detained in a state facility, known as a prison or jail, for a period of time 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.



According to the Sentencing Advisory Council, imprisonment was ordered in 2022-23 around 74% of cases in the higher courts, and 8% of cases in the Magistrates' Court. This equates to 7.9% of matters overall.

Prison rehabilitation programmes

Victorian prisons run classes and workshops such as:

- ReLink, run by the Victorian Association for the Care and Resettlement of Offenders, giving practical advice to women and Aboriginal inmates who are ready to be released.
- The Intensive Alcohol and Drug Program, addressing chronic substance abuse problems and providing intensive treatment.
- Making Choices, focusing on recidivism, relapse prevention, mood management, and the use of cognitive behaviour therapy.
- Ruffy Swag, in which men at Beechworth Correctional Centre make swag backpacks for homeless people in the community.

Dame Phyllis Frost Corrections Centre for women also has programmes tailored to common needs for women, including a 'Keeping Us Together' parenting programme for mums and kids, and Sisters Day In, a programme focused on family violence against Aboriginal women.

The Auditor-General's 2020 report on Ravenhall Prison, 'Rehabilitating and Reintegrating Prisoners', said that "A prison sentence is not enough to break the cycle of reoffending if the underlying issues that contribute to it are not addressed."

Very few rehabilitation programmes are offered by Corrections Victoria for the general population, as most are focused on women and Aboriginal prisoners according to targeted funding provided by Government.

REVIEW QUESTIONS – Types of sanctions

1. Provide a synonym for 'fines'.
2. Who pays a fine?
3. To whom is a fine paid?
4. Does the victim receive any benefit of the fine?
5. Does legislation prescribe fines in dollars or penalty units?
6. What is a penalty unit?
7. What percentage of offenders receive fines?
8. Provide a synonym for 'community corrections order'.
9. What literally is an 'order'?
10. Can a CCO be given in addition to a fine?
11. Can a CCO be given in addition to a term of imprisonment?
12. Would it make more sense for a CCO to be completed before or after a term of imprisonment was served?
13. Can an offender with a CCO go on an interstate holiday?
14. Will every offender on a CCO have to complete unpaid community work?
15. Can a CCO stop an offender from going to pubs, schools, or playgrounds?
16. Is a CCO an allowed sanction for an offender convicted of murder?
17. Provide a synonym for 'imprisonment'.
18. Where will an offender be detained?
19. Can a term of imprisonment be served at home?
20. What is a 'sentence'?
21. What is the difference between 'cumulative sentences' and 'concurrent sentences'?
22. What is the difference between Level 1 imprisonment and Level 9 imprisonment?
23. What is 'parole'?
24. Explain the relationship between parole and the bottom sentence.
25. What is 'ReLink', and how is it relevant to imprisonment?

Evaluation: Criminal consequences

The purposes of sanctions and the types of sanctions have been combined in the one evaluation table, because sanctions are always measured against the aims they are intended to achieve.

Exam tip: Note that strengths and weaknesses must always include *what* the point is, something factual you are basing your argument on, 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
Punishment: The offender suffers hardship by having to give money and receive nothing in return for it. Deterrence: The public can see that, if they commit the same crime, they will have to give up their money. This is general deterrence.	Fines	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. 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 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.
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. Punishment: Conditions attached may include restrictions on movement and unpaid community work. The offender must give up some of their liberty, time and energy. 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.	Community Corrections Orders	Protection: The restrictions on personal movement are much more flexible than imprisonment, and still allow the offender to live in society and theoretically harm people. Denunciation: Because the outside public does not see a visible change in the offender's circumstances, they may feel the offender's behaviour has not been publicly criticised. 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. Then-SAC Chair Arie Freiberg speculated that their custodial experience could have had a "criminogenic effect."
Protection: The community is protected from further harm because the offender is removed from society. Punishment: The offender suffers the hardship of being separated from friends and family and losing their liberty.	Imprisonment	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 Productivity Commission for 2022-23 show that 39.5% of prisoners released in Victoria during 2020-21 returned to prison within two years; 9% of offenders given CCOs over the same period received another penalty within 12 months, by comparison. 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).

APPLICATION EXERCISE – Criminal consequences: evaluation

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.”

- a. Evaluate the extent to which the sanction of imprisonment achieved the aim of rehabilitation in the case of Carr.
- b. Analyse the impact of Carr’s sentence on the aim of general deterrence.
- c. Which aim of criminal sanctions do you think is being prioritised in the case of Carr, and why?

SENTENCING HEARINGS

Factors considered in sentencing

The law does not prescribe a fixed sanction or sentence for each crime, because the appropriate consequence will depend on a range of factors unique to each instance of criminal wrongdoing. Instead, legislation usually sets out a sentencing range, or a maximum sentence that can be given, and the individual judge or magistrate is able to use her or his discretion within that.

Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the range of factors that must be regarded by the court when sentencing an offender in Victoria. These include, but are not limited to, the following:

- The maximum penalty for the offence
- Current sentencing practices
- The nature and gravity of the offence
- The impact of the offence on any victim of it
- Whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which that happened or they indicated an intention to do so
- The presence of any aggravating factor or mitigating factor concerning the offender or of any other relevant circumstances
- Legislated ‘standard sentences’: a numerical yardstick published by parliament for serious offences, where they prescribe what they believe to be the “middle of the range of seriousness” for that offence. Based on the 14 offences prescribed at the end of 2024, the ‘standard sentence’ is set at approximately 40% of the maximum penalty.
- Current sentencing practices for that offence – *except* for those offences where parliament has prescribed a ‘standard sentence’. For those offences, courts may only look at sentencing practices dating back to when the standard sentence was set (therefore, no earlier than 1 February 2018).

In other words, the presiding officer tries to balance the specific facts of the offence with the circumstances of the offender, the victim, and the contemporary application of the law.

The Queen v Brown [2018] VSC 742 (29 November 2018)

Brown was the first case in Victoria to sentence an offender under the standard sentence scheme. Justice Campion found that standard sentences were compatible with the ‘instinctive synthesis’ approach, but set precedent that Victorian Parliament’s intention, that standard sentences *increase* the sentences given by judges, was irrelevant because it had not been written into the legislation.

In Victoria, no factor attracts a prescribed numerical sentence increase or discount. For example, in South Australia, ss39-40 of the *Sentencing Act 2017* (SA) prescribe that a guilty plea entered within four weeks of a defendant’s first court appearance attracts a sentence discount of up to 25% for serious indictable offences and 40% for other offences; the discount then decreases down to 5% for a guilty plea entered between arraignment and the commencement of trial in serious indictable offences, or 10% for other offences. Victoria does not use this ‘mathematical’ approach. Instead, Victorian courts apply what is called an “instinctive synthesis” – meaning, they take all factors into account globally. The precedent for this is *Markarian v The Queen* (2005) 228 CLR 357:

[T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.

The four factors listed on the Study Design are the presence of aggravating factors, the presence of mitigating factors, the presence or absence of any guilty pleas, and the nature of any victim impact statements submitted.

Aggravating factors

Keyword: Increase

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 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.
- Where the offender attacked as part of a group.
- Where the offender has a history of prior offending.

Sometimes an aggravating factor can be simply that the offender committed a crime while, at the same time, breaking a number of other laws. Pleading 'not guilty' will *never* be an aggravating factor, and neither will a failure to show remorse. Every accused has the right to assert her or his innocence.

REVIEW QUESTIONS – Aggravating factors

1. Provide a synonym for 'aggravating'.
2. What is the difference between 'culpability' and 'seriousness of the offence'?
3. Does an aggravating factor automatically result in a higher sentence?
4. How does the precedent of 'instinctive synthesis' affect the impact of aggravating factors?
5. Why is a history of prior offending aggravating?
6. Why is attacking as part of a group aggravating?
7. Is the culpability of the offender increased by showing no remorse?

Mitigating factors

Keyword: Decrease

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 give a sentence discount, 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.
- This being the offender's first offence.
- The offender showing remorse for their actions.
- Childhood trauma on the part of the offender.
- The offender having a personality disorder, per *Brown v The Queen* [2020] VSCA 212; or a developmental disorder, per *R v Verdins* (2007) 16 VR 269.

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.

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.

A sentence discount is when the presiding officer decides the offender's sentence, and then reduces it by a specific amount that is told to the offender during sentencing. This is a clear reduction in addition to the instinctive synthesis. Entering a guilty plea is the only mitigating factor that attracts a *guaranteed* sentence discount.

Media coverage as a mitigating factor

The 2022 report 'Should media coverage affect sentencing?' by the Sentencing Advisory Council noted that, since 2001, High Court precedent has been split over whether adverse media coverage is a mitigating factor in sentencing. Despite the issue not being settled, courts across the country almost always accept that adverse media coverage can be a relevant mitigating factor in sentencing because of the stigmatisation of the offender, the psychological consequences to the offender, and the impact of overly sensational or inaccurate reporting.

REVIEW QUESTIONS – Mitigating factors

1. Provide a synonym for 'mitigating'.
2. Does a mitigating factor automatically result in a lower sentence?
3. Is a sentence discount calculated as part of the instinctive synthesis?
4. What is the only mitigating factor that receives a guaranteed sentence discount?
5. Why is offending as a first offence mitigating?
6. Is the culpability of the offender decreased by showing remorse?

Guilty pleas

Keyword: Acceptance

Definition

A guilty plea is where the offender pleads guilty to one or more charges, at any point between arraignment and verdict. A guilty plea will induce the judge or magistrate to 'discount' the sentence and 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.

In 2022-23, two-thirds of all guilty pleas for indictable offences were entered at or before the committal hearing. The remaining third were entered at some point in pre-trial or during trial.



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 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."

Exam tip: Use your content on guilty pleas here from earlier in the AOS.

REVIEW QUESTIONS – Guilty pleas

1. What is the earliest time a guilty plea can be given to the court?
2. What is the latest point in time that a guilty plea be entered?
3. What effect will a guilty plea have on sentencing?
4. Define 'sentence discount'.
5. Explain the different impact that a guilty plea will have compared with a late one.
6. Does a guilty plea have to be accompanied by remorse to be counted as a mitigating factor?

Victim impact statements

Keyword: Effect of crime

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 make requests of the judge or magistrate in relation to sentencing.

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. 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 content must relate to the physical, psychological, social and economic impacts of the crime on the victim. A Statement relates to the *effect* of the crime – it is not evidence of guilt and is not considered prior to a guilty verdict or guilty plea. The presiding officer may take Statements into consideration when deciding the sanction, because they may provide evidence of either mitigating factors or aggravating factors. If no Statements are made, the judge or magistrate will still consider the impact of the crime on the victim or victims, but will use evidence from the trial instead.

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 QUESTIONS – Victim impact statements

1. Provide a definition of 'victim impact statement' that focuses on using words other than 'victim', 'impact' and 'statement'.
2. Who is permitted to give a victim impact statement to the court?
3. Differentiate between a primary victim and a secondary victim.
4. Identify three pieces of information that a victim might choose to include in her or his statement.
5. Provide one example of a matter that would likely be deemed inadmissible by a judge and not taken into consideration.
6. What are some of the options for how a victim impact statement can be prepared and delivered?

APPLICATION EXERCISE – Victim impact statements

Using your notes and the following guide on 'Victim Impact Statements Made Easy', prepared by the Victorian Department of Justice, answer the questions below.

https://www.victimsofcrime.vic.gov.au/sites/default/files/2023-10/Publication_Victim_Impact_Statements_Made_Easy.PDF

- a. Identify two things that the guide suggests victims include in their Statement.
- b. Give examples of the types of feelings that the guide suggests victims talk about in their Statement.
- c. Give examples of activities that the guide suggests might have been affected.
- d. Give examples of the different Statement formats encouraged on p9.
- e. Can victims talk about the future in their Statement, or only the past?

Evaluation: Factors considered in sentencing

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

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

The law has developed to be flexible in relation to the content and form of victim impact statements. They are not designed to be onerous or to add even more stress to the experience for the victim; instead, the victim is able to choose, with a significant amount of freedom, how they want to express themselves and what they want to say. This increases the victim's access. The judge or magistrate is given the power to declare any part of a victim impact statement inadmissible if it contravenes the rules of evidence, or if the presiding officer fears it will otherwise unfairly prejudice sentencing. These restrictions are in the interests of fairness for the accused. Dedicated Victims Support Workers are available to assist victims with preparing their Statements, to enhance the effectiveness of the Statement and make the process less upsetting for the victim.	Victim impact statements	An unintended side-effect of victim impact statements is that they suggest 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. 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. Reforms in 2018 mean that victims are allowed to read out their entire statement, including inadmissible sections, but 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 diminishes fairness. The victims also do not know which parts were deemed inadmissible and ignored. Many victims are not given the ability to make a Statement because Magistrates' Court hearings are conducted so quickly, and guilty pleas can progress a case to sentencing before the victim has had a chance to prepare a Statement.
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APPLICATION EXERCISE – Factors considered in sentencing: evaluation

Allowing the sentencing judge to take aggravating and mitigating factors into account can have undesirable effects that were not intended when the law was adopted. A sophisticated offender or legal representative can '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 *Thomas* 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. Similarly, 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

AOS2: THE VICTORIAN CIVIL JUSTICE SYSTEM

Part 1: Key ideas in civil law

KEY PRINCIPLES IN THE VICTORIAN CIVIL JUSTICE SYSTEM

The system of trial used in civil disputes is similar to that in criminal cases, 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. 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. Alternative processes for resolving disputes are studied in methods for dispute resolution and non-court bodies such as the Victorian Civil and Administrative Tribunal and Consumer Affairs Victoria.

The burden of proof

Keyword: Bring evidence

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 any 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 civil 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.

REVIEW QUESTIONS – The burden of proof

1. Give a synonym of the word 'burden'.
2. Give a synonym of the word 'proof'.
3. Which party has the burden of proof in civil trials?
4. Why does this party have the burden?
5. If the evidence is evenly weighted, which party receives the benefit of the doubt and wins?

The standard of proof

Keyword: Amount of evidence

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 what ‘beyond reasonable doubt’ means. Current Australian precedent 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 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 it is *not* likely.

Note that the plaintiff’s case does not need to be more likely than the *defendant’s* case, because that is not the test: the defendant does not have an onus of proof and does not need to have a ‘version’ of the case. The defendant can simply discredit the plaintiff’s version.

REVIEW QUESTIONS – The standard of proof

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?

Evaluation: Key principles in the civil justice system

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

STRENGTHS		WEAKNESSES
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 fairness. The defendant will be thoroughly informed of all the evidence against them before they will be asked to defend themselves. This gives them access to justice, because it’s impossible to effectively defend oneself against claims without knowing the full details of them.	The burden of proof	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 unfair. In terms of evidence and legal arguments, equality 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.
The defendant cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the fairness of the trial, because it would be unfair to sue someone if there was little to no evidence justifying it and they were sure to be found not liable at the end. 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 fair, 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.	The standard of proof	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 equal 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 plaintiff’s case is more probable than not. 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.

APPLICATION EXERCISE – Key principles in the civil justice system: evaluation

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.

FACTORS TO CONSIDER BEFORE 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.

Costs

Keyword: User pays

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 expenses 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

Legal Aid is not focused on civil representation. The costs of representation, for both solicitor advice and barrister advocacy, must be borne by the parties personally.

It is not uncommon for an experienced junior solicitor to charge \$650ph, or a senior one \$900ph – these are the figures in the 2025 Supreme Court Scale of Costs for time-based billing. 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 \$41.80 per email (as of the 1 January 2024 Practitioner Remuneration Order), and traveling more than 16km away at \$142.80 for any part of an hour, up to \$1,999.30 per day.

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 2025 Supreme Court Scale of Costs lists a barrister’s daily court rate at \$10,672 for senior counsel and \$7,115 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. Under the County Court Rules, for instance, expert witnesses are paid \$197-395ph, up to a maximum of \$2,456 per day.

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 \$4,997.40 (2024-25 at the Corporate rate), or \$2,488.70 for an individual. Filing a monetary claim worth less than \$500.00 with the Magistrates' Court costs \$166.60 in initial filing fees (2024 rates), and a claim worth \$70,000 to \$100,000 costs \$793.60.

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. In the Magistrates' Court the first day is included, and subsequent days are \$681 at the standard individual rate.

Note that since 2024 all Victorian courts have used a 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: Bruce Lehrmann versus Channel 10 and Lisa Wilkinson

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.

In April 2024 Bruce Lehrmann lost his defamation lawsuit against Network Ten and journalist Lisa Wilkinson after the defendants proved, on the balance of probabilities, that Lehrmann forced sex on his colleague, and that their reporting was therefore not defamatory.

The Federal Court ordered Lehrmann to pay \$2 million to Network Ten, even though Ten's barrister told the Court that its costs at the end of May were \$3,668,420.83 – it agreed to discount the rest. Lehrmann's lawyer Paul Svilans noted that Ten sometimes had up to five lawyers in the court, and its lead barrister Matthew Collins charged \$11,000 a day.

Lehrmann was granted a stay on the enforcement of the costs order so he could appeal, with the matter set to be heard in March 2025. Justice Abraham ruled that enforcing the costs order could lead to Lehrmann's bankruptcy, which would affect his ability to pursue the appeal.

REVIEW QUESTIONS – Costs

1. Give a synonym for 'costs'.
2. Are costs the same as damages?
3. Explain the difference between costs for legal representation, witness costs and court costs.
4. What happens to a civil claim if the plaintiff cannot afford the filing fees and hearing fees?
5. Is it possible for a plaintiff to be self-represented if they cannot afford a lawyer?
6. Can a plaintiff settle a claim privately with the defendant if they cannot afford to continue the lawsuit?
7. Which is greater: the \$500 lost in a small claim in the Magistrates' Court, or the filing fee to start a claim for it?

Limitation of actions

Keyword: Application to dismiss

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 can apply to have the case dismissed.

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 in order to file – instead, the defendant applies to the court to show that they are *not*, and to have it dismissed.

The limitation period is different for personal injury cases and defamation cases. Section 5(1AAA) of the Act provides that the limitation period for defamation actions is *one* year, and s5(1A) 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.

REVIEW QUESTIONS – Limitation of actions

1. Provide a synonym for 'actions' in 'limitation of actions'.
2. Are actions 'limited' in the sense of the complainant being prevented from filing a claim?
3. What would a defendant do if they believed the plaintiff was 'out of time'?
4. Can a lawsuit continue to verdict after the limitation period has expired?
5. Will the limitation period always start from the date of the wrongdoing?
6. What is the limitation period for a standard action in tort, with no personal injury?
7. What impact will a limitation period have on the evidence in the case?

Enforcement issues

Keyword: Satisfaction

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 satisfy 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.



If the plaintiff succeeds in their claim but the defendant does not satisfy the judgment by paying it, 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.

The plaintiff will need to apply to the court for these orders, however, and pay for the filing fees and legal representation necessary for this enforcement hearing.

REVIEW QUESTIONS – Enforcement issues

1. Do 'enforcement issues' refer to the legal enforcement of the verdict or the financial enforcement of the order for remedies?
2. If the defendant is a 'straw person' and has no assets or savings, is it possible to *also* sue their insurance company or employer, etc?
3. What is the difference between a judgment debtor and a judgment creditor?
4. Is there an enforcement order the courts can give that cause some of the defendant's wages to go to the plaintiff instead?
5. Who pays upfront for a hearing to ask for an enforcement order?

Evaluation: Factors to consider before initiating a civil claim

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

STRENGTHS		WEAKNESSES
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 reasonable must be compensated. This contributes to a fair allocation of costs. 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 access. Courts have the power to order indemnity costs, which means the losing party may be ordered to pay the actual costs of the winning party over and above the standard scale of costs published by the court. This will happen when the losing party has acted unethically or deliberately frustrated resolution of the dispute. Tribunals usually do not make adverse costs awards.	Costs	Adverse costs orders usually do not reimburse the successful party for all of their actual costs because they are based on the court's scale of costs rather than actual invoices. This is unfair, because the system has determined they were in the right. 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 harmed individuals in the right from having effective access to the courts for resolution of their dispute if they simply cannot afford them. Costs can reduce equality 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. Because tribunals do not usually make adverse costs awards, the winner still usually has to pay costs.
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 fairer hearing. 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 access. Limitation periods differ depending on what is appropriate for the type of claim: personal injury claims begin time from when the injury was reasonably discoverable, while child sex abuse claims have no limitation period.	Limitation of actions	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 accessing reliable evidence to avoid a finding of liability. Limitation of actions time limits may prevent harmed plaintiffs from pursuing their rights, thereby denying them access to legal redress. Enforcement of the limitation period relies on the defendant having representation or adequate legal knowledge to know it exists and apply to have the case dismissed. Otherwise, they can be sued without realising they have a defence.
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 fairly. 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 access to justice, even against a less wealthy defendant.	Enforcement issues	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 access. 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 equally by the courts under this approach.

APPLICATION EXERCISE – Factors to consider before initiating a civil claim: evaluation

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.

- 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.

Part 2: The principles of justice during a civil dispute

The Study Design identifies the same principles of justice for civil disputes as for criminal disputes: fairness, equality, and access.

The way that features of the civil justice system work to achieve these principles in the resolution of a criminal case include resolution venues and methods that operate outside trials, such as mediation and conciliation, the Victorian Civil and Administrative Tribunal and Consumer Affairs Victoria; and the operation of the court system itself, such as its arrangement into a hierarchy, the roles of participants, and the ability of the plaintiff and defendant to reach agreement and have that made legally-enforceable by the courts.

These features are assessed according to how they achieve 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 those in the Victorian Charter.

The Charter focuses primarily on criminal disputes, but 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

Keyword: Natural justice

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 evidence and arguments, 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 apply for leave to appeal – for instance, to apply for leave from High Court of Australia. 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.

Equality

Keyword: Sameness

Definition

‘Equality’ is the idea that every person or organisation that has a dispute to be resolved is valued the same 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 an immutable characteristic: 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 narrow, as formal or procedural equality; or broad, as substantive or ‘opportunity-driven’ equality:

- ✓ Procedural equality focuses on 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, to achieve more equal outcomes or opportunities.

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 equality of opportunity, 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, and whether someone’s first or most fluent language and ways of communicating match the system.
- 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

Keyword: Meaningful use

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 about the ability, in real life, of different people to use the system 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 ability to use the systems and places chosen.

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.
- Wealth. 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.
- The Victorian Civil and Administrative Tribunal and the Magistrates' Court both have multiple locations around Victoria, so the physical locations for dispute resolution are more easily accessed by claimants in suburban and rural areas. For instance, there are five dedicated VCAT locations, and the Magistrates' Court sits at 52 different places state-wide (2024 numbers).

REVIEW QUESTIONS – The principles of justice

1. Give a synonym for 'fairness'.
2. Identify three things that have the ability in civil justice to compromise fairness.
3. Outline two ways in which the legal system attempts to achieve fairness in civil dispute resolution.
4. Give a synonym for 'equality'.
5. Differentiate between procedural equality and equality of opportunity.
6. Identify three things that have the ability in civil justice to compromise equality.
7. Outline two ways in which the legal system attempts to achieve equality in civil dispute resolution.
8. Give a synonym for 'access'.
9. Physical location is one aspect of access. Name two others.
10. Identify three things that have the ability in civil justice to compromise access.
11. Outline two ways in which the legal system attempts to achieve access in civil dispute resolution.

WAYS 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.

Methods used to resolve civil disputes

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

A hearing or trial is the only method available for the resolution of criminal disputes, but civil disputes 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

Keyword: Cooperation

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

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.

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 orders. Otherwise, it will be up to the parties to draw up a private contract.

If the mediation is unsuccessful, or only successful on some of the claims, the matter may proceed to a trial or hearing for full resolution. Mediation tends to have a 30-65% success rate, depending on the venue and type of dispute. According to the 2023-24 Supreme Court Annual Report, 539 cases were referred to judicial mediation or the Court's own Appropriate Dispute Resolution Centre staffed by judicial officers, with 58% choosing to attend and 312 completed mediations and 63% of matters resolved on the day either fully or in part. Mediations also occur in other areas of the court, such as the Costs Court or when parties use a private mediator in pre-trial. In VCAT, 952 mediations were conducted in 2022-23, resulting in 455 settlements (48% success rate) – a further 884 matters were mediated by the Dispute Settlement Centre of Victoria through the Fast-Track Mediation and Hearing programme, with 506 settled (57% success rate). In its 2023-24 Annual Report, VCAT stopped reporting on the number of matters mediated.

All civil disputes can be mediated – even appeals, disputes where there is an imbalance of power, or very complex matters. Mediation is the most common way to resolve very large class actions, for instance, and the Court of Appeal mediates complex appeals based on legal arguments. Disputes that may be considered inappropriate for mediation focus on those where one party wishes the courts to challenge or set a precedent, or where there are serious allegations of violence or abuse. The County Court will prefer a mediation called a 'Judicial Resolution Conference' in disputes where there is a self-represented litigant at a power disadvantage, for instance, as the mediation will be conducted by a judicial officer attentive to fairness.

Bruce Lehrmann v Network Ten; The Australian Broadcasting Corporation; News Life Media Pty Ltd & Anor

In 2023, former Liberal Party staffer Bruce Lehrmann launched a defamation suit in the Federal Court against Network Ten, the ABC, News Life Media, and journalists Lisa Wilkinson and Samantha Maiden personally, over coverage of allegations he raped fellow staffer Brittany Higgins in 2019. In his statement of claim, Lehrmann accused the defendants of being "recklessly indifferent to the truth or falsity" of the allegations.

News Corp settled its lawsuit in May 2023, leaving the ABC and the Network Ten matters on foot. On the first day of trial for the Network Ten dispute in November 2023, Lehrmann's lawyers told the Court that an out-of-court settlement had been reached in the ABC lawsuit and that the ABC claim had been discontinued. A deed of settlement was publicly released in December that showed the ABC had agreed to pay \$150,000, including \$143,000 towards Lehrmann's legal costs. The ABC also agreed to publish a statement of correction, not to reinstate the YouTube video of the segment, and to remove a Facebook video.

REVIEW QUESTIONS – Mediation

1. Provide a synonym for 'mediation'.
2. Will mediation be compulsory to attend if the complainant requests it before filing a lawsuit?
3. Will mediation be compulsory to attend if a court or tribunal orders it in pre-hearing?
4. Is it ever possible to make agreement at a mediation session compulsory?
5. Do parties focus on evidence or witnesses at mediation?
6. Do parties focus on legal arguments at mediation?

7. Is a mediation session bound by the rules of evidence and procedure?
8. Which of the following three things will be the most important at a mediation, and why: law, evidence, or agreement?
9. Will the mediator make the final decision in favour of one party at a mediation session?
10. Will the outcome of a private mediation automatically be binding?
11. What must happen for a private mediation to be legally-enforceable?
12. Will the outcome of a mediation conducted through courts or VCAT be legally-enforceable?
13. What is a 'deed of settlement' or 'consent order'?
14. Name two formal dispute resolution venues that use mediation in addition to hearings.
15. Can mediation be used for disputes where there is a significant imbalance of power?
16. Can mediation be conducted using legal representatives?
17. Can mediation be used for large disputes involving complex evidence or large amounts of money?

Conciliation

Keyword:Encouragement

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.

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 ordered 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 orders. If the conciliation is conducted privately, the parties can choose to write up the terms of the agreement in a private contract. If the conciliation is unsuccessful, or only successful for some of the claims, the matter may proceed to a trial or hearing for full resolution.

Conciliation is used by courts less frequently than mediation, although the Magistrates' Court and County Court 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. In 2023-24 the Magistrates' Court resolved 738 matters through a combination of mediation and 'conciliation' pre-hearing conferences (compared with 2,801 through hearings) – their Annual Report does not break this number down further. VCAT does not officially use conciliation, but its 'compulsory conferences' use a process that seems like conciliation. In 2022-23 VCAT conducted compulsory conferences in 1,933 matters and 820 of them resolved at the conference (42% success rate). VCAT stopped reporting these numbers in 2023-24.

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.

Early neutral evaluation

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. It can be considered a form of conciliation.

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.

REVIEW QUESTIONS – Conciliation

1. Provide a synonym for 'conciliation'.
2. Will conciliation be compulsory to attend if the complainant requests it before filing a lawsuit?
3. Will conciliation be compulsory to attend if a court or tribunal orders it in pre-hearing?
4. Is it ever possible to make agreement at a conciliation session compulsory?
5. Do parties focus on evidence or witnesses at conciliation?
6. Do parties focus on legal arguments at conciliation?
7. Is a conciliation session bound by the rules of evidence and procedure?
8. Which of the following three things will be the most important at a conciliation, and why: law, evidence, or agreement?
9. Will the conciliator make the final decision in favour of one party at a conciliation session?

10. Will the outcome of a private conciliation automatically be binding?
11. What must happen for a private conciliation to be legally-enforceable?
12. Will the outcome of a conciliation conducted through courts or VCAT be legally-enforceable?
13. What will be the result of a conciliation conducted by a CAV worker with a trader or landlord?
14. What is a 'deed of settlement' or 'consent order'?
15. Name two formal dispute resolution venues that use conciliation in addition to hearings.

Arbitration

Keyword: Informal submissions

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. In 2023-24 the Magistrates' Court finalised 1,048 civil matters in an arbitration hearing, and in 2023-24 the Supreme Court heard eight disputes in its Arbitration List. The County Court will refer parties to arbitration under s66(1) of the *Civil Procedure Act 2010* (Vic) where the parties are willing to enter into an arbitration agreement – in 2022 the Court established an Arbitration List for fast, confidential resolution of small claims (generally under \$150,000), where the parties can choose any arbitrator they like. No arbitrations were conducted in 2023-24.

If parties have filed a claim with a court, however, there is no obligation for them to accept an arbitration hearing instead of a judicial trial, because an arbitration *will* result in a binding outcome.



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 QUESTIONS – Arbitration

1. Provide a synonym for 'arbitration'.
2. Will arbitration through a private organisation be compulsory to attend if the complainant requests it before filing a lawsuit?
3. Will arbitration be compulsory to attend if a court or tribunal refers parties to it in pre-hearing?
4. Who is responsible for the outcome in an arbitration hearing?
5. Will the outcome of an arbitration be legally binding and enforceable?
6. Do parties focus on evidence or witnesses at arbitration?
7. Do parties focus on legal arguments at arbitration?
8. Is an arbitration hearing bound by the rules of evidence and procedure?
9. Is an arbitration hearing bound by the principle of natural justice?
10. Which of the following three things will be the most important at an arbitration, and why: law, evidence, or agreement?
11. Will a private arbitration be conducted if parties refuse to enter into an arbitration agreement beforehand?
12. Will the outcome of an arbitration conducted through courts be legally-enforceable?
13. Name two formal dispute resolution venues that can use arbitration instead of hearings.

Extension material: Negotiation

'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. Negotiation conducted privately between the parties commences often at the time of the wrongdoing, and can resolve the dispute any time up until a verdict or binding agreement is recorded or a contract signed.

For example, 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.

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.

APPLICATION EXERCISE – Methods used to resolve civil disputes: evaluation

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 whether *non-judicial* processes are susceptible to the same problem.

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.

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Evaluation: Methods used to resolve civil disputes

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

STRENGTHS		WEAKNESSES
Mediation is generally more cost-effective than a method such as judicial determination, which aids in access. For example, mediation at the Dispute Settlement Centre of Victoria ('DSCV') is free, and mediation conducted through VCAT does not incur an additional charge. 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). 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 equality across parties who have experience with the legal system and parties who haven't.	Mediation	Mediation with a private mediator, done before many 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 access. One party may compromise too much in an effort to resolve the dispute, because there is no requirement that the agreement be 'legally fair'. 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.
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 equality across parties who have different levels of experience with the legal system. 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. 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.	Conciliation	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. Conciliations do not involve a lot of documentation, but there is still material that must be prepared, including a contract to make a private agreement enforceable. This prevents access for people who do not understand the documentation or have to pay for an expert to assist them. 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.
The rules of evidence and procedure are flexible, but arbitrations are still bound by the basic principles of natural justice. This means that flexibility cannot be provided at the expense of fairness. Arbitrations are compulsory to attend – either because they are being conducted by a court after the plaintiff has filed with the Arbitration List, or because the parties have agreed to an arbitration in a pre-existing agreement. 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.	Arbitration	The arbitrator's award often cannot be appealed if one party believes an error has been made or the outcome was unfair or a product of an unequal capacity to argue their case. 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 unequally. 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.

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.

a. Discuss two weaknesses of mediation relevant to the *Al Azhari* case.

RESOLUTION THROUGH THE COURTS

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.

Administrative convenience

Keyword: Resources

Definition

Allocating matters across a vertical court hierarchy depending on the seriousness and complexity of the dispute allows administrative convenience because the courts can better allocate their resources and achieve efficient resolution.

Examples

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.

There will also be reason to have more Magistrates’ Court courtrooms because it receives 72% of all civil initiations: in 2023-24 the County Court received 7,715 new civil matters, and the Supreme Court and Court of Appeal received 6,667 civil filings including appeals and commercial disputes, while the Magistrates’ Court received 37,518.

REVIEW QUESTIONS – Administrative convenience

1. How does the Magistrates' Court and the Supreme Court hearing different severities of cases allow them to have more administrative efficiency?
2. What is the difference between specialisation and administrative convenience? Find one example of each to illustrate the difference.

Appeals

Keyword: Review

Definition

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.

Examples

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 High Court needs to give before any person is able to have their case heard there.

Extension material: The operation of precedent

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 doctrine of precedent relies on the principle of *stare decisis*, which means 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 on lower courts.

- 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.

REVIEW QUESTIONS – Reasons for a court hierarchy

1. What is the relationship between jurisdiction and a hierarchy?
2. Give a synonym for 'administration'.
3. Name one resource that the Magistrates' Court would need that the Court of Appeal may not.
4. Name one resource that the County Court would need that the Magistrates' Court may not.
5. How does administrative convenience lead to efficiency?
6. Give a synonym for 'appeal'.
7. Outline the difference between an appeal and a rehearing or retrial.
8. Why would appeals not be possible in a flat hierarchy?
9. What does 'leave to appeal' mean?
10. Does every case give the parties an automatic right to appeal?
11. Give one example of an appeal pathway in the civil hierarchy.

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

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

STRENGTHS		WEAKNESSES
Greater convenience and efficiency promote greater access 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 access. For example, the Arbitration List in the Supreme Court provides more administrative efficiency than the Supreme Court does compared with the County Court.
Parties have largely equal 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 fairness and the level of confidence the public has in the system.	Appeals	In reality, there is not equal 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 access 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.

APPLICATION EXERCISE – Reasons for a court hierarchy: evaluation

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 precedent as a reason for a court hierarchy. Using this as a guide, evaluate each of the reasons for a court hierarchy in the section.

Roles of key personnel in a civil dispute

The roles of key personnel such as the judge or magistrate, the jury, and the parties can be asked for as a general overview, or a specific number of smaller roles may be requested. All roles can be broken chronologically into pre-trial roles, hearing or trial roles, and post-verdict awarding of remedies and appeals.

Go back to your notes from AOS1 and use them here as the basis for your civil notes. Make adjustments and additions as necessary, but do not start from scratch.

Judge or magistrate

General role

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: If there is a need to be specific about details, 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.

Specific role in 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 to assist effective, prompt and economical resolution. 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.

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 struck down the law in a unanimous decision, declaring it inconsistent with the Commonwealth *Marriage Act*.

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 encourage cooperation, narrow the issues in disputes and streamline trial, and to impose penalties on parties who breach their duties.

Specific orders may include any of the following:

- The judge 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.
- The judge can direct parties to have a telephone or sit-down meeting rather than exchange a large number of pre-trial emails, or to attend a mediation conference prior to trial.
- The judge can direct parties to rely on one common expert witness rather than each party using its own competing expert witness.

A judge will have more pre-trial roles than a magistrate, because more serious claims have more extensive pre-trial procedures. Short Magistrates’ Court hearings do not conduct extensive directions hearings beforehand.

Detail on other roles

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, and ensure that no bias skews proceedings in favour of one side.
- In the courtroom the presiding officer will listen to the submissions and evidence given by each party, and use this evidence to reach a final verdict in all matters where there is no jury.
- Because their role is to be impartial, 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 – apprehended bias is as important in the law as actual 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.

REVIEW QUESTIONS – Role of the judge or magistrate

1. What is the difference between a judge and a magistrate?
2. Identify two adjectives that could be used to describe the role of the judicial officer in the civil justice system.
3. What rules are the judge or magistrate responsible for enforcing in court?
4. Outline two specific things that the judge will do as part of her or his role.
5. What statute gives judges and magistrates the power to direct the way parties present and prepare their cases?
6. What are ‘judicial directions’?
7. Will a judge or a magistrate have a larger role in giving directions, and why?

8. Identify two orders that can be given at a directions hearing.
9. In what kinds of trials or hearings will the judicial officer give the verdict?
10. Does the judicial officer or the jury determine damages?
11. Does the judicial officer or the jury determine injunctions?
12. Explain the difference between actual bias and apprehended bias.
13. Will the judicial officer direct the jury on matters of fact or matters of law?

Jury

A jury is a group of six women and men randomly selected from the community.

General role

Each juror individually, as well as the jury as a whole, has the role of listening 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* parties to a civil case a trial by their peers.

Civil juries will never issue injunctions, but 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.

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 re-litigation if the plaintiff wishes.
- 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 a special role 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 role of listening 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.

Jury assessment of damages

TJ (a pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga, Mark Edwards [2024] VSCA 262

After suing successfully for psychiatric injury caused by historical sexual abuse, the jury awarded the plaintiff general damages of \$1.1 million for pain and suffering, specific damages of \$965,000 for past and future economic loss, and \$1.3 million in exemplary damages. Edwards successfully appealed this award, and the Court of Appeal reduced general damages to \$550,000, set aside the exemplary damages, and kept the specific damages at \$965,000.

The Court found that the damages were, in part, "manifestly excessive" because "The abuse to which the plaintiff was subjected, while extremely serious, did not involve violence or acts of sexual penetration. With the assistance of psychological treatment, the plaintiff has subsequently managed to experience a relatively successful life, albeit one that has not been without challenges. He is married to a loving wife and together they have raised three happy, successful and independent children. He has participated in full employment of a rewarding kind for decades."

- Jurors have the role of respecting the secrecy of jury deliberations. 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.

REVIEW QUESTIONS – Role of the jury

1. When will a civil dispute be heard by jury?
2. Which courts in the Victorian hierarchy can conduct civil jury trials?
3. Will juries ever be called on to decide a civil appeal? Justify your answer.
4. What role does the jury play in relation to the verdict?
5. Does the jury have a role if a mediated agreement is reached between the prosecution and the accused?
6. Identify two specific things that the jury, or each individual juror, will do as part of its role.
7. Is a civil juror permitted to look something up if evidence or legal procedure is unclear in trial?
8. What is a juror meant to do if they do not understand the law in the area?
9. Does the jury play a role in determining damages?
10. Does the jury play a role in determining injunctions?

Parties

General role

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 entities of the plaintiff and the defendant – whether the 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, or self-represented litigant.

Detail on specific roles

- The plaintiff has the role of deciding 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 role of deciding whether to contest the case and file a notice of appearance, or whether to attempt settlement. They must also decide whether to issue a counterclaim.
- Each party plays a role in deciding whether to have legal representation or be self-represented, and researching which lawyer to engage based on the area of law being litigated.
- Each party plays a role in determining what evidence and 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 role of raising, 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 plays a role in upholding the primary duty 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 by giving directions or raising or lowering damages.

REVIEW QUESTIONS – Role of the parties

1. Who are the parties in a civil case?
2. What is the relationship of the civil complainant or victim to the legal parties?
3. Identify two adjectives that could be used to describe the role of the parties in the civil justice system.
4. Outline two specific things that the parties will do as part of their role.
5. Is a party allowed to pursue their own success in a dispute if that involves actions such as frustrating settlement or misleading the court?
6. Which party is responsible for deciding the civil claims being litigated?

7. Which party is responsible for deciding whether the claim is settled or contested in court?
8. Explain what is meant by the parties' 'paramount duty'.
9. Identify two of the overarching obligations placed on parties in a civil case.
10. Name the piece of legislation that governs the overarching obligations.

Evaluation: Roles of key personnel

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
The judge is 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 equally and fairly, and that natural justice is preserved. 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 access and ensuring that neither party uses bad faith strategy to disadvantage its opposition. The judge must not only consider whether they have actual bias – they must also recuse themselves if they perceive grounds for apprehended bias. Even if they believe they are impartial they must prioritise the ability of the community and the parties to have faith in the fairness of the system.	Judge or magistrate	The judge 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 assist unrepresented accused. Judges can only make decisions based on evidence and arguments put to them, can only direct the jury on matters raised by the parties, and the outcome is based on the best arguments rather than whom the court thinks is right. The extensive case management powers of the judge since 2010 (and later reforms such as reducing party control over expert witnesses) allows the judicial officer to interfere too much in party control and individual judgment, limiting access.
Jurors must be unbiased, and random selection 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 fairness. Jurors look at the case from the perspective of a layperson. Jurors being 'regular' people requires that legal jargon be kept to a minimum, which stops lawyers and judges from unintentionally overcomplicating the system, and allows parties and the viewing public to better understand the case. Jurors must 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. The role of jurors to listen carefully to all evidence and argument and refrain from doing any private research stops the verdict being based on potentially incorrect information, or material that one side is not able to cross-examine.	Jury	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. Many prejudices are common across different groups in society, so parties from minority groups in particular can fail to be treated as equals before the law. 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 unfair decisions based on a mistake. They then publish no reasons for their verdict, so review is not possible.
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 access, and may encourage confidence in the fairness of the outcome. Parties are experts in their own cases, and know the facts the best. They also have a vested interest in presenting their side as effective as possible. Giving them control is therefore arguably the most effective and efficient way of deciding how their side should be argued. Parties have a role that encompasses advocating for themselves as well as fulfilling a duty to the court and to law. This ensures that they do not mislead the court out of a desire to win. The role of the defendant is just as onerous as the role of the plaintiff, which impairs equality of opportunity due to the superior knowledge of the plaintiff who has had the opportunity to research the case and gather evidence before deciding to file a lawsuit. The plaintiff also controls the scope of the case with the claims they choose to make.	Parties	Party control puts a lot of responsibility and stress on individual parties, and most individuals are not experienced in arguing at trial. This increases party reliance on legal representation, which increases the costs of trial and reduces equality between parties if one party has greater financial resources than the other – this often happens if an individual sues a corporation or the government. Party control may cause delays – through inexperience, failure to select only the best arguments, or by the plaintiff or defendant refusing to negotiate for a fair and appropriate settlement. The court can sanction non-compliance with the <i>Civil Procedure Act</i>, but this mainly occurs through increased damages at the end of the dispute. Parties have a vested interest in arguing only the side of the case that is beneficial to them, and not helping to discover the truth. The inquisitorial system of the Coroner's Court or European criminal courts might more efficiently uncover the full set of facts.

APPLICATION EXERCISE – Roles of key personnel: evaluation

The adversary trial has historically been based on the principle of party control, because parties are the experts in the facts of their own cases and have a vested interest in presenting the strongest evidence and legal arguments to the court. This assists the court in being able to reach the most efficient and fair outcome. However, in recent years party control has been significantly decreased due to the case management powers given to the judicial officer in the *Civil Procedure Act 2010*. Parties can be limited in the questions they are able to ask witnesses, on top of the standard rules of evidence and procedure, and limited in the number of witnesses they can call – the judge may even choose one expert witness for both parties to use, even if that expert does not understand an uncommon or novel issue raised by one party, for instance. Party control has been blamed for creating a stressful and combative environment in court, and blowing out both costs and time, but the solution of case management decreases party access by preventing them from using their judgment to fully govern their own case.

- 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.

The need for legal practitioners in a civil dispute

Keyword: Effective submissions

Definition

Because the rules of evidence and procedure are quite complex, the judge does not actively manage the presentation of the parties' cases, and the parties have responsibility for understanding what law to argue, what evidence to lead and how to navigate the procedure and court's rules, most people could not effectively make effective submissions on the evidence and law without legal representation.

- ✓ There is no right to legal representation in civil law. This is because civil disputes are between individuals, and the state is not exercising its power; also, the consequences are less serious and the plaintiff may financially benefit from the case.
- ✓ Legal sources such as s25 of the Victorian Charter and the *Dietrich* case relate only to criminal law.

Detail

Many parties will be represented by both solicitors and barristers, as in the criminal justice system. Legal practitioners must adequately advise their clients on both legal rights and duties, advocate for their clients' interests, present the best case possible based on the law and the evidence in the case, 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 as per the *Giannarelli* precedent.

Legal advocates also 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 in *Giannarelli*, and it is a duty not enforced as strictly on self-represented litigants because of their inferior understanding even though they may be prompted by self-interest to hold back these disclosures.

Trained counsel are also vital in ensuring that parties understand their real chances of success. Individual parties can often be motivated by emotion. 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, while counsel for the defendant has the responsibility to advise the client of their likely chances of success and the consequences of failing to engage in pre-trial negotiations and settlement offers in good faith.

Self-represented litigants

For the 2016 'Access to Justice Review', the Victorian Department of Justice defined 'access to justice' as the ability for people to resolve their disputes according to law, using both formal and informal institutions and processes and with legal information and advice. Self-represented litigants face additional barriers because they lack the knowledge and experience of a professional advocate. Regardless of the strength of their case, the 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. In 2020-21, 40% of the appeals filed with the Supreme Court Trial Division were filed by SRLs.

- The Adoption List in the County Court has two-thirds of its matters commenced by self-represented litigants in 2023-24, and SRLs initiating matters in the General and Serious Injury List was up by 11% from 2022-23 to 83 new proceedings. The Court has established a dedicated Self-Representation Service with Justice Connect to assist SRLs because they are usually not equipped to manage forms, procedures and court rules without help: "This intensive case management requires significant judicial and administrative resources, with cases involving self-represented litigants requiring, on average, many more hearings and contacts with Court staff than other cases to reach resolution." (2023-24 Annual Report)

The County Court and Supreme Court have both published Guidelines for judges hearing disputes with unrepresented litigants. Judicial officers are expected to assist SRLs more than they would a represented party, in recognition of the disadvantage suffered by an SRL. The County Court Guide instructs judges, for instance:

- ✓ “Indicate, as soon as the nature and extent of the problem is clear, the role expected of the judge. For example, that the judge’s role requires more questioning than normal, that the judge will, where necessary, put questions to the parties’ witnesses intended not only to clarify, but also test their evidence because of the need to have a decision based on proper examination of the facts if justice is to be done and seen to be done. Indicate that it will also be necessary from time to time to advise the self-represented party of their rights, both procedural and evidentiary, and to assist the self-represented party at times in organising the presentation of their case.”

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.”

REVIEW QUESTIONS – The need for legal practitioners

1. What does ‘SRL’ stand for?
2. Does Victorian legislation recognise a right to legal representation in a civil case?
3. Does precedent recognise a right to legal representation in a civil case?
4. Do the rules of evidence and procedure apply in civil cases as well as criminal cases?
5. Does the *Giannarelli* precedent regarding a lawyer’s ethical duty apply in civil cases as well as criminal cases?
6. What is the name of the County Court service established to help unrepresented parties?
7. Who is benefited by parties being represented, in addition to the parties themselves?
8. What is the difference between how judges treat represented parties compared with unrepresented parties?
9. Identify two things a judge may assist an SRL with, according to the County Court Guide.
10. Can a lawyer keep quiet if they see a legal or factual error in trial?
11. Does a lawyer have the power to refuse to file a claim if the plaintiff is arguing a weak or unjust case?
12. Can a lawyer agree to a fair settlement on behalf of the defendant if the defendant instructs them not to?

Evaluation: The need for legal practitioners in a civil dispute

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

STRENGTHS	WEAKNESSES
Experienced representatives use their expertise to present the accused’s case in the best possible light. Lawyers gives the accused confidence in the system, and a better chance at a fair and just trial. Expert practitioners save the courts time and money, because they know the correct way to prepare documents, make legal submissions and elicit evidence from witnesses, and the best arguments to allow the court to home in on significant issues. The courts have established SRL Services for this reason. Qualified practitioners can level the playing field across accused of different backgrounds, ages, classes and levels of education. For example, in the Robodebt class action six plaintiffs and 400,000 group members, all Centrelink recipients without funds or legal experience, sued the Australian federal government. They were represented by Gordon Legal, and achieved a \$1.2 billion settlement. A lack of legal representation slows down a trial, and adds to the responsibilities of the judge. For example, the County Court Guide instructs judges to explain the rights of unrepresented parties and even assist with the way the case is presented. Because practitioners are not personally involved, they are better able to make strategic, objective decisions regarding the evidence and law than an accused who is emotionally invested. The experience and training of legal practitioners assists the court with the administration of justice. For example, in their 2008 research into barrister funding by VLA, Pricewaterhouse Coopers found that “the more adequately prepared and experienced a barrister the higher the likelihood that they will bring forth defence evidence and the perspective necessary to resolve cases fairly. This assists the judiciary in making better quality decisions.”	‘Justice’ may belong to parties who can afford the better legal representatives, rather than parties legally in the right. For instance, when Rolah McCabe sued British American Tobacco the tobacco company dragged the case out by frustrating discovery and launching appeals. Justice Geoffrey Eames found for McCabe in the first instance, saying that, “the process of discovery in this case was subverted by the defendant and its solicitor [...] with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful.” The case was still on appeal years later when she died of smoking-related cancer. It was before the courts from 2001 to 2011 and BAT won. Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in mediation because they may earn more from a longer dispute, or they may believe they can win outright for their client. Inadequate counsel can be responsible for poor advice and delays. For instance, the Law Institute of Victoria said: “Inadequate representation results in miscarriages of justice. It results in the interruption of trials.” Civil law mostly takes place outside the courtroom nowadays. Lawyers are trained in statutory interpretation, precedent, and matching legal arguments to the evidence in the case, but the vast majority of matters are settled before the parties see the inside of a courtroom and a different skillset is needed in negotiation that is meant to be cooperative but can become competitive. The more dominant personality can determine the case.

APPLICATION EXERCISE – The need for legal practitioners in a civil dispute: evaluation

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 engaging in mediation or sharing one common expert witness if the court orders it. The downside is that the legal expertise of counsel is being deprioritised. Judges use case management directions to intervene in decisions regarding witness choice and questioning, and lawyers have a statutory duty to engage in mediation and other negotiation. In an effort to reduce the costs and time of civil court resolution, the role of the lawyer has been reduced to following judicial instruction and giving up parts of the claim in order to induce the defendant to settle.

- 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 one other aspect of legal representation.

The use of class actions

Keyword: Representative plaintiff

Definition

A class action 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, but benefit from settlement or damages.

Detail

Because the named plaintiff represents a ‘class’ of people who all share a common characteristic or interest, class actions are also known as representative proceedings 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.

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 to resolve federal law disputes, and the state Supreme Courts to resolve state law disputes. 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.

Funding

Because the named plaintiff bears the burden of costs and possible adverse costs awards, there are four ways that they can be assisted with funding:

- i. More than one representative plaintiff can be used in the one action, to share the costs.
- ii. A ‘no win no fee’ arrangement can be drawn up with the law firm representing the plaintiff. No fees for representation are charged unless the action is successful. If it is successful, the plaintiff’s firm will have their fees approved by the court and will deduct them from the final settlement amount or damages awarded. Usually an additional allowance is made for legal fees when the damages or settlement amount is calculated, but in reality the amount allocated between group members will be reduced slightly because of the deduction of fees. ‘No win no fee’ arrangements only apply to costs of the law firm, however – they do not cover all the costs of the action.
- iii. 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.
- iv. The Supreme Court can make a group costs order that allows the law firm representing the class action to pay costs and a possible adverse costs award, but to take a percentage of the final damages or settlement in addition to their costs if the case is successful. Like litigation funding, a group costs order reduces the amount of money distributed to group members.

Litigation funding

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.

From 2013 to 2018, the percentage of class actions filed in the Federal Court that were funded by litigation funders increased from 49% to 78% in the final year.

Examples

From 2000-21, 421 representative proceedings were filed in Australia, with approximately two-thirds of them settling before trial. In 2023-24, 44 new class actions were filed in the Federal Court – the lowest number in one year since 2016-17. Twenty settlements were approved by the Court in 2023-24, representing over \$600 million in settlement funds.

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.
- In 2021 the Federal Court approved a \$112 million settlement for Centrelink recipients harmed by the Commonwealth's flawed Robodebt overpayment recovery system.
- Personal injury claims arising from defective products. Types of products include pacemaker batteries, artificial knees, arthritis medications, female contraceptive devices, and tobacco.
- Improper matters for class actions under the federal *Migration Act 1958* (Cth) including determinations of refugee status, the refusal of visas, deportations and illegal detention.

Many class actions involve public interest matters because large-scale harm has been caused by a Government policy or the profit-making actions of a corporation. The people harmed often do not have the funding to bring an action by themselves, their legal knowledge and experience is often lower than the defendant's, and sometimes their individual claims are too small to justify a lawsuit without others.

Andrinakis v Uber Technologies Inc & Ors

In December 2024 the Supreme Court of Victoria approved a \$271.8 million settlement in the Uber class action, on foot since 2019. Law firm Maurice Blackburn launched a representative proceeding against ride-share company Uber on behalf of licenced taxis, hire-cars, limousines and charter vehicles. Uber was sued for lost income and loss of licence values as a result of it operating illegally 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." 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.

There were around 6,000 registered group members, but the full settlement will not be shared between them. The matter was funded by one of the world's largest litigation funders, Harbour, and the law firm was operating as 'no win no fee' – legal costs and the litigation funder return will be deducted from the \$271.8 million first.

Exam tip: 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. 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 QUESTIONS – The use of class actions

1. Give a synonym for the term 'class action'.
2. How many people must be affected by the same fact situation in order to constitute a 'class'?
3. Which courts have the power to hear representative proceedings?
4. Are group members the same as plaintiffs?
5. Do group members instruct the legal representatives?
6. Do group members participate in discovery of their evidence and pre-trial procedures?
7. Are group members responsible for paying the costs of the class action?
8. Will group members have to pay an adverse costs award if the action is unsuccessful?
9. Does the named plaintiff receive a greater share of the damages, in recognition of their risk exposure and work?
10. How may the compensation received by group members be affected by the costs of bringing the action?
11. Can a group member opt out of the class action if they want to bring their own lawsuit?
12. If a law firm agrees to work on a 'no win no fee' basis, will they receive any payment if the action is unsuccessful?
13. Is the law firm able to negotiate with the plaintiff to determine the percentage of damages they receive in a group costs order, or will the judge determine the amount?

Evaluation: The use of class actions

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
Since the inception of the modern scheme for representative proceedings, judges on the whole have reported that class actions demonstrate positive outcomes. 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. Group members do not need to attend court or be scrutinised in evidence. They receive protection and benefit without having to undergo that stress.	Representative proceedings	Most often a defendant is sued by a group representative on behalf of a significant number of claimants, 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, because the sides are not equal. If the facts of the representative plaintiff case fail, every member in the group loses even though their facts or evidence weren't individually considered. 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 for months. The named plaintiff is responsible for all costs, including adverse costs award. This may diminish access, because they have to be willing to take this risk unless a litigation funder comes on board, or if costs can be taken 'no win no fee' or group costs order out of a final remedy or settlement.

INSTITUTIONS USED TO RESOLVE CIVIL DISPUTES

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.

Non-judicial venues

Consumer Affairs Victoria

Keyword: Facilitation and enforcement

Definition

Consumer Affairs Victoria ('CAV') is a Victorian Government body responsible for regulating Victorian consumer law and facilitating free non-binding dispute resolution between consumers and traders, tenants and landlords.

Operation

CAV has four main roles:

- Educating consumers and businesses about relevant consumer protection legislation
- Investigating complaints on behalf of consumers
- Conciliates disputes between consumers and traders, and tenants and landlords
- Taking enforcement action in the courts against traders and landlords for major breaches of consumer protection legislation

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.

Any resolution reached with CAV's assistance, or through CAV conciliation, is a private one between the two parties and is not legally-enforceable unless they choose to draw up a private contract.

After receiving this assistance, if a consumer or tenant is unable to resolve the dispute themselves, CAV will accept a formal complaint about the trader or the landlord. 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 the *Competition and Consumer Act 2010* (Vic), plus a range of other statutes 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. CAV, which ultimately brought the action against it, was 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. It generated this taskforce after numerous consumer complaints.

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.

REVIEW QUESTIONS – Consumer Affairs Victoria

1. What do the letters in 'CAV' stand for?
2. Does CAV belong to an arm of government?
3. What two areas of law can CAV operate in?
4. Identify the four functions that CAV performs.
5. How might CAV assist a complainant to resolve the dispute themselves?
6. Will CAV conciliate on behalf of the trader or landlord?
7. Does CAV draw up orders once the parties agree on a resolution?
8. What powers does CAV have if the parties cannot agree?

The Victorian Civil and Administrative Tribunal

Keyword: Efficient and binding

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. VCAT's monetary jurisdiction over civil disputes is unlimited, for instance – in 2023-24, the value of claims in the Civil Division totalled over \$396 million.

Operation

If the matter falls within VCAT's jurisdiction, the complainant can file with VCAT *instead* of filing with one of the courts. There are also a range of matters over which VCAT has exclusive jurisdiction, 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. Because VCAT is not a court, however, it cannot hear some matters: for examples, disputes arising under federal law, or where one party lives in another state.

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.

The 2023-24 Annual Report lists 79,386 new cases lodged and 90,477 matters finalised – VCAT has been working to clear its backlog of pending cases. In 2022-23, over 50,000 matters were heard online, with the remote facilities adopted by VCAT largely during Covid-19. VCAT currently estimates around 52 weeks for disputes to be resolved.

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 (nine in 2024), who are County Court judges. Underneath this, 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. Overall, VCAT lists 229 members hearing cases, as at 30 June 2024, 129 of whom are sessional.

Falls Festival dispute

Falls Festival played at the Sidney Myer Music Bowl in December 2022 after locals appealed the decision of the Colac Shire Otway Council to approve the Festival's planning permit for a Victorian location in Birregurra, near Lorne. Opposition to the festival happening in Birregurra came from concerns over noise and traffic, as well as farmers in the region arguing their land, animals and business would be severely impacted. The hearing was scheduled for March 2023.

After the 2022 festival, organisers announced they had withdrawn from the approval process and would look for a different location in 2023: "A small group of objectors opposed the planning permit approval for Falls Birregurra in Murroon, Victoria and applied to the Victorian Civil Administrative Tribunal (VCAT) to put a halt to it. Unfortunately, following initial compulsory mediation, the parties could not achieve a resolution. [...] Given the time and expense, we have decided to withdraw from the approval process."

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 in the Human Rights and Guardianship Lists or disputes over the refund of tenancy bonds, there is no fee payable. In other lists, such as the Civil Claims List, application fees are scaled depending on the amount of the claim and whether the applicant is an individual, a business, or a healthcare card holder: as of the 2023-24 financial year, for instance, fees for individuals range from \$72 for claims under \$3,001 to \$1,840.40 for claims of over \$5 million.

Costs are also limited because of the lesser use of legal representation. In most disputes worth under \$15,000, 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.

VCAT Backlog Recovery Program

VCAT established the Backlog Recovery Program in December 2021 to increase case clearance rates. The VBRP focused on the Residential Tenancies List, which had experienced the most significant growth in backlog: at 30 June 2023, there were 23,545 pending residential tenancies cases, compared with a pre-2020 average of around 3,000 cases. The majority of backlogged cases are monetary claims in relation to bond or compensation, and the List is VCAT's highest-volume list, receiving 45,863 new claims in 2022-23.

In 2023-24 the List achieved its highest clearance rate in five years (126%), with 4,007 matters left pending for 2024-25. Without the VBRP, it is estimated that the residential tenancies backlog would be over 46,000 cases.

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 but bound by the principle of natural justice. Some smaller matters at VCAT are referred to voluntary mediation using the Fast Track Mediation and Hearing ('FTMH') programme using Zoom or telephone, followed by a hearing within 24 hours if the mediation fails, and larger more complex matters are sent to pre-hearing mediation or a conciliation-style compulsory conference.

According to the 2022-23 Annual Report, of the 75,288 cases lodged in the year, 1,781 were resolved without a hearing:

- 884 mediations were referred out and conducted by the Dispute Settlement Centre of Victoria in the FTMH programme and 506 settled (57%, or 0.6% of total VCAT cases finalised).
- 1,933 matters (2.6% of VCAT's total cases that year) went to compulsory conference, and 820 (42%) of these settled.
- 952 disputes (1.3% of VCAT's total cases that year) were sent to non-FTMH mediation, and 455 (48%) were resolved.

In the 2023-24 Annual Report, VCAT stopped reporting these summarised numbers for resolution.

REVIEW QUESTIONS – The Victorian Civil and Administrative Tribunal

1. What do the letters in 'VCAT' stand for?
2. Does VCAT belong to an arm of government?
3. Does VCAT educate Victorians on the law and provide them with support and assistance?
4. Provide two examples of the kinds of disputes that VCAT can hear.
5. Give an example of a 'list' that exists within VCAT.
6. Is VCAT a tribunal or a court?
7. How is a tribunal different from a court?
8. Will VCAT only hear disputes that involve small amounts of money?
9. Does VCAT have exclusive jurisdiction over some disputes that are quite complex?
10. What is the main method of dispute resolution used by VCAT?
11. Are VCAT hearings conducted by judges and magistrates?
12. Outline two of the ways in which VCAT can resolve disputes outside a hearing.
13. What approximate percentage of disputes are resolved outside a hearing at VCAT?
14. Approximately what percentage of mediations and compulsory conferences result in an agreement?
15. Explain the role of legal representation in VCAT.
16. Outline two reasons why costs may be lower in VCAT than in courts.
17. Are legal representatives allowed in VCAT hearings?
18. Does VCAT have the power to hand down a final decision in a case?
19. Are VCAT orders legally-enforceable?
20. Do parties have the option of filing for a hearing at court instead, if they do not like the outcome at VCAT?
21. In what situations are appeals possible from a VCAT resolution?

Judicial venues

The Victorian courts of general jurisdiction that may be used to resolve civil disputes are the Magistrates' Court, the County Court and the Supreme Court Trial Division.

After a matter has been determined in the first instance it may be heard on appeal in the Court of Appeal or High Court, but appellate hearings operate differently from first instance trials. The procedures and costs for a minor Magistrates' Court dispute differ from those for more serious higher court trials, too, but this will be differentiated where relevant.

Courts

Keyword:Formality

Definition

Courts are formal dispute resolution bodies protected by the independence of the judiciary and run according to strict and formal rules of evidence and procedure to create a level playing field between parties and protect against prejudice. Courts are presided over by judicial officers and juries of six community members if elected, and give parties a binding outcome based on whether the plaintiff is able to discharge the burden to prove liability.

Operation

Magistrates sit in the Magistrates' Court to resolve disputes worth up to \$100,000 in hearings without a jury. Because the hearings are more streamlined and generally less complex, the Magistrates' Court uses limited pre-trial procedures and appeals are only permitted on an issue of law not fact or remedy.

The County Court and Supreme Court Trial Division are presided over by judges and justices, who hear trials with an optional jury of six if one party requests it. The higher courts can hear disputes worth any amount of damages, including lower amounts if the complexity or precedent justify it, and use more extensive pre-trial procedures. Appeals are available on questions of law, fact and remedy from trials in these courts.

All three courts provide legally-binding and enforceable verdicts and orders for remedies. Remedies can include both damages and injunctions, and costs awards that order the losing party to pay all or part of the costs of the winning party are standard in addition to a remedy or 'not liable' verdict. Legal representation is not only allowed in all court hearings, it is considered an integral part of a fair trial because of the formality and serious consequences.

Exam tip: This material on courts overlaps with other points in the AOS. Use your content on the court hierarchy, court personnel, the need for legal representatives – and topics to come such as remedies and the impact of costs and time.

Rules of evidence and procedure

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 dictate how a trial or hearing is run, and what happens in what order.

- 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.

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: assessing whether any aspects of the claim can be settled out of court; collecting evidence and researching the law in the area; and 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.

Pre-trial procedures in this stage include pleadings, discovery and directions hearings.

- Pleadings are the exchange of documents where the plaintiff states their claims, the defendant states their defences, and both parties try to narrow the issues in dispute on which evidence will have to be led.
- Discovery is where each party gives full and frank disclosure to the opposing side of the evidence they have to prove their version of the facts.
- Directions hearings are confidential meetings with the judge or magistrate, where the judicial officer gives any directions for trial preparation or conduct that she or thinks will assist with efficient, fair and economic resolution.

Use of dispute resolution methods

Courts mostly use hearings and trials, but all use a range of methods in pre-trial and sometimes as an alternative to trial. For instance:

- Mediation is used in all Victorian courts, and is authorised by the *Civil Procedure Act* in sections such as s48, which allows the court to make orders regarding the use of "appropriate dispute resolution." In 2023-24 the Magistrates' Court finalised 738 matters through mediation or compulsory conference, compared with 2,801 resolved at a full hearing. Any mediated agreements will be put into a deed of settlement.
- Conciliation is used under a range of different names, but is not as popular as mediation. The County Court uses a range of conferences led by judges and judicial registrars that come broadly under the conciliation heading, though – for instance, the Judicial Resolution Conferences in the Commercial Division, and Judicial Settlement Conferences in the Common Law Division. Any conciliated agreements will be put into a deed of settlement.
- Arbitration is used in all three courts as an alternative to a hearing or trial, when the dispute is appropriate to arbitration and parties have agreed to enter into an arbitration agreement instead. For instance, in 2022 the County Court established a new Arbitration List for fast, confidential resolution of small claims (generally under \$150,000), where the parties can choose any arbitrator they like. In 2023-24, the Magistrates' Court arbitrated 1,048 matters.

Costs and time

A full hearing or trial is generally the most time-consuming and expensive of dispute resolution options. Legal representatives are considered vital, and filing fees are higher than in VCAT. Because hearings are longer and more complex, with a rigorous examination of evidence and detailed legal submissions, daily hearing fees, witness fees and incidental expenses such as time off work and printing court transcripts each day are also higher.

Costs and time will depend on the choices made for the running of the dispute, however. For instance:

- ✓ Choosing to engage in settlement negotiations may decrease both time and cost.
- ✓ Choosing judicial mediation instead of a private mediator for \$5,000 or more for a half-day will reduce cost.
- ✓ Narrowing the issues in dispute during pre-trial discovery will reduce both time and cost.
- ✓ Many parties choose to engage a solicitor privately even if appearing at VCAT in a hearing where representation is prohibited. The same option is available at court, and a party can receive legal advice but self-represent at trial.

	Magistrates' Court	County Court	Trial Division	VCAT
Fee to commence an action Does not include summonses, daily hearing fees, etc	\$83.30 Concession for claims less than \$500, or \$166.30 Standard \$264.50 Concession for claims \$70,000 and over, or \$793.60 Standard	\$282.50 Concession \$800.20 Standard \$1,600.30 Corporate	\$338.00 Concession \$818.10 Standard \$1,636.30 Corporate	Nil to \$5,013 30 \$72 average for an individual in the Residential Tenancies Division and Civil Claims Division
Time to resolution from filing	72% defended claims finalised within 6 months	46% finalised within 12 months 11% longer than 24 months overall average 12-14 months average time between filing and trial	70% finalised within 12 months in the Commercial Division 49% finalised within 12 months in the Common Law Division 5-16% longer than 24 months	52 weeks to finalisation as an overall average 4 to 12 weeks average in the Residential Tenancies Division 52 weeks average in the Civil Claims Division

REVIEW QUESTIONS – Courts

1. Name the three courts of general jurisdiction that can resolve civil claims in the first instance in Victoria.
2. Outline the difference between 'in the first instance' and 'on appeal'.
3. Which court only conducts hearings and no trials?
4. Which courts can hear matters with a jury?
5. What will the role of the jury be in a civil trial?
6. Under what circumstances will a civil trial be heard by jury?
7. Are courts judicial bodies or Allan Labor Government bodies?
8. Is the verdict given by a court final and legally-binding?
9. Can courts give a verdict that is midway between the two parties, or do they have to award the case to one side or the other?
10. What is the name of the presiding officer in the Magistrates' Court?
11. What is the name of the presiding officer in the County Court or Supreme Court?
12. Is legal representation ever prohibited in court hearings and trials?
13. Give one example of a rule of evidence that protects the quality of evidence.
14. Give one example of a rule of procedure that protects a level playing field between parties.
15. Which court has fewer pre-trial procedures and why?
16. What information will the defendant gain from the pleadings in pre-trial that will help them prepare?
17. What information will the plaintiff gain from the pleadings in pre-trial that will help them prepare?
18. How will the discovery stage in pre-trial help streamline the eventual trial or hearing?
19. Must all civil disputes be resolved in hearings and trials at court?
20. Can courts make a cooperative agreement reached by the parties legally-binding?
21. Which venue is the most expensive to file a claim in? Give reasons for your choice.
22. Which venue is the least expensive to file a claim in? Give reasons for your choice.
23. Which venue is the quickest to resolve disputes on average? Give reasons for your choice.
24. Which venue is the slowest to resolve disputes on average? Give reasons for your choice.

Evaluation: Institutions used to resolve civil disputes

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

STRENGTHS		WEAKNESSES
The provision of advice and support processes to consumers and tenants for contacting traders and landlords assists less sophisticated consumers to achieve equality in their attempts to resolve disputes independently. 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 fairness where widespread conduct has impacted consumers significantly. CAV is entirely free, and performs a function that VCAT and the courts do not: it supports clients with their resolution, helps them draft documents, and educates them on their rights and the law. It helps meaningful access.	Consumer Affairs Victoria	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 advice for consumers and tenants to negotiate with the businesses and landlords themselves. 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. CAV resolutions can be unfair or dominated by one party acting uncooperatively and there is little CAV can do to remedy the situation. It is an advice and support body primarily, and does not actively intervene or make fair orders for resolution.
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 fair outcomes for the parties. 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 – particularly if the dispute is worth less than \$15,000. Open hearings ensure that VCAT determinations are transparent, contributing to the fairness and equality of its procedures. VCAT orders are binding and legally-enforceable, but can be appealed if one party believes that an error of law was made. This provides a check on the fairness of the process by experienced judicial officers.	Victorian Civil and Administrative Tribunal	Filing fees start from \$72 for the most popular small claims, but they climb into the thousands and daily hearing fees were 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 access it had compared with courts. 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 equality of opportunity. 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. VCAT timeliness was 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 64 weeks in 2022-23. This backlog has partly been cleared by a reliance on online resolution over in-person hearings, and encouraging parties to settle.
Courts give judges non-adversarial case management powers to facilitate the most effective, efficient and prompt resolution possible. Access is increased for both parties if the resolution process is shorter, cheaper and more efficient. Judicial control over rules of 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, and to help the court reach a sound verdict and develop legal principles in precedent. Courts are adapted to give options of procedures and methods appropriate to different types of dispute. Mediation has a demonstrated success rate of around 30-65% depending on the court in which it is used, saving days to years of time and thousands of dollars each case. The hierarchy also gives flexibility in procedures and resources such as juries, tailored to the needs and complexity of each case.	Courts	Complex rules can be manipulated by experienced parties and are confusing for inexperienced parties and the jury. Parties will not always have equal access to justice when one understands the rules and the other does not, even though the rules are there to promote equality and fairness. Some parties may feel that the case management powers strip them of access to justice by taking too much of their decision-making ability away. Parties will be less governed in a venue such as CAV. 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 access.

The rules of evidence and procedure allow for the interrogation of evidence and legal arguments. Courts use their formality, rules and longer hearing timeframes to investigate case facts and submissions thoroughly, to reach a sound, accurate verdict. Because courts do not rely entirely on cooperation or the persuasiveness and confidence of individual parties, the outcome doesn't rely on one party 'being kind' and passively accepting less, or reward the 'squeaky wheel' party that is loud and confident and refuses to budge. 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 accessibility of the process. Strict rules of evidence stop parties using 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 equality as one party is less able to manipulate inappropriate evidence to gain an advantage over the other. Other institutions such as VCAT and CAV do not interrogate evidence in this way, and submissions can be less reliable.	Judges cannot ensure that the resolution agreed upon in settlements such as mediation is fair and appropriate to the evidence in the case. This means that one party may agree to an unfair outcome if they lack knowledge or are less assertive or aggressive, and that outcome will be made legally-binding by a deed of settlement. Parties may think they want a contested trial in the resolution of their dispute, but most court mediation settlement rates being around 50% demonstrates that the majority of parties are actually willing to settle and cooperate if given the chance and professional support. Court resolution is costly and time-consuming. 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. Even with time limits on each stage of proceedings, hearings and trials take months to years to be listed and completed. One party, including the winning party, may then file an appeal, adding further potential years. 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 access for parties – not only if they can't afford it, but also if the costs of representation exceed the value of the claim.
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APPLICATION EXERCISE – Institutions used to resolve civil disputes: evaluation

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 each of VCAT and courts.

Comparative evaluation: Institutions used to resolve civil disputes

Many scenario-based questions provide a case study, and ask students to argue which venue or institution should be used and why. In order to prepare for this, you can organise your notes on CAV, VCAT and courts into a summary comparison table.

FEATURE	CAV	VCAT	COURTS
Scope of jurisdiction			
Independence and qualifications of presiding officer			
Availability of juries			
Rules of evidence and procedure			
Need for legal representation			
Average costs			
Average time			
Ability to negotiate an agreement			
Ability to receive an outcome from the presiding officer			
Enforceability of outcome			

THE IMPACT OF COSTS AND TIME

There are a range of factors that can compromise the ability of the civil justice system to achieve the principles of justice: fairness, equality and access. The Study Design lists two of them:

- The costs of achieving justice and resolving civil disputes.
- The time required to achieve justice and 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

Keyword: User pays

Definition

A plaintiff may not have the money 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 unfairly or have a judgment ordered against them.

Pelvic mesh class action

Pelvic mesh implants are pieces of woven synthetic netting implanted into women's pelvises to help combat prolapse and urinary incontinence. A class action was launched against Johnson & Johnson Medical and Ethicon after women were left mutilated, facing years of debilitating pain, the permanent inability to have sex, and ongoing surgeries. The matter went to the High Court, and was ongoing for 10 years.

In September 2022 a \$300 million mediated settlement was reached, but the women were told that Shine Lawyers, which ran the suit on a no-win-no-fee basis, would be claiming \$99.5 million in costs from the settlement they negotiated, in addition to \$40 million they received directly from Johnson & Johnson.

Between 6,000 and 11,000 women involved in the action as group members can each 'fast track' a \$7,500 compensation payment, or else go through an assessment process with a personal injury lawyer to assess their level of harm in the hopes of receiving more. Some women have spent upwards of \$100,000 on surgeries to repair the mesh implant damage, and a number have been told that they will never be able to have sex again.

Detail

In 2012 the then-federal attorney-general, George Brandis, said: "Unless you are a millionaire or a pauper, the cost of going to court to protect your rights is beyond you." Even if one party is a pauper, Legal Aid assists in vanishingly few types of civil matters because they are considered private disputes and not material to the safety of the community.

In order for a plaintiff to defend their rights, or for a defendant to defend themselves against claims they don't agree with, a range of expenses must be met:

- ✓ Obtaining legal advice from a solicitor and perhaps brief a barrister to appear at a contested hearing or mediation
- ✓ Paying fees to file documents with the court and issue summonses to potential witnesses
- ✓ Paying for expert reports and expert evidence during the trial
- ✓ Paying for interpreters
- ✓ Funding their own transport, research, post and telephone costs, as well as paying for that of their lawyers
- ✓ Often taking time off work without pay

Exam tip: A great deal of data on costs should already be in your notes. Do not remake the wheel here: use those data.

Specific factors that 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 representatives, but lawyers can charge any amount above the scale they choose.

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. Parties may also be pressured into settling for an unfair agreement if they cannot afford a contested hearing, or receiving a less favourable outcome at a hearing because they are unable to put their case effectively.
- 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 affordable options for running a claim means reduced meaningful engagement in the system.

Time

Keyword: Timely

Definition

Timely resolution means resolution that is fast enough for the both parties to afford and endure the process, but slow enough for the evidence and arguments to be properly researched and prepared.

- ✱ Delays can affect the ability of parties and witnesses to gain closure and get on with their lives. Either the plaintiff or the defendant can feel pressured into accepting an inappropriate settlement because they are not financially or emotionally able to contest the claim over a long period of time, and long delays can impair the ability of witnesses to give accurate evidence, hampering both parties in the presentation of their cases.
- ✱ 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 2023-24 Magistrates' Court Annual Report, a total of 37,518 new civil claims were filed, but only 8,595 were resolved at mediation, arbitration, or a hearing. 8,947 claims were dismissed because the defendant failed to file a defence, and 16,329 were dismissed because the plaintiff had failed to take any action for three months.
- 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. Courts and VCAT have specialised lists for complex cases to create specialisation and efficiency: for instance, the Supreme Court has a Major Torts List, and VCAT has a Major Cases List in the Planning and Environment Division.

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.

Exam tip: A great deal of data on time should already be in your notes. Do not remake the wheel here: use those data.

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 or their side of the facts.

REVIEW QUESTIONS – Factors that affect achievement of the principles of justice

1. Provide two specific examples of costs involved in bringing a lawsuit.
2. Give two data points to illustrate these costs.
3. Provide one specific example of costs involved in defending a lawsuit.
4. Give a data point to illustrate this cost.
5. Outline two examples of things that would be made more difficult in defending civil rights if either the plaintiff or the defendant could not afford the cost.
6. How will costs impact on a wealthy plaintiff or corporation differently from an impecunious or not-for-profit plaintiff?
7. Provide two specific examples of things that take time when defending a lawsuit.
8. Give two data points to illustrate the time required.
9. Identify one concern with resolution being rushed, and one concern with resolution being delayed.
10. Outline two examples of things that would be made more difficult for the plaintiff if there were delays.
11. How will delay impact the plaintiff compared with the defendant?

Part 3: Civil consequences

REMEDIES

A civil remedy is what 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.

Restoration

Keyword: Replace

Definition

Remedies may aim to return the plaintiff to the position they were in before their rights were infringed by replacing or restoring what was lost. This is the general purpose of *restoration*.

Compensation

Keyword: Equal value

Definition

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.

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.

Detail

- Specific compensation occurs when the value of what was lost can be calculated exactly and evidenced with documents such as invoices and payslips. Medical bills, for instance, can be specifically compensated. Specific compensation overlaps with restoration when lost money is replaced with money.
- General compensation occurs when the value of what was lost *cannot* be calculated exactly and evidenced with documents. Pain and suffering, for instance, can only be generally compensated.

Vindication

Keyword: Acknowledgement

Definition

Remedies may *vindicate* the plaintiff by publicly acknowledging that they have been harmed, or are legally in the right even if loss has not been suffered.

Protection

Keyword: Prevention

Definition

A remedy may aim to *prevent* the harm from occurring, or prevent further harm from occurring.

Example

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 before ordering compensation for that harm.

Punishment

Keyword: Hardship

Definition

Remedies may *punish* the defendant for particularly bad conduct, and cause them hardship over and above the value of the plaintiff's loss.

Example

Exemplary damages, also called punitive damages, can be awarded in addition to compensatory damages when the court finds that the defendant committed a deliberate wrongdoing rather than an accidental or negligent one, and that a state of mind such as malice, cruelty or the desire to abuse power was also present.

REVIEW QUESTIONS – Purposes of remedies

1. Give a synonym for 'restoration'.
2. When might it be impossible to restore what the plaintiff has lost?
3. Does this purpose of civil remedies overlap with the aims of criminal sanctions?
4. Give a synonym for 'compensation'.
5. Identify two losses a plaintiff could suffer that would be compensated with money.
6. What is the difference between specific compensation and general compensation?
7. Would loss of a work contract be likely to attract specific compensation or general compensation? Give reasons.
8. Give a synonym for 'vindication'.
9. Is it possible to give the plaintiff a remedy even if they have not suffered loss? Explain.
10. Give a synonym for 'protection'.
11. How does this purpose of civil remedies overlap with the aims of criminal sanctions?
12. Give a synonym for 'punishment'.
13. How does this purpose of civil remedies overlap with the aims of criminal sanctions?

Types of remedies

The two most common remedies are damages and injunctions. These are the remedies required by the Study Design. Each remedy 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:

- i. 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.

- ii. General compensatory damages are awarded for loss that does not have an exact dollar value – for instance, pain and suffering or embarrassment. The court needs to calculate an approximate equivalent dollar value.

If damages are awarded to compensate for future loss, that loss must be real and identifiable – not merely speculation about what “could” have been.

Aggravated damages can be added to compensatory damages to compensate for the plaintiff suffering particular distress or humiliation. Exemplary damages are used to punish a defendant for deliberate, malicious conduct. These are rarely awarded. Nominal damages are a small sum of money, such as \$2, awarded in situations where the plaintiff is legally in the right, but the court believes they have no loss to restore or they were responsible for their own loss. The small award therefore legally vindicates them, but does not compensate.

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.

Exam tip: Note that injunctions are directed towards the *defendant*. They are not orders for “a party” or “a person” to act.

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 jab 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, to be revised after verdict; or, as a permanent or ‘perpetual’ 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.

Note that mandatory injunctions can only be ordered for something that the defendant has a practical obligation or duty to do in relation to the plaintiff, such as to publish an apology for a defamatory publication – they cannot be awarded to compel the defendant to take unrelated or future actions. They are not rehabilitation or punishment tools: a defendant cannot be ordered as a civil remedy to undertake a safe driving course, for instance, if they are sued for negligent driving.

REVIEW QUESTIONS – Types of remedies

1. Give a synonym for ‘damages’ that does *not* use any of the purposes.
2. Differentiate between specific compensatory damages and general compensatory damages.
3. What is the main purpose of specific compensatory damages? Explain.
4. What is the main purpose of general compensatory damages? Explain.
5. Would an award of damages for psychological trauma fall under specific compensatory damages or general compensatory damages?
6. Differentiate between aggravated damages and exemplary damages.
7. Do nominal damages compensate? Give reasons.
8. Give a synonym for ‘injunction’.
9. Differentiate between a mandatory injunction and a prohibitive or restrictive injunction.
10. Do injunctions make orders for the plaintiff, the defendant, or both?
11. If my neighbour is taking down the fence between our properties and I take civil action to stop them, would I ask for a temporary or a perpetual injunction before trial to halt the action?
12. 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.

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 caused by the wrongdoing in the first place. Unlike damages, costs can also be ordered against the plaintiff – for the plaintiff to pay to the defendant if the plaintiff loses.

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', based on hourly rates and years of experience.
- 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: Civil consequences

The purposes of remedies and the types of remedies have been combined in the one evaluation table, because remedies are always measured against the aims they are intended to achieve.

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

STRENGTHS		WEAKNESSES
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 is financial in nature. This gives the plaintiff access to meaningful justice for their loss. 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 value of different kinds of harm. This keeps the treatment of different plaintiffs somewhat equal.	Damages	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 spent on the lawsuit. The plaintiff does not emerge from this as equal to the defendant, who did not suffer the initial loss. 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 justice against the real wrongdoer, and it also contributes to different parties having unequal access depending on the wrongdoer in their case.
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. 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 equal to plaintiffs with non-financial loss.	Injunctions	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 fairer outcomes that are better suited to the facts. 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 access to justice for the plaintiff.

APPLICATION EXERCISE – Civil consequences: evaluation

Wallace v Kam [2013] HCA 19

Wallace suffered from a protruding disc, and consulted Kam, a surgeon, who proposed an operation to relieve Wallace's pain. Kam failed to warn Wallace of two risks associated with this surgery: firstly, that Wallace might suffer neurapraxia, a temporary nerve damage that arises from lying face down on the operating table for an extended period; and, secondly, that Wallace might suffer permanent paralysis. After having the surgery, Wallace suffered temporary neurapraxia, and sued Kam for compensation. However, evidence before the court was that, even if Kam had warned Wallace about the risk of neurapraxia, Wallace would still have consented to the operation.

What remedy do you think would be most appropriate to award in this case? Give reasons for your answer. (5 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.

Unit 3 Practice Assessment

MINI-EXAM NO 1: UNIT 3

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

Section A – Structured questions

Question 1 (2 marks)

Define the category of ‘summary offence’ as it relates to criminal disputes.

Question 2 (13 marks)

2022 figures from the Australian Bureau of Statistics show that the second most common offence type committed by children aged 10 to 17 years was theft and burglary. A 2022 study published in the Youth Justice journal presented findings from interviews in the Children’s Court with children charged with burglary. The children interviewed said overwhelmingly that they did not plan targets, but instead committed them on the spur of the moment with groups of friends, and stole items to use or sell, such as food, drugs, jewelry and mobile phones. 16% of children interviewed said they only stole food, and took it home to eat or share with family members because they were hungry.

- a. Explain the role played by Victoria Legal Aid (‘VLA’) in assisting accused in Victoria. 4 marks
- b. Explain costs as one factor that affects the ability of the criminal justice system to achieve the principles of justice. 4 marks
- c. In your opinion, would fines or community corrections orders (‘CCOs’) be more appropriate as sanctions in the above cases? 5 marks

Section B – Case studies

Question 1 (10 marks)

Source 1

DPP v Ristevski [2019] VSC 253

In June 2016, Karen Ristevski went missing: in July, her husband Borce became the main suspect. Karen’s body was found in February 2017 and, despite a lack of forensic evidence tying Borce to her remains, Borce was charged with her murder.

In September 2018, after being committed to stand trial on the murder charge, he offered to plead guilty to manslaughter if the OPP reduced the charges, but the offer was rejected on the basis that Borce refused to give any information on how or why he killed his wife. The Office felt that this indicated insufficient cooperation and remorse. In March 2019, as the murder trial was about to begin, the trial judge ruled that certain aspects of Borce’s post-offence conduct could not be used by the prosecution as evidence of an intention to kill. Losing their evidence, the OPP accepted Borce’s original plea offer, and on 27 March 2019 the charge of murder was withdrawn and Borce plead guilty to manslaughter in the Victorian Supreme Court.

In April 2019 he was sentenced to nine years’ jail, with a non-parole period of six years. The maximum term of imprisonment for manslaughter was 20 years, while for murder it was life. His daughter with Karen gave a Victim Impact Statement in which she demonstrated support for her father. The prosecution appealed this sentence, and in December 2019 the Court of Appeal increased Borce’s sentence to 13 years, with a non-parole period of 10 years. The judgment found that Borce did not simply maintain his right to silence – he took active steps to avoid his crime being discovered. While the Court could only sentence Borce for manslaughter, not murder, their Honours found that Borce had not shown “one scintilla” of remorse, and it could not therefore be taken into account as a mitigating factor, despite his guilty plea, and he had disclosed no details of the killing.

- a. Discuss the ability of mitigating factors and aggravating factors to contribute to the achievement of justice. 4 marks
- b. Explain the impact of plea negotiations in sentencing, and analyse the strengths and weaknesses of this aspect of the criminal justice system. 6 marks

MINI-EXAM NO 2: UNIT 3

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

Section A – Structured questions

Question 1 (2 marks)

Define the standard of proof as it relates to civil disputes in Victoria.

Question 2 (3 marks)

Explain one reason why Consumer Affairs Victoria ('CAV') might be considered a *less* desirable option than the Victorian Civil and Administrative Tribunal ('VCAT') for the resolution of civil disputes.

Question 3 (5 marks)

Compare the role of the jury with the role of the judge or magistrate in the resolution of a civil trial.

Question 4 (5 marks)

Explain the way in which class actions aim to provide greater access to justice for Victorians.

Section B – Case studies

Question 1 (10 marks)

Source 1

Following are extracts from an article published on the ABC News website on 13 December 2022, relating to former Commonwealth Government staffer Brittany Higgins and her claims that fellow staffer Bruce Lehrmann raped her inside Parliament House. A criminal prosecution was launched against Lehrmann, and Higgins brought a lawsuit against the Commonwealth.

Brittany Higgins reaches confidential settlement with the Commonwealth

Brittany Higgins has reached a confidential settlement with the Commonwealth after the former political staffer's claims of sexual assault at Parliament House. Personal injury lawyer Noor Blumer, acting for Ms Higgins, issued a brief statement on Tuesday.

"At a mediation held today, the Commonwealth and Ms Higgins settled her claims," Ms Blumer said. "At the request of Ms Higgins, the parties have agreed that the terms of the settlement are confidential."

Earlier in December, Ms Higgins's civil action named three respondents: Senators Linda Reynolds and Michaelia Cash, for whom Ms Higgins worked, as well as the Commonwealth. Senator Reynolds is since believed to have been removed from the claim. The documents set out Ms Higgins's intention to sue for sexual harassment, sex discrimination, disability discrimination, negligence, and victimisation.

At the time, the claim was expected to be worth about \$3 million, including \$2.5 million for future economic loss, past economic loss approaching \$100,000 and general damages of \$100,000. None of those figures were mentioned on Tuesday.

"The parties welcome the fact of the settlement," Ms Blumer said.

Source 2

Following are extracts from the response to the settlement, written by Legal Affairs Contributor Chris Merritt and published by the Rule of Law Institute of Australia on 16 December 2022.

NACC should look into the hasty Higgins payout

The payout was made without a finding of wrongdoing against anyone. It was also made without the involvement of former Liberal ministers Michaelia Cash and Linda Reynolds, who were accused of wrongdoing by Higgins. Thanks to a report in *The Australian* on Thursday, it is now known that the Albanese government threatened to tear up an agreement to pay Reynolds' legal fees and costs unless she agreed not to attend that mediation.

It looks like an attempt to nobble this process so it would unfairly favour Higgins and financially disadvantage the Commonwealth. Persons unknown decided to use their control of public money to ensure the officials running the mediation were presented with an incomplete version of reality that had not been thoroughly tested. What needs to be resolved is whether the exclusion of Reynolds from the mediation left the officials running that process with a misleading impression of the strength of Higgins' case.

- a. Describe one reason for the importance of Higgins's legal representatives in the resolution of this dispute. 3 marks
- b. How might the remedy sought by Higgins have achieved one of the purposes of civil remedies? 3 marks
- c. Discuss why mediation was used as a way to resolve this civil dispute. 4 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:

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:

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:

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:

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:

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:

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:

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:

Question 4

Evaluate how effectively the jury performs one of its roles 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:

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:

Question 5

How does the provision for class actions help enhance the effective operation of the civil justice system?

(4 marks)

Sample answer 1

Class actions 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:

Sample answer 2

Class actions 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:

UNIT 4 – THE PEOPLE, THE LAW, AND REFORM

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.

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 Constitution created the federal parliament.

Federation

Australia has more than one parliament because the Constitution established Australia as 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.

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: Terms specifically 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.

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.

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	151	76	1

Exam tip: The lower house is due to decrease to 150 members at the next federal election in 2024 or 2025, based on the redistribution of seats calculated by the Australian Electoral Commission.

Each of the 151 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 regardless of state population, 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.

Government

Parliament is made up of 128 elected representatives in state parliament, and 227 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 Albanese Labor National Government, or the state Allan 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.

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.

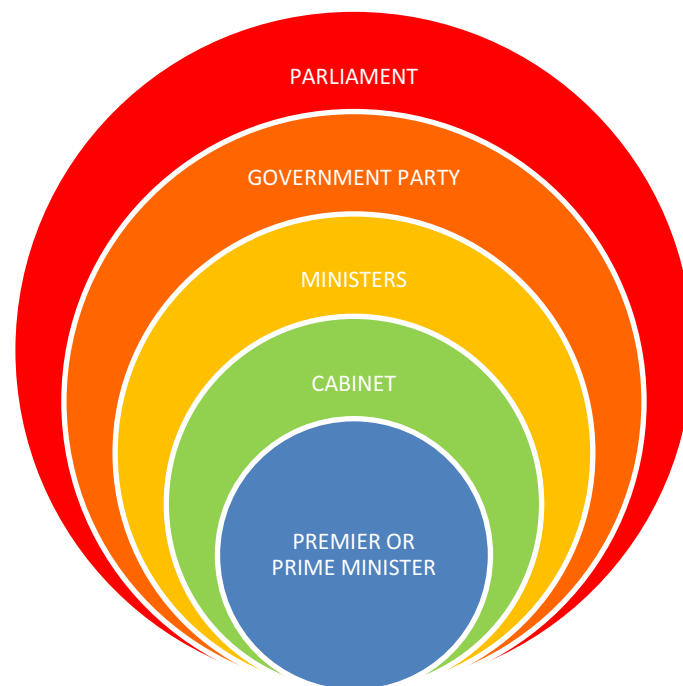
In a two-party system like Australia has, the party that does not form the executive government is called the Opposition, or the party 'in opposition'.

The Executive Government

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.

REVIEW 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. Is federal parliament higher than state parliament, is state parliament higher than federal parliament, or are they equal?
5. The Victorian and Commonwealth Parliaments are both bicameral. What does 'bicameral' mean?
6. Who or what is part of the structure of parliament in addition to these two houses?
7. What is the name of the lower house of federal parliament?

8. What is the name of the upper house of federal parliament?
9. What is the title of the King's representative in the federal parliament?
10. What is the name of the lower house of Victorian state parliament?
11. What is the name of the upper house of Victorian state parliament?
12. What is the title of the King's representative in the Victorian state parliament?
13. Distinguish between 'parliament' and 'Government'.
14. Explain how a political party is able to become the Government.
15. What kinds of responsibilities and power does being in Government give to a party?
16. How is the prime minister or premier chosen?
17. Using an example for each to illustrate, explain the terms 'minister' and 'portfolio'.
18. Do we vote directly for the executive government?

AOS1: THE PEOPLE, THE LAW, AND REFORM

Part 1: Parliament 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 official state 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 jurisdiction to interpret the meaning of the Constitution to resolve disputes.

PARLIAMENT AND ITS LAW-MAKING POWERS

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.

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, such as the courts or government departments
- The other arms of government cannot override or veto the law made by parliament, if that law is made 'intra vires' 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 the houses of parliament in law-making

The Study Design prescribes knowledge of the roles of the Crown, and the houses of *both* state and federal parliaments. Luckily, the roles are almost identical across state and federal parliaments.

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

Keyword: Majority support

Definition

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'.

Detail

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 happens without the people voting in another election, because the executive government is internally-decided within parliament.

- This role is the same in both state and federal parliaments.

Initiating most new bills

Keyword: Government bills

Definition

Most new bills will be initiated in the lower house because the Government drafts and introduces over 70% of proposed laws. It has the majority support of the lower house needed to pass the bills, most Government ministers sit in the lower house, and the lower house is the house of popular representation of the people.

Detail

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 46th federal parliament, from 2019-22, only 51 (9%) of the 573 bills originated in the upper house. In the Victorian Parliament, 45 government bills were introduced in the lower house in 2023, along with seven private member's bills. Only four bills were passed down to the lower house from the Legislative Council.

- This role is the same in both state and federal parliaments.

Initiating and amending money bills

Keyword: Government appropriation

Definition

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.

Detail

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

Keyword: Popular scrutiny

Definition

There is a chain of accountability from the executive government to the lower house of parliament and therefore indirectly to the people, because the Government is answerable to the lower house and the parliament is answerable to the people.

Detail

This 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. If the Government loses the confidence of the lower house they stop being Government.

One important vehicle for responsibility is parliamentary Question Time. Australia has inherited the Westminster system from England, and it can be contrasted with a system of responsibility through direct election of the Government like the United States of America has. Most Government ministers sit in the lower house, and are questioned about their portfolios by lower house MPs.

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 the same in both state and federal parliaments.

Acting as the "people's house"

Keyword: Popular

Definition

The lower house is called the "people's house" because it is the most democratically-elected, on the basis of 'one vote one value', and its role is to reflect the popular will of the majority of the people.

Detail

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 the same in both state and federal parliaments.

REVIEW QUESTIONS – The roles of the lower house

1. What does a party need from the lower house to form executive government?
2. Do more Government ministers sit in the lower house or the upper house?
3. Do non-Government members of the lower house vote on Government bills?
4. Is the lower house dissolved and re-elected if the Government loses the majority?
5. What kind of bill *must* be introduced and amended in the lower house?
6. Who holds the Government accountable in the chain of responsible government?
7. Who holds the lower house accountable in the chain of responsible government?
8. How many representatives are elected per electorate to sit in the lower house?
9. What percentage of the vote does a lower house MP need to be elected?
10. Why will lower house MPs often try to appeal to majority opinion?

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

Keyword: Scrutiny

Definition

Since most bills are initiated in the lower house, the upper house spends more time debating, researching and amending these bills – this scrutiny is known as being a ‘house of review’.

Detail

Because the upper house is usually not controlled by the executive, it can be a powerful check on Government power, and can be a 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.” 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 passes bills without amendment or debate it is called a ‘rubber stamp’. This is likely if the Government has a majority in the upper house, but this composition is rare. Instead, the upper house usually acts as a rubber stamp when the Opposition or crossbenchers have struck a deal with the Government to support their law. 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

Keyword: Diverse views

Definition

Upper houses represent more of a diversity of views than lower houses, as upper houses represent regions and smaller interest groups rather than just the majority.

- The Commonwealth upper house has twelve senators from each state, regardless of state population, and they are elected to represent the whole state when bills concern state interests. The proportional voting system also permits a wider range of parties to be elected with smaller percentages of the vote, giving a diversity of views.
- The Victorian upper house has five members from each of eight regions, and they are elected to represent the whole region when bills concern statewide interests. The proportional voting system also permits a wider range of parties to be elected with smaller percentages of the vote, giving a diversity of views.

Detail

The 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 such as states 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

Keyword: Review

Definition

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.

Detail

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, and include government departments.

- This role is similar across state and federal parliaments. The federal upper house is arguably more effective at scrutinising delegated legislation, though, because state 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.

Passing most new private member’s bills

Keyword: Non-Government

Definition

Most private member’s bills pass when introduced in the upper house compared with the lower house, because the Government rarely controls the upper house and private member’s bills can pass the readings stages with the support of the Opposition and crossbencher.

Detail

Private member’s 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 member’s 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 introduced in the lower house were private member's bills, compared with 25 private senator's bills from 41 total bills introduced in the Senate. No private member's bill introduced in the lower house passed the house in 2021.. Since Federation, 31 private member's bills have passed into law in the Commonwealth Parliament – including the 2009 bill to legalise same sex marriage and the Commonwealth Electoral Bill 1924 that introduced compulsory voting.

Exam tip: If a private member's bill is introduced in the upper house in federal parliament it is often called a 'private senator's 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 councillor's bill' is not used.

- This role is the same in both state and federal parliaments.

REVIEW QUESTIONS – The roles of the upper house

1. Identify two things the upper house will do as part of 'review' of proposed laws.
2. Which group usually has the deciding vote in the upper house: the Government, the Opposition, or the crossbenchers?
3. What phrase is used for 'deciding vote' in the upper house?
4. If the upper house acts as a 'rubber stamp', does that make it more effective or less effective as a house of review?
5. What will the upper house *not* do with Government bills if it is acting as a rubber stamp?
6. Is it possible for the upper house to be a rubber stamp if the deciding vote is controlled by the Opposition or crossbenchers?
7. If the upper house acts as a 'hostile' house, does that make it more effective or less effective as a house of review?
8. What will the upper house *not* do with Government bills if it is acting as a hostile house?
9. Who is most likely to have the deciding vote if the upper house is acting hostile?
10. Which regions are represented in the upper house of federal parliament?
11. How many senators does Tasmania have compared with New South Wales?
12. Do members of the Victorian upper house who represent rural regions need to win a majority of votes in city and suburban Melbourne, too?
13. Is each region in the upper house represented by only the most popular candidate in that region, or by multiple candidates with fewer votes?
14. Who initiates a private member's bill?
15. Compare the chance of success between a private member's bill and a Government bill.
16. How many private member's bills since Federation have become law?

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

Keyword: Approval

Definition

The Crown grants royal assent to bills that have passed both houses of parliament in the same form. The King's representative signs the bill on the King's behalf to signify his approval, and this is necessary for the bill to become law.

Detail

The Crown has the power under s58 of the Australian Constitution in federal parliament to refuse assent, to withhold it for a period of time, or to request amendments to the bill as a condition of giving it. The Victorian state constitution is silent on this, and it has not been tested in the courts, but tradition suggests it can be done at state level, too. Normally, however, the Crown gives royal assent as a matter of procedure and does not use these additional powers.

- This role is the same in both state and federal parliaments.

Acting as head of the executive government

Keyword: Regulations

Definition

The Crown will exercise the executive power of the government by authorising regulations 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.

***Deing v Tarola* [1993] 2 VR 163 – the Studded Belt Case**

Section 6 of the *Control of Weapons Act 1990* says “A person must not possess, carry or use any regulated weapon without lawful excuse,” but the statute does not define ‘weapon’. The definition and list of ‘weapons’ was left to the Control of Weapons Regulations 1990, created by the state executive council. The Regulations said that “Any article fitted with raised pointed studs which is designed to be worn as an article of clothing” counted as a weapon.

In the Studded Belt Case, the accused was arrested because he was wearing a belt with raised metal studs on it. He was found guilty in the Magistrates’ Court, but appealed. The Supreme Court decided a weapon was anything that had a common use as a weapon, and no common use as anything else, and invalidated that section of the Regulations as falling outside the statute.

Detail

The Crown, acting as head of the executive, will also appoint judges to courts, authorise delegated legislation by government departments and statutory authorities, and designate sitting dates and times for parliament.

- This role is the same in both state and federal parliaments.

Exercising reserve powers

Keyword: Discretion

Definition

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 at their own discretion 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.

Example

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.

REVIEW QUESTIONS – The roles of the Crown

1. Is the Crown part of parliament or separate from parliament?
2. Can a bill become law without receiving royal assent?
3. Can a bill receive royal assent if it was amended in the second house and the houses disagree?
4. Does the Crown have the authority to refuse royal assent?
5. Is it common for the Crown to withhold royal assent?
6. Who sits on the executive council?
7. Does the Crown and the executive council have the power to make law?
8. What part or parts of the law relating to controlled weapons was authorised by the Crown?
9. On whose advice does the Crown exercise the reserve powers?
10. Where are the reserve powers listed?

Evaluation: Roles of the Crown and houses of parliament in law-making

The focus of this evaluation 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, something factual you are basing your argument on, plus an explanation of *why* you think it is good or bad. This equals ‘knowledge + argument’.

STRENGTHS		WEAKNESSES
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. 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. Each electorate is represented by one member, therefore people have a clear spokesperson for their district to lobby and present petitions to.	Roles of the lower house of parliament	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 taxation, euthanasia, drug use and treatment, environmental protection, and civil rights often produces divided opinions, and politicians’ fear of outcry or backlash may prevent change in the 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). The lower house cannot introduce and debate unlimited new bills. 35 sitting days are scheduled for the first half of 2025 for the House of Representatives, and 31 days from August to December. 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, because they are desperate to retain majority support and party endorsement.
When the balance of power is held 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. 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. Private member’s bills give minority interests a chance to be represented and heard, and can fight against the tyranny of the majority or the policies that the major parties have promised their supporters and donors. The 2017 change to legalise same-sex marriage was made through a private member’s bill, for instance.	Roles of the upper house of parliament	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. This also occurred with ‘anti-terrorism’ laws following the 2001 World Trade Centre attacks, even though the Government did not control the Senate. 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. 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.
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. The reserve powers are the ultimate safeguard of responsible government, the rule of law, and the effective running of the democratic system The people can be confident that the head of the executive is ultimately a non-political figure whose interests are only for the country.	Roles of the Crown	If the crown does only act on advice, it could be argued that royal assent is unnecessary and time-wasting formality. 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. 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.

APPLICATION EXERCISE – Roles of the Crown and the houses of parliament in law-making: evaluation

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 one role of each of the lower house and the Crown.

The allocation of 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. All law-making areas the new Commonwealth was allowed to legislate on were written into the Constitution and called 'specific powers'. The main list of specific powers is in s51, called the 'heads of power'.

From the beginning, it was planned that this 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.

In constitutional law, the allocation is called the 'division of constitutional law-making powers' although this language is not used on the Study Design to avoid confusion between concepts.

Exam tip: Do not confuse the allocation of constitutional law-making powers with the separation of powers. Confusing the two will likely result in your answer being awarded zero marks.

The constitutional allocation of law-making powers therefore gives the Commonwealth the power to make law, but it also restricts parliaments from being able to legislate.

For instance:

- The states cannot legislate in any area of power exclusively given to the Commonwealth
- 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

Exclusive powers

Keyword: Commonwealth only

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 Commonwealth specific powers that have also been taken away from the states.

Exclusive powers may be made expressly exclusive in the wording of the section, may be constructed by reading two or more sections together, or may be interpreted as exclusive in nature by the High Court even if the wording does not specify.

Examples

- The imposition of uniform duties of customs and excise "shall become exclusive": 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

Keyword: Shared

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, if it is successfully raised in court.

Exam tip: The impact of s109 is discussed further in the next topic. You can use material from there in this topic.

Examples

- Marriage is given to the Commonwealth and not taken away from the states: s51(xxi)
- Postal, telegraphic, telephonic, and other like services are given to the Commonwealth and not taken away from the states: 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, 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

Keyword: States only

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 remained 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 and the courts interpret the Constitution.

Examples

- Public transport
- Primary and secondary education

Extension material: Specific powers

The 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 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 include:

- 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)
- Immigration and emigration: s51(xxvii)

Comparison: The allocation of law-making powers

The different categories of law-making powers complement each other. In order to prepare for this, you can organise your notes into a summary comparison table.

FEATURE	SPECIFIC POWERS	EXCLUSIVE POWERS	CONCURRENT POWERS	RESIDUAL POWERS
Parliament or parliaments it belongs to				
Enumerated in the Constitution or not				
Wording able to be interpreted				
Same law across the country or different per state				
Examples				

REVIEW QUESTIONS – The allocation of law-making powers

1. What name is given to the category of *all* powers given to the Commonwealth in the Constitution?
2. What part of the human body is used for the label given to s51 of the Australian Constitution?
3. Can states legislate on matters that are exclusive powers?
4. Are all exclusive powers called “exclusive” in the wording of the Constitution?
5. Give two examples of powers that are made exclusive in different ways.
6. Can states legislate on matters that are concurrent powers?
7. Is it possible for laws made in concurrent areas to be different all across the country?
8. Was Covid quarantine a Commonwealth power or a state power or both?
9. If there are laws in conflict with each other, which law does s109 of the Constitution say overrides the other?
10. Can states legislate on matters that are residual powers?
11. Can the Commonwealth legislate on matters that are residual powers?
12. Are the residual powers listed in the Constitution?

The significance of section 109

Keyword: Conflict

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 enacted 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 on the same area of law 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

The two laws must be incompatible with each other such that they cannot both be followed. Section 109 will not be triggered if the laws can be seen as complementary to each other, filling different gaps. The s109 inconsistency rule applies to situations in which one law grants a right that another law takes away; in which one law tells the public to do something that is prohibited by another law; and in which the Commonwealth law seems to intend to cover the whole field of law in the area.

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).

Laws made in concurrent areas may trigger s109 because both the Commonwealth and the states can legislate on these topics, but laws may also cover the same area using two different powers. For instance, a law imposing a tax on schools may be passed using the Commonwealth’s taxation power, but also using a state’s residual education power.

Exam tip: The Study Design explicitly includes the number of the section. Questions can therefore request information on the section by using the number only – you must remember the number ‘109’.

The impact of the rule

- ✓ 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.
- ✓ The state parliament does not lose the power to legislate, and the power does not become exclusive – it is only that particular piece of legislation that cannot be enforced.
- ✓ Laws of other states will not be affected unless they are challenged, too.
- ✓ State laws will only be invalidated if there is a successful court challenge. Section 109 is not enforced by the Commonwealth Parliament or automatically without a court case.

McBain v State of Victoria [2000] FCA 1009

The Victorian law, the *Infertility Treatment Act*, passed under the residual health power, 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* passed under the exclusive external affairs power (to do with international treaties) made it unlawful to deny a person a medical service on the basis of 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 regardless of her relationship status he was obeying the Commonwealth law but breaking the Victorian one.

The Federal Court determined that the laws were in conflict. 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 QUESTIONS – The significance of section 109

1. 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.
2. Is it possible for one law passed using exclusive powers to be in conflict with another law passed using residual powers?
3. Does a federal law need to be inconsistent with laws from all six states for s109 to apply?
4. What nickname is given to s109 of the Australian Constitution?
5. Can two laws cover the same area but both be followed?
6. If s109 is triggered, which law takes precedence?
7. How many sections of the inconsistent law are declared invalid?
8. Can the Commonwealth Parliament invalidate a state law by itself?
9. Once s109 is triggered, do the state parliament legislative powers increase, decrease, or stay the same?
10. How did s109 impact the law in the McBain case?

Evaluation: The allocation of law-making powers

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

STRENGTHS		WEAKNESSES
The division of powers allows for an efficient implementation of laws because it ensures laws of a national character are made centrally, without conflict and overlap in their relationship to state laws, but that 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. 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 that they all agreed on.	The allocation of law-making powers	The division of powers is written with mostly oblique or non-specific language, which means the courts are ultimately in charge of the powers of the parliaments. The courts have a great deal of power to change the interpretation of specific powers and restrictions, and to radically alter the federal balance between otherwise democratic, elected parliaments. 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.
Section 109 is a restriction on the states because the concurrent powers make up the majority of the Commonwealth's powers, and s109 allows the Commonwealth to override state law on all of them. 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. For instance, the 1935 <i>Brislan</i> case gave the Commonwealth the power over radios, and the states have left the Internet to the Commonwealth because the precedent suggests they would lose. 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.	The significance of s109	Section 109 is not a very powerful restriction because it only relates to areas of overlapping legislation. Areas of residual power and exclusive power are less likely to be affected. 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 again. Section 109 is not an effective provision because the Commonwealth has gained more power since Federation than the founders ever intended when they wrote the Constitution.

APPLICATION EXERCISE – The allocation of law-making powers: evaluation

Section 109 acts as a partial limitation on the state parliaments because laws passed in areas of overlapping regulation 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 that the Commonwealth can find a head of power for, and can only be activated by a 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 Commonwealth 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 on the significance of the McBain case as a case study.

The impact of High Court interpretation on law-making powers

Keyword: Scope

The Study Design specifies that you must understand the impact and significance of *one* High Court case that had an impact on the constitutional allocation of legislative powers to the state and federal parliaments. This Study Guide will provide summaries of a selection of appropriate cases: you should choose just *one*.

Definition

Section 76 (i) of the Constitution gives the High Court 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. This interpretation can increase the scope of the Commonwealth's power at the expense of the states, or can protect the powers of the states against the Commonwealth.

Detail

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 of specific powers will expand the federal powers and reduce the state ones indirectly through the impact of s109, or reduce state powers directly through the expansion of exclusive powers
- A narrow construction will decrease the scope of the federal powers and increase the state ones indirectly through the impact of s109, or increase state powers directly through the reduction in exclusive areas

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Keyword: Reserved powers

Legal question

Should the interpretation of the Commonwealth's specific powers be artificially narrowed in scope so that Commonwealth powers can only operate in areas where the states *cannot* legislate?

Facts

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, so that Commonwealth laws could only operate in areas the states could not legislate. The Western Australian Parliament had legislated for state award wages, so the engineers were covered by that, instead.

This artificial limitation of Commonwealth powers was called the 'doctrine of reserved powers', and it was based on the fact that the framers of the Constitution intended the majority of powers to be left with the states. The engineers challenged this.

Outcome

The engineers were successful, and the case overturned the doctrine of reserved powers.

- 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.

Significance

The precedent 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.

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 allocation of powers rulings since 1920 are only possible because of the Engineers Case.

Commonwealth v Tasmania (1983) 158 CLR 1

Keyword: International concern

Legal question

Can the Commonwealth use its s51(xxix) power over 'external affairs' to legislate to implement the terms of a treaty, even if those terms fall into residual areas?

Facts

In 1974 Australia signed a Convention 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.

Tasmania challenged the validity of the Commonwealth law, arguing that it was invalid because it was not based on a specific power covering the environment, culture, or energy production. The High Court had to determine whether the Commonwealth law was valid, and whether its power over 'external affairs' covered any matter over which there was international concern. In the 1982 *Koowarta* case that set the most recent precedent the Court was split: only three justices interpreted 'external affairs' to mean *any* matter covered by an international agreement, and this was not enough to set a binding interpretation. In the ten months since, one justice had died, one had retired, and two new justices had been appointed.



Outcome

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.

- 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 the matters contained in the treaty were topics of residual powers, because 'external affairs' were *any* matters of *international concern*.
- The broad interpretation of *Koowarta* was confirmed: the majority of the Court in the Tasmanian Dams Case affirmed the interpretation of the three justices who had found in *Koowarta* that the existence of a treaty made *any* matter 'external'.

Significance

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." The Commonwealth was therefore able to override conflicting state law in a wider range of areas, arguing the s109 inconsistency rule in relation to laws that had been passed pursuant to a treaty. The states therefore lost some ability to govern themselves in ways contrary to Commonwealth policy, in areas that had originally been intended to remain residual.

The Court placed some limits on the scope of the power. Firstly, the treaty itself had to be *bona fides*, legitimate. Secondly, the law needed to fall within the scope of the treaty and properly execute the obligations in the treaty. One of the new members of the High Court bench, William Deane, said: "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

Keyword: Taxation

Legal question

Could the Commonwealth use its s51(ii) power over 'taxation' to legislate to give bonuses or grants of money to Australian taxpayers, using money collected by taxation?

Facts

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 the payments were called a "tax bonus," but were actually a gift and were therefore not supported by the Commonwealth's taxation power.

Outcome

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 Commonwealth law was held to be invalid under the 'taxation' power.
- However, the law was held to be valid under *other* heads of power in the Constitution.
- The tax bonus payments could therefore be made, and Pape himself received \$250.
- The taxation power was given a narrow reading: it only included amounts actually paid in tax or tax rebates, and not simply any expenditure made with money collected from taxes or payment made to taxpayers.

Significance

The Commonwealth's legislative power was narrowed under the 'taxation' head of power to only laws specifically relating to taxation, but arguably expanded under the other heads of power: the s61 executive power and the s51(xxxix) incidental specific power.

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 payments determined by the national Government 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." The word 'incidental' means related to, or happening as a result of. In other words, if the executive Government has a legitimate power under s61, then s51(xxxix) gives the Parliament the power to legislate on what the Government has a policy to do.

After the Tax Bonus Case ruling, Pape argued that the case was "probably one of the most important constitutional cases in 106 years of the High Court." Constitutional law professor George Williams said that an audit of federal spending was needed, because "the Commonwealth may well find now that it's made what could amount to billions of dollars in illegal payments." He explained that there was no issue with the Commonwealth legislating to fund areas over which the states traditionally had power, such as the arts, the Olympics, and local government. "There's no problem giving out money for things like taxation, defence, social security, a range of areas where it's got power," he said. "But there are many other areas where it doesn't have power and it's been funding them anyway. If you like, the Commonwealth's bluff has been called."

REVIEW QUESTIONS – The impact of High Court interpretation on law-making powers

1. Do the 'heads of power' relate the powers of the parliament, the executive government, or the courts?
2. What section of the Constitution gives the High Court power over the Constitution?
3. Can the High Court change the wording of the Constitution?
4. Can the High Court change the meaning of the wording of the Constitution?
5. Can the High Court give the Commonwealth Parliament a new specific power?
6. What must happen before the High Court is allowed to interpret the Constitution?
7. 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.
8. 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.
9. Can parliaments declare each other's legislation invalid if it falls outside the Constitution?
10. Whose legislation is being challenged in each case: the Commonwealth or the state?
11. What is needed in the Constitution for the Commonwealth to validly enact legislation?
12. What meaning was given to the specific powers in the Engineers Case?
13. What meaning was given to the 'external affairs' power in the Tasmanian Dams Case?
14. What meaning was given to the 'taxation' power in the Tax Bonus Case?

Evaluation: The impact of High Court interpretation on law-making powers

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

STRENGTHS	WEAKNESSES
The founders adopted short, general phrases for most constitutional provisions for the exact reason that they wanted the courts 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. 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.	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. 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. In neither case does the Court ask what the 'best' outcome would be.

APPLICATION EXERCISE – The impact of High Court interpretation on law-making powers: analysis

The Tasmanian Dams Case of 1983 asked whether the Commonwealth could use its s51(xxix) power over 'external affairs' to legislate to implement the terms of a treaty, even if those terms fell into residual areas. Tasmania had challenged the validity of Commonwealth law prohibiting a hydroelectricity dam in Tasmania, arguing that it was invalid because it was not based on a specific power covering the environment, culture, or energy production. The most recent precedent from the 1982 Koowarta case was split: only three justices interpreted 'external affairs' to mean any matter covered by an international agreement, but this was not enough to set a binding interpretation and there were two new justices on the Court in 1983. This demonstrates the volatility and subjective nature of interpretation, as the scope of the Commonwealth's powers can change in less than a year if the composition of the Court changes. In Tasmanian Dams 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 because the existence of the treaty demonstrated that the matter was "of international concern." While this significantly widened the scope of the external affairs power, giving the Commonwealth almost unlimited scope to enter into the residual powers as long as it could show "international concern," the treaty had to be bona fides, legitimate, and the law needed to properly execute the obligations in the treaty. The precedent did not, therefore, give the Commonwealth unchecked power.

- a. The above answer is a sample of an analysis on the significance of a case. Go through the paragraph and analyse its structure by identifying the way in which the following structural elements have been used:
- strengths or ways power was increased
 - weaknesses or ways power was checked
 - 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 on a High Court case of your choice.

FACTORS THAT AFFECT THE ABILITY OF PARLIAMENT TO MAKE LAW

Parliament is the supreme law-maker, but its ability to make law is not unrestricted.

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.

In 2022 the House sat for 10 days in the first 6 months of the year, but this was low mostly because of the federal election – in 2023-2025 the House was scheduled to sit between 33 and 37 days in the first six months between January and June. The last five years have seen some of the fewest sitting days for the House in modern history. Even once parliament drafts legislation, however, it must not only be passed through parliament: it must be able to be funded by taxation revenue, and it must be able to be enforced by government departments and the police.

The Study Design lists three specific factors that must be studied in terms of their impact on the ability of parliament to make law. The four factors listed on the Study Design are the bicameral structure of parliament, the impact of international pressures, and the representative nature of parliament.

The bicameral structure of parliament

Keyword: Checks

Definition

The bicameral structure of parliament is the division of the legislature in section 1 of the Australian Constitution into an upper chamber and a lower chamber, both with approximately equal powers of law-making, and who must agree on the final form of every bill for it to become law.

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. A bill can start in each house, as long as it isn't a money bill, but for a bill to become law it must be approved by both houses in exactly the same form – if one house makes an amendment, the other house must approve that amendment.

The roles of the houses of parliament

The roles studied above in the AOS will be used here, in terms of how each role might affect the ability of parliament to make law. Remember that 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.

Forming the Government in the lower house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. A minority government can result in bills being the result of cooperation and work-shopping. 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.	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]." 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. 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.

Initiating most new bills in the lower house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. 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 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.	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. 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. Since Federation, only 10 private member's bills from lower house MPs have been passed into law.

Initiating and amending money bills in the lower house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. 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 introducing its own money bill, but its work can be checked and improvements can be made.	The Legislative Council is unable to effectively 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 by allowing the lower house to ignore all Council requests for amendment. 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.

Performing responsible government in the lower house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. 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. 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.	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. 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.

Acting as the "people's house" in the lower house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. 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.	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. 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.

Acting as a house of review in the upper house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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	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

record numbers of crossbenchers, which has required a great deal of negotiation and cooperation. 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. 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.	passed by House of Representatives without adequate review and scrutiny. 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. 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.
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Representing regional or state interests in the upper house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. 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. 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.	Too many diverse interests in the upper house can make passing simple legislation unwieldy, slowing down the process and even preventing reform. 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.

Scrutinising delegated legislation in the upper house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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 over 1,500 federal regulations a year. 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. 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.	The parliamentarians on the Senate Committee only actually review around 250 federal regulations each year of the 1,400-2,000 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 2023, according to the Committee's Annual Report, 1,885 regulations were nominally reviewed, 363 were flagged for concern – significantly more than 240 in 2020. Neither the Committee nor the Senate can amend problematic regulations. They can only disallow the regulation if the relevant minister refuses to change it. Delegated legislation can be exempted from parliamentary and committee oversight – 278 regulations were exempted in 2023. 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.

	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.
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Initiating most new private members bills in the upper house

ENABLING PARLIAMENT	LIMITING PARLIAMENT
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. Backbenchers within the Government party can seek the support of their party to present a private member's bill on a topic that the party is not willing to adopt formal policy on, allowing parliament to debate it. The Marriage Amendment (Definitions and Religious Freedoms) Bill 2017 was put forward by a private senator, Dean Smith, a member of the then-governing Liberal party. The Liberals supported the bill.	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.

REVIEW QUESTIONS – The bicameral structure of parliament

1. In theory, both houses have virtually equal legislative power. What does this mean?
2. How might one house making an amendment to a bill stop parliament from making law?
3. How could a minority government improve the quality of laws?
4. What impact might the 'guillotine' have on the quality of bills?
5. How does the Westminster System of government help the lower house pass a great volume of bills?
6. Why are private member's bills difficult to pass through the lower house?
7. How does the second reading speech help parliament make quality law?
8. In what way does receiving many different petitions help parliament make effective law?
9. In what way does receiving many different petitions not help parliament make effective law?
10. How does crossbenchers holding the balance of power in the upper house improve law-making?
11. Do minor parties and independents have the power to prevent parliament from making law?
12. Will an upper house controlled by the Opposition always be hostile to Government bills?
13. How does party loyalty prevent the upper house from performing all of its law-making functions?
14. How does a proportional voting system, where less popular candidates also get elected, help parliament be a more effective law-maker?
15. More delegated legislation is made by the Government than legislation is made by parliament. How does this help parliament be a more effective law-maker?
16. How does delegated legislation inhibit the effectiveness of parliament as a law-maker?
17. Are backbenchers within the Government party able to put forward private member's bills that aren't supported by Government policy?

International pressures

Keyword: Diplomatic influence

Definition

Australian parliaments cannot be overridden or directed on law-making by international organisations, governments, corporations or individuals, but may be influenced in their law-making by their criticisms or policies in order to maintain good diplomatic and trade relations, and to create a positive image in the eyes of the Australian public.

Impact of climate change

In September 2022 the UN Human Rights Committee found that the Australian Government's failure to protect Torres Strait Islanders from the effects of climate change was a violation of the right to culture and the right to be free from arbitrary interference with privacy.

This finding had no legal status in Australian, but in March 2023 the Australian Government responded by announcing consultation measures and making funding commitments. The National Wellbeing Framework released in July 2023 introduced 50 key indicators to track progress on climate change measures and balance them against economic and social goals for overall wellbeing.

Detail

International pressures include the following:

- Benefiting from diplomatic and trade relationships with the governments of other countries
- The influence of international opinions on what the public thinks of Australian governments at home
- International law that Australia commits to by ratifying treaties and conventions
- Maintaining relationships with international and multinational organisations – diplomatic, like the United Nations, and corporate, like BHP Billiton and Meta

International opinion

Australian governments have an interest in listening to international voices because they want to appear credible and worthy of trust. International governments could refuse to trade with Australia, international and multinational companies could pull out of the Australian market, and the Australian people at home could switch their vote to another election candidate if the current government loses face or disregards public opinion.

Environmental protection policies

The Australian State of the Environment Report is compiled every five years by independent experts. In July 2022 the federal environment minister, Tanya Plibersek, announced reforms to Australian environmental policies in light of the bleak account contained in the 2021 Report.

The federal government tabled the Climate Change Bill 2022 to codify the emissions reduction targets developed from the international Paris Agreement. The Greens internally debated whether to support the bill or try to push the Government to a higher reduction in emissions, because the bill needed the support of the 12 Greens senators and one crossbencher to pass the Senate. Ultimately, Greens leader Adam Bandt announced that the party would support the Government bill in both houses, saying the Greens would not stand in the way of some improvement.

The September 2022 passing of the Climate Change Bill coincided with the fifth annual ‘Fridays For Future’ youth movement protests. These began in 2018, inspired by Greta Thunberg’s solitary protests outside the Swedish parliament, and reached a high point in November 2019, when 4 million people took part in 4,500 actions worldwide on the same Friday. The most recent took place over 15–17 September 2023, when climate protesters in more than 50 countries demanded that governments phase out the burning of fossil fuels heating the planet.

International law

Australia is a signatory to hundreds of international agreements, including the seven core human rights treaties – such as the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights. Becoming a signatory and ratifying these agreements signifies to the international community that the federal executive government intends Australia to be bound by the terms in them, but they do not automatically become law.

International law is not binding in Australia, and international organisations such as the United Nations cannot make policy that applies in Australia or direct Australian parliaments on what law to make. However, diplomatic and trade relationships with other countries rely on a level of cooperation and respect within the international community, and can influence Australian law-makers to respond to these non-binding influences because they want other governments and trade partners to view Australia favourably. Domestic organisations such as Australian advocacy groups and law reform bodies such as royal commissions can also rely on international agreements when pressuring parliament to change the law.

UN Optional Protocol to the Convention against Torture

The Northern Territory Royal Commission into the Protection and Detention of Children was established in 2016 after the ABC TV *Four Corners* programme exposed abuse of children detained in Don Dale detention centre in the NT. The Commission called for Australia to ratify the United Nations Optional Protocol to the Convention against Torture (‘OPCAT’) in its final report in 2017. 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.”

In December 2017 Australia ratified OPCAT, eight years after initially signing the treaty. 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. All places of detention in Australia will also now be subject to international inspections conducted by the UN Subcommittee on the Prevention of Torture, if Australia follows the agreement. In February 2023 the UN Subcommittee on the Prevention of Torture canceled its planned inspection of Australian jails and detention centres after it was denied full access to institutions in New South Wales and Queensland. Other than Australian, Rwanda is the only signatory to have had inspections canceled.

20 January 2025 will be two years since the Victorian, NSW and Queensland Governments missed the deadline to implement their obligations under the Protocol, but a funding standoff continues that divides responsibility between the Commonwealth and the states and practices such as solitary confinement for children have not been outlawed – in November 2024, the Queensland Liberal National Party even proposed *compulsory* solitary confinement for children in detention who use violence against staff, in contravention of the Protocol. Change the Record is an Australian charity organisation campaigning on Australia's implementation of OPCAT.

Legislating on international concerns

The federal government consults with the states before entering many treaties, but the states do not have the power to enter into international agreements themselves. Similarly, the federal government has the power to enter into the treaty, but not the power to make the terms legally binding in Australia. For the provisions in treaties to become domestic law in Australia, it is not enough for the Government to ratify the treaty: the federal parliament needs to legislate to implement them.

The Tasmanian Dams Case in 1983 gave the Parliament the power to do this, even if the subject matter of the treaty falls outside the federal parliament's heads of power in the Constitution, because the High Court interpreted the Commonwealth's s51(xxix) 'external affairs' power as covering all matters of *international concern*.

***R v Burgess; Ex parte Henry* (1936) 55 CLR 608**

Australia was a signatory to the Paris Convention on International Transport 1919, but the subject matter of aviation was a residual power. Henry Goya Henry 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. 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.

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 and Tasmanian Dams Cases. The Commonwealth's regulations were held to be invalid on the facts of the case, because the laws did not properly give effect to the terms of the treaty, but a majority of the Court agreed that the external affairs power *could* cover matters contained in a treaty even if those matters were not otherwise listed in the Constitution as Commonwealth powers, as long as the subject matter of the treaty was properly a matter of international concern.

Chief Justice Latham noted that, already as of 15 August 1935, the list of treaties and international agreements to which Australia was a signatory stretched over 18 pages and the topics were "so various that it is impossible to classify them." He had concerns that the Constitution should not be "indirectly amended by means of an international agreement made by the Executive Government," but thought it appropriate that the federal parliament be able to legislate on its "relations" with other countries.

Burgess triggered a referendum, a change in Commonwealth law, and further High Court cases, as Australia struggled to balance its constitutional rules with international pressures on the regulation of aircraft.

- ✓ On 6 March 1937 a referendum was put to the people, to give the Commonwealth a constitutional head of power over aviation – this was introduced to overcome the High Court's decision in the Henry case. The proposal received 53.56% of the vote nationwide, but only received a majority in Victoria and Queensland – therefore, it failed.
- ✓ Following the unsuccessful referendum in 1937, the Commonwealth altered the regulations following the case, to avoid the issues raised by the High Court.
- ✓ In 1939 Henry was convicted of flying too low over the aerodrome in Mascot. The High Court upheld both the new regulations and his conviction.

REVIEW QUESTIONS – International pressures

1. Is 'diplomacy' about law or relationships?
2. Identify three different pressures from international organisations or bodies that have influenced Australia's climate change policies and laws.
3. Are the Greens subject to international pressures when deciding to vote for the Climate Change Bill 2022 even though they are not in government?
4. Can international organisations such as the United Nations introduce laws into Australia?
5. Can international organisations such as the United Nations direct Australian policy?
6. Can other governments refuse to trade with Australia if they disapprove of Australia's laws, or are they bound to agreements?
7. Do multinational companies have to follow Australian laws if they trade in Australia?
8. Once Australia signs and ratifies an international agreement such as a treaty, does that agreement become law in Australia?
9. Who enters into international agreements on Australia's behalf?
10. What must happen for the commitments in a treaty to become Australian law?
11. What power can the Commonwealth Parliament use when legislating on the terms of a treaty?
12. Can the Commonwealth Parliament legislate on the terms of an international agreement if it covers areas of residual power?
13. 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?
14. 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.

ENABLING PARLIAMENT		LIMITING PARLIAMENT
Governments often care more about relationships with larger and more powerful organisations such as other nations and multinational corporations than they do about relationships with individual Australian voters. Showing that an issue is part of a bigger global concern gives smaller domestic groups more influence with law-makers. Australian parliaments are not controlled by international organisations or other nations. Australian governments can heed international influence and opinion, while still retaining independence and making local law-making decisions. Because of the speed and pervasiveness of media nowadays, Australians are heavily influenced by opinions from overseas groups and individuals. We are better able to inform ourselves about global issues, and develop educated opinions on the policies of people standing for election domestically. Law-makers need to be aware of these international influences to maintain support in their constituencies. 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. Any time the Government commits us to formal international obligations, it involves the Australian community and representatives. Because Australia is treated as one country on the international stage, other nations do not recognise the sovereignty of each individual state to enter into its own international agreement. The Commonwealth therefore takes the lead on matters of international concern so that Australia has a unified response and reputation.	International pressures	The international community can have priorities that do not align with domestic Australian values or social needs. Each country has a different geographical location, culture, history, and distribution of money and resources. What is appropriate for other countries to legislate on might not be right for Australia – an isolated continent with spread out population and a unique relationship with its Indigenous peoples. Many large multinational companies such as BHP Billiton wield more power than local organisations or Australian voters because the Australian economy relies on their trade. This ties the hands of governments who cannot afford to refuse their demands. The demands of maintaining a positive international presence can lead governments to focus more on diplomacy and marketing than on following through with laws. Australia ratified OPCAT, for instance, but did not follow through with the promise to allow inspections. This has not caused major problems for Australia internationally, however, because other countries do not tend to interfere with domestic laws, and many Australians were satisfied that we ratified OPCAT and have not kept on top of its implementation. 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 by the executive. This allows the executive government to prioritise international relations over the allocation of powers intended by the Constitution. Many international pressures are undemocratic. The people have refused to give powers to the Commonwealth at referendum that have subsequently been implemented through treaties, and most international relations such as COP28 are managed by the unelected executive government rather than the democratic parliament.

The representative nature of parliament

Keyword: Democratic representation

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

Australia uses a democratic system of government, which means that the people are ultimately in charge of authorising power being given to the parliament and government through the Constitution, and responsible for selecting people to exercise that power at regular elections. Because members of parliament want to be elected for another term, and political parties want their members to be supported for a majority of seats in parliament, politicians will want to make decisions that keep the majority of people happy with them. Sometimes this will mean reflecting majority opinion at that point in time, while at other times it will mean doing the best thing for the future or minority interests based on the research and points of view that members of parliament have access to.

Consider the competing aspects of representative government:

Indirect democracy

Under ss7 and 24 of the Australian Constitution, which say that members of parliament are “chosen” by the people, representative government is merely a system of indirect democracy. Our representatives perform representative government

simply by being elected and making laws on our behalf, and may sometimes support laws we do not want because they are acting in what they decide is the long-term interest of the community.

Relay mechanism

Under the populist view, our representatives must reflect the views of the majority. Here, an elected representative loses authority to use her or his own judgment or to protect minority interests.

Mirror function

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 or demonstrate good judgment, if we can't see our demographics represented in the people elected.



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. Majority opinion was not reflected in the repeal, however, because of internal Liberal-National party priorities.

Exam tip: Note that representative government is focused on receiving the support of the majority of people. There will therefore sometimes be a tension between the representative following her or his party or own opinion, and the representative following majority opinion in the community.

REVIEW QUESTIONS – The representative nature of parliament

1. What does the 'demos' mean in the word 'democracy'?
2. What is the name of the event at which the people choose their representatives?
3. Why do members of parliament often want to please the majority?
4. Can a member of parliament sit in parliament if they perform their job well but the public does not vote for them?
5. How is 'indirect democracy' different from being a 'relay mechanism'?
6. How might the relay mechanism form of representative government lead to 'tyranny of the majority'?
7. Will you necessarily agree with an MP's political views if they share a personal characteristic with you and you can see yourself in them?
8. How does a 3-4 year gap between each election give MPs some freedom from pleasing the majority on every law?

ENABLING PARLIAMENT		LIMITING PARLIAMENT
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. Parliament is authorised every 3–4 years to use its collective judgment for the good of the community. It has democratic law-making power delegated to it by the people, and can confidently act within its jurisdiction to protect the best interests of the public according to its best judgment, knowing that it is acting within its lawful authority.	The representative nature of parliament	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 taxation, euthanasia, drug use and treatment, environmental protection, and civil rights often produces divided opinions, and politicians’ fear of outcry or backlash 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, given the range 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, as happened with the repeal of the Medevac legislation. Representative government may not 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.

THE CONSTITUTION AS A CHECK ON PARLIAMENT IN LAW-MAKING

In addition to the responsibilities of parliament that affect its ability to make and change law, the Constitution places a number of restrictions on the parliaments, enforced by the High Court and the rest of the court hierarchy.

The Study Design specifies the role of the High Court in protecting representative government; the separation of legislative, executive and judicial powers; and the express protection of rights as the most important means by which the Australian Constitution acts as a check on parliament in law-making.

The role of the High Court in protecting representative government

Keyword: Implied by the Constitution

The High Court of Australia has the power to interpret the Constitution any time a case comes before it that questions the validity of law or government policy. 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 Constitution Act form precedent, and are written down in law reports; these precedents are just as binding as the words of the Constitution themselves.

Commonwealth of Australia Constitution Act 1900 (UK)

Section 7 – The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

Section 24 – Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

Sections 7 and 24 of the Australian Constitution provide for the election of members to the upper house and lower house of federal parliament. They establish Parliament as a democratic body, but do not give detail on the management of these elections or whether any associated ideas such as universal suffrage or free speech should be also protected. Since the 1990s, ss7 and 24 have increasingly been interpreted by the High Court as creating a broad system of representative government.

A number of case examples have been provided, to illustrate how the High Court has protected this system.

Definition

Sections 7 and 24 of the Constitution create a system of representative democracy that protects things necessary for the operation of representative government such as voting and public communication about political parties and candidates for election. The High Court can protect representative government by invalidating any laws or government policies that disproportionately infringe on its operation.

Detail

The High Court is established in s71 of the Australian Constitution and is given jurisdiction over the interpretation of the Constitution in s76(i). 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.

Representative government is a 'principle': a value or an idea of government that we try to protect through law. It is not itself an 'individual right' or a law. The High Court has found that the Constitution implies representative government as a principle or a value of Australian government, and will therefore decide whether laws are invalid because they infringe too much on this principle. This is why representative government is called a 'structural protection' rather than a right, because it is something woven into the system of government established by the Constitution and it indirectly protects the people rather than giving each individual the ability to do something in particular.

If the High Court hears a case where a person or organisation is affected by a law and they think that law improperly infringes on representative government, the Court can hear that challenge and declare the law to be invalid if they agree.

Case studies

Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106

Keyword: Freedom of political communication

Legal question

Do ss7 and 24 of the Constitution create an implied system of representative government; and, if so, does this system prevent the parliament from legislating to prevent communication and advertising on political issues prior to an election?

Facts

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 the implied meaning of ss7 and 24 of the Constitution.

Outcome

A system of representative government was implied by the text of ss7 and 24 and the Constitution as a whole, and the Act was invalid to the extent that it disproportionately prevented the discussion of election issues and candidates.

- 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.

Significance

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, and the courts could invalidate any legislation or government policy that improperly infringed on this.

Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104

Keyword: Compatible laws

Legal question

Does the freedom of political communication implied by the system of representative government provide a defence to individuals sued under state law for non-constitutional wrongs such as defamation?

Facts

Andrew Theophanous was a member of the House of Representatives and he sued a newspaper group, the Herald and Weekly Times ('HWT'), on the grounds that it had defamed him in an article that was critical of his views on immigration. HWT defended itself by arguing a freedom of political communication as a common law defence to state defamation laws.

Outcome

HWT was protected by the principle of representative government because it was deemed to be using its freedom of political communication.

- The common law was changed to be compatible with ss7 and 24: the common law was 'constitutionalised'.
- The constitutional protection of representative government was expanded to apply to *state* laws, not just federal laws, even though the Australian Constitution is a federal statute.
- A new defence to defamation was created: appropriate political communication.
- The freedom of political communication, for a short time, was enforced as a positive right and not just a protection against government and parliamentary power.

Significance

The Court was not unanimous, but held 4:3 that the common law could be changed if it limited the freedom of political communication too much. Therefore, as a result of *Theophanous*, the High Court exercised the power to reshape – or constitutionalise – the civil common law in situations where it overlapped with political discussion. In this case, it was to create a new defence of qualified privilege to defamation actions. This took an implied constitutional principle from the federal constitution and applied it to *state*-based common law governing the private responsibilities of individuals under *civil* law.

The High Court did not apply the principle of representative government as an individual right for very long. It walked back *Theophanous* three years later in the case of *Lange*, and decided that it would only enforce representative government as a structural protection against overreach by government and parliament.

Roach v Electoral Commissioner [2007] HCA 43

Keyword: Protected franchise

Legal question

If all prisoners are excluded from voting, is parliament "chosen by the people" in the way required by the system of representative government?

Facts

Prior to 2006, the Commonwealth *Electoral Act* prevented any person serving a prison term of three years or over from voting in a federal election. In 2006, the Parliament amended the law so that *all* people serving a federal, state or territory prison term of any length were disqualified. Vickie Lee Roach was a Victorian woman serving a 4-6 year term of imprisonment. She challenged the validity of both laws on the grounds that there was a constitutionally-implied right to vote as part of the system of representative government established by ss7 and 24.

Outcome

The principle of representative government was held to *limit* the ability of the Commonwealth to exclude people from voting. Any voting exclusions must be appropriate and reasonable, and not unnecessarily burden the democratic system of representative government. The Commonwealth had gone beyond that in its 2006 amendment.

- The validity of the 2004 prisoner disenfranchisement law was confirmed, but the 2006 amendment was held to be invalid and unenforceable because it went too far and was unreasonable and unnecessary.
- An individual implied "right to vote" was rejected by a majority of the Court, but a structural protection of suffrage was found to be implied by the system of representative government.
- The test for proportionality was held to also apply to voting. In other words, voting could be restricted if the restriction was reasonable and proportionate.

Significance

Roach relied on the precedent set by the ACTV Case, but asked the High Court to expand it into other areas: the principle of representative government was protected in relation to voting franchise, and not just political communication.

Chief Justice Gleeson held that there was a constitutionally-implied individual right to vote, but he was in a minority of one on this issue. Justices Gummow, Kirby and Crennan decided *against* a "right to vote"; instead, they found in favour of a general community protection being given by the system of representative government. All four justices applied the proportionality test: the Parliament could disqualify people from voting if there were reasons that were substantial, and appropriate to achieving a legitimate purpose.

The Court therefore protected representative government, but not as an absolute right: it allowed it to be limited if it was for a necessary and proportionate reason. The Court found that the 2006 amendments went beyond what was “appropriate and adapted” to the purpose of removing voters who had committed serious misconduct against society, but that the law prior to 2006 was appropriate and adapted, and was valid.

On 22 May 2019 the ABC published an interview with Roach as part of its *Conversations* podcast, with the synopsis: “Vickie’s met with trouble all through her life, starting with a police record at the age of two. She went on to challenge a federal law on the rights of prisoners.” It has a duration of 52 mins and can be found on the Apple podcasts site amongst other locations:

<https://podcasts.apple.com/au/podcast/conversations/id94688506>

REVIEW QUESTIONS – The role of the High Court in protecting representative government

1. How does the High Court ‘protect’ the Constitution?
2. To what extent can the High Court change the Constitution? Explain your answer.
3. Outline what ss7 and 24 of the Australian Constitution say.
4. How do ss7 and 24 create a system of representative government?
5. How does a structural protection differ from an individual right?
6. Is representative government a structural protection or an individual right?
7. What can the High Court do with legislation that limits representative government?
8. What can the High Court do with government policy that limits representative government?
9. Can the High Court protect representative government against state law as well as federal law?
10. Are parliaments and governments able to override the Court’s decisions?
11. Why is political communication necessary for representative government?
12. Why are voting protections necessary for representative government?
13. The structural protection of representative government 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.

The separation of legislative, executive and judicial powers

Keyword: Prevent corruption

The first three chapters of the Constitution establish the separation of powers.

Chapter I The legislature

Chapter II The executive

Chapter III The judiciary

Definition

The separation of powers is the power to govern the country being 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 prevent corruption and the abuse of power.

Detail

Legislative function	Executive function	Judicial function
- The power to make laws - Exercised by parliament	- The power to administer laws and conduct the business of government - Exercised by the Crown and ministers	- The power to apply laws and resolve disputes - 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.

Australian Military Court

In *Lane v Morrison* (2009) 239 CLR 230 the High Court declared the Australian Military Court unconstitutional and dismantled it, vacating its convictions and releasing prisoners from custody. The Court found that it was an executive government body, staffed by government military rather than independent judges, and could not therefore perform a judicial role.

In 2010 the Government passed legislation to create the replacement Military Court of Australia, a court that complies with the Chapter III requirements for an independent judiciary. No crimes are tried on indictment, so no civilian jury is required, and minor offences heard by military tribunals can be appealed there.

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.

REVIEW QUESTIONS – The separation of legislative, executive and judicial powers

1. Identify the body that performs each of the following functions in the Australian system:
 - a. Legislative function
 - b. Executive function
 - c. Judicial function
2. Identify the role that is performed by each of the following arms of government:
 - a. Legislative arm
 - b. Executive arm
 - c. Judicial arm
3. In the Australian system the executive and legislative functions overlap. Explain how ministers exercise both executive and legislative powers.
4. Outline two ways in which the judicial arm is kept almost entirely separate from the legislative and executive arms of government.
5. Which two arms of government did the Australian Military Court improperly overlap?
6. Which arm of government was responsible for vacating the Australian Military Court?
7. Which arm of government was responsible for creating the replacement Military Court of Australia?
8. 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.

The express protection of rights

Keyword: Restrictions on legislative power

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 of the Constitution is unclear, there is some disagreement over the exact number.

Section 51(xxxi) Just terms

- The right to receive 'just terms' fair compensation when private or state property is acquired by the Commonwealth

Section 80 Juries

- The right to have a unanimous verdict from a jury when an accused person is tried on indictment for a Commonwealth offence

Section 92 Interstate trade

- The right to be free from unreasonable state or Commonwealth burdens on interstate trade, commerce and movement

Section 116 Religion

- 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

Section 117 State residence

- The freedom from state laws discriminating or imposing an unfair burden on the basis of out-of-state residence, when in another state

Each right has a defined scope that protects some integral aspects, but doesn't protect others that are less central. For instance, the right to trial by jury:

DOES PROTECT	DOES NOT PROTECT
A jury of 12 people	An accused who wishes to not have a jury
A unanimous verdict	State offences
Commonwealth offences	Crimes tried other than on indictment
Crimes tried on indictment	Civil matters

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. But the scope of s117 cannot be guaranteed unless the law is tested.

We do not always know the extent to which every part of an express right checks the power of parliament. Some aspects of the rights have been altered by High Court interpretation of the Australian Constitution and are therefore not exactly as written in the Constitution – for instance, the High Court addition of atheism to the s116 limited freedom of religion. Other aspects have yet to be clarified by High Court interpretation because no case has come before the courts. For example, 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 – so the section possibly applies to limit both states *and* Commonwealth, but we can't be sure.

Exam tip: Always use an 'umbrella' structure to make an example shorter. In other words, use an umbrella statement to indicate that s116 provides a "limited freedom of religion," and then provide one or two examples of the protections it covers to illustrate. This prevents you having to remember every single part for what should be a quick example.

REVIEW QUESTIONS – The separation of legislative, executive and judicial powers

1. Give a synonym for 'express'.
2. Give a synonym for 'right'.
3. Express rights are entrenched in the Constitution. What does it mean for rights to be 'entrenched'?
4. Does the High Court have the power to interpret the meaning of each express right?
5. Is parliament allowed to legislate to limit the express rights?
6. What will happen to legislation that infringes express rights?
7. Do all express rights relate to the Commonwealth Parliament?
8. Which express rights relate to the state parliaments?
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?

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Evaluation: The Australian Constitution as a check on parliament

The focus of this evaluation is the ability of the Australian Constitution to effectively check the power of parliament and ensure it doesn't abuse its power. Note that this is different from an evaluation of the key ideas themselves: we are not evaluating the separation of powers in general – we are evaluating the extent to which it can *check the power of parliament*.

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

INCREASES POWER		LIMITS POWER
If the Commonwealth disagrees with the Court's application of representative government, the Parliament can draft a referendum bill to put to the people that changes the wording of the sections, adds new sections clarifying parliamentary power, or removes the sections completely. The High Court usually does not second-guess the parliament's policy decisions. It is strictly concerned with the legality of laws, and not whether it agrees with the policy direction of them. For instance, upholding the 2004 amendments to voting eligibility in the Roach case was not done on the basis that the court supported the policy ideologically. 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 on a case-by-case basis. The implied freedom has been developed to be very flexible and practical, and not dogmatic or overly literal. 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. The Court will only protect the principle of representative government if an aggrieved party brings a case before it. If the parliament legislates to limit representative democracy, that limitation will stand as good law if no-one challenges it.	The role of the High Court in protecting representative government	The High Court can go beyond the explicit words of the Constitution to decide implied clauses or provisions, such as the structural protection of representative government. This increases the ability of the Court to check the legislature, beyond what might be obvious from the text of the Constitution. The interpretation of the High Court is fully enforceable, in that the parliament or government cannot ignore or overrule a court finding. A statute or government policy is invalid if the courts say it is, and a new law will have to be re-drafted that works around the reasons given for the invalidity. 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. 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. Parliament and the executive can infringe the protection provided by representative government for what they believe to be proportionate reasons, and not know whether those laws will be challenged and struck down. This can become an expensive and unpredictable gamble. 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.
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. 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. The court is only asked to use its role of checking the legislature if a case comes before it that challenges an act of the parliament. The judiciary does not have the power to act or give advisory opinions on its own initiative.	The separation of powers	The High Court determines what the scope of each branch'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. 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. The separation of powers allows the courts to enforce a range of limitations against the parliament: the allocation of law-making powers, representative government, express rights – all are enforced by the courts against the parliament because of the authority the separation of powers gives the judiciary.

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 once appeals are factored in. 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. 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. The rights are written in brief, ambiguous language. There is therefore a great deal of scope for confusion and disagreement over the extent of the protection. Parliament can make many laws in the area of each right, that nevertheless avoids the exact wording of the right. For instance, the statute establishing the Military Court of Australia provided that even serious crimes would not be tried on indictment – to avoid the right to trial by jury in s80.	The express protection of rights	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. Rights should be non-discriminatory. 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. The High Court can alter the interpretation of each right, but they cannot contradict the wording of them and no parliament can alter them without public approval. 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. The ambiguity of the wording in many rights gives a flexible scope that the courts can interpret broadly. This increases the scope of each right, and decreases the power the parliament has to legislate in the area. For instance, the s92 protection of 'free intercourse among the states' was expanded to include movement as well as trade.
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APPLICATION EXERCISE – The Australian Constitution as a check on parliament: evaluation

The separation of powers is intended as a limitation on the power of parliament. Parliament cannot make laws that give a judicial power to an executive or legislative body. Also, no parliament can act outside its jurisdiction – and jurisdiction is determined by the judicial arm. The way in which the Court interprets this jurisdiction is outside the power of the parliament, and the Court has the authority to invalidate any law that it finds is *ultra vires* and the parliament cannot ignore or override that finding. In reality, though, this is not a significant restriction on the law-making of parliament. Historically, the High Court has taken a fairly broad 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.

Part 2: The Victorian courts and the High Court in law-making

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 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.

STATUTORY INTERPRETATION

Keyword: Meaning

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.”

Detail

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.

- 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 did *not* argue in favour of same-sex marriage: they 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.

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 or biological sex.

REVIEW QUESTIONS – Statutory interpretation

1. Provide a synonym for ‘statute’.
2. Provide a synonym for ‘interpretation’.
3. Are the courts able to change the word in the statute if the current word does not fulfil the purpose of the law?
4. Are the courts able to change the word in the statute if there has been an error in drafting the law?
5. What does it mean to ‘narrow’ the scope of the wording?
6. What does it mean to ‘expand’ the scope of the wording?

APPLICATION EXERCISE – Statutory interpretation

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.

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.

Broad wording

Keyword: Specific

Definition

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

- In the Kevin and Jennifer Case the word 'marriage' in the *Marriage Act 1961* (Cth) could 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 part of this definition in 2007 to include same-sex marriage.
- The Brislan Case queried the scope of the Commonwealth's communications power in the Constitution, 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 an expansive definition based on using technology to send messages at a distance, and included one-way broadcast devices such as radios as "like" two-way communication devices.

Failure to foresee new technologies

Keyword: Included in the purpose

Definition

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 to achieve the purpose of the act.

Examples

- The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) 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.
- The Brislan Case asked whether the Australian Constitution's reference to telegraphic, telephonic, postal, and "other like services" should encompass new communications technologies such as radios.

Changing values

Keyword: Accepted

Definition

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 accepted by contemporary society.

Examples

- The 2021 *Namoa* case reflected the way that 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 separate legal individuals.
- Regarding the unreported NSW Magistrates' Court case of *Police v Shannon Thomas Dunn* (23 August 1999), 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

Keyword: Avoid

Definition

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 and avoid the unintended consequences.

Examples

- In the *Crimes Act 1958* (Vic) 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, and the courts needed to interpret the meaning to avoid this consequence. The meaning has been interpreted as ‘using something as though it were your own’.

Other reasons

- Ambiguous wording that has multiple possible meanings – courts must select the most appropriate meaning.
- Parliament’s failure to define a word used in the act – courts must define the word.
- A word or phrase being used in multiple contradictory ways in the one statute – courts must select the best way.
- The meaning of words used in the act changing over time – courts must update the meaning.

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. Match each with an example.

REVIEW QUESTIONS – Reasons for statutory interpretation

1. Give a synonym for ‘broad’.
2. Give an antonym for ‘broad’.
3. If new technologies have not been foreseen and expressly named in the act, when should they be included?
4. Give a synonym for ‘values’.
5. Why should laws change when values change?
6. Give a synonym for ‘consequences’.

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?

The parties will receive a binding resolution

Keyword: Outcome

Definition

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 and the parties will receive a final outcome.

Examples

- In the *Tasmanian Dams Case* the interpretation of ‘external affairs’ given by the High Court allowed it to rule that the Commonwealth was acting within its jurisdiction and Tasmania was prevented from going ahead with the dam.
- In the *Studded Belt Case* the defendant was found not guilty on appeal to the Supreme Court, on the that the word ‘weapon’ was interpreted to include only those items that had a common use as a weapon and no common use as anything else. His belt was therefore excluded.

The meaning of the law may be expanded

Keyword: Broader scope

Definition

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 it did before the precedent was set.

Examples

- In the Tasmanian Dams Case 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, and encompassed any matter of international concern, even if otherwise residual.
- In the *Aubrey* case of 2017 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

Keyword: Changing common law

Definition

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 change the common law and supply a new precedent.

Examples

- In the 2017 case of *Aubrey* 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.
- In the case of *Masson v Parsons* [2019] HCA 21 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 what the court called a more 'common sense' definition that included non-biological adoptive parents: "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

Keyword: Create common law

Definition

When a court interprets a statute in a test case, where a word has not been tested before, 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

- In the Studded Belt Case the Supreme Court's *ratio* of the meaning of the word 'weapon' established a new authoritative definition because prior to the case the only meaning was the one determined by the Regulations.
- In the 1926 Roads Case 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. The Commonwealth could therefore offer grants of money to the states with conditions attached that concerned their residual powers.

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.

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 QUESTIONS – Effects of statutory interpretation

1. Can the parties to the case disagree with the court's interpretation and resolve the case in a different way?
2. 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?
3. Assume parliament does not approve of an interpretation applied to a phrase in legislation. What can it do to change it?
4. Give a synonym for 'expanded' meaning.
5. If a previous court has already interpreted the meaning of a word in legislation, can a later court change that meaning?
6. Does the interpretation of a law itself form law?

Evaluation: Statutory interpretation

STRENGTHS	WEAKNESSES
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. 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.	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. 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.

APPLICATION EXERCISE – Statutory interpretation: evaluation

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

THE DOCTRINE OF PRECEDENT

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.

Binding and persuasive precedent

In some situations, courts will *have* to follow the common law rule set in precedent by another court – this would be called a 'binding' precedent. In other situations, a court will *not* have to follow the rule – in this case the precedent would be called 'persuasive'.

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, and all courts would have had to look for foresight of 'possibility' rather than 'probability'.

The doctrine of precedent

Exam tip: The focus is not on memorising the doctrine, but on being able to use that content to explain how courts are therefore about to make and change the law. Application and discussion are key.

Keyword: Court-made law

Definition

The doctrine of precedent is a common law principle in which the *ratio decidendi* of superior courts of record are 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* are the legal reasons 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.

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 principle, so neither of them is bound by precedent or can form precedent.

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.

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.

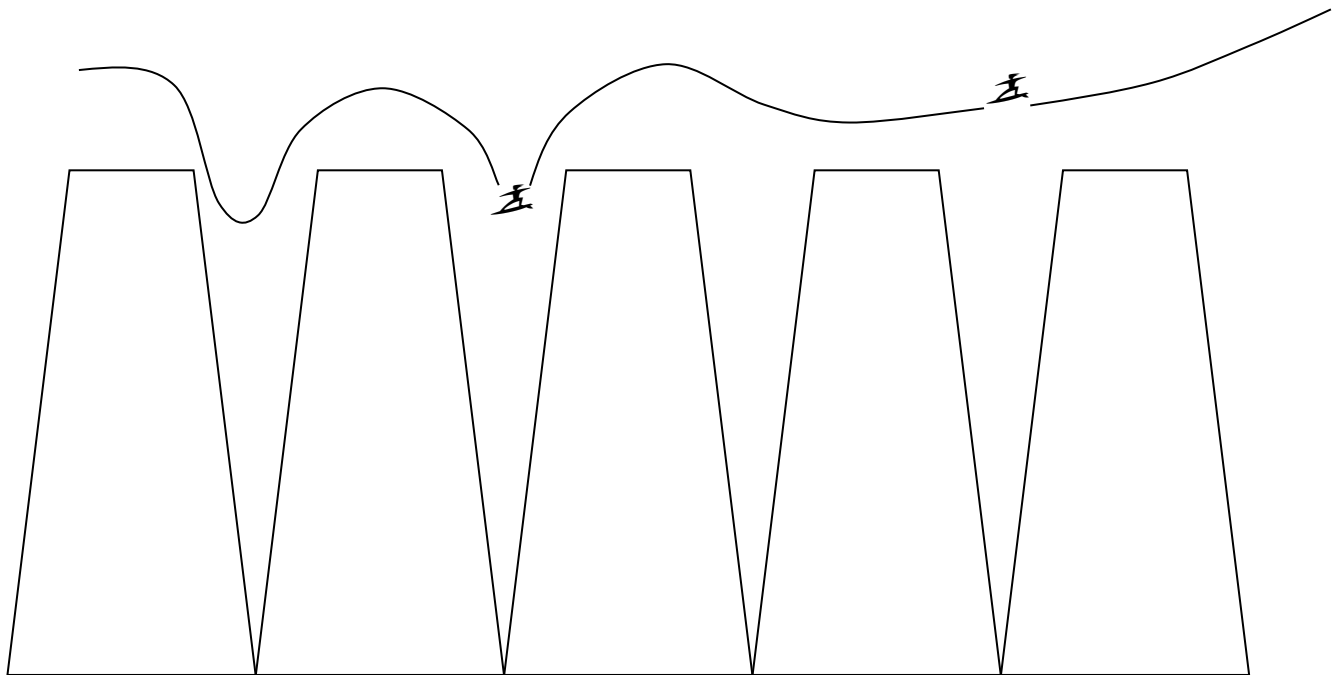
Binding precedent

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 all the following apply:

- ✓ The current court is in the same hierarchy than the precedent court; AND
- ✓ The current court is lower in the hierarchy than the precedent court; AND
- ✓ The current 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 precedent remarks come from the *ratio decidendi* of its judgment.

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.
Fill each hurdle above with one of the conditions for binding precedent.***

Persuasive precedent

Persuasive precedent is formed by any legal principle or remark that is not binding on the current case. There are many different reasons why a precedent might be binding, and only *one* needs to be present.

Reasons why a legal principle or remark might be only persuasive include:

- ✗ The precedent court is from a different hierarchy than the current court; OR
- ✗ The precedent court is lower in the hierarchy than the current court; OR
- ✗ The precedent case is on a different area of law than the current case; OR
- ✗ The precedent case has slightly different material facts than the current case; OR
- ✗ The remarks being argued as precedent come from the *obiter dicta* of the judgment; OR
- ✗ The precedent court is an inferior court with unreported judgments, such as the County Court.

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: whether the will was contained in a "document," and whether 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 that are persuasive in Australia.

REVIEW QUESTIONS – Binding and persuasive precedent

1. Which law-maker makes precedent?
2. Provide a synonym for 'precedent'.
3. Where is precedent written down?
4. Give the English for '*stare decisis*'.
5. Give the English for '*ratio decidendi*'.
6. Give the English for '*obiter dicta*'.
7. Provide a synonym for 'binding'.
8. Provide a synonym for 'persuasive'.
9. What is the fundamental difference between binding and persuasive precedent?
10. What is the only part of the judgment that is capable of forming binding precedent?
11. Is the Magistrates' Court capable of setting binding precedent?
12. Will a statement of law from a higher court in a different hierarchy be binding?
13. If a precedent is argued to a judge as binding, can the judge reject that and find the precedent to be persuasive?
14. Who determines whether a precedent is binding or persuasive in a case?
15. Give two examples of circumstances in which a precedent will be incapable of being applied as binding.
16. What happens when a dispute comes before the courts and there is no law that exactly covers the area?
17. Can courts make and change the common law whenever they want? Explain your answer.

Developing precedent

There are a range of instances in which a court will not apply or follow a precedent. A precedent might be argued as a persuasive rule to the court, or it might be *argued* as a binding rule by one of the parties, but the court may choose to reject the party's arguments and find the precedent persuasive only. The court might apply a precedent submitted by the opposing party instead, or it might decide the precedent doesn't apply to the facts of the case. If the court has authority, it might even decide the rule in the precedent is wrong and change it.

There are a number of technical labels for these situations. The ones listed in the Study Design are reversing, overruling, distinguishing, and disapproving.

Reversing

Keyword: Successful appeal

Definition

If a case is heard on appeal, the appeal court may reverse a statement of law established by an earlier hearing by rejecting it and replacing it with a different precedent.

Detail

The appeal court may decide that the precedent was made in error and, since the later court is higher than the precedent court because an appeal always rises through the hierarchy, it may choose to 'reverse' the precedent and invalidate it entirely.

Overruling

Keyword: Retrospective change

Definition

If a statement of law from an earlier case is argued before a higher court, and the court believes the earlier precedent was made in error, the later court may overrule the principle by invalidating it retrospectively and replacing it with a different precedent.

Detail

Overruling has the effect of erasing the original statement of law as though it never existed. This is why it occurs very infrequently, and only when the later court decide that the original precedent was made in error.

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*, 'land belonging to no-one'. The precedent of *terra nullius* was a common law principle in 1788 that gave the Indigenous people in Australia the legal status of 'non-owners' – people not capable of owning land, because they did not have systems of land settlement and government that the British recognised. The British were therefore entitled to colonise Australia under international law.

The High Court overruled the previous common law of *terra nullius*, which found it as wrongly decided *from the very beginning* in 1788. The Court replaced it with a new common law rule of native title, traditional Indigenous ownership over land, and treated this new statement of law as though it had been the law *from the very beginning* when Australia was colonised.

Distinguishing

Keyword: Different material facts

Definition

A court may distinguish the material facts of the case before them from the facts of the precedent case and determine that the precedent is not relevant to their set of facts.

Detail

The source of distinguishing can be that the facts of the current case are themselves different from the case that set the precedent, but it can also be that *society* has changed since the precedent was set and the precedent is no longer appropriate or relevant to the facts of the current case.

Disapproving

Keyword: Criticism

Definition

A court may disapprove a precedent by criticising it in their *obiter dicta*, regardless of whether the judge then follows that precedent or chooses not to follow it by using a method of departure such as distinguishing.

Detail

'Disapproving' is not itself a method of departure. A lower court may express disapproval, for instance, but be compelled to follow a binding precedent anyway. If a higher court disapproves a precedent, this is a signal to lower courts to use other principles of law where possible, even if the higher court chooses not to take the radical step of formally overruling the precedent. Disapproval is a strong signal from the courts that the law is considered outdated.

State Government Insurance Agency v Trigwell (1979) 142 CLR 617

In *Trigwell*, the High Court *declined* to alter or depart from an existing common law rule that gave the owners of livestock immunity if their animals escaped and caused injury. Multiple judgments on the case disapproved the precedent, which had been adopted from the British case of *Searle v Wallbank*, but the majority followed it. The criticisms prompted parliament to abrogate it through statute.

Justice Gibbs said, for instance, called the common law rule "anachronistic, inconsistent with principle and unsuitable to modern conditions." Justice Murphy noted that Australian law reform bodies had investigated the rule and "the tenor of all of them is that *Searle v Wallbank* should not be part of the law."

REVIEW QUESTIONS – Developing precedent

1. Which method of departure is used when a precedent is overturned on appeal?
2. Will the original precedent still be good law after it has been reversed?
3. Which courts have the power to overrule a precedent?
4. Will the original precedent still be good law after it has been overruled?
5. Which courts in the hierarchy have the power to depart from a precedent by distinguishing it?
6. On what grounds may a precedent be distinguished?
7. Will the original precedent still be good law after it has been distinguished?
8. What would a court do in its judgment if it wanted to disapprove a precedent?
9. Will the original precedent still be good law after it has been disapproved?

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, but the High Court will be included, as it exercises state jurisdiction and hears cases on appeal that began in Victorian courts.

The doctrine of precedent

Keyword: *Stare decisis*

Definition

The common law system of precedent is based on the principle of *stare decisis*, which means that courts are expected to stand by previous common law decisions and prioritise consistency. This enables higher courts to set legal rules with authority, but prevents courts from changing rules if they cannot depart.

Detail

There are a range of points to consider when analysing the impact that the doctrine of precedent has on the ability of courts to make law. These include:

- The ability of the court to depart radically by overruling, versus the easier departure by distinguishing the material facts of the case or the contextual facts of society changing.
- The nature of precedent only being set or changed retrospectively, *ex post facto*, after the facts have already occurred and when a case is brought.
- The influence of persuasive precedent, even if there is no binding statement of law.
- The impact of the separation of powers: parliament is the supreme law-maker, and can override precedent; courts can also be reluctant to radically change precedent because the judge may consider it a law-making function.



Exam tip: Recognise the overlap between topics and use detail from other dot-points to elaborate and explain. The previous dot-points on statutory interpretation, binding vs persuasive precedent, and departing from precedent are all detail relevant to this sub-heading – as well as earlier material on the High Court interpreting the Constitution.

REVIEW QUESTIONS – The doctrine of precedent

1. Give a synonym of the word 'doctrine'.
2. Give a synonym of the word 'precedent'.
3. If a court has authority and opportunity, how does the doctrine of precedent allow it to create law rather than simply decide the outcome of one case?
4. How does the doctrine of precedent create consistency?
5. What is the English for 'ex post facto'?
6. What is the meaning of 'supreme law-maker'?
7. Does the separation of powers mean the courts *cannot* make law?

ENABLING COURTS	LIMITING COURTS
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. Even though precedent can be changed over time or created in gaps in the law, the doctrine manages this unpredictability by limiting the courts with the authority to do this. Only superior courts with experienced judges, who hear fewer cases, have the authority to do this. Judges can create new common law when a dispute arises in a test case 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 and a gap in the law is filled. For instance, when <i>Donoghue v Stevenson</i> was decided in 1932 because a consumer was injured by a snail decomposing in her bottle of ginger beer, no law of negligence existed and had to be developed fresh by the courts. 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.	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. Prioritising consistency and predictability above all else stops the law achieving substantive fairness. 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, but the original rule will remain good law. 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. Any changes made to the law through precedent tend to be incremental and take a long time. Because the doctrine of precedent limits courts to making law <i>ex post facto</i>, only once a case has come before them, entire areas of law can remain incomplete or ambiguous because no case has been brought. Judges cannot initiate rulings or give advisory opinions.

Judicial conservatism and judicial activism

Judges differ on their approaches to judicial law-making and developing precedent, particularly when interpreting legislation.

APPROACH	VALUES	MEANING
Originalism or original intent interpretation	Most conservative	An interpretation that is the same as that which was intended by the framers of the Act when it was written is the goal, so that the legislation keeps its original character as much as possible.
Legalism or textualism	Conservative	An 'objective' or literal interpretation of the text is the goal, so that the interpretation is theoretically protected from politics and the individual values and philosophies of judges. The history of precedent and prior authority may be relied on heavily here, to reduce the discretion of individual judges.
Purposive interpretation	Progressive	An interpretation that achieves the underlying purposes of the individual section and/or the statute as a whole is the goal, so that judges are tied to the goals of the framers but not their ignorance of the future, new technologies, or outdated attitudes.
'Living tree' interpretation	Most progressive	An interpretation that brings the operation of the statute in line with contemporary needs, attitudes and values is the goal, so that the meaning of the law grows along with the country – like a tree.

These principles can also be applied to developing common law rules in areas where there is no legislation. For example, in the *Trigwell* case the High Court preferred to follow the common law rule that the owner of livestock was immune from negligence actions if the livestock escaped and caused injury. This was a common law precedent that the Court had the authority to change, but the majority described it as a "settled" statement of law, and did not think it was a judicial function to change "settled" law.

Judicial conservatism

Keyword: Original

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, and that judges should apply the original intentions of parliament or common law rules that are already settled.

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 the existing common law rule, even though it had the authority to overrule or distinguish the precedent.

Justice Ninian Stephen said in his judgment: "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

Keyword: Change over time

Judicial activism is 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 over time.

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, looking at contemporary needs or views, or creating new rules in areas where parliament has failed to act.

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 express a freedom of speech in any way, and the inclusion of an implied right by reference to the democratic system of representative government 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.

REVIEW QUESTIONS – Judicial conservatism and judicial activism

1. Provide synonyms of 'conservatism'.
2. Provide synonyms of 'activism'.
3. How do judicial conservatism and judicial activism relate to the separation of powers?
4. Explain the relationship between judicial conservatism and parliament's intentions when drafting legislation.
5. Explain the relationship between judicial activism and parliament's intentions when drafting legislation.
6. Explain the relationship between judicial conservatism and established common law rules.
7. Explain the relationship between judicial activism and established common law rules.
8. How is judicial activism represented by a 'living tree'?

ENABLING COURTS		LIMITING COURTS
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. 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. Judicial conservatism respects existing common law rules that are "settled" and therefore known and understood in society. This prevents courts from changing precedent, but gives court-made law more power once it is made, because generations of judges will respect these existing rules.	Judicial conservatism	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, and there are incomplete records of the intentions behind each section. It is not always possible to <i>know</i> what the original intentions of parliament were behind the language of statutes. Conservatism limits courts from keeping the law healthy and relevant. One reason old statutes like the Constitution have endured is because the courts have been able to keep it relevant by evolving its meaning. 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. Judicial conservatism hides the subjective decisions and value-judgments of individual judges by claiming they are not used or relevant. Each case will involve ambiguity and judgment-calls, however – conservatism simply pretends this doesn't happen, which means it can't be scrutinised.
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. 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. 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. Effective rules are kept, and ineffective ones are changed case-by-case.	Judicial activism	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. 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. 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.

Costs and time in bringing a case to court

Keyword: Barrier

Definition

Individuals and governments must ask the courts to develop or clarify the law by initiating a case that raises questions of statutory interpretation or a common law rule, but the need for claimants to invest their *own* resources of money and time into these cases acts as a barrier to the courts reviewing laws that need it.

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. Australian courts do not have the power to issue advisory opinions in matters of precedent without a contested matter being brought to them.

The claimant in the case will 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.

REVIEW QUESTIONS – Costs and time in bringing a case to court

1. Which party must pay most of the upfront fees to bring a court case?
2. Can adverse costs awards be made in cases where the courts were being asked to consider precedent?
3. Can a shorter hearing in the Magistrates' Court set or change court-made law?
4. Can juries set or change court-made law?
5. Why must cases usually be heard on appeal in order to set or change court-made law?

ENABLING COURTS	LIMITING COURTS
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. 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. 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. People are less likely to waste their own time and money on frivolous cases.	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. 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. 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.

The requirement for standing

Keyword: Directly affected

Not every interested party in society is able to ask the courts to review the law: 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 can be charged with breaking a criminal law
- ✓ A state government can argue that the Commonwealth has legislated improperly to infringe on its residual jurisdiction
- ✓ An individual or organisation can be barred from doing an action they believe they have a legal 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 to help the court better understand a relevant legal point; 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 – The requirement for standing

1. Can individual people in society bring a case to court and ask the judge to review or change the law?
2. Can companies and organisations in society bring a case to court and ask the judge to review or change the law?
3. Can governments bring a case to court and ask the judge to review or change the law?
4. Can the courts develop precedent without harm or loss being suffered first? Explain your answer.
5. Are the courts able to review or change the common law without a case being brought to them first?
6. Are the courts able to review or change the common law if a case is brought to them *but* that change is not argued by either party to the case?
7. Do third-party interveners have standing to ask a court to make or change the common law?
8. Do *amicus curiae* have standing to ask a court to make or change the common law?

ENABLING COURTS	LIMITING COURTS
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. 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 would not have standing if they did not have an individual willing to act as the named plaintiff. 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.	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. 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. 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.

Evaluation: Factors that affect the ability of courts to make law

APPLICATION EXERCISE – Factors that affect the ability of courts to make law: evaluation

Adopting some judicial conservatism in the development of statutory interpretation 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 left in statute law – for instance, the *Crimes Act 1958* (Vic) doesn't define a crime of murder, as it exists in precedent.

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 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. This means that the examination can include questions explicitly naming any or all of them.

The supremacy of parliament

Keyword: Power

Definition

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.

Detail

Sovereignty also means that parliament 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.

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 courts can invalidate law as being on a matter outside the jurisdiction of the parliament – for being unconstitutional or *ultra vires* the parliament's power – but they cannot override 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.

REVIEW QUESTIONS– The supremacy of parliament

1. Give a synonym for 'supremacy'.
2. Identify one body that can make law other than parliament.
3. How does parliament 'override' law made by other bodies?
4. What does 'retrospective' law-making mean?
5. What does 'prospective' law-making mean?
6. Could parliament legislate for the entire education system in one statute?
7. Could parliament pass a statute covering just one school?
8. Give the English for 'ultra vires'?
9. Give the English for 'intra vires'.
10. Outline the difference between amending and repealing.

The ability of the courts to influence parliament

Keyword: Responsiveness

Definition

The courts cannot direct parliament to legislate, but the detailed judgments and verdicts provided by courts can inform parliament of the need for reform in the law or draw parliament's attention to injustices in society not currently being regulated by appropriate law. Parliament may be compelled to respond to court outcomes by legislating on the area.

Detail

Parliament may be influenced to respond in a range of ways:

- If parliament supports common law rules developed by the courts, this can be a trigger for it to draft its own law along the same lines. Alternatively, common law rules that do not reflect parliamentary values or priorities can motivate legislation overriding precedent.

- If parliament disapproves of the interpretation given to existing legislation by courts, they may amend statutes to clarify the meaning of words or phrases. Parliament may also be influenced to legislate to include an interpretation it agrees with, if there is concern that the interpretation might be changed in the future – for instance, if a minority judgment disapproves it.
- Sometimes courts will use their *obiter dicta* comments to ask that parliament consider an issue or reform an area of law, such as the High Court did in *Trigwell* with the immunity for owners of livestock. 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. Parliament may act on these comments as written, or may inquire independently into the area of law and make its own changes.
- Some courts exist in order to make recommendations to parliament for law reform – the primary example of this in Victoria is the Coroner’s Court. The Coroner’s Court will alert parliament to any causes of large fires or preventable deaths that can be addressed through regulation, and parliament may choose to act on these recommendations.

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. It did not win the 2019 election, but after the 2022 election the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* was passed. It did not restore penalty rates *or* abrogate the *Esso* decision, but it made a raft of changes that Labor argued would improve worker conditions and bargaining across the board and that had been inspired by the *Esso* judgment.

REVIEW QUESTIONS– The ability of the courts to influence parliament

1. Can courts instruct parliament to legislate?
2. Is parliament bound by its own previous legislation?
3. If parliament bound by the statements of law made by the courts?
4. Differentiate between *ratio decidendi* and *obiter dicta*.
5. Does the *obiter dicta* of a judgment form part of the common law?
6. Is parliament able to override one part of the common law but retain other parts?

The codification of common law

Keyword: Confirm

Definition

‘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 common law principle into legislation so that it cannot be altered by the courts.

Detail

If parliament decides that a precedent or a collection of precedents are effective and desirable law, it may choose to take those precedents and arrange them into a more organised and permanent statement of law. Parliament can then pass that as an act, and the law will have legislative force.

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 is an example of codification: the year after the judgment that ‘marriage’ was defined in law as the union of one woman and one man, federal parliament codified the definition of marriage as the union of one woman and one man. This definition was altered by legislation in 2007 to include same-sex marriage, but once codified was not able to be changed again by the courts.

REVIEW QUESTIONS– The codification of common law

1. Give a synonym of 'codifying'.
2. Can the courts follow the wording of their original common law after parliament has codified the rule?
3. Does the entire common law need to be codified, or may parliament choose aspects?

The abrogation of common law

Keyword: Change

Definition

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, overriding, or abolishing.

Detail

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.

- 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.

Marital immunity for rape

Marital immunity was a common law doctrine that protected a husband from charges of rape against his wife on the basis that the marriage contract gave him perpetual matrimonial consent to sexual intercourse. It was summarised by Byrne J in *R v Clarke* [1949] 2 All ER 448 as: "The intercourse between husband and wife is, therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage."

In 1980 the Victorian Parliament *partly* abrogated this in the *Crimes (Sexual Offences) Act 1980*. Section 62(2) said that when a married man is living "separately and apart" from his wife, the immunity no longer applied. They named this section 'Abrogation of Obsolete Rules of Law'. In September 1985 *The Age* reported on a Supreme Court case in which a man plead guilty to assault charges against his wife, but was acquitted of rape charges because the two were not living "separately and apart." The newspaper interviewed the wife victim, but was not able to report her name or the name of the case because the judge hearing the matter made an order suppressing case details as well as his own name.

Victorian Parliament responded to the public outcry within three months by amending the *Crimes Act* to state that "The existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration."

- 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 and replace it with a definition based in biology – his government drafted a bill to abrogate the principle that a person could be classified as a legal 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.
- Parliament may respond to a recommendation in the *obiter dicta* of one or more cases, advising parliament that the law is out-of-date and advising that it be reformed. For instance, following the *Trigwell* decision.

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: "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 QUESTIONS– The abrogation of common law

1. Give a synonym of 'abrogating'.
2. Can the courts follow their original common law after parliament has abrogated the rule?
3. Does the entire common law need to be abrogated, or may parliament choose aspects?
4. Will the common law be abrogated if the legislation fails to use the word 'abrogated' or 'abolished', but creates a new rule that is inconsistent with the common law?

Evaluation: Features of the relationship between the courts and parliament

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

FAVOURING PARLIAMENT	FAVOURING COURTS
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. 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 wait for multiple fact scenarios to be developed, see this in the big picture, and make comprehensive changes based on the experience of the courts. 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 in the future. 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 or too 'settled' for the common law to reform.	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, so the relationship is reciprocal and the parliament does not have unfettered authority over courts. 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, even by abrogating the common law, the courts can interpret that legislation. 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. The details of law will always be developed piece-by-piece when the specific facts of each individual case are considered. Parliament may not always expressly abrogate the law. Depending on how comprehensive or clear the wording of the statute is, parts of the common law may therefore continue to operate in the gaps. It is impossible for parliament to foresee every situation where law will be required. For instance, when <i>Donoghue v Stevenson</i> was decided in 1932 because a consumer was injured by a snail decomposing in her bottle of ginger beer, no law of negligence existed. The courts will always have a role in developing law for unforeseen situations or areas where parliament has not acted.

APPLICATION EXERCISE – Courts and parliament as law-makers: evaluation

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:

- Common law provides consistency and predictability through the application of precedent.
- Courts can fill in the gaps in the law.
- Judges make law piece-by-piece as cases come before them needing resolution.
- Courts are independent and impartial law-makers, unelected and apolitical.



AOS2: THE PEOPLE AND REFORM

Part 1: Law reform

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

Keyword: Unforeseen harm

Definition

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 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 other formats, to be expanded by judges when others emerged.

The Productivity Commission made formal recommendations in 2017 that these laws be changed. The *Copyright (Disabilities and Other Measures) Act 2017* was passed soon after 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

Keyword: Accepted

Definition

‘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 euthanasia 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 end their own life.
- The 2018 introduction of safe injecting rooms can be used, because it reflects a change in attitude away from punitive and deterrent responses to drug use and towards an alternative value of medicalised treatment and supervised use.

A desire to generate changes in attitudes

Keyword: Progress

Definition

Parliament may pass new laws to encourage greater tolerance or 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 goal of the Commonwealth's *Racial Discrimination Act 1975* was to formally discourage harmful treatment of others on the basis of perceived race and encourage the Australian public to conform with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that Australia had ratified.
- 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

Keyword: Closing loopholes

Definition

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 2017 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. In October 2023 the Bail Amendment Act was passed to modify some of these changes and reduce improper pre-trial detention.
- The Victorian Parliament introduced the new crime and defence of 'defensive homicide' in 2005: excessive self-defence, that could be used as a partial defence to a murder charge, but could also be charged as a crime in its own right. It was intended to be used in situations where a person had a reason for self-defence, but used too much force or the reason was not objectively sufficient and they overreacted. It was used to victim-blame or excuse inappropriate force, however, and was therefore abolished in 2014.

Responding to new threats

Keyword: Minimising risk

Definition

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, kidnapping, or terrorist acts.

LAW REFORM INFLUENCE FROM INDIVIDUALS AND GROUPS

Law reform includes repealing or abrogating an existing law, amending a law, or introducing a bill on a new area that has not been legislated on before. 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 or introduce their own bill, but there are a range of strategies they can use to try to persuade law-makers to take the action for them.

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, but 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. Mobilising the average person to act on a reform issue is also 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.

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.

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

Keyword: Signatures

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.

REVIEW QUESTIONS – Law reform influence through petitions

1. What is a petition a collection of?
2. Can a petition simply name a general area of law that the people wish the parliament to inquire into?
3. What is the difference between a traditional petition and an e-petition?
4. Can e-petitions on websites like change.org be presented to parliament?
5. Can a parliament receive a petition that covers matters outside its constitutional powers?
6. Give one example of a petition being effective.
7. Give one example of a petition being ineffective.

Demonstrations

Keyword: Impact

Definition

A demonstration, also known as a protest, usually involves a group of individuals making a visible public statement to express desire for a change in the law, often by physically gathering together.

Detail

Demonstrations can take a range of different forms, including strikes by employees, boycotts of products, and marches progressing along major thoroughfares. 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 to the industry or company targeted, to the parliament, or to the community as a whole.

Even though popular wisdom states that disruptive or unlawful protests will damage the cause and lose public support, research such as the July 2023 Social Change Lab study suggests that "the strategic use of nonviolent disruptive tactics" are actually one of the most effective ways to force actual change and not be dismissed: "Disruption of everyday life is often the best way to receive media attention, generate visibility for a cause and above all to push political and economic elites to compromise and accept change, if only to protect their own interests."



Examples

- 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. One of the calls was for people to vote against the Liberal Morrison Government at the upcoming 2019 election, as the Labor Opposition promised to undo recent changes to casual work if elected. The Change the Rules rally began at Trades Hall in Carlton, and progressed down Swanston St and along Bourke St to Parliament House. Victorian Labor premier Daniel Andrews marched with protestors, who said that the objectives of the march were more important than the disruption caused.

Labor was not elected in 2019, and the Morrison Government did not improve laws for casual workers. The Albanese Labor Government was elected in 2022, but prioritised passing wage theft legislation in December 2023 and committed to taking action on casual work and gig economy insecurity in 2024.

- In May 2023 four Greens MPs and local residents of the Wombat State Forest protested Labor Government changes to protest laws, risking arrest by breaching conditions of the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic) that criminalises protest activity that disrupts forestry and logging activity. Penalties include fines of up to \$21,000 or 12 months' imprisonment. The law has not been repealed.

REVIEW QUESTIONS – Law reform influence through demonstrations

1. Give a synonym of 'demonstration'.
2. What is a march, as a form of protest?
3. What is a boycott, as a form of protest?
4. What is strike, as a form of protest?
5. Identify how demonstrations may cause disruption or social conflict.
6. Give one example of a demonstration being effective.
7. Give one example of a demonstration being ineffective.

Use of the courts

Keyword: Change precedent

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 they have standing in the case, and must put legal arguments to the court that address the change they are hoping to make: the court's judgment will only consider the arguments made by the parties to the case.

Once the petitioner to the courts presents 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. Alternatively, 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. If the case being brought is a private law civil one, rather than a criminal one, out-of-court settlement will prevent law from being changed by the courts. It could still influence a change in government policy or legislation, but it will not alter precedent or create *obiter dicta*.

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.

Use of the courts for climate action

In November 2020 a 25-year-old man sued his superannuation fund, Rest, for failing to manage the financial risks of climate change. Rest settled with him out of court, and agreed that its trustees would commit to net-zero emissions for its investments by 2050. Because the case was settled, no precedent was set.

In May 2021, the Federal Court found that the federal Environment Minister had a duty of care to young people in relation to the impact on them of climate change. This determination set a precedent. The matter was a class action brought against the Minister, Sussan Ley, by eight named plaintiffs on behalf of all Australian children and teenagers. The teenager plaintiffs based their claim on the Whitehaven coal mine in New South Wales, arguing that if the Minister approved the extension to the mine she would be breaching her duty. They also asked for an injunction to prevent the approval.

The Minister appealed the decision, and in 2022 the Full Bench of the Federal Court reversed the finding, and held that the Minister did *not* owe a duty of care in these circumstances. They held that court proceedings were inappropriate vehicles to determine matters of public policy and that the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) did not impose the duty on her.

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 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.

REVIEW QUESTIONS – Law reform influence from use of the courts

1. Can courts change the law directly if a case is brought before them?
2. Can courts influence parliament to change the law through legislation?
3. Are courts able to change the law in a way not argued by either party to the case?
4. Is it possible to challenge the validity of a law if you have been arrested and charged under that law?
5. Is it possible to challenge the validity of a law on behalf of others if you are a community advocacy organisation?
6. Give one example of use of the courts being effective.
7. Give one example of use of the courts being ineffective.

Evaluation: Law reform influence from individuals and groups

STRENGTHS		WEAKNESSES
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. 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." 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.	Petitions	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. Petitions do have direct contact with parliament, but parliament is overwhelmed by petitions: in the first 18 months of the 47th federal parliament, from 26 July 2022, the House of Representatives received 775 petitions with 1,002,046 signatures. This volume dilutes the effect of any one petition. 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.
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. 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. A protest that is large and receives a lot of publicity can draw parliament's attention to the need for change in the law.	Demonstrations	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. 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. 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.
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.	Use of the courts	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.

APPLICATION EXERCISE – Law reform influence from individuals and groups

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.

- 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.
- 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."
- 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.
- 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.

ROLE OF THE MEDIA IN REFORM

Keyword: Reach

Definition

The media can be used by itself to inform and persuade other people in society about need to change the law because of its wide reach and ability to access millions of people simultaneously, 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.

Detail

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.

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.

Traditional media

Keyword: Editorial control

Definition

Traditional media comprises television news and advertising, radio, newspapers and magazines. It encompasses any method of communicating current events or opinions over which a central organiser exercises editorial control, choosing what information is conveyed and the angle it takes, and fact-checking or moderating contributions.

Detail

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.

Groups and individuals can also 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.

Examples

- In 2016 regional TV networks re-ran their Save Our Voices campaign in the lead-up the federal election, in an effort to influence the federal parliament to reconsider its plans to change the law to allow metropolitan networks to acquire regional networks and, in most cases, scrap the regional services. A group of networks including WIN and Southern Cross Austereo funded the campaign, but it was ultimately unsuccessful.
- Carbon pricing legislation was introduced by the federal Gillard Government in 2012, despite the Chamber of Commerce and Industry, the Coal Association, the Minerals Council and the Housing Industry Association joining to launch an advertising campaign against it that cost over \$10 million. In 2012 the Australian Centre for Independent Journalism and the University of Melbourne found inaccurate reporting and biased language against the laws. The Liberal Opposition used this negative public sentiment to win the 2013 election, and repealed the carbon price in 2014.

Social media

Keyword: Decentralised

Definition

Social media comprises social networks such as Twitter, forums such as Reddit, image-sharing and video-sharing platforms such as Instagram, and the comments sections on any site where members of the public can contribute in a decentralised and uncontrolled way.

Detail

Groups and individuals can use a range of social media platforms to distribute campaign materials for free, and reach an unlimited number of supporters and interested parties without funding and coordinating large-scale letterbox drops or paid advertising

spots. Posts on Facebook, Twitter, Instagram, YouTube and private blogs, for instance, can ask supporters to share the message, attend a rally, financially support a cause, or contact their own local member of parliament.

Action 1 – Social Media Swarm

For one targeted week (24 November – 1 December) we want to swarm Attorneys-General social media with #RaiseTheAge on Instagram, X (Twitter) and Facebook.

Take a photo of you with #RaiseTheAge written on paper, a big sign or whatever you've got close by (get creative!) and tag your State/Territory Attorney-General and Federal Attorney-General Mark Dreyfus.

Tell them that you want them to #RaiseTheAge to at least 14 now, and feel free to add why this is important to you. Make sure you use the #RaiseTheAge hashtag in your caption so we can see your posts!

Looking for more content or info you can share with your photo? Download this pack of Week of Action [social media tiles here](#).

#RaiseTheAge instructions to supporters

Social media lacks centralised or editorial control because any member of the public can post or share whatever information or message they like. There is no person or organisation controlling the point of view put forward on an issue, and no fact-checking body that ensures material shared on social media is accurate. Members of the public can also discuss issues with each other in an open forum, asking and answering questions without needing qualifications or expert authority.

Examples

- In 2013 Michaela Banerji was fired from the Department of Immigration and Border Protection for using an anonymous Twitter account to criticise Government policy. In 2019 the High Court held that her freedom of political communication had been limited, but that this was appropriate because of the likelihood that she would eventually be identified, and because it was appropriate for the Government to want to stop its own public servants from trying to influence policy using the media.
- The Robodebt royal commission was triggered in part by social media activism. The Robodebt Twitter campaign began on Boxing Day 2016 with the hashtag #notmydebt and activists set up the Not My Debt website – around 100 Twitter accounts initially produced around half the posts, getting engagement from around 10,000 others. In late 2017, the name 'Robodebt' was created and this hashtag took over. This became the name of the eventual royal commission.

Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022 (Vic)

In 2022 the Victorian Parliament legislated to criminalise protest activity that disrupts forestry and logging activity. Penalties include fines of up to \$21,000 or 12 months' imprisonment.

The Victorian Forest Alliance had a campaign to stop the law from passing. It said: "Many world-renowned National Parks and significant heritage areas in Australia have been protected by just these sorts of protests. [...] The Human Rights Law Centre called it unnecessary, undemocratic, and threatens our fundamental democratic freedom to protest. You can take action by emailing your local member to put pressure on the Andrews government to withdraw the bill!" It also provided a template email for supporters to complete and send to their local MP, and hosted a petition.



Image by Matt Hrkac

On 20 May 2023, the day the Act came into effect, nearly 200 environmental activists gathered at five logging sites, openly defying the law. No arrests were made.

REVIEW QUESTIONS – Role of the media in reform

1. Give two specific examples of traditional media.
2. Give two specific examples of social media.
3. What does it mean to have 'centralised' or 'editorial' control?
4. In what way does social media lack centralised or editorial control?
5. How might public awareness translate into pressure on parliament?
6. Give one example of use of traditional media being effective.
7. Give one example of use of traditional media being ineffective.
8. Give one example of use of social media being effective.
9. Give one example of use of social media being ineffective.

Evaluation: Role of the media in law reform

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

STRENGTHS	WEAKNESSES
Paid campaigns generally have very clear messages that have been honed and subjected to market research. They are as powerful and memorable as possible. 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. 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. 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 if those members of the public translate their support into petitions, lobbying of MPs, and voting patterns at elections. Social media gives everyday members of the community more direct participation in our government and laws, and a sense of ownership over social issues, because it allows them to engage personally. Everyone can share their opinions, ask and answer questions, and even post directly to the accounts of influential members of government and parliament. Social media encourages law-makers to host their own pages and accounts, and talk directly to the people they are making laws for. Many members of parliament post updates on their work and respond personally to comments from constituents in real time, involving the public and informing themselves of public opinion.	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. 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 the increasing influence of bots and AI over social media, which floods feeds with inauthentic accounts and fake 'public support'. 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. 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 detail of the law or policy. Inaccurate information and bias compromise all forms of media. Traditional media is subject to editorial control, and media owned by the same group may be compelled to favour one point of view on an issue – even if that introduces bias into the coverage. Social media by its nature is subjective and unreliable, because it lacks any editorial control, fact-checking, or professional objectivity. Sites such as 'X' (Twitter) have introduced 'Community notes' to crowd-source fact-checking, but there are no controls placed on contributors to the Notes to ensure they have knowledge in the area.

FORMAL LAW REFORM BODIES

In addition to informal methods of influence, there are a range of formal bodies that are established by parliamentary or government action, and that are publicly funded. The Study Design expressly lists the Victorian Law Reform Commission for study, along with *one of either* a parliamentary committee or a royal commission. Students should not study both.

Role of the Victorian Law Reform Commission

The Study Design focuses on the role of the Victorian Law Reform Commission, and its ability to influence law reform.

Keyword: Recommendations

Definition

The Victorian Law Reform Commission ('VLRC') is an independent body established by the Victorian Parliament to assist it with law reform and research in the state. The VLRC conducts research into existing legislation or a proposed new law, assessing its effectiveness, and recommending changes to the Victorian Parliament.

Exam tip: The two most important parts of the VLRC's role are the process of investigation and the ability to make recommendations to parliament. You should ensure you include examples of steps the VLRC will take to research the reform, and the fact that it has the power to recommend but not to actually change the law itself.

Detail

The process of the VLRC can be split into the following stages, *RRRR*:

- i. Referral
- ii. Research
- iii. Report
- iv. Response

The VLRC is funded by the parliament, but is not controlled by the parliament or the Government of the day. 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.

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.



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 any aspect of it.
- On 25 October 2022 the Attorney-General asked the Victorian Law Reform Commission to inquire into and make recommendations on the meaning of 'recklessness' in Victorian criminal law. The VLRC is considering whether the definition of recklessness in Victoria should change from knowledge of probable harm to knowledge of possible harm or something else, and whether a definition should be written into the *Crimes Act*. In some Australian jurisdictions, for most offences against the person involving recklessness other than murder, the accused need only foresee the possibility that harm might occur for recklessness to be established. The Commission concluded that recklessness test for offences against the person should not change and does not need to be legislated. The report was tabled in Parliament on 28 May 2024.

The Commission said: "unusually for a VLRC project, the subject matter was recently considered by both the Victorian Court of Appeal and the High Court of Australia. Although narrowly deciding that the current law concerning recklessness should continue to apply in Victoria, members of the High Court criticised the correctness of Victoria's current test. Such criticism was echoed by Victoria's prosecutorial agencies. But the Commission must consider a range of factors in making its recommendations. In this inquiry, we had to balance the views of the High Court with policy considerations, taking into account submissions by other stakeholders that the current test operates well and has done so for more than 25 years. Moreover, the test is just one piece in a complex system, and piecemeal reform to a single element could have far-reaching consequences. We have concluded that to disturb a functioning system to achieve unclear results would not be a wise course of action."

One recent VLRC inquiry

Exam tip: The Study Design expressly requires that you know one "recent" example of an inquiry the VLRC has undertaken in relation to law reform. The Study Design defines 'recent' as within the last four years – this is a hard-line definition, and should be dated from the conclusion of the inquiry. In other words, four years from when the final report was tabled in parliament.

The recent Commission inquiry must relate to law reform in the civil or criminal justice systems.

Inclusive juries

The last year this recommendation will be considered 'recent' is 2027, based on the 2023 date of the final report.

Referral

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 referral the Commission framed for itself focused on the changes to legislation and court practice that should be made to enhance access for people who wish to serve as jurors, but who experience impairments. Currently, people with hearing and vision 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 under the '13th juror' rule.

Research

In August 2020 the Commission consulted with a small group of stakeholders including the courts, legal professionals, and disability advocacy groups in order to frame its consultation paper. The paper was published in December 2020 and public submissions were invited – the Commission received 14 submissions from stakeholders such as Blind Citizens Australia and Juries Victoria. Twenty-nine stakeholder consultations were also held online.

The Commission investigated the practice in comparable Australian and international jurisdictions such as the United Kingdom and the United States, where the jury systems permit jurors with hearing and vision impairment to serve.

Report

The Commission's final report was delivered to the Attorney General on 30 July 2022 and tabled in Parliament on 16 May 2023. In the Report the Commission made 53 recommendations, including:

- ✓ That the Government amend the *Juries Act* to abolish the '13th juror' rule. This would allow support people into the jury room if they took an oath to respect juror deliberations, not participate, maintain confidentiality, and interpret truthfully.
- ✓ That the law allow reasonable adjustments such as Auslan interpreters and speech-to-text readers to be used by jurors sitting on trials.

Response

No Government response had been released, and no recommendations had been implemented, as at the end of 2024.

REVIEW QUESTIONS – Role of the Victorian Law Reform Commission in influencing law reform

1. The VLRC usually reviews legislation in response to a reference. What is a 'reference'?
2. From whom does the VLRC receive its references?
3. How can the VLRC look into minor matters of community concern?
4. How does the VLRC's process ensure that recommendations it makes to parliament match the values and expectations of the community?
5. Outline a range of processes that the VLRC might go through in the course of investigating a possible change to the law.
6. Why might the recommendations made to parliament by the VLRC carry more weight than the message conveyed by a public demonstration?
7. Does the VLRC have the power to change the law? Outline the authority that the body has.
8. 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.

Role of government investigations in influencing law reform

Parliament has many research bodies feeding into its legislative process, which is one reason why it is an effective law-maker. Parliament establishes committees composed of members of parliament, gathered into smaller, specialised groups, and it can call on the government to call an independent royal commission, what the Australian Government website, Australia.gov.au, calls "the highest form of inquiry on matters of public importance."

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.

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: The Study Design expressly requires that you know one "recent" example of an inquiry the body has undertaken in relation to law reform. The Study Design defines 'recent' as within the last four years – this is a hard-line definition, and should be dated from the conclusion of the inquiry. In other words, four years from when the final report was tabled in parliament.

Parliamentary committees

Keyword: Specialised

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 specialised 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

The process of a parliamentary committee can be split into the following stages, *RRRR*:

- i. Referral
- ii. Research
- iii. Report
- iv. Response

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. In the first 18 months of the 47th parliament, from 26 July 2022, the House of Representatives had 108 committee reports presented, and the Senate had 268.

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. Select committees are formed for specific short-term purposes, while standing committees are permanent.

Examples

Committees can deliver multiple reports, often divided along party lines.

- For instance, the Joint Standing Committee on Electoral Matters report on the 2022 Election, tabled in November 2023, recommended donation and spending caps for federal elections, but the majority report helmed by the Labor Government chairwoman focused on “the potentially corrupting influence of big money,” while the minority dissenting report from Coalition members focused on donations by unions that flowed mainly to the Labor Party but would not be captured by the changes.

Parliamentary committee inquiry case studies

Inquiry into Anti-Vilification Protections in Victoria

This inquiry is also known as the ‘Nazi symbol ban’. The last year this recommendation will be considered ‘recent’ is 2025, based on the 2021 date of the final report.

Referral

The Legal and Social Issues Committee is composed of members of the Legislative Assembly in the Victorian Parliament. In September 2019 it was referred an inquiry into Victoria’s anti-vilification laws and asked to consider the effectiveness of the *Racial and Religious Tolerance Act 2021* (Vic) and whether the law against ‘vilification’ should be expanded to categories other than race and religion.

Research

The Committee commenced its call for submissions in October 2019 through advertising in *The Age* and a stakeholder mailout. The inquiry was also promoted through Parliament of Victoria’s social media, including Facebook and Instagram. The Committee received 73 submissions from stakeholders, including government departments and agencies, community and social service organisations, community legal centres and experts, multicultural and religious organisations, academics and individual members of the community.

The Committee held seven days of public hearings, commencing in March 2020 and ending in June 2020. Public hearings were held remotely via video link and were live broadcast.

Stakeholder submissions were divided on the questions. Members of the public recounted instances of vilification and abuse, and the difficulty of bringing successful actions under the existing law, but organisations such as Liberty Victoria raised concerns about natural justice and freedom of expression. Liberty Victoria argued that the law would reverse the burden of proof and require the accused to prove a defence such as academic work rather than the prosecution to prove racial vilification. “This unravels the ‘golden thread’ of the criminal law of the presumption of innocence [...] Concerningly, it appears that these aspects of the proposed offence have been chosen to make prosecution easier, notwithstanding that in other contexts reverse onus provisions have been found to be unjustifiable and contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic).” They also pointed out that the prohibition of the swastika in Germany has not been effective in preventing the re-emergence of far-right extremism and argued for a focus on the causes of extremism including “social isolation, growing economic insecurity and mistrust in government and the media.”

Report

The Committee’s final report was delivered on 3 March 2021. The Committee found that the legal definition of ‘incitement’, urging others to commit an offence, is different from what many people in the community expect, and that it does not cover mere abuse. In the Report the Committee made 36 recommendations, including:

- ✓ That protections for anti-vilification be expanded in both criminal and civil regimes to cover additional attributes such as sex and sexual orientation, disability, and ‘personal association’.
- ✓ That powers be given to the Victorian Equal Opportunity and Human Rights Commission to regulate anti-vilification laws, and to be able to compel a person to produce documents needed for a complaint by filing the order with VCAT.
- ✓ That the law lower the threshold required to prove criminal vilification to include conduct that is “likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of” another person or class of persons based on their protected attribute.
- ✓ That a special criminal offence be created to outlaw any display of Nazi ideology, including the Nazi swastika, with limited exceptions such as for educational purposes.

In its Report, the Chairwoman stated that, “From the outset, the Committee was determined to strengthen Victoria’s anti-vilification laws [...] This will be achieved through recommendations such as lowering the legal threshold for incitement-based vilification and introducing a harm-based vilification provision to make it easier to substantiate a complaint.” This was ambiguous in terms of the purpose of the inquiry: it raised the question of whether the Committee was inquiring into *whether* anti-vilification laws should be expanded, or whether Committee members had already formed a position on this question and were only inquiring into implementation.

Response

In September 2021 the Victorian Government published its response to the Report, in which it supported all but one of the recommendations either in content or in principle. Some recommendations have since been implemented, and the Government commissioned Engage Victoria to conduct further rounds of public consultation in 2023.

In June 2022, Victorian Parliament passed the *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* to ban use of the swastika. Penalties include up to a \$22,000 fine or one year imprisonment. Exceptions were made for use in contexts such as existing tattoos, or by religions whose use of the swastika pre-dates the Nazi use. The law received bipartisan support. Attorney-General Jaclyn Symes said: “It’s a proud moment to see these important laws pass with bipartisan support – I’m glad to see that no matter what side of politics, we can agree that this vile behaviour will not be tolerated in Victoria.”

The *Summary Offences Amendment (Nazi Salute Prohibition) Act 2023* (Vic) was passed to expand the ban.

REVIEW QUESTIONS – Role of parliamentary committees in influencing law reform

1. Do committee members have to sit in parliament?
2. Can a committee be drawn only from one house of parliament?
3. Can a committee be drawn from across both houses of parliament?
4. Is a parliamentary committee independent of law-makers?
5. Do members of political parties sit on committees?
6. Which members of parliament do not sit on committees?
7. What are ‘terms of reference’?
8. Who gives a committee its terms of reference?
9. Can a committee investigate outside its terms of reference?
10. What is the difference between a select committee and a standing committee?
11. Identify two things a committee will generally do to investigate a matter referred to it.
12. Are the recommendations made by a committee binding on the parliament?

Royal commissions

Keyword: Public inquiry

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 process of a royal commission can be split into the following stages, *RRRR*:

- i. Referral
- ii. Research
- iii. Report
- iv. Response

The scope and length of the inquiry are set by the letters patent, which operate as terms of reference similar to the VLRC's 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, but 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.

Examples

Legal action can be recommended as well as law reform.

- Robodebt, used by government unemployment and benefits agency Centrelink from 2015, employed an income-averaging formula to estimate debts and recover money from welfare recipients. It raised \$1.76 billion from hundreds of thousands of people, but many of the calculated debts were wrong because they used estimated average income rather than actual income. The Report found that Cabinet was misled on what the scheme involved, that it was rushed through without proper scrutiny, and that it was used until November 2019 even though concerns were raised as early as 2016.

The 2023 Final Report of the royal commission into the Robodebt programme contains a sealed chapter that recommends civil enforcement and criminal charges be brought against named individuals in the government and the public service. Among the crimes that might be considered by federal police and the Director of Public Prosecutions are the Commonwealth offences of abuse of public office and giving false or misleading evidence to a royal commission. Both are punishable by up to five years in prison. The names of the people recommended for prosecution and enforcement remain secret.

Royal commission inquiry case studies

Crown Melbourne royal commission

The last year this recommendation will be considered 'recent' is 2025, based on the 2021 date of the final report.

Referral

On 22 February 2021, the Governor of Victoria appointed the Hon Ray Finkelstein AO QC, a former Federal Court judge, as commissioner into the 'Casino Operator and Licence: An inquiry into the suitability of Crown Melbourne Limited to hold a casino licence.'

The Commission was given letters patent to inquire into whether Crown Melbourne and its associates were suitable to hold a casino licence, whether they were complying with various statutes, whether it was in the public interest for Crown to hold a casino licence, and what would be required for it to become suitable.

Research

The Commission conducted eight weeks of public hearings from May to July 2021, and a number of closed hearings where only approved people could attend and the content was redacted from public transcripts and recordings.

The Commission employed independent counsel to assist its inquiry. Counsel made its closing submissions in July 2021, and parties including Crown Melbourne filed their submissions in response in August. Public submissions were also invited, and the Commission received 90 from stakeholders such as individuals who had used Crown Casino, research bodies such as the South Australian Centre for Economic Studies, cultural organisations, legal bodies, and advocacy organisations such as the Monash Addiction Research Centre.

One of the orders made using the investigatory powers of the Commission was that the personal details of any person giving evidence must remain private and unpublished.



Royal Commission
into the Casino Operator and Licence

In June 2021 the Commission heard evidence from Sonja Bauer, Crown Melbourne's general manager for responsible gambling. She revealed a series of deficiencies in the way Crown goes about its "responsible gambling" practices, such as allowing a patron at the casino to gamble for 34 hours straight, and allowing people to gamble for 12 hours or more before suggesting they take a break. Bauer said that Crown Melbourne employed 12 staff as 'responsible gambling liaison officers', tasked monitoring gamblers for signs of gambling harm. The Commissioner queried how 12 staff could monitor a casino with more than 2,600 gaming machines, 540 gaming tables, and 64,000 visitors a day. "I'm just trying to work out how a handful of people can look out for people suffering from gambling problems," he told Bauer. "It can't be done. It is physically, humanly impossible."

ORDER PURSUANT TO SECTION 26 OF THE INQUIRIES ACT 2014 (VIC)

Commissioner: The Hon. Ray Finkelstein AO QC

Date of order: 17 May 2021

How made: Order of the Commission

THE COMMISSIONER ORDERS THAT:

1. Pursuant to s 26(1)(b) of the *Inquiries Act 2014* (Vic) no email address, phone number or private address of any individual that appears in any exhibit is to be published.
2. A copy of this order is to be posted on the hearing room door.

.....
The Hon. Ray Finkelstein AO QC
Commissioner

Report

The Commissioner delivered his report to the Governor on 15 October 2021, making 33 recommendations across 652 pages.

The inquiry found that Crown was unsuitable to hold a casino licence: it had engaged in conduct that was "illegal, dishonest, unethical and exploitative," and the scale of this wrongdoing was so widespread and egregious that "No other finding was open." The Commissioner found serious, ongoing legal misconduct that broke both Australian laws and international laws, often with the knowledge of executives; consistent non-cooperation with the regulator, bullying of the regulator, and providing the regulator with false or misleading information; and serious ongoing breaches of gambling obligations, including in relation to vulnerable groups.

The final report concluded: "The Royal Commission finds that Crown's board failed to carry out its responsibilities to ensure that the organisation satisfied its legal and regulatory obligations. It also finds many senior executives involved in the misconduct were indifferent to their ethical, moral and sometimes legal obligations."

The Commission determined, however, that immediately cancelling the gambling licence was not in the best interests of the Victorian community because of the potential economic and employment impact on the community, and the belief of the Commission that Crown has the capacity to reform itself and become suitable. Therefore, it recommended that Crown be allowed to operate for two years under a reform programme.

Response

In April 2022 the Government accepted all of the Commission's findings. It introduced the Casino and Gambling Legislation Amendment Bill 2021 to codify nine priority reform recommendations and establish a 'Special Manager' to oversee Crown, veto decisions of the Board if necessary, and have unrestricted access to all areas of the casino and its books and records. The Casino and Gambling Legislation Amendment Bill 2021 was also introduced, to address some of the issues relating to money laundering and links to organised crime. Both bills passed in December 2021. The maximum penalty under the *Casino Control Act 1991* has also been increased from \$1 million to \$100 million for breaches of the law.

Part of the legislative reform shifts the burden onto Crown to show reasons why its licence should not be canceled. If it does not, it will be presumed canceled by default. This goes further than the Commission's recommendations.

In July 2023 the Andrews Government announced reforms to the laws governing electronic gaming machines. Slower spin speeds will be introduced, along with a spending cap reduction: currently \$1,000 can be put into a machine at one time, but this will be reduced to \$100. Gamblers will also have to commit to a spending limit before they play, and gaming venues other than Crown Casino will have to close between 4am and 10am each day. The Government said that they extend on the changes introduced after the findings of the Royal Commission.

The Gambling Legislation Amendment (Pre-commitment and Carded Play) Bill 2024 was introduced at the end of November 2024 and will be debated in 2025.

REVIEW QUESTIONS – Role of royal commissions in influencing law reform

1. Do commissioners sit in parliament?
2. Can a commissioner be a member of parliament or the executive government?
3. What are 'letters patent'?
4. Who creates a commission and issues its letters patent?
5. Can a commission investigate outside its letters patent?
6. What is the difference between an investigatory commission and a policy commission?
7. Identify two things a royal commission will generally do to investigate a matter referred to it.
8. Identify one special power that a royal commission has when investigating.
9. Are the recommendations made by a royal commission binding on the parliament?

Evaluation: Formal law reform bodies

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

STRENGTHS		WEAKNESSES
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. 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. 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.	Role of the VLRC	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. 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. 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.
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 cover a wide scope of topics. Committees frequently spend months scrutinising a bill in detail before reporting back to the relevant house. 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.	Role of parliamentary committees	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. 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. 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.

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. Commissions can take broad, systemic approaches to issues, and look into matters of huge public importance. 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. Commissions have powers of compulsion, to compel witnesses and stakeholders to give vital evidence. They also have the ability to redact sensitive information or hold closed hearings, to protect the privacy and identity of vulnerable participants.	Role of royal commissions 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. 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. 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. For instance, the royal commission into Crown Casino is called the ‘Finkelstein Inquiry’.
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APPLICATION EXERCISE – Formal law reform bodies

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.

- 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.
- 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.
- 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.

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EVALUATION: LAW-MAKERS

Parliament and the courts can be compared holistically, across their various features, taking into account the Key Knowledge studied on them throughout Unit 4.

PARLIAMENT	FEATURE	COURTS
✓ 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 those laws. ✓ Parliament can make laws <i>in futuro</i>, 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. ✗ Limited funds means that non-priorities for the Government will not be allocated any money.	The power to effect reform	✓ 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." ✓ 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. ✗ 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. ✗ 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.
✓ 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. ✓ 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.	The capacity for research and investigation	✓ 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. ✓ 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. ✗ 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. ✗ 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 only distinguish one rule in order to be free to follow another existing one.

✓ 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. ✓ 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. ✓ Each electorate is represented by one member; therefore, people have a clear spokesperson for their district to lobby and present petitions to. ✗ 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. ✗ 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. ✗ 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.	The ability to be responsive and representative	✓ 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. ✓ 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. ✓ 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. ✗ 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. ✗ 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.
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APPLICATION EXERCISE – Law-makers: comparative evaluation

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.

Part 2: Constitutional reform

When looking at how the Constitution has been altered since 1901, two ways are most important:

- How the express wording of the Constitution has been changed through the referendum process outlined in s128. This has made eight alterations in 124 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 124 years.

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 45 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.

REASONS FOR CONSTITUTIONAL REFORM

Broadly speaking, most reasons come down to changes in the understanding of democracy, changes in the rights and values we believe should be contained in a constitution, and proposals for structural changes to the powers and institutions of government. Occasionally individual proposals cover more than one of these reasons.

Exam tip: Illustrate each reason with an example, to help explain general concepts.

Changes for democracy

Keyword: Participation

Definition

The concept of 'democracy' means government by the people and sovereignty of the people. As community ideas of democratic government become more participatory and rely more on public engagement and decision-making, our foundational government documents change to reflect more universal suffrage and more meaningful public authority.

Detail

The Australian system of democracy is one of indirect democracy, or representative democracy. This is where law-makers are elected by the people to represent their interests and make laws on their behalf, and the people do not personally vote on every change to the law. The public vote on changes to the Constitution is the most significant exception to this. Principles of democratic government include universal suffrage, a broad entitlement to vote that includes adults of both sexes and all races; the principle of 'one vote one value', which gives each vote similar weight so no voter is favoured over another; and regular elections, to allow the people to keep law-makers accountable and re-authorise their delegation of power.

Examples

- The 1967 Aboriginal Advancement referendum deleted s127, which excluded Indigenous populations from the numbers of representatives given to each state in the House of Representatives. Including Indigenous populations increased the democratic representation of the lower house, because it made each electorate more accurately the same population size.
- The 1967 Nexus proposal sought to break the nexus between the House of Representatives and the Senate by allowing the numbers of the more democratic lower house to be increased without increasing the numbers of senators for each state. At the time, the Senate was regularly hostile to Government policy, and this was viewed as unrepresentative senators blocking the will of an elected Government.
- The 1974 Democratic Elections proposal sought to change the mode of calculating the size of each electorate for the lower house. Electorates are based on the number of voters in each area, and the proposal sought to change this to the population of each area, including all people enrolled to vote as well as not enrolled to vote – such as children.

Rights and values

Keyword: Protection

Definition

Rights can be thought of as positive grants of power, allowing the people to act, speak and think freely; or as negative protections from the power of government, limiting the ability of the government to infringe on the freedoms of the people. The 20th century saw an increase in the value placed on individual rights, and a broader scope given to the areas in need of protection for equality and human dignity.

Detail

Over time, the understanding of rights and freedoms has evolved from first generation rights through to third generation rights.

- ✓ First generation rights are bedrock rights, focusing on individual liberty and participation in public and political life. These include the right to life, the right to equality before the law, freedom of speech, and universal suffrage.
- ✓ Second generation rights relate to equality and began to be recognised by governments after World War II. These are generally economic and social in nature, and include the right to education and healthcare, the right to safe employment, and the right to food and housing. Second generation rights are not absolute or inalienable, and depend on the availability of resources.
- ✓ Third generation rights are aspirational, and relate to collective and cultural rights that are also called 'solidarity' rights. These include the right to intergenerational equity, the right to a sustainable environment, the right to cultural heritage, and the right to access natural resources. Very few constitutions recognise third generation rights: exceptions include the South African Constitution and 'soft law' mechanisms such as 1972 UN Stockholm Declaration and Finland's Committee for the Future.

Examples

- The 1977 Territories referendum altered the referendum procedure in s128 to allow voters in the territories, as well as voters in the states, to vote in constitutional referendums.
- The 1988 Rights and Freedoms proposal sought to expand existing rights in the Constitution, 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 1951 Communists proposal sought to give the Commonwealth the power to make laws restricting "communists" because communist activity was thought to present a grave threat to industrial peace and national security. The people were being offered the "freedom from subversive communist activity" as a reaction to the conflict with Russia following World War II and Australia's involvement in the Korean War.

Structural changes

Keyword: Powers and institutions

Definition

The Constitution is the 'birth certificate of the nation' and lays down the foundation for Australian government. It creates the three arms of government in Chapters I, II and III, allocates powers to each of them, and establishes rules and procedures to ensure the smooth running of government and to prevent the abuse of power.

Detail

Structural changes may be to the arms and institutions of government themselves, or they may be to the powers exercised by those arms or the rules and procedures they are expected to follow.

- ✓ The Commonwealth Parliament may be allocated greater legislative powers, instead of the state parliaments.
- ✓ People exercising government power, such as members of parliament and judges, may have changes made to their powers or employment conditions.
- ✓ Rules and procedures regarding elections and the operation of subordinate bodies such as local governments may be changed.

The vast majority of proposals put to the Australian people have been structural in nature.

Examples

- The 1946 Social Services referendum gave the Commonwealth a specific head of power to legislate regarding a range of social services such as widow's pensions and unemployment benefits. This was considered vital for reconstruction following World War II.
- The 1988 Local Government proposal sought to recognise the third tier of government, local government, in the Constitution.
- The 1999 Republic proposal sought to change the system of Australia's government from a constitutional monarchy to a constitutional republic. This would have removed the Crown as head of state, and replaced them with a democratically-elected head of state.

- The 2023 Voice proposal sought to create an advisory body for Indigenous peoples, sitting alongside federal parliament and the executive government but not exercising independent legislative power. This proposal would have added an additional chamber of government, with lesser powers, and an additional chapter in the Constitution.

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.

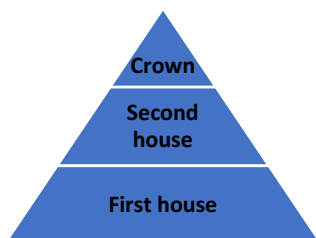
The alteration requirements of s128

Keyword: Double majority

The Study Design requires study of both key stages in a referendum vote: the requirement for the approval of the Commonwealth Houses of Parliament, and the requirements for a 'double majority' in the public vote at a referendum.

Definition

Section 128 of the Constitution allows the wording of the Constitution to be changed by a referendum bill passed by federal parliament, if the voters of Australia approve the change with a double majority: a majority in support nationwide, and a majority of voters in a majority of states – ie four out of six.



Referendum process

The process for changing the words of the Constitution is laid out in the Constitution itself, in s128.

Definition

Any bill to alter the Constitution must be approved by federal parliament, receive a double majority in favour from the people at a referendum, and be given royal assent by the governor-general.

Passage through parliament

The first stage of a s128 constitutional alteration requires that a referendum bill be drafted and put to one of the two houses in federal parliament. It may originate in either house.

Detail

- No state parliament may pass a referendum bill, as the Constitution is a federal law.
- No individual or group outside parliament may introduce a referendum bill.
- A referendum bill differs from other bills in that it does not require approval by both houses: if the proposal is rejected by the second house and passed again by the first after a 3-month gap, the Governor-General may choose to put the proposal to the people anyway.

The referendum 'double majority'

The second stage is the public vote referendum, which must be held between two and six months after the passage of the bill through parliament. Every person enrolled to vote for the House of Representatives must cast a vote on the proposal, and will be asked to select either 'YES' or 'NO'. In order for the referendum to succeed, the votes cast must provide a double majority: a majority in favour nationwide, and a majority of votes in a majority of states.

In other words, 50% +1 of the valid 'YES' or 'NO' votes cast Australia-wide must be in favour, and 50% +1 of the valid 'YES' or 'NO' votes cast in at least four out of six states must be in favour.

Exam tip: Note that a double majority does not require "a majority of states" to be in favour – this wording suggests that the state governments or parliaments themselves vote on the proposal. Instead, the requirement is that a majority of voters IN a majority of states be in favour.

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.
- Informal and invalid votes are not counted when calculating the double majority.

Royal assent

The third and final stage of a s128 constitutional alteration is the granting of royal assent to the referendum bill by the Crown or his representative. This is necessary for the change to the Constitution to be proclaimed and take effect.

REVIEW QUESTIONS – The alteration requirements of s128

1. In what section of the Constitution is the referendum process?
2. Can any other method, such as High Court interpretation, alter the wording of the Constitution?
3. Which parliament must introduce a referendum bill?
4. Are members of the public allowed to initiate a citizens' referendum bill?
5. Name the three stages of a s128 constitutional alteration bill.
6. Does a referendum bill have to be passed by both houses of parliament?
7. Which house of federal parliament must a referendum bill be initiated in?
8. Define the term 'double majority'.
9. What is the difference between the phrase 'a majority of states' and the phrase 'a majority in a majority of states'?
10. Will it be sufficient to have a majority vote in three states if a nationwide majority of over 60% is attained?
11. Will the people be given a list of proposed changes and asked to rank them in order of preference?
12. Who is responsible for giving the referendum bill royal assent if the vote passes?

Factors affecting the success of a referendum

Referendum campaigns are complex, and proposals often involve issues of party policy and alignment, community values, constitutional interpretation, and economic and social concerns. The referendum vote itself will also be affected by timing: whether the government is enjoying a high-point of support, whether multiple proposals are put to the people simultaneously or just one, and whether other votes such as elections are running concurrently.

Gauging public opinion will be a mix of opinion polls, which are influenced by the questions that are asked and the sample of the population interviewed, media coverage, and actual voting patterns on the day.

It is therefore very difficult in most cases to pinpoint the exact reason a referendum proposal was passed or rejected. Every proposal is the result of multiple factors combined. 'Factors' should be thought of as possible influences, rather than clear answers.

Multi-party support

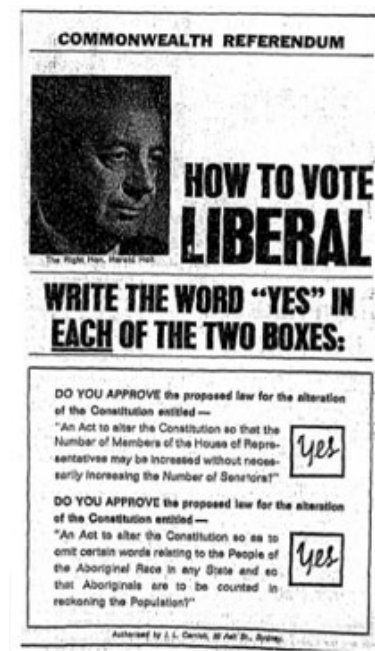
Keyword: Bipartisan agreement

Definition

Referendum proposals will have a greater chance of success if there is bipartisan agreement and both major parties support the change. This is because they will both urge their supporters to vote in favour, and there will be less divided public debate. If the vote in parliament is unanimous, no 'NO' booklet will be distributed to the people.

Examples

- In both the 1977 Territories proposal to allow citizens in territories to vote in referenda, and the 1977 Retirement of Judges proposal to introduce a compulsory retirement age of 70 years for federal judges, there was no 'NO' case submitted. The proposals passed resoundingly. Only three of the eight successful proposals have involved a 'NO' case being distributed to the public.
- In the 1967 Aboriginal Advancement referendum there was no 'NO' case produced and very little public debate. In 'What a 'no' vote would mean' published in *The Age* on 7 April 1967, Bruce Grant wrote: "there seems to be virtually no organised opposition to the spirit of the referendum on Aborigines."



Lack of clarity and understanding

Keyword: Confusion

Definition

The legal issues involved in referendum proposals can be confusing for a public without legal training or familiarity with the Constitution, and too many conflicting claims can be made about the future consequences of the change. If the public feel doubt over the meaning of the alteration or the effects it might have on government or their rights, they may prefer to play it safe and reject change to preserve our currently high standard of living.

Examples

- Proposals such as the Aboriginal Advancement referendum in 1967 and the 1977 question of federal judges retiring at the age of 70 both seemed clear in public debate and there are few records of conflict and questioning. Both have subsequently resulted in unforeseen consequences – the 1967 change has permitted Commonwealth discrimination against the Aboriginal race and the 1977 change has resulted in important cases involving implied constitutional freedoms being tied 3:3 on the bench and therefore not decided. At the time, however, the public felt confident in their understanding of the proposals and voted 90.77% in favour of the 1967 change and 80.10% in favour of the 1977 change.
- The 1988 Rights and Freedoms proposal generated significant confusion and public debate was dominated by competing and contradictory arguments. Victorian Liberal senator Richard Alston reportedly warned that the passage of the Rights and Freedoms amendment could see corporal punishment in schools written into the Constitution, for instance. No states had majorities in favour of the change, and the nationwide ‘yes’ vote of 30.8% was the lowest of any referendum since Federation.

Magnitude of change

Keyword: Status quo

Definition

Australian voters regularly show themselves to be conservative, and in favour of maintaining the status quo. Most Australians have a high standard of living globally, and may therefore be inclined to support proposals that are symbolic rather than materially significant, or minor and procedural rather than foundational.

Examples

- The 1999 Republic proposal sought to change the system of Australia’s government from a constitutional monarchy to a constitutional republic. This would have removed the Crown as head of state, and replaced them with a democratically-elected head of state. It was regarded as a significant change, and received only 45.13% of the vote.
- The 2023 Voice proposal sought to create an advisory body for Indigenous peoples, sitting alongside federal parliament and the executive government but not exercising independent legislative power. This proposal would have added an additional

chamber of government, with lesser powers, and an additional chapter in the Constitution. It was regarded as possibly a significant change, with different democratic rights attaching to different races and a potential avenue for the High Court to grant additional heads of power to the Commonwealth Parliament, and received only 39.94% of the vote.

- Proposals such as the 1977 Retirement of Judges referendum, the 1977 Senate Casual Vacancies referendum to replace a vacancy in the Senate with a member of the same party, and the 1906 Senate Elections referendum to allow elections for both houses to occur on the same day, all seemed minor and unlikely to alter the living conditions of the average person. They all received 73% or more of the vote in favour, and majorities in all states.

Conflicting values

Keyword: Attitudes and opinions

Definition

Australia is a diverse country with people spread across different geographical regions and coming from different racial, religious, cultural and social backgrounds. It is uncommon for any party in government to win more than 55% of the two-party preferred vote, and we have a history of rigorous public and political debate that has only grown more polarised and less based on compromise in the 21st century as people become more exposed to information and disagreement. It is becoming increasingly difficult to find matters on which we can reach consensus.



Examples

- The 1951 Communists referendum was supported by the 'YES' case because communist activity was supposedly presenting a grave threat to industrial peace and national security. The 'NO' case, on the other hand, argued that this would restrict individual rights to political association and speech, and the term 'communist' could be interpreted liberally to strip many different groups of rights. It failed. The proposal received a nationwide 'yes' vote of 49.44% and a majority in only three states.
- The 2023 Voice referendum generated conflicting opinions on whether equality and unity between races could be best achieved by giving Indigenous peoples a constitutional advisory body to influence federal law and policy, or whether this would divide the people on the basis of race. The proposal received only 39.94% in favour nationwide, and a majority was not obtained in any state.

Wariness of power

Keyword: Decentralised control

Definition

Before Federation, Australia was a collection of largely self-governing colonies, and the Constitution was drafted to protect both states' rights and individual autonomy. Even statements of rights were omitted from the Constitution to protect individual freedoms and the powers of the states to regulate their populations. It is still difficult to convince large sections of the public to cede more power to the centralised government.

Examples

- In the 1937 Aviation proposal that the Commonwealth receive legislative power over aircraft the 'YES' case argued that it was only left out of the Constitution because planes were a new technology, but the 'NO' case argued that it would destroy state railways transport. The referendum failed, with a majority obtained in only two states.
- In the 1984 Interchange of Power proposal to allow the Commonwealth to refer powers to the states, the same as the states can refer powers to the Commonwealth, the 'NO' case argued that it would allow the governments to change the division of powers without consultation with the people. A majority was not obtained in any state, and there was a nationwide 'yes' vote of only 47.06%.
- The 1967 Parliament proposal to increase the size of the House of Representatives without having to increase the size of the Senate was presented by the 'NO' case as a diminishment of state rights. It failed. A majority was achieved in only one state, with a nationwide 'yes' vote of only 40.25%.

Evaluation: Referendum

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, something factual you are basing your argument on, plus an explanation of *why* you think it is good or bad. This equals 'knowledge + argument'.

STRENGTHS		WEAKNESSES
The double majority provision ensures that any proposal that succeeds will be supported by the vast majority of groups across the country. 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. 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.	Public nature of the vote	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. 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. 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 in order to be confident in their support.
A 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. 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.	Ability to alter wording of the Constitution	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. 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.
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. 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.	Method of conducting a referendum	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. Arguably, the s128 process is too difficult, and it is too hard to have a referendum pass. This makes the Constitution too rigid. Since Federation, five proposals have failed because they did not receive a majority in at least four states, even though they had a majority nationwide. 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.

The people cannot themselves initiate a referendum; even though the people have the final say on any proposed amendments, they cannot put an amendment to a vote no matter how much public support exists for it. This power resides solely with the federal parliament. Even though the people can determine what power the Commonwealth has, referendums don't permit them to control the way the Commonwealth uses its powers. For instance, the 1967 referendum giving the Commonwealth the power to legislate regarding Indigenous people has been used in a way that is harmful to First Nations people, even though it was supported mostly because people wanted to increase Indigenous rights and recognition.	Public control	The double majority requirement makes it very difficult for the federal parliament to give itself greater law-making powers in the Constitution, or to remove law-making restrictions or human rights from the Act. The people, rather than the parliament, are given the final say on what changes ought to be made to the Constitution. If the federal parliament wishes to increase its own power or decrease the protections given to the people, it must convince not only a majority of people nationwide that it is in the best interests of the country, it must appeal to a broad enough cross-section of people to spread that support across a minimum of four states.
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APPLICATION EXERCISE – Referendum: evaluation

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.

CONSTITUTIONAL REFORM CASE STUDIES

The Study Design specifies that you must understand the impact and significance of the 1967 Aboriginal Advancement referendum about First Nations people, and the 2023 referendum about an Aboriginal and Torres Strait Islander ‘Voice’.

The significance of the 1967 referendum about First Nations people

Two separate referendum proposals were put to the people in 1967: one regarding Aboriginal populations and one regarding the parliamentary ‘nexus’. The Study Design limits the scope to only the changes regarding First Nations people.

Keyword: Commonwealth restrictions removed

Significance

The Aboriginal Advancement or ‘race power’ referendum allowed federal parliament to legislate specifically for the Aboriginal race by removing a restriction on Commonwealth power from the Constitution, and permitted the inclusion of Aboriginal people in the population count for federal purposes such as calculating the numbers of MPs in the House of Representatives.

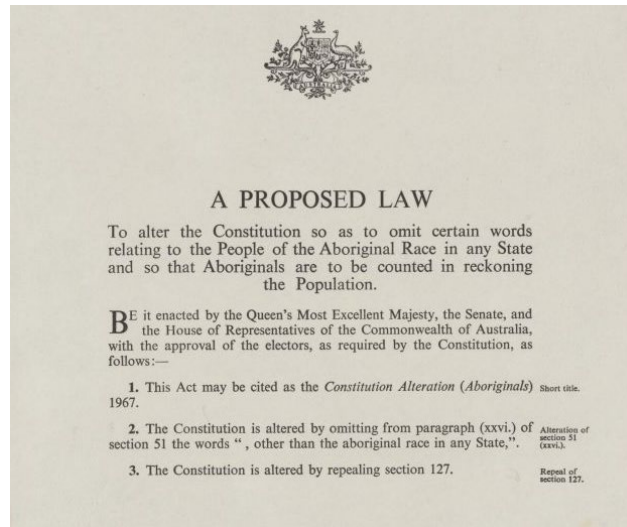
Existing law

The First Nations referendum proposals concerned ss51(xxvi) and 127 of the Constitution.

- Section 127 said that Aboriginal populations were *not* to be counted for federal constitutional purposes such as House of Representatives representation and federal grants of money to states.
- Section 51(xxvi) is a Head of Power that enables the Commonwealth to legislate in relation to any race of people in the country. The “Aboriginal race” was excluded. This enabled 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, and all other races were concurrent.

Proposed change

The referendum proposed to remove the restriction on Commonwealth power from the race power to include the Aboriginal race as a concurrent power, and to remove s127 entirely.



Arguments

No official 'NO' pamphlet was distributed to the public because the proposal had bipartisan support and a unanimous vote in Parliament. The 'YES' campaign argued that the referendum was necessary for the equal standing of First Nations people in Australia, and the righting of previous injustices. The YES flyer approved by the Australian Government told the public that the changes were necessary "to remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the Aboriginal race."

Many Indigenous individuals and groups campaigned for the removal of s127 and for federal control of Indigenous affairs – the 1965 Freedom Rides bus tour of regional NSW showed students of the University of Sydney the practical segregation that existed in NSW and the sometimes shockingly poor living conditions of Aboriginal people in rural and coastal areas. The Federal Council for Aboriginal Advancement drew up the following table in 1962. It was used, amongst other materials, to educate people for the 1967 referendum, by showing the ways in which state law differed from jurisdiction to jurisdiction, and denied First Nations people equal rights.

	NSW	VIC	SA	WA	NT	QLD
STATE VOTING RIGHTS	Y	Y	Y	N	Y	N
MARRY FREELY	Y	Y	Y	N	N	N
CONTROL OWN CHILDREN	Y	Y	N	N	N	N
MOVE FREELY	Y	N	N	N	N	N
OWN PROPERTY FREELY	Y	N	N	N	N	N
RECEIVE AWARD WAGES	Y	N	N	N	N	N
ALCOHOL ALLOWED	N	N	N	N	N	N

The Commonwealth electoral laws granted voting rights to all Aborigines who were entitled to vote in their state of residence – but the state laws determined who was eligible in each state. Many of the racist distinctions had been removed by the time of the 1967 referendum (Queensland and Western Australia had permitted voting by 1965), but the referendum was seen as a guarantee of this in the future, and as a symbol of beliefs and a shared commitment to equality.

The referendum was also campaigned for on the basis of several misconceptions that persist today. These include:

- ✖ That Aboriginal people were not counted on the census. The census was ad hoc and disorganised in the early years of federation, and states had little incentive to do a proper census of Indigenous populations because they did not receive funding or House of Representatives representation by virtue of s127, but First Nations people *were* counted on the census prior to the 1967 referendum.
- ✖ That Aboriginal people were not citizens. Every person born in Australia was made automatically a citizen of Australia through the *Nationality and Citizenship Act 1948* (Cth), and First Nations people *were* therefore citizens under this Act.

- ✖ That Aboriginal people did not have the ability to vote. This *was* true for some First Nations people prior to 1965, but by the 1967 referendum Queensland and Western Australia had legislated to change this. Other states had laws pre-existing Federation that included Aboriginal voters.
- ✖ That Aboriginal people were legally plants or animals instead of human beings. There has never been a 'flora and fauna' act, or one that classified Aboriginal people as flora and fauna, and the 1967 referendum did not concern this fiction.

The referendum did not occur before 1967 because the previous prime minister, Prime Minister Robert Menzies, did not support the change. Menzies believed that the s51(xxvi) was fundamentally racist, and could be used by the Commonwealth to discriminate against Aboriginal people if it were changed. Menzies argued it would allow the Commonwealth to set up "a separate body of industrial, social, criminal and other laws relating exclusively to Aborigines." The prohibition was therefore "a fundamental safeguard against discriminatory Commonwealth legislation directed *against*" Aboriginal people. Menzies retired in 1966, and the new prime minister, Harold Holt, supported the referendum.

'What a 'no' vote would mean' by Bruce Grant

Published in The Age on 7 April 1967

The sub-section does not specify whether the discrimination is adverse or favourable and it does not confer full protection against discrimination by States. For these reasons, Mr Wentworth proposed a new section for the Constitution which would outlaw racial discrimination of any kind.

But the Government decided not to support the idea of a constitutional guarantee against racial discrimination on the ground, as Mr Holt put it when he announced the referendum proposals, that such a guarantee would have no effect on the way people acted or felt.

So we are being asked next month to remove a section of the Constitution which is obviously discriminatory and to amend another section so that the Commonwealth will have power to discriminate (either for or against) in respect of Aborigines.

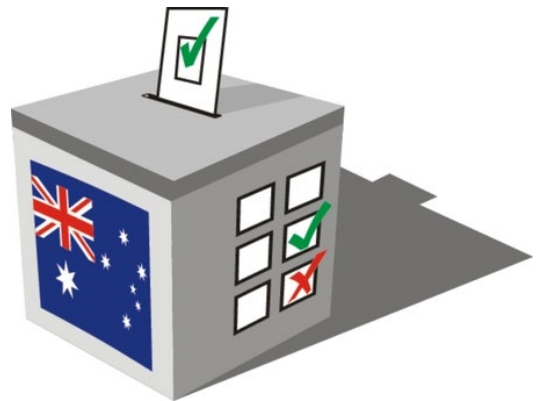
Outcome

The changes to s51(xxvi) and 127 were bundled together in one question. Together, they received a vote of 90.77% in favour nationwide, and a YES vote in six out of six states. This is the most successful referendum in Australian history, even though it was held at the same time as a second proposal that failed.

Exam tip: Remember that your knowledge on the s128 'double majority' requirement is relevant here, as well as information on factors affecting the success of referenda.

Impact

- The powers of Commonwealth parliament were increased: a residual power, legislating for Aboriginal people as a race, became a concurrent power. This enabled the Commonwealth to override state law under the s109 inconsistency rule.
- The *ability* for rights to be protected was increased: Aboriginal populations could change the number of representatives given to a state in the House of Representatives, and the Commonwealth could pass laws directed towards the benefit of Indigenous people as a class.
- The ability for rights to be *diminished* was increased: members of parliament will not necessarily make laws that benefit any particular class of person, and the Commonwealth gained the power to pass laws that are arguably to the detriment of Indigenous people as a class because no words protecting rights were inserted into the Constitution at the same time.



At the time, the popular belief was that the power only extended to laws that were for the *benefit* of First Nations peoples, but this is not specified in the wording of the section. 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%. The Intervention has aims to benefit Indigenous populations, but has been called "a new stolen generation."

Professor of Law George Williams, in the 2007 essay 'The races power and the 1967 referendum' summarised: "while the referendum deleted an obviously discriminatory provision in the form of section 127, it did not insert anything in its place. Indigenous peoples were not granted any particular rights to land or otherwise. The change left the Constitution, including the preamble, devoid of any reference to Indigenous peoples. Discrimination was replaced with silence."

***Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('Hindmarsh Island Bridge case')**

A group of Ngarrindjeri women challenged the validity of the Commonwealth's *Hindmarsh Island Bridge Act 1997* on the basis that it was not supported by the s51(xxvi) race power. They said it operated to the detriment of Indigenous peoples, and the 1967 granting of power only included laws for the benefit of the Aboriginal race.

The Commonwealth argued that there are no implied limits on the race power, and that it is "infused with a power of adverse operation" that give it a "direct racist content." Justice Kirby asked: "is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary [...] I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it." The Solicitor-General for the Commonwealth answered that yes, a law such as the Nazi race law was permitted by the s51(xxvi) race power.

Justice Kirby dissented, finding that the 1967 referendum "did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws." Instead, it represented the Parliament's unambiguous intention, with "unprecedented support" from the people, to allow only neutral or beneficial laws.

The Court was split 2:2 on this question, with the remaining two judges withholding judgment and deciding the case on other grounds. No precedent was set, and the Commonwealth has continued with its own interpretation.

Since 1967 the Commonwealth has used the referendum changes to instruct the Australian Electoral Commission to base lower house MP numbers on populations that include First Nations people in each state, to create the Aboriginal and Torres Strait Islander Commission as a national policy and service agency for First Nations peoples, and to pass the *Native Title Act 1993* to confirm traditional Aboriginal ownership of land.

The referendum also had a symbolic impact. Kamilaroi man and CEO of the Australian Institute of Aboriginal and Torres Strait Islander Studies, Russell Taylor, said: "Regardless of any myths and/or misrepresentations, I believe very strongly that the majority of my fellow Indigenous Australians take considerable comfort, confidence and moral strength from the 1967 referendum outcome. Many of us consider the outcome to represent the historic high point in our relationship with the nation and we collectively own and cherish this historic marker, despite any pragmatic assessment of what it was all actually about."

REVIEW QUESTIONS – The significance of the 1967 referendum about First Nations people

1. What did s51(xxvi) say before 1967?
2. What did s127 say before 1967?
3. In what ways were First Nations people excluded by these sections?
4. What change was made to the wording of s51(xxvi)?
5. What impact did the change to the wording of s51(xxvi) have on the law-making powers of the parliaments?
6. Were any words such as "for the benefit of Aboriginal people" inserted into s51(xxvi)?
7. What change was made to the wording of s127?
8. What impact did the change to the wording of s127 have on federal administration?
9. Did the 1967 referendum change voting laws?
10. Did the 1967 referendum change citizenship laws?
11. Did the 1967 referendum change census laws?
12. Did the 1967 protect Aboriginal people against discrimination?
13. Were both 'YES' and 'NO' booklets produced for public distribution?
14. Was bipartisan support achieved for the proposal?
15. What result was obtained in the 'double majority' stage of the referendum?
16. Identify two beneficial laws or policies that have resulted from the 1967 change.
17. Why did Justice Kirby disagree with the majority in the *Kartinyeri* case?

The significance of the 2023 referendum about an Indigenous 'Voice' to parliament

2023: Voice to Parliament referendum

Keyword: Advisory body rejected

Significance

The 2023 Voice referendum failed to establish an advisory body to federal parliament and the executive government by inserting a new section 129 into the Australian Constitution. This advisory body would have been called the 'Aboriginal and Torres Strait Islander Voice', and would make representations on matters "relating to Aboriginal and Torres Strait Islander peoples," and was meant to be composed of Indigenous representatives – although this, and its specific powers, were not outlined.

Existing law

There is no mention of First Nations people in the Constitution. The 1967 Aboriginal Advancement referendum removed the earlier references to the Aboriginal race on the basis that they were exclusionary, but this left the Australian Constitution with

no recognition of Indigenous peoples. The federal parliament and executive government had the power to establish an advisory body composed of First Nations representatives, but this body would not have constitutional recognition or authority.

The federal Hawke Labor Government established the Aboriginal and Torres Strait Islander Commission in 1990, for instance, as a funded government body responsible for making representations to parliament and government, and administering programs and funding for Indigenous populations. This was dismantled in 2005, however, following criticism and a reduction in funding from the contemporary Howard Coalition Government.

Proposed change

It was proposed that a new chapter be inserted into the Constitution, composed of only one section.

Chapter IX — Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*
- (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*
- (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.*

The explanatory memorandum distributed to parliament with the text of the referendum bill outlined what the Voice would be able to do, versus what it would not be able. For instance:

- “The Voice would be an independent advisory body that would be empowered to make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.”
- “While the constitutional nature of the body and its expertise in matters relating to Aboriginal and Torres Strait Islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature.”
- “The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government.”
- “The constitutional amendment would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action.”

These matters were not stated in the text of the referendum proposal, though. They would therefore be determined by a court such as the High Court or Federal Court if a case was raised, and the interpretation of the court may differ from the intentions of Parliament in passing the Bill.

The only constitutional requirement would be that a body existed: its powers, functions, members, or funding would not be constitutionally-mandated. This would give the federal government flexibility over time to alter the body if social needs changed, but it would also mean that the body lacked some protections. An ‘inter-state commission’ was established by s101 of the Constitution, for instance, and it no longer physically exists or is given any functions even though s101 has not been amended or removed.

101. Inter-State Commission

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Anne Twomey, Professor of Constitutional Law at the University of Sydney, argued this as a positive: “But if, over time, it ceases to work well, parliament has been given the flexibility to change the composition of the Voice and how it operates, so that it can properly fulfil the role voters intended for it. This avoids the problem of becoming stuck with a dysfunctional body and ensures the democratically elected body, parliament, has full power to make necessary changes.”

Lead-up to the referendum

In 2015, a Referendum Council was established jointly by the federal Turnbull Liberal Government and the Shorten Labor Opposition to advise the Government and Opposition on the next steps to take in a referendum to recognise Indigenous people in the Constitution. The Referendum Council organised a series of Dialogues around Australia, in which First Nations groups met to discuss potential reforms, and a National Constitutional Convention at Uluru that produced the Uluru ‘Statement from the Heart’.

Committees of politicians who voted 'YES' and 'NO' were given 28 days to assemble persuasive essays on each side for the Australian Electoral Commission to send to all Australians in an official referendum pamphlet. Each case had to consist of no more than 2,000 words, and had to be authorised by a majority of the members of parliament who voted on that side. The AEC does not have authority to edit, amend or fact check either case.

The main 'Yes' campaign was named 'Yes23', while the main 'No' campaigns were 'Fair Australia' and 'Recognise a Better Way'. Campaigns focused on two main themes:

- ## Rights and equality

The Fair Australia campaign, on the other hand, argued that it was divisive and unfair to create separate groups under the Constitution, with rights or access to parliament differentiated by race.

Arguments were divided over whether the Voice would have a significant impact, or no significant impact. There was confusion over the power that an 'advisory body' would wield, and whether later interpretation of s129 would expand the scope of that power. There was also disagreement over whether approving the Voice would make other changes such as treaties or a Indigenous recognition in the Preamble of the Constitution less likely.

Liberal MP Julian Leeser said he and other conservatives would make the case for the Voice through doorknocking, street stalls and advertisements, calling it a “safe change.” Former independent senator Rex Patrick agreed that it was a ‘safe change’, but found that to be a weakness. He said that the proposal “won’t give our indigenous citizens any real influence in Canberra. It will, without any real cost to our professional politicians, give a lot of people a nice feeling in their hearts that they’ve done something for First Australians. In effect, it will be a Constitutional lobby group, formally recognised, legislated and funded, but a lobby group none-the-less.” Recognise a Better Way, an Indigenous-led campaign backed by former President of the ALP Nyunggai Warren Mundine and senator Jacinta Nampijinpa Price, argued that policies for Indigenous economic participation and autonomy would be more effective than an advisory body.

Public polling indicated that support for the Voice fell over the year leading up to the referendum, from a high of 64% in September 2022, to 53% in May 2023 and 49% in June. Three states – Western Australia, South Australia and Queensland – were polling as ‘NO’ votes overall one month after the Bill passed federal parliament.

[illegible]

10% of voters would be likely to cast an informal vote, and an additional 9% could not say whether they currently preferred either 'YES' or 'NO'.

Polling by RedBridge Group in September 2023 showed that only 11% of people intended to vote 'YES' because they believed the Voice would bring the country together and produce concrete results, while 23% of people intended to vote 'NO' because they believed the change would divide the country and 15% believed insufficient details on the reform were provided and that it would not help Indigenous Australians in a practical way. 30% of respondents who intended to vote 'YES' said that they were not doing it for any of the reasons articulated by the 'YES' campaign – this gap between the campaign and its supporters made it difficult for the campaign to build momentum.

Outcome

The Voice to Parliament proposal was the first referendum in 24 years. Prior to the 1984 referendum, seven referendum bills passed parliament, but only two were ultimately put to the people. This is at the discretion of the Government.

The Voice referendum was conducted on 14 October 2023, and was unsuccessful. It received a 'YES' vote nationwide of only 39.94%, and did not receive a majority support in any state.

The 2024 'INFLUENCERS and MESSAGES: Analysing the 2023 Voice to Parliament Referendum Campaign' report by LaTrobe University found four key explanations for the failure:

1. Lack of bipartisan support
2. Labor voters divided
3. Different demographic groups divided
4. A 'no' campaign that was simple, repetitive and targeted effectively

The team found that support dived after Leader of the Opposition Peter Dutton announced his opposition to the proposal in April 2023, and that early surveys in 2022 likely overstated support because of the “superficially positive character of the ‘Voice’ label” and biases in survey responses “attributable to social desirability and acquiescence.” Dutton pledged in September 2023 to hold a later referendum on Indigenous recognition in the Constitution’s Preamble if the Voice failed. He presented this as an alternative to the Voice proposal. He said, “Enshrining a voice in the Constitution is divisive, it will divide the country down the middle and it will not provide the practical outcomes.”

In contrast with the ‘Yes’ campaign, the ‘No’ campaign focused on a small number of clear messages: “the Voice will divide us,” and “if you don’t know, vote no.” The ‘No’ campaign received less mainstream media coverage, but embraced social media and TikTok. Clarifying the campaign message earlier then allowed ‘No’ to amass more followers.

The 2023 ‘Detailed analysis of the 2023 Voice to Parliament Referendum and related social and political attitudes’ survey, published by the ANU Centre for Social Research and Methods, found that “Australians voted no because they didn’t want division and remain sceptical of rights for some Australians that are not held by others.” They do overall believe that Indigenous people suffer levels of disadvantage that warrant government support, but “did not see the Voice model put to them as the right approach to remedy that disadvantage.”



REVIEW QUESTIONS – Possible future constitutional reform

1. What change was proposed for the wording of the Constitution in the 2023 Voice referendum?
2. Would the proposed body have been a third house of parliament?
3. What power was it intended the Voice to Parliament have in law-making?
4. Where did the Voice to Parliament proposal originate?
5. Did the Voice to Parliament referendum bill receive unanimous support in federal parliament?
6. Was there bipartisan support for the Voice proposal?
7. How many public information pamphlets were distributed by the AEC?
8. Who was responsible for writing the public information distributed by the AEC?
9. Outline one argument made in favour of the Voice proposal that related to equality.
10. Outline one argument made against the Voice proposal that related to equality.
11. Outline one argument made in favour of the Voice proposal that related to the impact it would have on government.
12. Outline one argument made against the Voice proposal that related to the impact it would have on government.
13. Was the Voice to Parliament referendum successful?
14. Explain the outcome of the public vote in terms of the s128 requirement for a double majority.
15. Provide one example from public polling prior to the referendum that suggested a 'NO' outcome was possible.

Unit 4 Practice Assessment

MINI-EXAM NO 3: UNIT 4

Total marks = 30

Reading time: 10 mins

Writing time: 45 mins

Section A – Structured questions

Question 1 (3 marks)

Compare the concept of abrogating the common law with the concept of codifying the common law.

Question 2 (4 marks)

Discuss the impact of costs and time on the ability of an individual to bring a case to court.

Question 3 (8 marks)

Outline the way in which the express protection of rights acts as a check on parliament in law-making, and evaluate the extent to which this protection is supplemented by the ability of the High Court to protect the principle of representative government.

Section B – Case studies

Question 1 (10 marks)

Source 1

The following are extracts from an interview with journalist and activist Wendy Bacon, published 16 April 2017.

Free Speech and Exposing Corruption: An Interview with Wendy Bacon

Interview with Kieran Adair of Sydney Criminal Lawyers

Wendy Bacon was just 23-years old when sentenced to eight days in prison and sent to Silverwater Remand and Reception Centre for her actions following the publication of a poem. Although she was later released, Wendy's case became a defining moment for free speech in Australia.

The year was 1970, and as a newly elected editor of the UNSW student paper, *Tharunka*, Wendy was right in the thick of it: "Censorship was a really big issue from the 60s onwards, there was a really repressive regime in Australia" she told Sydney Criminal Lawyers. It was during this time that Wendy, along with her fellow editors, published a poem [...] that would ultimately lead to her criminal conviction.

"When we took on the editorship of *Tharunka* we weren't planning to have a great big campaign against censorship, but on the other hand we were determined to resist self-censorship," Wendy recalls. "There was actually a broad campaign against censorship during those years, people were picketing theatres, people were having festivals of banned works, people were beginning to take direct action against censorship – there was the feeling that people just wanted to break through."

The poem caused scandal, and Wendy along with her co-editors were arrested and charged under the *Obscene Publications Act*. During her hearing, she and other students protested by dressing as nuns inside the courtroom, with lines from the poem written across their chests. Although the *Tharunka* editors were eventually cleared, Wendy was sentenced to eight days in prison for wearing the statement inside court. The experience would have a profound impact on her.

"I was a radical student, but I also came from quite a middle-class background. Though I certainly cared about poverty, I had no real experience", she remembers.

Following her time in prison, Wendy, along with a university colleague, started the support group 'Women Behind Bars', campaigning for the rights of women inmates and justice for those unfairly convicted.

"There was a woman called Violet Roberts who had ended up with a life sentence for murdering an extremely brutal husband. We conducted a campaign of civil disobedience, camping outside Corrective Services for an entire winter, in the end the Labor government granted her mercy and released her from prison."

Source 2

Following is s17 of the *Summary Offences Act 1966* (Vic).

SUMMARY OFFENCES ACT 1966

SECTION 17

Obscene, indecent, threatening language and behaviour etc in public

- (1) Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon —
- (a) sings an obscene song or ballad;
- (b) writes or draws exhibits or displays an indecent or obscene word figure or representation;
- (c) uses profane indecent or obscene language or threatening abusive or insulting words; or
- (d) behaves in a riotous indecent offensive or insulting manner — shall be guilty of an offence.

Penalty: 10 penalty units or imprisonment for two months;

For a second offence — 15 penalty units or imprisonment for three months;

For a third or subsequent offence — 25 penalty units or imprisonment for six months.

- a. Who would have been responsible for signing the *Summary Offences Act 1966* (Vic) into law? 1 mark
- b. Explain one reason why the courts may need to interpret s17 of the *Summary Offences Act 1966*, and one possible effect of this interpretation. 6 marks
- c. How might judicial conservatism affect the meaning of s17 of the *Summary Offences Act 1966*? 3 marks

Question 2 (5 marks)

Source 1

Following are extracts from 'Government seeks legal power to deport Aboriginal non-citizens', 6 April 2022, published in The Guardian by Paul Karp.

Government seeks legal power to deport Aboriginal non-citizens

Parliament should have the power to define "aliens," including to allow the deportation of Aboriginal non-citizens or even dual nationals, the Australian government has argued.

The solicitor general, Stephen Donaghue, made the submission on behalf of the Commonwealth in a High Court appeal seeking to overturn an earlier ruling that Aboriginal people cannot be deported, even if they lack Australian citizenship.

At a hearing on Wednesday, the Commonwealth urged the Court to junk the landmark decision of *Love and Thoms* handed down in February 2020 or, if it is accepted, to rule that people without Aboriginal biological ancestors are not exempt from deportation. In November, the Federal Court ordered the release of Shayne Montgomery, a New Zealand citizen who has argued that because he is culturally adopted as Aboriginal he cannot be an alien for the purposes of the Constitution.

The immigration minister, Alex Hawke, has appealed to the High Court and in doing so sought to reopen *Love and Thoms* on the basis it was wrongly decided.

Source 2

Following is an extract from the Australian Constitution.

Section 51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xix) naturalization and aliens

- a. Identify one category of legislative power in the constitutional allocation of powers, and discuss the extent to which the states are restricted by the allocation of legislative powers. 5 marks

MINI-EXAM NO 4: UNIT 4

Total marks = 25

Reading time: 5 mins

Writing time: 40 mins

Section A – Structured questions

Question 1 (10 marks)

In April 2020 the Victorian Law Reform Commission (VLRC) received a reference from the Commonwealth Attorney-General to inquire into the community law reform project of 'Inclusive Juries'. The VLRC published a consultation paper in December 2020, and sought public submissions. Individuals and groups in the community who had standing in the issue made submissions to the Commission on the matter, and in July 2022 the Commission submitted its final report to parliament. It was never tabled in parliament, so in February 2023 the VLRC implemented key recommendations from the report and the bill was given royal assent.

- a. Explain two errors in the above scenario and provide corrections for each error. 4 marks
- b. Referring to one example of a recent recommendation made by the Commission, evaluate the effectiveness of the VLRC as a law reform body. 6 marks

Question 2 (5 marks)

Evaluate the extent to which the people have the power to change the Australian Constitution.

Section B – Case studies

Question 1 (10 marks)

Source 1

Following are extracts from 'No, Mr Morrison. Minority government need not create 'chaos' – it might finally drag Australia to a responsible climate policy', 16 May 2022, published by Kate Crowley, Adjunct Associate Professor for Public and Environmental Policy, University of Tasmania in *The Conversation*.

No, Mr Morrison. Minority government need not create 'chaos' – it might finally drag Australia to a responsible climate policy

Labor might be leading in the national polls, but a hung parliament after the May 21 election remains a distinct possibility. So-called "teal" independents, whose blue conservatism is tinged with green concern for climate change, may well join Greens MP Adam Bandt and current independents on the lower house crossbench. Under that scenario, any minority government would need their support.

With the support of advocacy group Climate 200, the teals are campaigning on issues relevant to their electorates and raising funds locally. But high on their agendas is a strong, science-based response to the climate crisis. A weekend report by *Nine* newspapers suggested most independents seeking a lower house seat would not strike a formal power-sharing deal with either the Coalition or Labor. This would leave a major party in minority government negotiating with the crossbench on every piece of legislation it wants to pass.

Prime Minister Scott Morrison claims the election of more independents to parliament would lead to "chaos". But, as the experience of the Gillard Labor government shows, minority government can break intractable policy logjams. The Gillard minority government reversed years of climate policy failure by delivering carbon pricing and other reforms. This came at the behest of the Greens and with the support of independents Andrew Wilkie, Rob Oakeshott and Tony Windsor. Carbon pricing prompted Australia's greenhouse gas emissions to fall for the first time. But from 2013, under successive Coalition governments, climate policy hit reverse. Renewable energy targets diminished. Carbon pricing was abandoned and is now considered a political poisoned chalice. Neither major party would relish re-negotiating its climate policy with teal independents and the Greens. But consensus and policy action, on climate and other big issues, is possible under minority government.

As Tony Windsor this month pointed out, the Gillard minority government passed more legislation than any other, aside from John Howard's in its final term. Former Queensland Premier Peter Beattie also insists minority government can work. And former Coalition Prime Minister Malcolm Turnbull this month hailed the rise of the teal independents, who would sit on the cross bench, calling it "direct, democratic action from voters. People power, you might say."

- a. Explain one reason why laws might need to change. 3 marks
- b. Outline one way in which individuals might influence parliament to change the law. 3 marks
- c. Analyse the extent to which the media can play a role in law reform. 4 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:

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:

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:

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:

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:

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: _____

Justification:

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:

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:

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:

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:

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:

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:

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:

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:

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.

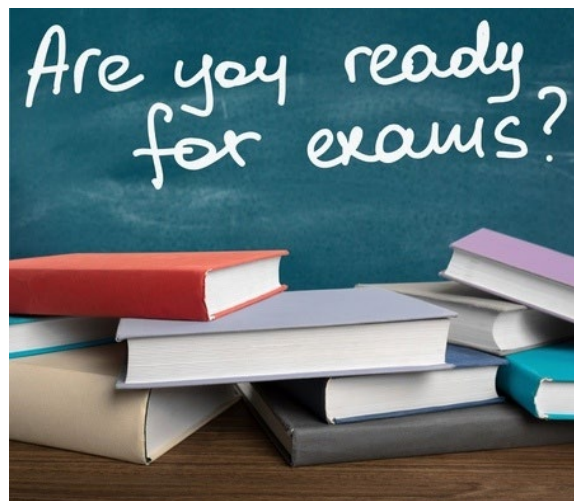
Notes organisation

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	Just give the answer, usually in a full sentence with at least one synonym of the answer to demonstrate knowledge.

		"Could" something happen: yes or no	
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 What is the relationship between	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, giving reasons	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 multiple 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 2024-2028* 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 the end of 2024.

- 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.

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 2024* was held on the Monday 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 still 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

Section A – Structured questions

Question 1 (2 marks)

Define the category of ‘summary offence’ as it relates to criminal disputes.

MARK RANGE	QUALITIES OF ANSWER
2 marks	A clear and complete answer that defines a summary offence as a more minor offence that is heard in the Magistrates’ Court. Answers may elaborate by explaining that summary offences are not heard by jury, receive hearings rather than trials, and that have a maximum sentence attached. They may also provide examples. This should not be required information, however, if the answer is very clear on the relative lack of severity of summary offences, and the court in which they are heard – these are the most important pieces of information.
1 mark	- An answer that omits or is vague on one of the above points, such as saying ‘lower courts’ only. - That provides a comprehensive definition, but then adds inaccurate information that undermines it.

Sample answer:

✓ *Summary offences are the relatively minor offences that are resolved in the Magistrates’ Court without a jury.*

Question 2 (13 marks)

a. Explain the role played by Victoria Legal Aid (‘VLA’) in assisting accused in Victoria. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	A clear and accurate answer that states that the VLA can give both legal advice/information and possible representation; and

	- That supports this answer with appropriate detail; and - That makes use of the stimulus material.
3 marks	- It lacks detail in the description of the VLA's function. - It lacks meaningful use of the stimulus material. - It has one or more content errors. - It is overall too brief.
2 marks	- An answer that is brief and superficial. - An answer that is undermined by incorrect content. - An answer that omits more than one piece of required content. - An answer that entirely fails to reference the stimulus material.
1 mark	More than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answer:

- ✓ *VLA supports access to justice for vulnerable accused such as children by providing limited representation services and giving free legal advice and information. VLA can provide funded representation to children charged with burglary so they can engage a solicitor, and can also in some cases supply an in-house VLA solicitor or provide funding for a private barrister. In addition, VLA provides services such as duty lawyers at courts and tribunals, to assist unrepresented accused – particularly those being held on remand and seeking bail at the Children's Court. They also provide telephone and Internet advice, and hold drop-in sessions using volunteer lawyers.*

b. Explain costs as one factor that affects the ability of the criminal justice system to achieve the principles of justice. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	- An answer that defines costs as a factor; and - That draws meaningful connections between costs and <i>at least two</i> of the principles of justice; and - That provides support for the arguments in the form of specific detail and/or examples; and - That makes meaningful use of the stimulus. Note that the Study Design provides three principles of justice: fairness, equality, and access. For a 4-mark question, it is not necessary to engage deeply with all three. Assessors may wish to see all three <i>named</i>, but detailed engagement with two should be sufficient.
3 marks	- An answer that is slightly general on the concept of 'costs'. - An answer that seems to have some civil costs in mind, that a criminal accused would not have to pay. - An answer that is slightly superficial or repetitive in its treatment of the principles of justice. - An answer that tries to cover all three principles and is slightly list-like as a result. - An answer that is slightly brief or shallow in its reference to the stimulus material.
2 marks	- An answer that lacks meaningful engagement with any arguments, and instead covers basic factual information on costs. - An answer that uses only one principle and fails to identify either of the other two principles. - An answer that fails to use any specific information on costs. - An answer that fails to use the stimulus in any way. - An answer that contains fundamental errors of understanding or fact. - An answer that reads like a 'shopping list' of bullet points rather than an explanation of arguments. - An answer that is extremely brief.
1 mark	- The name of one principle of justice, but nothing more. - A comment on the stimulus material, but nothing more. - An identification of one source of costs, but nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Sample answer:

- ✓ *An accused is charged by the government, 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, which creates an unfair playing field between them and the OPP. The parties do not have equal resources. This is particularly concerning when the accused is a vulnerable child, and where there may already be issues with poverty – 16% of children said they only stole food because they did not have enough at home. Legal representation is expensive, and there is an increasing move away from the standard use of scales of costs, so the amount varies between lawyers and could be unfair for some. Victoria Legal Aid pays senior counsel \$417ph for preparation, but this could leave a gap of hundreds an hour that prevents access to knowledgeable representation.*

c. In your opinion, would fines or community corrections orders ('CCO') be more appropriate as sanctions in the above cases? 5 marks

MARK RANGE	QUALITIES OF ANSWER
5 marks	A clear and complete answer that chooses <u>one</u> of the named sanctions and that shows an understanding of it, even though a freestanding definition is not required; and

	- That contains meaningful engagement with multiple arguments in relation to the appropriateness of that sanction – this may or may not involve the aims of sanctions, as the question does not require it; and - That shows clearly <i>how</i> and <i>why</i> that sanction would be more effective than the alternative – some comparison is required by the word ‘more’ in the question; and - That demonstrates meaningful use of the stimulus in those arguments. Note that arguments do not need to weigh ‘both sides’ against each other, but sophisticated answers <i>may</i> consider the flipside, and suggest why the chosen sanction may still be flawed. As long as the overall contention is clear, this is fine. Note that ‘appropriateness’ essentially means strengths and weaknesses <i>in relation to</i> the facts of the case or scenario.
4 marks	- An answer that is slightly general on use of detail from the chosen sanction. - An answer that spends a little too much time focused on arguments that aren’t clearly in support of the contention. - An answer that is slightly superficial or repetitive in its treatment of ‘appropriateness’. - An answer that focuses slightly too heavily on the stimulus material and lacks some depth in legal sanction content and theory. - An answer that is slightly brief or shallow in its reference to the stimulus material.
3 marks	- An answer that fails to use the stimulus material. - An answer that relies more on content facts about the chosen sanction than on a meaningful engagement with arguments. - An answer that focuses too much on the stimulus material and is more of a subjective discussion on the situation. - An answer that fails to give a clear response to the question, and instead argues for both sanctions. - An answer with material errors of understanding or fact. - An answer that is overall too brief. - An answer that reads like a ‘shopping list’ of dot points.
2 marks	- An answer that suffers two of the problems identified in the 3-mark range. - An answer that omits arguments entirely in favour of memorised content detail on the sanction. - An answer that is undermined by significant errors of understanding or fact. - An answer that discusses the stimulus material, but that only gives the student’s opinion on it and does not use it to answer the question. - An answer that makes only two short points.
1 mark	- An answer that chooses and briefly outlines a sanction but does nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example answers:

- ✓ *Imprisonment could deter the children, because even very short sentences could remind them that there are consequences to breaking the law, even if they believe they are stealing things they need. A CCO, on the other hand, might allow them to disregard consequences because it is non-custodial and some conditions, such as not leaving the state, might seem inconsequential to a child who is normally in school. Discouragement and deterrence could be achieved with the kind of short sentence able to be handed out by the Children’s Court, because children are more likely to be first time offenders and the impact of losing their freedom would be greater. Even a short sentence is highly punitive, however; especially for young people, because they are cut off from family and friends at an important stage in life. This may encourage them to take advantage of prison education programmes and rehabilitate.*
- ✓ *A CCO would be more appropriate because of its non-custodial nature. Detention away from home and friends is too harsh for a child, and they may learn to distrust society and resist rehabilitation. Allowing them to come into contact with more experienced criminals in prison may also have a criminogenic effect – research shows that imprisoning first-time offenders increases the chance of them coming back to the criminal justice system. A CCO, on the other hand, allows the child to live in the community and go to school and work, but also be disciplined with core terms (such as no further offending) as well as flexible conditions. These conditions may address issues such as treatment for drug dependence, which seems to be a factor in offending, as many children are stealing drugs. A CCO gives the accused the best chance of finishing their education and getting employment, as an alternative to crime.*

Section B – Case studies

Question 1 (10 marks)

- a. Discuss the ability of mitigating factors and aggravating factors to contribute to the achievement of justice. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	- A clear and comprehensive answer that demonstrates understanding of mitigating and aggravating factors, even though freestanding definitions are not required; and - That demonstrates meaningful engagement with one or more arguments in relation to mitigating factors; and - That demonstrates meaningful engagement with one or more arguments in relation to aggravating factors; and - That links these arguments with the concept of justice in general – some students may use the terminology of the principles of justice, and this is fine; and - That provides support for the arguments by making meaningful use of the source. Note that arguments do not need to weigh ‘both sides’ against each other equally for the task word ‘discuss’, but more is required than a simple list of weaknesses or strengths with no reflection or engagement. Better answers will certainly <i>consider</i> the flipside, even though they might ultimately dismiss it, or finish without a concrete contention. Note also that some arguments may relate to mitigating and aggravating factors <i>in general</i> rather than individually. This is fine. Answers must <i>at some point</i> differentiate between them, however.

3 marks	- An answer that focuses slightly too heavily on content detail and lacks in the discussion of factors being good or bad to take into account. - An answer that focuses slightly too heavily on discussing the source case and lacks legal theory content. - An answer that lacks slightly in elaboration and detail. - An answer that lacks meaningful use of the source case to support arguments. - An answer that contains slight errors in fact. - An answer that is slightly short, making perhaps only two good points.
2 marks	- An answer that is rote-learned content on mitigating and aggravating factors and does not 'discuss'. - An answer that does not demonstrate an understanding of what mitigating factors or aggravating factors specifically are and instead talks about 'factors' in a general sense. - An answer that fails to use the source material. - An answer that contains significant errors of understanding or fact. - The answer reads like a brief 'shopping list' of dot points rather than a discussion.
1 mark	- An answer that defines mitigating and/or aggravating factors but does nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Example arguments:

- ✓ *It is appropriate that the individual circumstances of Ristevski be taken into account when the sentence is determined, such as the fact that he was willing to enter a guilty plea and that his daughter gave a statement in support of him. These are potentially mitigating factors that lessen his culpability or the seriousness of his offence for fair reasons. It may feel as though he gets off 'lightly', but sanctions are offender-focused rather than victim-focused.*
- ✓ *Borce has been rewarded for pleading guilty and taking responsibility for his actions, because it is a mitigating factor on the basis that he has saved court time and witness trauma, and has therefore lessened his culpability. Karen's family has still lost a loved one, however, and Karen herself has lost her life. It may not think it is fair that Borce benefits from a lesser charge, and the High Court considered his plea strategic.*
- ✓ *On appeal, the Court of Appeal able to take into account aggravating factors such as the failure to disclose any details of the crime, which allowed him to inject subjectivity into the sentencing decision. The 13 years' imprisonment handed down may have been increased by the Court's perception of a lack of good faith, and may not be fair or equal across different offenders.*

Problematic answer:

- ✗ *Mitigating factors are factors regarding the offender or the offence that reduce the culpability of the offender or the seriousness of the offence, and that result in a lesser sentence being given. Aggravating factors are the opposite, and increase the sentence. It was appropriate for both to be taken into account in Ristevski's case because this makes the sentence he is given more relevant to the facts of the case and Ristevski's individual offending.*

This is problematic because it defines mitigating factors and aggravating factors as things that *necessarily* change the sentence, instead of parts of the overall 'instinctive synthesis'. Secondly, it lacks meaningful use of the source material and focuses on definitions, with only a general comment in response to the question.

- b. Explain the impact of plea negotiations in sentencing, and analyse the strengths and weaknesses of this aspect of the criminal justice system. 6 marks

MARK RANGE	QUALITIES OF ANSWER
6 marks	- An answer that demonstrates an understanding of plea negotiations, even though a freestanding definition is not required; and - That clearly identifies the impact of the negotiations being to enter a guilty plea to the <i>lesser charge</i> of manslaughter, and to therefore <i>decrease</i> the sentence; and - That shows meaningful engagement with at least two strengths of plea negotiations; and - That shows meaningful engagement with at least two weaknesses of plea negotiations; and - That provides a level of elaboration and detail appropriate to the number of arguments covered, with enough depth for 4-5 of the 6 marks; and - That makes meaningful use of the source material. Note that arguments should cover 'both sides' for the task word 'analyse', because 'analyse' means to argue the different aspects, components or sides to something. More is required than a simple list of strengths or weaknesses with no reflection or engagement. No definitive opinion needs to be given in conclusion, however.
5 marks	- An answer that meets all the criteria for a 6-mark answer, but is inadequate in one aspect. - An answer that meets all the criteria for a 6-mark answer, but that contains a few small errors of understanding or fact - An answer that meets all the criteria for a 6-mark answer, but that is slightly short. - An answer that fails to explain the specific impact of the plea negotiations on sentencing in Ristevski's case, but gives an excellent analysis of plea negotiations.
4 marks	- The answer relies on content facts more than on a meaningful engagement with arguments or different angles/perspectives (and therefore does not 'analyse'). - The answer has small errors of understanding or fact. - The answer is overall too brief. - The answer is too heavily weighted towards the opening explanation, and has an analysis worth no more than 2 marks. - The answer fails to explain the specific impact of the plea negotiations on sentencing in Ristevski's case, but gives a competent analysis of plea negotiations.
2-3 marks	An answer that suffers two of the problems identified in the 4-mark range.

	- An answer that omits 'analysis' entirely in favour of memorised content facts. - An answer that is undermined by significant errors of understanding or fact. - An answer that fails to provide an analysis, and has only an excellent explanation of the impact of plea negotiations on sentencing in Ristevski's case. - An answer that fails to explain the specific impact of the plea negotiations on sentencing in Ristevski's case, and gives only a brief or superficial analysis of plea negotiations. - An answer that makes only a couple of points.
1 mark	- An answer that defines plea negotiations but does nothing more. - An answer that says that Ristevski received a reduced sentence but does nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Example explanation:

- ✓ *The plea negotiations reduced Borce's charge from murder to manslaughter, which then reduced his sentence because manslaughter receives a lesser sentence than murder. The fact that Borce plead guilty after the plea negotiations also reduced his sentence, because guilty pleas attract a guaranteed sentence discount.*

Example arguments:

- ✓ *Plea negotiations helped Ristevski to understand the case against him. The negotiations may have given the accused a sense of control in his situation, enabling him to make the decision not to defend the charges vigorously, and instead offering to plead guilty for a measurable reduction in sentence. This might be particularly important for accused like Borce, who have children to care for as a single parent – having a less adversarial process with more clear information provided to him might help him maintain caregiving through resolution.*
- ✓ *Witnesses and victims, including secondary victims such as the family members such as the daughter who gave the Victim Impact Statements, benefit by not having to appear and give evidence under cross-examination at a contested trial if a plea negotiation results in a guilty plea like Ristevski's did. The primary victim, Karen, is deceased and cannot give evidence; other witnesses may have been traumatised by the violence. Obtaining a guilty plea could make the process easier for them – unless they wanted to have their day in court and miss the opportunity to give a public statement.*
- ✓ *Plea negotiations take place privately between the prosecution and the accused, the OPP and Borce. Criminal court proceedings, on the other hand, would have taken place in public in the Supreme Court, and the public would have been able to scrutinise the process and ensure justice was done. The verdict of the court could then have been scrutinised on appeal, which cannot happen with plea negotiations. It reduces access to justice and the perception of fairness by resolving criminal disputes in secret and without appeal. The Court of Appeal hearing righted this situation, as it was heavily publicised and allowed public scrutiny.*

MINI-EXAM NO 2: UNIT 3 – MARKING GUIDE

Section A – Structured questions

Question 1 (2 marks)

Define the standard of proof as it relates to civil disputes in Victoria.

MARK RANGE	QUALITIES OF ANSWER
2 marks	- A clear and complete answer that defines the standard of proof as an amount of quality/weight of evidence that the plaintiff needs to bring in order to prove the defendant liable; and - That specifies 'on the balance of probabilities' as the civil standard of proof. Answers may elaborate by explaining that the defendant does not need to bring evidence proving their lack of liability, or by explaining the meaning of 'balance of probabilities', but this is additional quality – not required.
1 mark	- An answer that omits one of the above points. - That is vague or imprecise on one of the above points, such as the meaning of 'standard' or the exact wording of the standard. - That provides a comprehensive definition, but then adds inaccurate information that undermines their understanding of it – for instance, that includes criminal terminology.

Sample answer:

- ✓ *The standard of proof is the quality of evidence that must be brought by the plaintiff to prove the defendant liable for the loss. The civil standard is on the balance of probabilities.*

Problematic answer:

- ✓ *The standard of proof is on the balance of probabilities. This means that the judge must decide which version of the facts is more persuasive, the plaintiff's or the defendant's.*

This is problematic because it does not explain what the concept 'standard' means, in terms of quality or weight of evidence. It is also problematic because it turns the standard into a contest between parties, which is incorrect – the defendant does not need to prove their version of the facts, because they do not have the burden of proof.

Question 2 (3 marks)

Explain one reason why Consumer Affairs Victoria ('CAV') might be considered a *less* desirable option than the Victorian Civil and Administrative Tribunal ('VCAT') for the resolution of civil disputes.

Advice

Note that only material relating to the *first* identified reason should be marked. In 2017 the Chief Assessor reminded students that “If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for.” Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
3 marks	- A comprehensive explanation that clearly provides one weakness of CAV compared with VCAT; and - That explains the way in which CAV and VCAT are different in this respect; and - That explains the reason why this point is a weakness of CAV – which <i>may</i> be done through a comparison with the benefit of VCAT.
2 marks	- A failure to clearly identify one weakness, and ambiguously bringing a few points together. - A failure to properly relate the weakness of CAV to VCAT, to show the difference between them – this may be a result of keeping CAV and VCAT separate in the answer rather than linking them. - A failure to show exactly <i>why</i> the weakness is a weakness – which may be done by focusing only on the benefits of VCAT in respect of the point and omitting CAV. - Minor errors of fact or understanding. - Slightly brief and superficial content.
1 mark	- An answer that explains a weakness of CAV that is <i>also</i> present in VCAT. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example weaknesses:

- ✓ *CAV gives unequal provision of advice and support. It advises tenants and consumers over landlords and traders, but this may not be appropriate if a tenant is experienced in the legal system, but a landlord is a private individual who perhaps has one investment property and has never been involved in a dispute before. VCAT does not give uneven services like this, and both parties receive the same limited support.*
- ✓ *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. A complainant may not be able to afford to defend their own rights, but the CAV may not see a large enough claim. VCAT uses its compliance powers in every case brought before it.*
- ✓ *CAV can register agreements that have been made by individual parties, to lend authority to the agreements and make it easier for claims to be brought if one party dishonours them, but there are no avenues or appeal or review within CAV feels they were pressured into an unfair agreement. VCAT gives parties appeals on questions of law against its orders.*
- ✓ *CAV relies on conciliation and voluntary participation, which can give stronger parties an advantage or benefit parties who are willing to push the matter to court or VCAT. VCAT hearings are compulsory to attend, including mediation conferences if ordered. This reduces the advantage gained by uncooperative parties.*

Problematic example:

- ✗ *CAV resolves matters without applying strict rules of evidence and procedure, which means that the outcome could be swayed by faulty or misleading claims made by one party. There is less of an opportunity to test the reliability of claims and evidence if there is a lack of rigorous rules and examination.*

This is problematic because the same can also be said of VCAT, so it is not a difference.

Question 3 (5 marks)

Compare the role of the jury with the role of the judge or magistrate in the resolution of a civil trial.

Advice

Note that the task word ‘compare’ requires at least one difference *and* at least one similarity.

MARK RANGE	QUALITIES OF ANSWER
5 marks	- A clear and comprehensive answer that provides at least one similarity between the responsibilities of the personnel and at least one difference; and - That covers two or more responsibilities of each, not necessarily in equal depth; and - That has elaboration appropriate to the number of points made.
4 marks	- Something lacking in the quality of description and elaboration. - An absence of either similarities or differences, even though the answer (relying only on one side) would otherwise be worth 5 marks in terms of scope and detail. - Minor errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole – for instance, criminal terminology used in one or two superficial ways.
3 marks	- An answer with two of the problems identified in the 4-mark range. - An answer that focuses on one personnel category and leaves the comparison with the other largely implied. - An answer that elaborates on the responsibilities of each but leaves the comparison between them unstated. - An answer that covers only one responsibility, even though it is discussed very well as a comparison. - An answer that contains errors of understanding or content that begin to undermine sections of the answer.
2 marks	- An answer that identifies responsibilities but engages in no elaboration or comparison. - An answer that covers only one comparison point, in no more than adequate detail.

	An answer with significant errors in understanding or content.
1 mark	- An answer that outlines only one responsibility. - An answer that names one shallow similarity or difference, with no elaboration. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example comparisons:

- ✓ *The judge plays the role of delivering the verdict in all matters where a jury has not been requested, whereas in all cases using a jury this will be the responsibility of the jury and not the judge. Juries are never used in matters before a magistrate. The judge or magistrate has the role of finding liability in matters where a jury is not present.*
- ✓ *Jurors have a paramount duty to the court and to justice – they must listen impartially to all the evidence, and apply their judgment in good faith without fear or favour to the parties. This is similar to the duty that judges and magistrates have to the court. A judicial officer plays a role in serving the interests of natural justice and a fair trial, without bias or a vested interest in the outcome.*
- ✓ *The judge plays the role of awarding remedies such as damages in all matters where a jury is not empaneled, which is similar to the responsibility held by juries in most cases. In all matters other than defamation lawsuits, juries have the role of calculating the damages payable to the successful plaintiff.*
- ✓ *The judge plays a role in giving court orders and awarding non-monetary remedies such as injunctions. This is different from the jury, as the jury does not have the authority to give court orders – juries will only determine monetary remedies such as damages; they do not have the role of ordering injunctions compelling the defendant to act.*

Question 4 (5 marks)

Explain the way in which class actions aim to provide greater access to justice for Victorians.

Advice

Class actions do not need a separate definition at the start, before the task word is addressed.

MARK RANGE	QUALITIES OF ANSWER
5 marks	- A comprehensive answer that clearly expresses an understanding of class actions, even though a freestanding definition is <i>not</i> required; and - That draws meaningful connections between the proceedings and <i>at least two</i> of the principles of justice; and - That provides support for the arguments in the form of specific detail and/or examples. Note also that excellent answers covering two principles of justice can still be given full marks, even if they do not address the third principle. Many answers will mention the names of all three, but 5 marks is too small a question to demand full coverage.
4 marks	- An answer that meets all the criteria for a 5-mark answer, but is weaker in one aspect. - An answer that meets all the criteria for a 5-mark answer, but that contains a few small errors of understanding or fact.
3 marks	- An answer that focuses on detailed description and leaves the discussion arguments largely implied. - An answer that covers only one main arguments, even though it is discussed very well. - An answer that contains errors of understanding or content that begin to undermine sections of the answer.
2 marks	- An answer that lacks meaningful engagement with any arguments, and instead covers basic factual information on class actions. - An answer that uses only one principle and fails to identify either of the other two principles. - An answer that discusses the principles of justice but fails to refer to class actions at all. - An answer that provides only general statements about class actions and gives no specific detail or examples. - An answer that contains fundamental errors of understanding or fact. - An answer that reads like a 'shopping list' of dot points rather than an explanation of arguments.
1 mark	- One fact about class actions, such as the need for seven injured parties, but nothing more. - An identification of one or more principles of justice, but nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example arguments:

- ✓ *The original purpose of implementing a representative proceedings regime in 1992 was to enhance access to justice by reducing the cost of court action to the individual plaintiff, in situations where multiple people had been harmed in similar fact scenarios. It was particularly designed for situations where they could not afford to initiate proceedings themselves and especially when the defendant was a powerful and wealthy organisation. For example, the recent Robodebt action has group members who are Centrelink recipients and therefore must be among the least wealthy in society.*
- ✓ *In 2013 Federal Court justice Bernard Murphy said that class actions are "important in improving access to the protection of substantive laws," because group members bear no risk in terms of the cost of losing, and do not need the money to fund the legal advice and representation in the first place. Group members can access the protection of laws, while also being protected from risk.*
- ✓ *Representative proceedings provide equality across groups in society by giving a variety of ways in which actions can be funded. A wealthy plaintiff may be able to pay for their own representation and court fees, but in class actions there is more likely to be a 'no win no fee' arrangement, and the group costs orders introduced in 2020 allow the court to order the plaintiff law firm to bear the costs of the action. Class actions also use litigation funders. This gives an equal opportunity to less wealthy complainants, even if they can't afford an action themselves.*
- ✓ *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. It would not be fair if the justice system only catered to wealthy or business interests.

Problematic example:

- * *Representative proceedings allow seven or more people all harmed by the same wrongdoing the ability to share the costs of the action. Legal representation is expensive, but if all group members share in those costs, they make bringing a civil case possible in situations where no group member could afford to pay for representation by themselves.*

This is problematic because it makes the common mistake of saying that group members share the costs of the action. They do not. Often, they will receive a reduced amount in damages, if some costs are taken out of the final settlement or damages award before it is divided between members. This is also very close to making an argument regarding justice, but it holds back and limits itself to factual claims.

Section B – Case studies

Question 1 (10 marks)

- a. Describe one reason for the importance of Higgins’s legal representatives in the resolution of this dispute. 3 marks

Advice

Note that only material relating to the *first* identified reason should be marked. In 2017 the Chief Assessor reminded students that “If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for.” Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
3 marks	- An answer that gives a clear identification of one reason for the importance of legal representatives that is relevant to Higgins, the plaintiff, in this case; and - That goes beyond the identification to provide detail or elaboration; and - That uses the source material in a meaningful way. Note that the Higgins case settled before trial. Therefore, the duties referred to must be either pre-trial, or relevant to preparing for a planned future trial.
2 marks	- An answer that lacks detail in the description of the reason. - An answer that lacks meaningful use of the source material. - An answer that has one or more significant content errors. - An answer that doesn’t apply perfectly to Higgins or the fact that a trial was not held, and is only ambiguously relevant. - An answer that is overall too brief.
1 mark	- An answer that is correct but that relates to defence counsel or to a trial that did not happen in the source case. - More than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Example reasons:

- ✓ *Higgins’s legal representatives are responsible for preparing the legal submissions to the court on her behalf, such as the initiation of proceedings and the statement of claim. This paperwork must be prepared according to the complex court rules, and both filed with the court and served on the defence in order to commence her civil action against the Government. If this had not been done properly, default judgment may have been entered against her and she would not have had the opportunity to engage in more beneficial negotiations.*
- ✓ *Higgins’s legal representatives were responsible for managing pre-trial negotiations for her: deciding when to approach the Government with a settlement offer, and whether to accept anything they were willing to offer, short of the \$3m she was asking. The mediation would have been conducted by Higgins’s lawyers rather than Higgins herself, which would have been less stressful for her.*
- ✓ *Legal practitioners have a paramount duty to the court and to justice – this is in the Civil Procedure Act, and it means that Higgins’s lawyers were only able to make submissions on fact or law to the court and in the original claim documents that they believed were truthful and in the interests of an efficient resolution to the dispute, even if Higgins hypothetically instructed them otherwise. They preserved natural justice.*

- b. How might the remedy sought by Higgins have achieved one of the purposes of civil remedies? 3 marks

MARK RANGE	QUALITIES OF ANSWER
3 marks	- An explanation that clearly expresses an understanding of damages, even though a freestanding definition is <i>not</i> required; and - That clearly identifies one purpose of damages; and - That makes one or more arguments about how a monetary award might achieve that purpose in the context of Higgins’s case; and - That makes meaningful use of the source material.
2 marks	- An answer that is vague on the nature of damages, and does not expressly indicate that the award is money from the defendant to the plaintiff. - An answer that is vague on the chosen purpose, and that perhaps conflates two or more purposes. - An answer that is overly theoretical and fails to make adequate use of the source case. - An answer that talks almost exclusively about the source case and shows little knowledge of legal content. - An answer that contains small errors of fact or understanding. - An answer that addresses the required content but is slightly brief and superficial.

1 mark	- An answer that defines damages but does nothing more. - An answer that defines one purpose of damages but does nothing more. - More than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.
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Example answer:

- ✓ *Higgins was initially seeking damages of reportedly close to \$3m. Source 1 explains that the money Higgins was seeking from the Government defendant was meant to compensate for loss such as past and future economic loss. Compensation is where an amount of money is given to the plaintiff that is roughly equivalent to the harm they have suffered, even though they might not be able to be placed in the exact position they were in before the harm occurred. Damages cannot undo sexual assault, but they can replace lost wages.*

c. Discuss why mediation was used as a way to resolve this civil dispute. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	- A comprehensive answer that clearly expresses an understanding of mediation, even though a freestanding definition is <i>not</i> required; and - That engages with arguments regarding the benefits of mediation – answers may also address the drawbacks of mediation as part of this discussion; and - That uses detail and/or examples to elaborate; and - That makes meaningful use of the source case as the context for the answer. Note that arguments do not need to weigh ‘both sides’ against each other equally for the task word ‘discuss’, but more is required than a simple list of strengths with no reflection or engagement. Better answers will certainly <i>consider</i> the flipside, even though they might ultimately dismiss it, or finish without a concrete contention.
3 marks	- Very little detail on mediation, rendering some parts of the answer slightly general. - Some lack of depth in the discussion. - A slightly brief acknowledgement of the benefits and/or drawbacks, with too much focus on factual content. - An answer that contains some small factual errors. - An answer that is slightly short. - An answer that lacks full and sophisticated use of the source material, and has use that is too brief or too shallow.
2 marks	- An answer that describes mediation but does not answer the question. - An answer that is sidetracked into discussion of the case, rather than mediation in the context of the case. - An answer that makes only one or two points. - An answer that is a short shopping list of dot-points. - An answer that has significant content errors that undermine the answer as a whole.
1 mark	- An answer that gives a brief definition of mediation only. - An answer that makes one brief comment about the source case only. - An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example arguments:

- ✓ *Mediation helped to resolve the lawsuit in a more cost-effective way than progressing to trial, which aided in access for Higgins. Higgins was suing at least in part for past and future economic loss; this suggests that she lost income, and that she expects to have reduced or lost income in the future. This would make it more difficult for her to bear the costs of civil litigation, especially against a wealthy defendant like the Government. By settling the dispute pre-trial, Higgins has saved tens of thousands of dollars in legal representation and court fees.*
- ✓ *Because the mediation resulted in a settlement so much earlier than a trial verdict, the dispute was resolved in many months – potentially years – less than if it had gone to a court hearing. Generally, mediation conferences last from a few hours to a few days, as opposed to a large action against the Government like this, which could take months to schedule and then weeks in court. Pre-trial mediation meetings are held privately and do not allow the public to see justice be done, but Higgins’s harm was intimate and does not necessarily need public scrutiny.*
- ✓ *Mediation resolution allowed Higgins to keep some of the details of her complaint private, and prevented her from having to give evidence again in a civil trial. Especially considering the type of harm she was suing for – sexual assault – any courtroom examination and cross-examination could have been traumatic. Source 2 does, however, argue that the mediation was an inadequate method for testing the evidence of her claims. It may not be appropriate to settle and make complaints ‘go away’ in private mediation sessions if there is insufficient evidence to support them.*
- ✓ *Mediation is still quite costly for the average person: mediators charge by the half-day, with fees commonly ranging from \$5000-15,000 per party, and judge-led mediation requires court fees to be paid. Higgins would also have paid her lawyer, Noor Blumer, for attendance and preparation in relation to the mediation conference. Higgins has been able to have her loss addressed without going to the additional expense of trial, but the fees may still have been prohibitive for many complainants.*

Problematic examples:

- ✗ *Higgins was able to get the Government to agree to a mutually-satisfactory outcome, without having to fight them for months in court. However, mediation does not give a binding resolution, so it might be inappropriate given that Higgins likely wants an enforceable outcome. The Government has agreed on a financial settlement, but, if they fail to follow the agreement, the matter will have to progress to a hearing or trial anyway, for a verdict and damages to be awarded.*

This is problematic because it argues that court-ordered mediation is not made into a legally-binding resolution. This is not true.

MINI-EXAM NO 3: UNIT 4 – MARKING GUIDE

Section A – Structured questions

Question 1 (3 marks)

Compare the concept of abrogating the common law with the concept of codifying the common law.

Advice

Neither abrogating nor codifying needs a separate definition at the start, before the task word is addressed.

Note that the task word ‘compare’ requires at least one difference *and* at least one similarity.

MARK RANGE	QUALITIES OF ANSWER
3 marks	- An answer that clearly expresses an understanding of both codifying and abrogating, even though a freestanding definition is <i>not</i> required; and - That identifies at least one difference between the two – two separate definitions will not be sufficient; and - That identifies at least one similarity between the two.
2 marks	A sufficient response, but lacking in detail or accuracy. For instance: - An answer that defines the terms, but is vague on the specific similarities and differences between the concepts and therefore fails to address the task word. - A lack of sufficient elaboration. - Missing either similarities or differences. - Small factual inaccuracies.
1 mark	More than <i>nothing</i> that is accurate and responsive, but limited to one point that is something less than the 2-mark range, for instance: A brief definition of one of the concepts.

Example answer:

✓ *Codification is where the common law is contained in statute so that the new legislation confirms what the precedent said and prevents it from being overruled in the future, whereas abrogation is where a rule different from the common law is passed in statute so that the new legislation invalidates the precedent. In both instances the parliament has legislated to override the common law.*

Problematic example:

✗ *Codification is where the common law is contained in statute so that the new legislation confirms what the precedent said and prevents it from being overruled in the future. Abrogation is where the new legislation invalidates the precedent. If a precedent is abrogated, it is no longer valid law.*

This is problematic because it reads like two separate definitions slightly more than a comparison.

Question 2 (4 marks)

Discuss the impact of costs and time on the ability of an individual to bring a case to court.

Advice

Note that arguments do not need to weigh ‘both sides’ against each other equally for the task word ‘discuss’, but more is required than a simple list of strengths with no reflection or engagement. Better answers will certainly *consider* the flipside, even though they might ultimately dismiss it, or finish without a concrete contention.

MARK RANGE	QUALITIES OF ANSWER
4 marks	- An answer that outlines the costs and time that a potential plaintiff would have to spend on bringing a case; and - That engages with multiple arguments about the impacts or strengths and weaknesses of these on the decision to bring a case; and - That provides detail appropriate to the number of arguments made.
3 marks	Something slightly less than a sophisticated, complete 4-mark answer. For instance, any of the following in an otherwise excellent answer: - Lacking in elaboration and detail. - Focusing too heavily on definitions and lacking in the subjective ‘discuss’ component. - Too much focus on either costs or time, and inadequate time spent on the other. - Small errors in fact or understanding.
2 marks	A response that is limited to only one or two good points, for instance: - A failure to cover one of either costs or time. - Two definitions but no discussion or detail. - Significant content errors that undermine the answer. - A failure to relate points to how a complainant might be influenced.
1 mark	An answer that is otherwise more than <i>nothing</i> accurate and responsive, but that is limited to one point that is something less than the 2-mark range, for instance:

	• One example of costs or time. • A shallow statement that a complainant might be discouraged from bringing action.
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Example arguments:

- ✓ *If the complainant hopes to set precedent with their case, they may decide that the time it takes to have an appeal heard in a superior court of record is not worth bringing a challenge, especially since they may have to face a lower court first. The appeal court would likely add months to years on top of what has already taken time, and the issue causing the challenge may not even be relevant any longer – for instance, in some asbestos and cigarette cases, the injured person had died.*
- ✓ *A potential plaintiff should consider whether they can afford to fund a lawsuit for months or potentially years into the future, because the matter may have adjournments and appeals. They will therefore need to assess their ongoing income, assets, and whether they want to take on the long-term financial stress of a case.*
- ✓ *A complainant may choose not to pursue a claim through legal channels if the value of the claim is less than the amount they are likely to spend in pursuing it. The defendant may not settle before trial, and a claim worth less than \$20,000 may not be worth pursuing through a court. Filing fees for simply commencing range from \$166.30 (in the Magistrates' Court) to almost \$2,488.70 in the Court of Appeal, and many solicitors will require a retainer of \$10,000 to begin prep for a case.*
- ✓ *Standard costs recompense an average plaintiff for only around 60% of their true costs, if they win, and indemnity costs are difficult to get. The complainant would also run the risk of an adverse costs award if they lost. Unless they were wealthy, or the legal principle was worth enough to them, they may be discouraged from pursuing a lawsuit through the courts, and they may choose to take the loss already suffered and 'cut their losses' so to speak.*
- ✓ *If the defendant refuses to engage in mediation or negotiation before trial in good faith, the courts can sanction them by awarding additional damages to the plaintiff if the plaintiff is successful. If the defendant refuses to negotiate, this may encourage a potential plaintiff to pursue legal action through the courts, because they may see an opportunity for their costs to be further reimbursed or offset because they were the party who tried to settle in good faith.*
- ✓ *The courts can award indemnity costs to a plaintiff who wins a lawsuit against a defendant who acts in bad faith, for instance by dragging their heels and delaying resolution. The opportunity of being awarded total costs may encourage a complainant to pursue a case, if the respondent is being antagonistic. For example, in 2017 Rebel Wilson offered to settle her defamation action against Bauer Media for \$200,000. Bauer Media refused this offer, but lost the case and was ordered to pay \$600,000. As a result of their 'litigious' conduct, Bauer Media was ordered to pay three times the settlement offer amount, and Wilson was able to seek indemnity costs for the expense of running her case, which could have been avoided.*
- ✓ *Delays can affect the willingness of complainants to use the legal system because they may want closure and to be able to get on with their lives, but they may feel pressured by the possible duration of a dispute to accept an inappropriate settlement.*
- ✓ *A potential plaintiff may be influenced to file court action instead of seeking a tribunal or mediation resolution, because rushing parties into resolution may prevent them from being able to prepare their best case thoroughly. 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. This is why resolution through court has the benefit of pre-trial procedures, which take longer but ensure thoroughness.*
- ✓ *Trials are increasing in length, which makes the decision to file a lawsuit a bigger decision. 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.*

Question 3 (8 marks)

Outline the way in which the express protection of rights acts as a check on parliament in law-making, and evaluate the extent to which this protection is supplemented by the ability of the High Court to protect the principle of representative government.

Advice

Note that only material relating to the *first* identified case should be marked. Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into a second answer.

An 'evaluation' requires an opinion or conclusion to be argued, and arguments weighed up on both sides of that opinion. Arguments should engage with each other and not be presented in lists.

MARK RANGE	QUALITIES OF ANSWER
8 marks	• A comprehensive answer that explains how express rights limit the legislative power of parliament by prescribing restrictions on that power; and • That gives an opinion on the ability of the High Court to supplement this protection; and • That provides sufficient detail on one or more express rights to illustrate the answer; and • That demonstrates meaningful engagement with two or more arguments in relation to the High Court setting precedent in this area of implied rights or structural protections. Note that express rights should be used as a general concept, but should also be illustrated with specific examples to illustrate. Either or both of Commonwealth and state parliaments may be addressed, as the question does not specify.
7 marks	Something slightly less than a sophisticated, complete 8-mark answer. For instance, any of the following in an otherwise complete answer: • Lack of a clear contention or opinion. • A lack of scope or detail in the arguments, either covering slightly too few or a good number in slightly too little depth. • Reliance on examples of express rights with too little general answer on their ability to limit parliament. • A slight reliance on a factual description of a High Court case, instead of using the case in arguments. • Slight errors in fact or superficial terminology. • An answer that is slightly short.
6-5 marks	A sufficient response, but lacking in detail or accuracy. For instance: • Omission of express rights.

	- An incorrect case being chosen to illustrate. - No understanding shown of the basis of representative government in the Constitution. - A failure to evaluate, and relying on factual descriptions of cases and rights. - Significant errors of fact or understanding.
4 marks	Answers that demonstrate more significant problems or omissions, such as: - No relevant examples. - An answer that consists of examples of rights and a relevant case description, but that does not evaluate or answer the question. - An answer that contains errors of fact or understanding that are significant enough to undermine the answer. - An answer that provides no detail on either rights or a relevant case and relies entirely on general statements. - An answer that reads like a 'laundry list' of dot points.
3-2 marks	A response that is limited to only one or two good points, for instance: - An answer that makes a statement about express rights or identifies a relevant case. - A brief case description in relation to representative government. - A detailed discussion of High Court interpretation in general.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example arguments:

- ✓ *The protection given by express rights is meaningfully supplemented by High Court interpretation of ss7 and 24, because ss7 and 24 relate to the structural protection of representative government and this is not a matter covered by any of the recognised express rights.*
- ✓ *Express rights are 'entrenched' because they cannot be changed or removed without following the referendum process in s128, whereas the protection given by ss7 and 24 can be changed or removed by the High Court adopting a different interpretation – the people do not need to authorise this by voting. Express rights are therefore more democratic restrictions on the power of the parliaments, and the people have a say in what protections they want to have.*
- ✓ *Express rights give protections from government power that are explicitly written into one section of the Australian Constitution, whereas ss7 and 24 give protections that only exist in judicial interpretation of their wording. This means that express rights are clearer restrictions for the public to read and understand. A protection such as democratic voting procedures, for instance, has more ability to change from case decision to case decision – and is not even written in the text of the sections, so people may not know the parliament has this limitation on its power.*
- ✓ *The scope of protection afforded by express rights is more specific and narrow than the protection afforded by ss7 and 24. This is because the protection is explicit in the wording of the right, whereas the protection given by ss7 and 24 is implied and exists only in the developing case law created by the High Court – we do not know how that precedent will be added to or changed in future cases.*
- ✓ *High Court interpretation can increase the scope of the constitutional rights, or even add additional rights to those contained in the express wording. For instance, in the ACTV Political Broadcasting Case the Court found that ss7 and 24 created an implied freedom of political communication. This increases the ability of the Court to check the legislature, beyond what might be obvious from the text of the Constitution.*
- ✓ *The express right to trial by jury in s80 of the Constitution restricts only the Commonwealth Parliament, and only when it is legislating regarding offences it deems to be indictable. The Parliament cannot create a federal indictable offence and legislate to remove juries.*
- ✓ *Express rights can put explicit restrictions on the power of the parliaments, but these can also be expanded by High Court interpretation of the wording. For instance, the s116 restriction on federal legislation regarding religion has been expanded by precedent to include atheism.*
- ✓ *The Roach case came before the High Court regarding the question of voting rights. The Commonwealth had legislated to prohibit voting by any person held in custody, even on short sentences or presumed innocent on remand. Roach argued that this breached the implied right to vote contained in the ss7 and 24 provisions that the houses of federal parliament be "chosen by the people," and that the Parliament could not stop 'the people' from participating. The High Court refused to find an absolute right to vote, but did agree that the Parliament had limitations placed on it by the sections and could not legislate to prevent participation in elections without substantial and proportionate reasons.*

Problematic example:

- ✗ *Express rights are rights that are explicitly written into one section of the Australian Constitution, whereas ss7 and 24 are sections governing the constitution of the houses of federal parliament and have been interpreted by the High Court.*

This is problematic because the focus is on definitions of the two, rather than on the way they operate as protections.

Section B – Case studies

Question 1 (10 marks)

- a. Who would have been responsible for signing the *Summary Offences Act 1966* (Vic) into law? 1 mark

MARK RANGE	QUALITIES OF ANSWER
1 mark	An answer that clearly states that the Victorian Governor would do this. Note that giving the correct answer of the <i>state</i> Crown representative will be enough to have used the source material in the answer. Alternatively, an answer that merely says 'Crown' might be improved with a reference to Victoria or the Act.

Example answer:

- ✓ *The Victorian Governor would give assent.*

Problematic answer:

- ✗ *The King.*

This is problematic because it is not the King personally who would have given assent, and the name of the King fails to show an understanding that the Act is a Victorian state law.

- b. Explain one reason why the courts may need to interpret s17 of the *Summary Offences Act 1966*, and one possible effect of this interpretation. 6 marks

Advice

Note that only material relating to the *first* identified reason and *first* effect should be marked. Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into a second answer.

MARK RANGE	QUALITIES OF ANSWER
6 marks	- An answer that clearly identifies one specific reason and one specific effect; and - That provides detail with enough depth on each; and - That has meaningful use of the source material within each of the answers, showing their relevance to the law.
5 marks	Something slightly less than a sophisticated, complete 6-mark answer. For instance, any of the following in an otherwise excellent answer: - An answer that is slightly short or lacking in detail. - A few small errors of understanding or fact. - Slightly too much focus on one part of the answer, with insufficient depth on the other. - Something less than a sophisticated use of the source material.
4 marks	A sufficient response, but lacking in detail or accuracy. For instance: - Material errors of content. - An answer that is overall too general or brief. - Heavy weighting towards one part of the answer, so that the second part is superficial at best. - Some overlap between reason and effect, or ambiguity in the line separating them. - One of the two parts that fails to relate to the source material.
2-3 marks	A response that is limited to only one or two good points, for instance: - No meaningful relationship with the source material – two extended definitions of reason and effect only. - An answer that mistakes statutory interpretation with parliament changing the law. - Significant errors of understanding or fact. - An answer that gives only two outlines.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range, for instance: A simple definition of one reason <u>or</u> one effect.

Example reasons:

- ✓ Courts may need to interpret the Act if a word used in the act such as 'obscene' was not defined at the time of drafting. For instance, the word 'obscene' refers to a public reaction such as offence that changes over time, as society stops being offended by some things and starts being offended by others. Bikinis are no longer offensive, for instance. Parliament may have omitted a definition to allow for this.
- ✓ Laws must match community values, or they won't be accepted and followed. So, as society's attitudes change, laws need to be interpreted in light of those values. The previous definition of 'indecent' may have been based on social beliefs about decency that have subsequently changed. For instance, swearing is more acceptable in public than it used to be. Society today may not support mere swearing being criminalised.

Example effects:

- ✓ One effect may be to influence parliament to respond by legislating. If the Victorian Parliament disagrees with the definition of "obscene" and wants to have laws in line with a different standard of 'obscenity', it could pass a bill to amend the Summary Offences Act and define obscenity as something either more strict or more lenient than the precedent. For instance, they may define it closer to psychological harm, or closer to mere hurt feelings.
- ✓ Once s17 of the Act has been definitively interpreted by a court, it can be confidently applied to the facts of cases. A clear standard for obscenity allows the parties and their legal representatives to better predict the chances of success for their side of the case, and allows them to prepare witnesses who will speak to whether the wrongdoing fits this definition. This will make it clearer whether the accused acted inside the law or outside it.

Problematic example:

- ✗ Courts may need to interpret a statute if an error was made in the drafting. Bills are drafted by parliamentary counsel, and are passed through both houses of parliament, sometimes with very little time allowed for scrutiny and debate – the first wave of 2001 'anti-terrorism' laws were given to MPs to read overnight, even though they contained more than 600 pages. Section 17 may have an error in its drafting that requires courts to clarify the meaning.

This is problematic because it relies on an outside example rather than focusing on the source material, and neither provides evidence that there has been an error in drafting nor indicates what that error might be.

- c. How might judicial conservatism affect the meaning of s17 of the *Summary Offences Act 1966*? 3 marks

Advice

Judicial conservatism does not need a separate definition at the start, before the task word is addressed.

MARK RANGE	QUALITIES OF ANSWER
3 marks	- A clear and complete answer that shows an understanding of what judicial conservatism is – the preference by a judge to interpret law in line with the original intentions of parliament, and to follow existing precedent rather than change it; and - That makes a clear connection between judicial conservatism and how this might affect the meaning of s17 in particular – a particular word or phrase being interpreted should be referenced somewhere in the answer.
2 marks	Something slightly less than a sophisticated, complete 3-mark answer. For instance, any of the following in an otherwise complete answer: - An answer that is vague on the nature of conservatism, or that explains it in a circular fashion as being ‘conservative’. - Too little specificity in the use of s17 of the Act. - An unclear explanation of what the ‘conservative’ interpretation might be. - Small errors of fact or understanding. - An answer that is slightly brief and superficial.
1 mark	More than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range, for instance: - An answer that defines judicial conservatism but does nothing more. - An identification of which specific part of the section is being interpreted.

Example answer:

- ✓ *Since judicial conservatism is a reluctance in judges to ‘change’ the law, it will result in the court being less likely to expand the meaning of ‘obscene’ or ‘indecent’ and set new precedent. Justice Kirby says judicial conservatism can be called ‘strict legalism’, because it follows the law rather than changing it. In this case, following old precedent could maintain an inappropriately wide scope of what is criminalised, because some things that used to be considered socially obscene are no longer offensive.*

Problematic example:

- ✗ *Judicial conservatism is the idea 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. An example of judicial conservatism is the Trigwell case, in which Justice Mason said “The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found.” Section 17 could be kept very narrow and conservative.*

This is problematic because it focuses on a definition rather than explaining an impact on the source Act. The reference to the source uses ‘conservative’ in a circular way, and the idea of keeping it ‘narrow’ doesn’t make sense with the facts because the previous understanding of indecency was broader than the current one. Students must think meaningfully about the source material.

Question 2 (5 marks)

- a. **Identify one category of legislative power in the constitutional allocation of powers, and discuss the extent to which the states are restricted by the allocation of legislative powers. 5 marks**

Advice

If multiple answers are given for the identification, the *first* listed power should be marked. If the student lists a range of ‘categories’ and it reads like a scattergun list of correct and incorrect guesses, the identification should be marked overall as incorrect even if the first answer is accurate. For instance, “residual, legislative, executive, and exhaustive” would be overall incorrect.

MARK RANGE	QUALITIES OF ANSWER
5 marks	- A clear and complete answer that contains the name of one accurate category of power; and - That contains meaningful engagement with multiple arguments in relation to the effect of the allocation of powers on the power of the state parliaments – the ‘effect’ may be on literal power, or on the practical and political ability to legislate; and - That uses the source material in a meaningful way. Note that the task word ‘identify’ requires only the name to be given. Note also that students do not need to weigh each argument against counterarguments for the task word ‘discuss’, but more is required than a simple list of strengths or weaknesses with no reflection or engagement. Note also that no definitive opinion needs to be given in conclusion, because that is not required for ‘discuss’.
4 marks	- An answer that fails to correctly identify one correct category of power. - An answer that focuses slightly too heavily on factual information and/or case examples and does not focus sufficiently on the subjective discussion. - An answer that is slightly one-sided or list-like. - An answer that shows slightly superficial use of the source material. - An answer that is slightly brief. - An answer that contains a few small errors of understanding or fact.
3 marks	- The answer provides accurate content but lacks meaningful engagement with subjective arguments. - There are material errors of understanding or fact. - The answer that fails to relate the arguments properly to the state parliaments. - The answer is overall too general or brief. - The source material is not used.
2 marks	An answer that suffers multiple of the above problems.

	- An answer that omits ‘discussion’ entirely in favour of a few content facts or a detailed explanation of the allocation of law-making powers. - An answer that is undermined by significant errors of understanding or fact. - An answer that reads like a ‘shopping list’ of dot points. - An answer that simply discusses the source material, but does not use it to answer the question.
1 mark	- An answer that correctly identifies a category of power but does nothing more. - Anything else that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range. Note that answers where the student has confused the allocation of powers with the separation of powers <i>may</i> fall here, if the student makes a point relevant to the allocation somewhere in the course of the answer.

Categories of power:

- ✓ *Specific – this is not listed in the Study Design, but is a valid category of power*
- ✓ *Exclusive*
- ✓ *Concurrent*
- ✓ *Residual*

Example arguments:

- ✓ *The allocation of powers ensures laws of a national character are made centrally, without conflict between states and confusion for the public when dealing with interstate jurisdictions. These laws made using specific powers do limit the power of state parliaments to pass contradictory laws, but it is overall for the public good.*
- ✓ *The protection of residual powers in the allocation 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. This gives the states the power to make many laws that govern important aspects of everyday life. Section 51, as seen in Source 3, does not contain local issues like these, in its list of Commonwealth powers.*
- ✓ *The allocation 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, because ‘water’ is not on the list of heads of power in s51 of the Constitution. Section 51 focuses on national issues, such as ‘naturalisation and aliens’ as is extracted in Source 3.*
- ✓ *The allocation 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. The High Court can interpret an exclusive power to be broader than it literally appears, or can interpret a seemingly concurrent power (such as immigration) to be exclusive. This reduces the power of the states.*
- ✓ *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 allocation of powers has worked in practice. Over the last century, the constitutional allocation of law-making powers has operated 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. Treaties and declarations are part of this, as the Commonwealth can legislate to implement them even if the topics are otherwise residual.*

MINI-EXAM NO 4: UNIT 4 – MARKING GUIDE

Section A – Structured questions

Question 1 (10 marks)

- a. Explain two errors in the above scenario and provide corrections for each error. 4 marks

Advice

Note that only material relating to the *first two* identified errors and corrections should be marked. Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into a third answer.

MARK RANGE	QUALITIES OF ANSWER
4 marks	- A clear and accurate answer that unambiguously provides two errors; and - That matches each error with a correction for each.
3 marks	- An answer that lacks one error or one correction. - An answer that is on track, but slightly too vague about one error/correction pair. - An answer that is correct except for one small factual error that doesn’t undermine the response as a whole.
2 marks	- An answer that has only two errors and no corrections, or only one pair. - An answer that makes two unclear statements that combine the errors and corrections. - An answer that so brief as to omit necessary information. - An answer that is undermined by incorrect content.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example pairs:

- ✓ *The VLRC doesn’t receive commissions from the Commonwealth Attorney-General. It receives commissions from the state Victorian Attorney-General.*

- ✓ Community law reform projects are not initiated by a commission from the attorney-general. Community law reform projects are self-initiated by the VLRC.
- ✓ Standing is not required for individuals or groups to make submissions to the VLRC. Standing is for court cases, and anyone can submit in response to the VLRC consultation paper.
- ✓ The VLRC does not have the power to implement its own recommendations through legislation. The Commission can recommend laws, but if the parliament doesn't introduce a bill to implement the report, no new law will receive assent.

b. Referring to one example of a recent recommendation made by the Commission, evaluate the effectiveness of the VLRC as a law reform body. 6 marks

Advice

The VLRC does not need a separate definition at the start, before the task word is addressed.

The recommendation must have been given in the last four calendar years for it to be considered 'recent'. Discretion may be used if the recommendation is older than that, but has been the subject of implementation or government response in the last four years to 'renew' it as current.

An 'evaluation' requires an opinion or conclusion to be argued, and arguments weighed up on both sides of that opinion. Arguments should engage with each other and not be presented in lists.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that clearly identifies one recent recommendation; and • That provides elaboration and detail with enough depth for roughly 2 of the 6 marks; and • That demonstrates a clear understanding of the role of the VLRC, even though a freestanding definition is not required; and • That gives a clear opinion in response to the question, at the start of the answer, at the end of the answer, or woven throughout the answer; and • That shows meaningful engagement with at least two arguments in relation to the effectiveness of the VLRC.
5 marks	Something slightly less than a sophisticated, complete 6-mark answer. For instance, any of the following: • Lack of a sophisticated opinion in response, and giving a general "I agree to a certain extent" with insufficient clarification through the arguments. • Lack of scope or detail in its arguments, either covering slightly too few, or a good number in slightly too little depth. • A small number of minor errors in understanding or content. • Lack of weighing strengths against weaknesses. • Lack of detail and reliance on general statements. • A failure to use the recommended reform as part of the answer, leaving it as a solo definition.
4 marks	A solid response but lacking in sufficient detail or accuracy, for instance: • Relying only on generic arguments for criminal and civil systems, and making no differentiation between them. • A number of content errors. • Too few counter-arguments on the other side.
3 marks	A sufficient response, but lacking in detail or accuracy. For instance: • A number of errors in facts or understanding. • A failure to use any reform, or use of an invalid reform. • Too few arguments or too little elaboration. • A failure to weigh strengths against weaknesses, keeping them as separate points.
2 marks	A response that is limited to only one or two good points, for instance: • One recommendation described well. • One fully-worked argument about the Commission. • A short list of dot-point arguments about the Commission.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example arguments:

- ✓ The Commission is funded 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. Most of its commissions also last for no more than 24 months, which means that often the Government that requested the recommendations is still in power. This doesn't mean the Government is guaranteed to implement the recommendations, though: the main recommendation on Committals, to abolish the test and hearing, has not been picked up.
- ✓ The Commission makes fully-developed recommendations with detail for implementation, but the extent of the VLRC to meaningfully influence the legal system will depend on the funding that the government commits to reform. For example, programmes such as the Online Dispute Resolution at VCAT, and the Youth Justice Panel alternative for juries in trials for child offenders, have received positive feedback from court users as well as staff, but were not implemented. In 2020, despite the Covid-19 lockdown, VCAT began removing ODR materials from its website because no funding had been allocated by government following the successful pilot.
- ✓ The VLRC 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. The recommendations carry more weight than petitions and public lobbying requests that do not have the same expert weight behind them.
- ✓ The recommendations on Inclusive Juries, weren't tabled in Parliament for over a year, which leaves the timeline for final implementation in the hands of the Government. Even before this, 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. Even the community law inquiry on funeral and burial instructions lasted for 18 months, from June 2015 until December 2016. If there has been a change of Government in this time, the new Government may prefer its own policy agenda and may sideline the non-binding recommendations to distance itself from the previous governing party.

Question 2 (5 marks)

Evaluate the extent to which the people have the power to change the Australian Constitution. 5 marks

Advice

No procedure such as bringing a court challenge or the referendum procedure needs a separate definition at the start, before the task word is addressed. At least two procedures should be mentioned in the answer to be eligible for full marks, however.

MARK RANGE	QUALITIES OF ANSWER
5 marks	- A complete and sophisticated answer that gives a clear opinion on how much or well the people can change the Constitution; and - That addresses two or more ways, or procedures, through which this change can be attempted; and - That demonstrates engagement with multiple arguments in relation to the ability of the people to effect change; and - That provides counterbalancing arguments so that ‘both sides’ are considered; and - That uses the source material in a meaningful way. Note that arguments <i>do</i> need to cover ‘both sides’, regardless of the opinion given, because of the task word ‘evaluate’. Arguments should also engage with each other and not be a list. Note also that an opinion does not need to be given for <i>each</i> way or procedure: an opinion is only required overall, and ways or procedures for influencing change can be balanced against each other with one being effective and the other ineffective.
4 marks	- An answer that fails to come to a clear conclusion in response. - An answer that fails to mention any more than one way or procedure. - An answer that is limited in its ‘counterbalancing’ and lacks some engagement between the sides. - An answer that contains a few small errors of understanding or fact. - An answer that lacks some sophistication in its use of the source material.
2-3 marks	- An answer that relies on listed points and lacks any engagement with the arguments. - An answer that only addresses one side of the question, either effective or ineffective. - An answer that covers two ways or procedures in shallow definitions, or one way with less than sophisticated evaluation. - An answer that contains significant errors of understanding or fact that undermine the answer. - An answer that fails to use the source material.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Example arguments and counterarguments:

- ✓ *Referendum is the only process that gives the people the power to alter the wording of the Constitution. The only way in which a referendum can be passed is by the public voting in favour of it and providing a double majority – this prevents the Commonwealth Parliament from changing powers such as amending the power over “aliens” and redefining it, without going through the people first. The wording voted on by the people will always be subject to High Court interpretation, though. In the cases of Love and Thoms, the High Court interpreted the meaning of the aliens power, and could do likewise with whatever change the public voted for.*
- ✓ *The people can vote in a s128 referendum to change the wording of the Constitution, but achieving the intent of the change can present a complex challenge in the future if dissenting members of the public bring High Court cases and the Court interprets the wording in a way that perhaps the voters at the time did not intend. Interpretation determines the meaning, scope and application of words, and therefore has the power to radically change the operation of the Constitution in practice, in a way not foreseen by the people supporting the referendum. 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 disadvantaged Indigenous people, even though this was not the original intent.*
- ✓ *No member of the public has the authority to initiate a referendum bill. Instead, the people have to wait for the federal government to draw up something they support. The ability of the people to bring a High Court case is greater, but an appropriate person must be found who has standing in the issue and the time and willingness to be the named applicant. The High Court also cannot change the wording of the Constitution, or change the interpretation of the wording simply because a member of the public disagrees with it. For instance, members of the public may believe that a biological ancestor should be required to exempt an Aboriginal person from the ‘aliens’ power, but the Court will not change its interpretation unless a legal argument can be made why its current precedent is wrong in law.*
- ✓ *The people can use the power of representative government to influence the federal parliament to apply the Constitution in a way supported by the people – or, even, to introduce a referendum bill. For instance, the public could use their votes at election to support candidates who pledged to exempt all Aboriginal Australians from the ‘aliens’ and deportation laws, regardless of the High Court’s interpretation. This relies on multiple electorates all pushing a single issue, though; usually, people vote according to party policy, and support parties for more than a single policy. Climate change was significant in the 2022 federal election, for instance, but few entire electorates were decided on this issue alone.*

Section B – Case studies

Question 1 (10 marks)

- a. Explain one reason why laws might need to change. 3 marks

Advice

Note that only material relating to the *first* identified reason should be marked.

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that gives a clear identification of one reason; and • That goes beyond the identification to provide detail or elaboration; and • That uses the source material in a meaningful way.
2 marks	• An answer that lacks detail in the description of the reason. • An answer that ambiguously covers more than one general reason by blending them together. • An answer that lacks meaningful use of the source material. • An answer that has one or more significant content errors. • An answer that is overall too brief.
1 mark	An answer that is more than <i>nothing</i> accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Sample answers:

- ✓ *Changes to technology, and the ability to both pollute the environment with fossil fuels and measure the environmental impact of business and human activity, make some things possible that were impossible in the past. Legislation such as carbon pricing may be needed to respond to this, which is why so many independents campaigned on climate policy.*
- ✓ *Newly-emerging threats and harmful trends can influence a change in the law because parliament seeks to address the specific harm that might be caused by the new situation. Australia has suffered devastating bushfires and floods in recent years, and this might be exacerbated by climate change. The Greens have prioritised no new coal or gas to respond to this.*

- b. Outline one way in which individuals might influence parliament to change the law. 3 marks

Advice

Note that only material relating to the *first* identified way should be marked.

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A clear answer that gives a comprehensive definition of one way; and • That makes a link between the method and how it would be likely to have an effect on law-makers; and • That uses the source material in a meaningful way.
2 marks	• An answer that gives a clear and comprehensive definition of a valid way, but that fails to mention the source. • An answer that combines a number of ways so that the focus of the answer is unclear. • An answer that begins with a valid way, but then segues into one or more other ways so that the answer is unclear. • An answer that gives a way that isn't expressly linked in any way with how it influences parliament. • An answer that contains minor factual errors.
1 mark	• An answer that identifies a valid way, but that provides no definition of it. • An answer that meets the criteria for a 2-mark response, but that contains some error of fact that is more than merely superficial. • Anything else that is more than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answers:

- ✓ *Individuals can raise awareness by putting out and sharing social media messages. Social media gives members of the community the chance to post their own opinions and the reasons behind them so that other people can learn about the issues and develop their own knowledge and voting preferences. The Internet could have been used in this case to promote independent members standing for climate change, by individuals sharing candidate posts and pages and commenting favourably without the limits of editorial approval, and perhaps getting these new MPs onside for later parliamentary debate.*
- ✓ *Individuals can encourage change by signing petitions to parliament, giving parliament a specific request for action on a matter within their jurisdiction. If enough people sign a petition with a specific request for something that is compatible with what the Greens support, such as a higher renewable energy target, the Greens may be encouraged to push that from the crossbench. The crossbench wields more power when the Government does not have a majority in its own right.*

c. Analyse the extent to which the media can play a role in law reform. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	- An answer that clearly identifies the way that the media relates to law-reform; and - That provides a clear opinion on the extent to which that influence is strong or weak (or similar words of measurement); and - That presents a range of subjective arguments in relation to that opinion; and - That uses the source material in a meaningful way.
3 marks	- An answer that fails to clearly express how the media relates to reform. - An answer that shows a slightly excessive focus on one example or case to the detriment of its broader answer to the question. - An answer that focuses too heavily on one side of the question. - An answer that refers to the source material only superficially. - An answer that contains slight errors in fact. - An answer that is slightly short.
2 marks	- An answer that gives a good outline of media involvement in reform, but that does not go beyond this to 'analyse'. - An answer that provides a basic argument as to the impact of the media but that lacks entirely in elaboration and explanation. - An answer that fails entirely to refer to the source material. - An answer that contains fundamental errors that undermine the answer. - An answer that elaborates on only one point. - An answer that runs through a short laundry list of dot points.
1 mark	- One example that illustrates the role of the media in influencing reform. - More than <i>nothing</i> accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample arguments:

- ✓ *Social media may be used by groups and individuals, and they can raise awareness by putting out social media messages and hoping they are shared. Many of the teal independents standing for election in 2022 would have relied on this to spread their policies and wished-for legislation, because they did not have party campaign machines to market them.*
- ✓ *The media can be used to encourage, publicise or assist other types of political action such as protesting, gathering support for petitions and lobbying members of parliament. Both of the sources are examples of this: members of the public reading them might come away more informed on policies to do with climate change and Medicare, and might then lobby their local member to support them.*
- ✓ *Paid campaigns generally have very clear messages that have been honed and subjected to market research. They are as powerful and memorable as possible. The last time a carbon price was introduced it suffered from a lack of public support; the media plays a significant role in this because lobby groups can use it to increase or decrease support for a reform.*
- ✓ *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. This can be manipulated by parties who want to win elections, though, and entire policy platforms can be reduced to three- or four-word slogans. This reduces the complexity of new proposals and public understanding.*
- ✓ *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. A minority government is an example of this diversity of opinion, because there is no clear majority of the public in favour of one party policy platform.*

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

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

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

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

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

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

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

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

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 roles in a criminal trial. (4 marks)

Sample answer 1

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

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 class actions help enhance the effective operation of the civil justice system? (4 marks)

Sample answer 1

Feedback:

- ✓ This answer contains a lot of correct information about class actions.
- ✗ 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

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 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.

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

PART A

Question 1 (2 marks)

What is meant by a 'bicameral' system of parliament?

Question 2 (4 marks)

Outline the remedy of injunctions, and discuss the ability of injunctions to achieve its purpose.

Question 3 (7 marks)

Federal Health Minister Mark Butler said in a press statement on Monday 1 May 2023: "Vaping was sold to governments and communities around the world as a therapeutic product to help long-term smokers quit. It was not sold as a recreational product – especially not one for our kids. But that is what it has become: the biggest loophole in Australian history. One in six teenagers aged 14-17 has vaped. One in four people aged 18-24 has vaped. By contrast, only one in 70 people my age has vaped."

a. How does the representative nature of parliament impact the ability of parliament to make law?

4 marks

b. Explain one reason for law reform.

3 marks

Question 4 (5 marks)

Using one example of a recent recommendation for reform to illustrate your answer, describe the role played by the Victorian Law Reform Commission (VLRC) in law reform in the state.

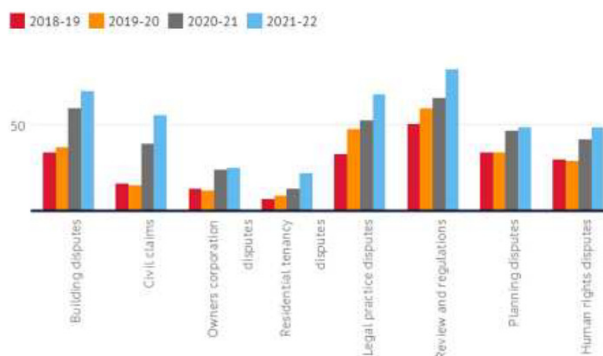
Question 5 (4 marks)

Comment on the ability of class actions to enhance access to justice in the civil system.

Question 6 (8 marks)

Dealing with the Victorian Civil and Administrative Tribunal

80th percentile (number of weeks taken to settle 80% of cases)



Source: VCAT 2021-22 annual report

Evaluate the appropriateness of the Victorian Civil and Administrative Tribunal (VCAT) for settling major civil disputes.

Question 7 (10 marks)

On 5 April 2023 a jury found former rugby league player Jarryd Hayne guilty of sexual assault after 23 hours' deliberation over more than a week. After eight days the jury sent a note to the judge asking whether "ignorance of the law" was "sufficient defence," and one hour later the jury notified the judge that their deadlock had been resolved and they had a unanimous verdict. Hayne's barrister, Margaret Cunneen SC, expressed concern over the wording of the note, saying that the same wording appeared in articles on the case online. Hayne plans to appeal.

Discuss the roles of personnel and the importance of legal representation in a criminal trial.

END OF SECTION A**SECTION B****Instructions for Section B**

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Answer **all** questions in the spaces provided.

Question 1 (16 marks)**Source 1**

The following is extracted from the Voice to Parliament referendum bill.

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023

Type: Government
Portfolio: Attorney-General
Originating house: House of Representatives
Status: Passed Both Houses

Summary

Proposes an alteration to the Constitution to recognise First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples. [The bill was passed by an absolute majority of each House of the Parliament thereby enabling the proposal to be submitted to the electors for approval in a referendum - see section 128 of the Constitution.]

Alteration

Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

Source 2**What happens if the government goes against the advice of the Voice to Parliament?**

28 February 2023

Anne Twomey, Professor Emerita, University of Sydney for The Conversation

If the government disagrees with representations made by the Voice, the short answer is that the government prevails. Governments and parliaments are elected to represent all the people, not just one group of the people. This means they have to take into account a broad range of considerations, including how to manage the budget and the economy, ensure national security and maintain the social wellbeing of the whole country.

Could the courts force the government or parliament to implement the Voice's representations?

The High Court has consistently stayed out of the internal proceedings of parliament. It does not determine what parliament should or should not consider when passing laws. Due to the separation of powers, the courts cannot instruct parliament to give effect to representations by the Voice.

However, the courts can review a government decision that affects the interests of people if it was made in an unfair manner. If, for example, a law said the decision-maker must take into account representations of the Voice before making a certain type of decision, failure to do so would

mean the decision was invalid. The court would then send the decision back to the decision-maker to be remade once the relevant representations had been taken into account.

In these cases, the courts are only concerned with the fairness of the process – that the decision is made properly, taking into account all relevant considerations – not the content of the decision.

- a. What category of power under the division of legislative powers would have been used to pass the Voice to Parliament bill? Justify your answer. 2 marks
- b. Discuss one role of the lower house when passing this bill. 4 marks
- c. Comment on the means by which the s128 requirement for a double majority acts as a check on parliament in law-making. 5 marks
- d. Discuss the role of the High Court in interpreting the Australian Constitution. 5 marks

Question 2 (24 marks)

Source 1

Following are extracts from the court's judgment in the matter of *BA v The King*.

BA was found guilty of a 2019 breaking and entering, in relation to an apartment in which he previously lived with his former girlfriend and where he was still on the lease. He appealed this conviction to the High Court.

***BA v The King* [2023] HCA 14**

Date of Hearing: 7 February 2023

Date of Judgment: 10 May 2023

KIEFEL CJ, GAGELER AND JAGOT JJ

This appeal should be dismissed.

The Court of Criminal Appeal was correct to conclude that, on the facts of this case, the appellant's status as a co-tenant under a residential tenancy agreement did not give him a right to kick down the door, enter the dwelling-house, and assault his former partner who resided in the dwelling-house and who had refused him entry.

Archbold said that, for burglary, "[o]ccupation rather than legal ownership must be proved." East described occupation as the key to making a mansion house subject to this "high protection of the law." East also explained that burglary did not depend on either ownership or possession, but occupation by inhabitation.

The appellant was not entering the apartment to exercise any right under the *Residential Tenancies Act*. He broke a door down so he could enter, and then assaulted his former partner in her home.

GORDON, EDELMAN, STEWARD AND GLEESON JJ

The question raised by this appeal is: for the purposes of s112 of the *Crimes Act*, did the appellant commit a "break and enter"? The answer is 'no', and the appeal should be allowed.

The appellant had a right of exclusive possession which would not have been lost even if it had been found that he ceased to occupy the premises prior to the expiry or termination of the residential tenancy agreement. Consistent with that right, the appellant had lawful authority for entry into the Queanbeyan apartment, including by force of the kind that would constitute a "break" in the absence of such authority, so that his forcible entry was no trespass. Having that authority, the appellant did not require the complainant's consent to enter the residential premises.

- a. Was BA's appeal successful? Give reasons for your answer. 3 marks
- b. How is the phrase "break and enter" an example of statutory interpretation in the case of BA? 4 marks
- c. Discuss one reason for the existence of a criminal court hierarchy. 4 marks
- d. To what extent have the presumption of innocence and the burden of proof contributed to justice in the case of BA? 6 marks
- e. Would the victim be permitted to bring a private lawsuit against her former partner following his acquittal? Explain your answer. 3 marks
- f. Explain two factors that might influence her decision to bring legal action. 4 marks

INDEX

- “Living tree” approach, 159
- Abolishing, 165
- Abrogation, 165
- Access to justice, 30
- Accused, 12
- Act, 112
- Administrative convenience, 80
- Adversary system, 15
- Advisory opinions, 146
- Aggravating factor, 61
- ALP, 113
- Amicus curiae*, 162
- Annulling, 165
- Appeal, 41, 81
- Appropriation bills, 117
- Arbitration, 77
- Attachment of debt order, 70
- Attachment of earnings order, 70
- Australian Constitution, 112, 115
- Backbencher, 119
- Bail hearing, 17
- Barrister, 68
- Beyond reasonable doubt, 16
- Bicameral, 112, 132
- Bill, 112
- Binding precedent, 154
- Boycotts, 170
- Broad reading, 128
- Burden of proof, 16
- Cabinet, 114
- Case law, 147
- Civil law, 12
- Civil pre-trial, 95
- Civil Procedure Act 2010* (Vic), 83
- Civil remedy, 102
- class action, 89
- Codification, 164
- Colony, 115
- Common law, 147
- Common law rule, 154
- Commonwealth of Australia, 115
- Commonwealth Parliament, 112, 113
- Community corrections orders, 57
- Community legal centres, 33
- Compensatory damages, 103
- Conciliation, 76
- Concurrent powers, 124
- Constitutional monarchy, 112
- Consumer Affairs Victoria, 91
- County Court, 40
- Court hierarchy, 40, 80
- Court of Appeal, 40
- Courts, 91
- Criminal law, 12
- Crossbencher, 119
- Crown, 112, 120
- Damages, 103
- Delegated legislation, 119
- Democracy, 112
- Demonstration, 170
- Denunciation, 55
- Deterrence, 54
- Directions hearings, 82
- Disapproving, 156
- Disbursements, 68
- Distinguishing, 156
- Division of constitutional law-making powers, 123
- Doctrine of precedent, 153
- Doctrine of reserved powers, 128
- Double dissolution, 121
- Double majority, 188
- Duty lawyer, 33
- Early neutral evaluation, 76
- Electorate, 113
- Enforcement orders, 70
- Entrenched, 144
- E-petition, 169
- Equality, 29
- Exclusive powers, 123
- Executive, 113, 143
- Executive council, 121
- Express abrogation, 165
- Express rights, 144
- External affairs, 129
- Fair hearing, 29
- Federal parliament. *See* Commonwealth Parliament
- Federation, 112, 115
- Fines, 56
- Freedom of political communication, 141, 159
- Fully enforceable, 141
- General compensatory damages, 104
- General deterrence, 54
- Governing party, 113
- Government, 113
- Government department, 114
- Governor, 112
- Governor-general, 112
- group proceedings, 89
- Guilty plea, 36, 62
- Heads of power, 124
- High Court of Australia, 40, 115
- House of parliament, 112
- House of Representatives, 113
- House of review, 118
- Hung jury, 44
- Implied abrogation, 165
- Imprisonment, 57
- Inconsistency rule, 124, 126
- Independence of the judiciary, 143
- Indictable offence, 14
- Injunction, 104
- Instalment order, 70
- Intra vires*, 163
- Judge, 43
- Judge-made law, 153
- Judgment creditor, 70
- Judgment debtor, 70
- Judicial activism, 159
- Judicial case management, 82
- Judicial conservatism, 159
- Judicial creativity, 159
- Judicial restraint, 159
- Judiciary, 143
- Jurisdiction, 12
- Jury, 44
- King, 112
- Labor Party, 113
- Legal Aid Act 1978* (Vic), 31
- Legal convention, 121
- Legal representation, 47, 87
- Legislation. *See* Act
- Legislative Assembly, 113
- Legislative Council, 113
- Legislature, 143
- Letter of demand, 78
- Letters patent, 180
- Liberal Party, 113
- Limitation of actions, 69
- Limitation of Actions Act 1958* (Vic), 69
- LNP, 113
- Lobbying, 173
- Local government councils, 112
- Locus standi*, 161
- Lower chamber. *See* Lower house
- Lower house, 112
- Magistrate, 43
- Magistrates’ Court, 40
- Majority verdict, 44
- Marches, 170
- Material facts, 153
- Mediation, 75
- Methods of dispute resolution, 74
- Minister, 114
- Mitigating factor, 61
- Money bills, 117
- Narrow reading, 128
- National Party, 113
- Natural justice, 29
- News media, 173
- Non-judicial bodies, 91
- Obiter dicta*, 153
- On the balance of probabilities, 66
- Opposition, 114
- Overarching obligations, 85
- Overriding, 165
- Overruling, 156
- Paid media, 173
- Paramount duty, 85
- Parliament, 112
- Parliamentary committee, 178
- Parties, 45
- Penalty units, 56
- Persuasive precedent, 154
- Petition, 169
- Plaintiff, 12
- Plea negotiation, 37
- political party, 113
- Portfolio, 114
- Precedent, 147, 148
- Premier, 114
- Presumption of innocence, 17
- Primary victim, 63
- Prime minister, 114
- Private member’s bills, 119
- Proportionality test, 141
- Prosecution, 12
- Protection, 55
- Protest, 170
- Punishment, 54
- Purposes of criminal sanctions, 53
- Question Time, 117
- Ratio decidendi*, 148, 153
- Referendum, 144
- Rehabilitation, 54
- Repeal, 163
- Representative government, 138
- representative proceedings, 89
- Republic, 112
- Reserve powers, 121
- Residual powers, 124
- Responsible government, 117
- Reversing, 155
- Right to be informed about the proceedings, 25
- Right to be tried without unreasonable delay, 19
- Right to trial by jury, 21
- Right to vote, 142
- Rights of the accused, 18
- Rights of victims of crime, 24
- Royal assent, 120
- Royal commission, 180
- Rubber stamp, 118
- Sanction, 53, 56
- Seat of Government, 116
- Section 109. *See* Inconsistency rule
- Section 51, 124
- Section 76, 141
- Sections 7 and 24, 141
- Senate, 113
- Sentence discount, 62
- Sentencing, 54
- Sentencing Act 1991* (Vic), 53
- Sentencing range, 60
- Separation of powers, 114, 143
- Social media, 173
- Specialisation, 41
- Specific compensatory damages, 103
- Specific deterrence, 54
- Specific powers, 124
- Standard of proof, 16
- Standing, 161
- Stare decisis*, 153
- State parliaments, 112
- Statute. *See* Act
- Statutory interpretation, 148
- Strict legalism, 159
- Strikes, 170
- Structure of parliament, 112
- Subordinate authorities, 119
- Summary offence, 14
- Superior courts of record, 153
- Supreme Court, 40
- Supreme law-maker, 115, 163
- Territories, 112
- Third-party intervener, 162
- Treaties, 129
- Trial Division, 40
- Two-party system, 113
- Ultra vires*, 163
- Unanimous verdict, 44
- Upper chamber. *See* Upper house
- Upper house, 112
- Victim impact statement, 63
- Victims Charter Act 2006* (Vic), 24
- Victoria Legal Aid**, 31
- Victorian Civil and Administrative Tribunal, 92
- Victorian Law Reform Commission, 175
- Victorian Parliament, 113
- Warrant to seize property, 70

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