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# VCE LEGAL STUDIES

## Units 3 & 4

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**3RD EDITION**

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# UNIT 3 AOS 1: THE VICTORIAN CRIMINAL JUSTICE SYSTEM

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

Image: © County Court Victoria

## KEY KNOWLEDGE

*Key concepts*

- the principles of justice: fairness, equality and access
- key concepts in the Victorian criminal justice system, including:
  - the distinction between summary offences and indictable offences
  - 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 a fair hearing, and the right to trial by jury
- the rights of victims, including the right to give evidence as a vulnerable witness, the right to be informed about the proceedings, and the right to be informed of the likely release date of the accused

*Determining a criminal case*

- the role of institutions available to assist an accused, including Victoria Legal Aid and Victorian community legal centres
- the purposes of committal proceedings
- the purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases
- the reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals
- the responsibilities of key personnel in a criminal trial, including the judge, jury, parties and legal practitioners
- the purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection
- fines, community corrections orders and imprisonment, and their specific purposes
- factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements

*Reforms*

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

## KEY SKILLS

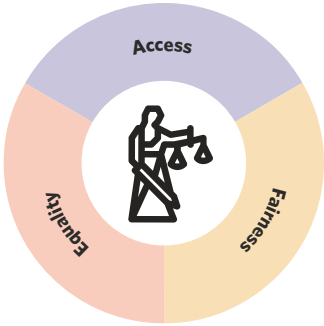
- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the rights of an accused and of victims in the criminal justice system
- explain the purposes of committal proceedings and the roles of institutions available to assist an accused
- explain the reasons for the Victorian court hierarchy in determining criminal cases
- discuss and justify the appropriateness of the means used to determine a criminal case
- discuss the responsibilities of key personnel in a criminal trial
- discuss the ability of sanctions to achieve their purposes
- discuss recent reforms and recommended reforms to the criminal justice system
- evaluate the ability of the criminal justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

# 3.1.1 Principles of justice (AOS 1)

**There is no universal definition of 'justice' or conversely 'injustice'. Therefore, what one person considers a 'just' outcome may be very different from another person. This can explain why there are such varied opinions on the appropriateness of many institutions and mechanisms that exist in the criminal justice system.**

To explore further, the following comments from former Chief Justice of the Supreme Court of Victoria, the Hon. Marilyn Warren AC, are relevant:

> What is justice? For different people at different times it means different things.
>
> To the ordinary person 'justice' will often mean due punishment when a criminal is sentenced for a crime. To the popular media 'justice' will generally mean harsh punishment primarily focused on strong retribution and deterrence.
>
> To the accused person justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope.
>
> Immediately after delivery of sentence it often happens that the victim's family and supporters will express their satisfaction or dissatisfaction with the sentence. We sometimes hear the statement 'justice has been done'. We also hear 'justice has been denied to the victim' because the punishment was too lenient.
>
> But the tension for victims is not just between victims' rights and the rights of accused persons, there are also the rights of society enshrined in sentencing laws, for example, the goal of rehabilitation and the mercy shown to young offenders balanced by the goal of deterrence.
>
> *Source:* What is justice? Remarks of the Hon. Marilyn Warren AC Chief Justice of Victoria 20 August 2014 http://classic.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf




We will revisit these comments in Lesson 3.1.13

The principles of justice are three key ideals that will help you determine whether justice has been achieved in a particular case or whether specific institutions or processes in the criminal justice system uphold or achieve justice. These principles are fairness, equality and access.

This lesson covers the VCAA key knowledge point: '**The principles of justice: fairness, equality and access**' which we have broken down into the following concepts:

| | |
|---|---|
| Access | 3.1.1.1 |
| Fairness | 3.1.1.2 |
| Equality | 3.1.1.3 |

## Access 3.1.1.1

**'Access' is defined** in the VCAA Legal Studies Study Design as individuals in society – including accused persons, victims of crime and witnesses giving evidence in a trial – having an 'understanding of legal rights and an ability to pursue their case'.

**In Victoria's criminal justice system** this means (in practice):

- Understanding the court system.
- Understanding the criminal law and legal defences an accused person is able to present; knowing how to present evidence to disprove the prosecution's case.
- Victims of crime understanding their legal entitlements in the criminal justice process.
- Being able to engage with services to support those in the court system, such as legal representation, support for victims and so on.

## Fairness 3.1.1.2

**'Fairness' is defined** in the VCAA Legal Studies Study Design as 'fair legal processes are in place, and all parties receive a fair hearing'.

**In Victoria's criminal justice system** this means (in practice):

- All hearings being conducted in public.
- Decision makers being independent and unbiased, with decisions based solely on the law and the facts.
- Accused persons being presumed innocent.
- Prejudicial and irrelevant evidence not influencing courts' decisions (such as an accused person's prior convictions).
- Accused persons having the ability to test the evidence presented against them, and to present evidence in their own defence.
- Resolution of cases with minimal delay, as delays add to the stress and anxiety of victims, witnesses, accused persons awaiting trial (and these parties' families).
- A right to legal representation to present one's case in its best light.
- Accused persons having their personal characteristics taken into account. For example in sentencing:
  - A young first-time offender who has shown remorse should be treated differently to a middle-aged career criminal.
  - Victims of crime should have the impact on them reflected in sentencing, as individuals will respond differently to crime.

**USEFUL TIP** In your responses, avoid using the word 'fair' to define 'fairness'. Instead try using words such as 'impartial', 'unbiased' or 'equitable' in the definition.

'Fairness' is defined as ensuring unbiased legal processes are in place, and all parties receive an impartial hearing.

## Equality 3.1.1.3

**'Equality' is defined** in the VCAA Legal Studies Study Design as 'all people treated equally before the law, with an equal opportunity to present their case'.

**In Victoria's criminal justice system** this means (in practice):

- All accused persons having access to a fair trial and fair treatment (as described above) regardless of personal characteristics such as wealth, language background, ethnicity, religion and so on.
- All victims of crime being able to remain informed about proceedings and contribute to the sentencing process, regardless of personal characteristics such as wealth, language background, ethnicity, religion and so on.
- Procedures in the courts being applied in the same manner in all cases.
- All members of the community are subject to the standards of behaviour set by the criminal law; those in more powerful positions in society (members of parliament, police officers, the very wealthy) are not entitled to preferential treatment by the courts (either as a victim of crime or an accused person).

**USEFUL TIP** In your responses, avoid using the word 'equal' to define 'equality'. Instead try using words such as 'the same', 'like' or 'equivalent' in the definition.

'Equality' is defined as ensuring all people are treated the same before the law, with a like opportunity to present their case.

**USEFUL TIP** When discussing the strengths and weaknesses of legal bodies and processes, you will often also need to consider how these bodies/processes contribute to the achievement of the principles of justice.

- When considering whether **access** is upheld through the legal system, it will be coloured **purple**.
- When considering whether **fairness** is upheld through the legal system, it will be coloured **orange**.
- When considering whether **equality** is upheld through the legal system, it will be coloured **red**.

**USEFUL TIP** Revisit this lesson throughout your study of the criminal justice system in Unit 3, AOS1 – it provides a way to evaluate the strengths and weaknesses of Victoria's courts and criminal processes.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.1: Principles of justice (AOS1)**

## Keen to learn more?

**Rule of Law Institute of Australia,** www.ruleoflaw.org.au/guide/index.html

**VGSO – Right to a fair hearing,** https://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-24-fair-hearing

**Hon. Warren, M (2014)** ***What is Justice? 2014 Newman Lecture*** https://classic.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf

QUESTIONS

# 3.1.1 Principles of justice (AOS 1)

LEVEL 1:
Define and understand

**1.** Which of the following does not promote the achievement of 'fairness' in the criminal justice system?

- **A.** Accused persons having the ability to test the evidence presented against them, and to present evidence in their own defence.
- **B.** Decision makers being independent and unbiased, with decisions based solely on the law and the facts.
- **C.** All accused persons are guaranteed legal representation in Victorian courts.
- **D.** Prejudicial and irrelevant evidence not influencing courts' decisions.

**2.** The rule of the law states that all members of society are equally subject, and accountable to, the law. In which scenario(s) below is the principle of 'equality' not upheld?

- **A.** A member of parliament uses their position to avoid paying outstanding parking fines.
- **B.** A teenager who did not know it was illegal to trespass is charged.
- **C.** A migrant who speaks very little English cannot explain her behaviour to the police because she does not understand their questioning. She is therefore charged with an offence.
- **D.** Both A and C

**3.** Fill in the blanks for the following statement:

'Legal institutions like courts and tribunals exist to provide solutions to _____ problems. When people cannot access these institutions, or if their ability to access them is limited they cannot receive _____ outcomes. Access to justice is fundamental to the working of the legal system – a state can have the fairest and best laws in the world, but if people cannot use them to seek solutions to problems and just outcomes, then the law is _____. A significant part of access to justice is having access to legal _____ from _____ who can use their expertise to present a legal matter to the court in the _____ way possible.'

*Source:* Rule of Law Institute of Australia, www.ruleoflaw.org.au/guide/index.html

- **A.** legal, good, effective, advice, the police, fastest
- **B.** legal, just, useless, advice, a lawyer, best
- **C.** legal, just, useless, advice, a lawyer, fastest
- **D.** legal, good, useless, information, a lawyer, cheapest

LEVEL 2:
Describe and explain

**4.** Define 'fairness' as a principle of justice, and identify two ways the criminal justice system achieves fairness. (3 MARKS)

**5.** Define 'equality' as a principle of justice, and identify two ways the criminal justice system achieves equality. (3 MARKS)

**6.** Define 'access' as a principle of justice, and identify two ways the criminal justice system achieves access. (3 MARKS)

# 3.1.2 Key concepts in the criminal justice system

**To explore how criminal proceedings are conducted in the Victorian justice system, we first must understand critical terminology and concepts within criminal proceedings.**

This lesson covers VCAA Key Knowledge point: **'Key concepts in the criminal justice system including: the distinction between summary offences and indictable offences, the burden of proof, the standard of proof and the presumption of innocence'**, which we have broken down into the following concepts:



## Summary offences 3.1.2.1

**Summary offences are** a type of criminal offence, minor in nature (that is, not very serious) that are usually resolved in the Magistrates' Court by a single magistrate (or by infringement notice).

**Examples of summary offences**

Some summary offences are set out in the *Summary Offences Act 1996* (Vic) and include:

- Disorderly conduct (s.17A)
- Common assault (s.23)
- Tattooing of juveniles (s.42)
- Food or drink spiking (s.41H)

**Sanctions imposed** for summary offences are usually less severe (such as small fines or short periods of imprisonment).

## Indictable offences 3.1.2.2

**Indictable offences are** a type of criminal offence that is serious in nature heard by a judge and a jury (if the accused pleads 'not guilty') in a higher court.

**Examples of indictable offences**

Unless otherwise stated all offences in the *Crimes Act 1958* (Vic) are indictable offences and include:

- s.3: Murder
- s.5: Manslaughter
- s.63A: Kidnapping
- s.21A: Stalking
- s.254: Destruction of evidence
- s.318: Culpable driving causing death

**Sanctions imposed** for indictable offences are usually much more severe than those imposed for summary offences (such as larger fines and extended periods of imprisonment).

**USEFUL TIP** The *Summary Offences Act* and the *Crimes Act* are not the only pieces of legislation that set out summary and indictable offences.

**Indictable offences triable summarily are** a subset of indictable offences that may be heard like a summary offence as they are heard by a magistrate (without a jury) instead of a judge and jury in a higher court (such as the County Court).

**When may an indictable offence be tried summarily?**

An indictable offence may be triable summarily if:

- The offence is eligible to be tried summarily (an indictable offence is triable summarily if it is punishable by a term not exceeding 10 years imprisonment)
- The court determines it appropriate
- The accused agrees: *Criminal Procedure Act 2009* (Vic) s.29

**Examples of indictable offences triable summarily**

- s.17 *Crimes Act*: Recklessly causing serious injury
- Sections 81 & 82 *Crimes Act*: Obtaining property or financial advantage by deception (if the value of the property/financial gain does not exceed $100,000)
- Sections 74–76 *Crimes Act*: Theft, robbery and burglary (if the value of the property stolen does not exceed $100,000)

## Burden of proof 3.1.2.3

**The burden of proof refers to** the responsibility of proving the facts of a case (or the party who is responsible for meeting the standard of proof).

**Who does the burden of proof rest with in a criminal case?**

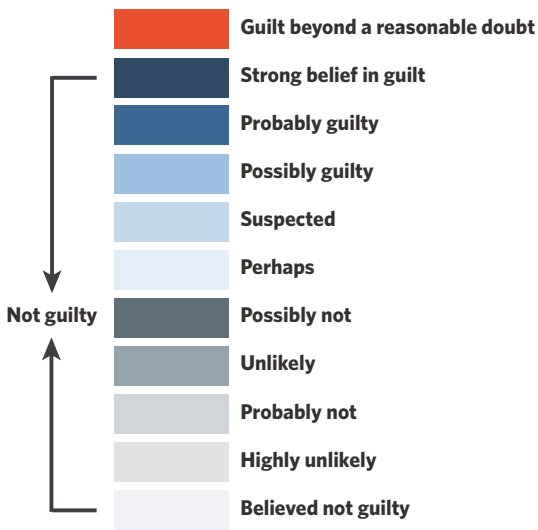
The burden of proof rests with the **prosecution** in criminal cases.

## Standard of proof 3.1.2.4

**The standard of proof refers to** the strength of the evidence or level of confidence required to support a case.

**What is the standard of proof in criminal proceedings?**

The standard of proof in criminal proceedings is **'beyond reasonable doubt'**. This means the presiding magistrate/jury in a particular case are so confident that the accused is guilty that it would be **unreasonable** to return a verdict of 'not guilty'. This does not mean, however, that someone should only be convicted if no doubt exists, only if no **reasonable** doubt exists.




CASE STUDY

***THE QUEEN v DOOKHEEA* [2017] HCA 36**

In this case Mr. and Mrs. Dookheea were accused of beating and strangling Mr. Zazai to death. Mr. Dookheea was convicted but his appeal made its way all the way to the High Court on the ground that the judge in his first trial incorrectly advised the jury of the meaning of 'beyond reasonable doubt'.

See comments from the court below to enhance your understanding of the criminal standard of proof:

- 'If you [the jury] are not satisfied beyond reasonable doubt of the elements of the offence, then you should find Mr Dookheea not guilty of that offence'

- 'If you [the jury] are not sure – and that is the collective state of your minds: did he, didn't [he], we don't know – you will acquit him because you would not be satisfied beyond a reasonable doubt'
- 'A reasonable doubt is not just any doubt that jurors might entertain, but rather what a reasonable jury considers to be a reasonable doubt'
- 'Beyond reasonable doubt is not something that is capable of expression on some sort of percentage basis'

See here for the full High Court judgement: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2017/36.html

## Presumption of innocence 3.1.2.5

**The presumption of innocence refers to** a guarantee made to all accused persons (regardless of who they are and the circumstances of the case in which they are implicated) that they are innocent until it is proven, beyond reasonable doubt, that they are guilty. This principle guards against self-incrimination:

- An accused person does not need to/cannot be pressured to give evidence to prove their guilt;
- An accused person does not need to prove their innocence (the magistrate/jury assumes they are innocent until their guilt is proven); and
- Accused persons can (in general) remain silent.

Section 25 of the Victorian *Charter of Human Rights and Responsibilities* states:

> A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

**The presumption of innocence, the burden and standard of proof taken together:**

- A magistrate or jury in a criminal proceeding must assume an accused person is innocent;
- The prosecution present their evidence of the accused person's guilt; an accused does not need to prove their innocence; **then**
- The magistrate or jury can only return a 'guilty' verdict if persuaded beyond reasonable doubt that the accused committed the offence**.**

**USEFUL TIP** In an exam, students may be asked to make a connection between the burden of proof and the presumption of innocence.

For example, the 2018 VCAA Sample Exam included the following question:

> Describe the relationship between the burden of proof and the presumption of innocence. (3 MARKS)

This question requires students to explain that the burden of proof in a criminal trial upholds the presumption of innocence by placing the responsibility on the prosecution to prove that the accused has committed a crime. The accused does not need to prove that they are not guilty, because they are presumed to be innocent until proven guilty by the prosecution.

**USEFUL TIP** Accurate use of legal terminology is critical! Be sure to use the terms prosecution, accused, beyond reasonable doubt, etc. correctly in your responses.

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.2: Key concepts in the criminal justice system**

### Keen to learn more?

**Judicial College of Victoria – Criminal Charge Book: 1.7 Onus and Standard of Proof,** www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1290.htm

**Rule of Law: Presumption of Innocence** www.ruleoflaw.org.au/education/videos/innocence/

QUESTIONS

# 3.1.2 Key concepts in the criminal justice system

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

Summary offences are _____ _____ offences, heard in the _____ Court, where the decision will be made by a _____. _____ criminal offences committed in Victoria are summary offences, an example of them is being drunk in a public place. It is _____ for a person convicted of a summary offence to go to jail.

**A.** minor; criminal; Magistrates'; judge; Most; impossible

**B.** minor; both civil and criminal; Magistrates; few; Frequent; possible

**C.** minor; criminal; Magistrates'; magistrate; Most; possible

**D.** all; both civil and criminal; County; jury; Most; impossible

**2.** Read the following statements and determine which are incorrect:

**I.** Indictable offences are a type of criminal offence that is serious in nature heard by a judge and a jury (if the accused pleads 'not guilty') in a higher court.

**II.** Sanctions imposed for indictable offences are usually much more severe than those imposed for summary offences.

**III.** The Magistrates' Court cannot conduct trials for indictable offences.

**IV.** Most offences tried by the courts are for indictable offences.

**A.** II, III and IV

**B.** III and IV

**C.** II and IV

**D.** III

**3.** The police believe Sophie has stolen a car. Sophie denies this when defending herself in the Magistrates' Court. With respect to the burden of proof, which party would need to provide evidence first.

**A.** As Sophie is arguing she did not commit an offence, she would face the burden of proof and have to provide evidence for her side of the story.

**B.** The police and Sophie must answer the magistrate's questions, to help the magistrate discover the truth of who stole the car.

**C.** Because the police allege that Sophie has committed an offence, they would face the burden of proof and have to provide evidence for their side of the story.

**D.** None of the above is correct regarding the burden of proof.

**4.** Which of the following statements are true?

**I.** The standard of proof in criminal cases is beyond reasonable doubt.

**II.** A magistrate or jury must be 100% confident the accused is guilty for the standard of proof to be met.

**III.** The standard of proof prevents the accused person being convicted with insufficient evidence.

**IV.** The accused must prove beyond reasonable doubt the truth of any defence they raise.

**V.** The standard of proof upholds the principle of fairness.

**A.** I, III, IV and V

**B.** I, II, III and V

**C.** I, III and V

**D.** I and III

**5.** Which of the following is not true with respect to the presumption of innocence?

**A.** The presumption of innocence means the accused does not need to present evidence.

**B.** The presumption of innocence prevents accused persons from having to give self-incriminating evidence.

**C.** The presumption of innocence applies only to those charged with indictable offences.

**D.** The presumption of innocence means the accused will be considered innocent until the standard of proof has been met.

LEVEL 2:
Describe and explain

**6.** Rosie, 18, has been charged with being drunk in a public place. Rosie does not understand the criminal justice system.

Using an example, explain to Rosie the concept of summary offences. (2 MARKS)

**7.** Distinguish between indictable offences and indictable offences triable summarily. (2 MARKS)

**8.** Explain how the burden of proof relates to the presumption of innocence. (2 MARKS)

**9.** Define the standard of proof and explain how it contributes to the element of fairness in the criminal justice system. (2 MARKS)

**10.** Describe the term 'presumption of innocence'. (2 MARKS)

LEVEL 3:
Apply and compare

**11.** Your friend Steve has been charged with an indictable offence and is awaiting trial. He thinks that:

- his case must be heard in the County or Supreme Court
- he should pressure his lawyers to prove he is innocent
- a jury will only acquit him if they know he is definitely innocent

Outline why each of these statements is incorrect. (4 MARKS)

**12.** The following information relates to Bob's trial in the Supreme Court:

- Bob has been charged with murder
- the jury concludes that they are 'more sure than unsure' that Bob is guilty
- the jury believes that the standard of proof is more strict in murder cases

Based on the information provided, describe:

- What kind of offence has Bob been accused of?
- Who does the burden of proof rest with?
- Is it likely that Bob will be acquitted, based on the jury's comments?
- Is it correct that the standard of proof is more strict in murder cases?

Justify your conclusions. (8 MARKS)

# 3.1.3 Rights of the accused

**An accused person has certain rights and entitlements in the Victorian justice system. In addition to the presumption of innocence (see Lesson 3.1.2) the law provides important safeguards to protect those charged with criminal offences.**

This lesson covers VCAA Key Knowledge point: **'The rights of an accused, including the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury',** which we have broken down into the following concepts:



## Right to be tried without unreasonable delay 3.1.3.1

**The right to be tried without unreasonable delay is** the right of an accused person to have their case heard/decided in a timely fashion unless there are reasonable reasons why their case should be delayed.

The right to be tried without unreasonable delay is protected by s. 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

**What is considered an 'unreasonable' delay or an 'unreasonable' reason for delay** will depend on a number of factors. What is 'unreasonable' will vary from case to case, particularly depending on the complexity of the police investigation. The ACT case of *R v Upton* found that relevant factors in determining the 'unreasonableness' of a delay may include the length of the delay, the reasons for the delay, the complexity of the case. Other factors may include case backlogs in the courts, availability of resources, impact on the victim and the accused.

A court is likely to intervene only to protect an individual who can demonstrate that the delay causes unacceptable injustice or unfairness (such as being on remand for an unreasonably long time before a trial). Such an intervention is likely to be releasing an accused person on bail.

Although there is no 'rule' we can look to case law to better understand what Australian courts have previously considered an 'unreasonable' delay.

**CASE STUDY**

***R v AHMAD NIAZI* [2008] VMC 22**

The accused was charged with significant drug offences (if convicted, he faced a lengthy prison sentence); given there was likely to be a two year delay prior to trial (at least), the accused was granted bail while awaiting trial.

**CASE STUDY**

***GRAY v DPP* [2008] VSC 4**

The Supreme Court considered the impact of a trial delay that could mean the accused would spend longer on remand than any sentence that might be imposed (if convicted). The Court determined that Gray's continued remand was not justified because of the delay in the trial, and he was released on bail (with strict conditions).

These accused persons still faced trial; the delay between arrest and trial was significant, so the Court removed them from remand to minimise the negative impact of this delay. There will be circumstances where granting bail is not appropriate, even when significant delays occur (for further information see *Dinh v DPP* [2015] VSC 318).

A court has the power to permanently stay a trial (that is, to order the accused not stand trial at all) in response to an unreasonable delay, but this is a highly unlikely step for a court to take.

**Does it matter who is being tried?**

This right applies to every accused person irrespective of their personal circumstances or the facts of their case.

## Right to a fair hearing 3.1.3.2

**The right to a fair hearing is** the right of an accused person to have their case heard fairly, publicly and presided over by a competent, unbiased and independent court.

Section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic):

> 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.

**Is anyone excluded from the 'public'?**

A court may, at their discretion, exclude certain individuals/groups from attending a particular hearing. This may be because a certain individual/group's presence may distress/intimidate a witness while giving evidence, may detract attention away from the proceedings etc.

**How is the right to a fair hearing reflected in criminal proceedings?**

- Consistent rules of evidence and procedure to ensure guilty verdicts are based only on reliable, relevant evidence – not evidence that is prejudicial or cannot be verified.
- Directions to the jury to base their verdict solely on the facts of the case, not on any bias or preconceived ideas of the accused person's guilt.
- The ability to cross-examine prosecution witnesses, to test the accuracy of the prosecution's evidence.
- The ability to select legal representation, to have an expert cross-examine witnesses, address the jury and raise lawful defences – these allow the accused to present their case in its best light.
- Public hearings, to ensure those administering justice do so in a way that the public can see is fair (providing public scrutiny of the work of the courts, prosecutors and the police).
- The accused is given an opportunity to present evidence in their defence, to ensure equality of opportunity to present 'their side' of the case.
- Judges (and juries) must be independent of the parties, witnesses and victims, to ensure decisions are based on the facts and the law, not prejudice or bias.
- An accused person does not need to prove their innocence; they do not need to answer questions (in general) and exercising this right to silence may not be used by a court to infer the accused is guilty.

## Right to trial by jury 3.1.3.3

**The right to a trial by jury is** the right to be tried by an unbiased jury comprising the accused person's peers who have been randomly selected from the electoral roll. This right applies where an accused person pleads not guilty to an indictable offence (this right does not apply to summary offences) pursuant to the *Criminal Procedure Act 2009* (Vic) or has been charged with a Commonwealth indictable offence (pursuant to s. 80 of the Australian Constitution).

Juries determine the guilty/not guilty verdict in County Court and Supreme Court trials for indictable offences (see Lesson 3.1.9 for further information).

**The right to a jury trial applies to a small proportion of cases:**

- **The majority of offences committed in society are summary offences**, determined by a magistrate sitting alone (or penalised through an infringement notice); and
- **Many offenders charged with indictable offences plead guilty**, meaning no jury is required and the offender moves straight to a sentencing hearing (judge alone);
- **Therefore**, while those charged with an indictable offence have a right to jury trial (randomly selected from within the community), very few offenders are subject to a jury trial:
  - 'Jury trials make up a very small proportion of court cases in Victoria. There were a total of 584 Supreme and County Court jury trials in 2012–13. Of those, 501 were criminal matters and 83 were civil matters. 448 jury trials were held in Melbourne and 136 were held in regional Victoria.'

    *Source:* www.lawreform.vic.gov.au/content/2-jury-trials-victoria-0#toc-the-number-of-jury-trials-in-victoria-6_POWGPh
  - In 2016–17 the County Court finalised 2122 criminal matters – 226 by jury trial and the remainder by guilty pleas that go directly to sentencing. Therefore, only about 10% of all matters in the County Court are resolved by jury trial.

    *Source: County Court of Victoria Annual Report 2016/17*

## Rights of the accused & the principles of justice

### Principle of justice: *Access*

| Strengths of rights of the accused – how access is promoted | Weaknesses of rights of the accused – limitations in achieving access |
|---|---|
| **Timely.** The right to be tried without unreasonable delay upholds access because if cases are resolved in a timely manner case backlogs may be relieved, enabling other matters to move through the criminal justice system more swiftly.<br><br>**Just outcome.** The right to a fair hearing upholds access as accused persons are given the best possible chance to achieve a just outcome.<br><br>**Community involvement.** The right to trial by jury upholds access as members of the public are able to engage with and participate in the criminal justice system; all accused persons charged with indictable offences may access jury trial, as the state bears the cost (and an accused person tried in the County Court or Supreme Court cannot choose not to have a jury trial in that court). | **Reasonable delays.** Although the right to be tried without unreasonable delay protects the accused from experiencing delays which are manifestly unjust or unfair, there will inevitably still be some reasonable delays associated with court and trial processes which limit access. |

### Principle of justice: *Fairness*

| Strengths of rights of the accused – how fairness is promoted | Weaknesses of rights of the accused – limitations in achieving fairness |
|---|---|
| **Quicker resolution.** The right to be tried without unreasonable delay upholds fairness as accused persons/victims of crime do not have to endure prolonged anxiety and stress of waiting for the resolution of their case.<br><br>**Fair trial.** The right to a fair trial upholds fairness as accused persons are given the best possible opportunity to defend charges brought against them and test the accuracy of evidence presented by the prosecution, for victims to have their say and for legal representatives to build the best case for their clients.<br><br>**Unbiased.** The right to a fair hearing ensures decisions are based on the law and the facts, not bias or prejudice.<br><br>**Independent decision-maker.** The right to trial by jury ensures that decision-makers are independent (with a range of safeguards in jury empanelment and management to ensure they remain independent). | **Jury trials are used in very few matters.** Only a very small proportion of cases are resolved using a jury as most cases are resolved through a guilty plea. This limits fairness as very few accused persons are tried by their peers. |

**Principle of justice: *Equality***

| Strengths of rights of the accused – how equality is promoted | Weaknesses of rights of the accused – limitations in achieving equality |
|---|---|
| **Minimises delays.** The right to be tried without unreasonable delay upholds equality as all accused persons, irrespective of the circumstances of their case/the crime they are accused of/their personal characteristics, will not have to endure unreasonable delays.<br><br>**Same process for all accused.** The right to a fair hearing upholds equality as the same fundamental rules of evidence and procedure apply to all accused persons. All accused persons are entitled to a decision maker free from bias, and have the ability to test the evidence led against them.<br><br>**Jury trials.** Equality is achieved as all accused persons have the right to be tried by a jury of their peers if they have been accused of an indictable offence, regardless of their personal circumstances. | **No guarantee of legal representation.** Accused persons who are homeless or impoverished will not be able to afford legal representation; though the law protects the right to a fair trial, unequal access to legal representation can prevent this from always occurring in practice. |

**USEFUL TIP** Please see Lesson 3.1.9 for further information about the extent to which jury trials promote the achievement of the principles of justice.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.1.3: Rights of the accused**

## Keen to learn more?

**Victorian Government Solicitors' Office: Charter Guide,**
https://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-24-fair-hearing
**Judicial College of Victoria: Charter of Human Rights Bench Book,**
www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57449.htm

QUESTIONS

# 3.1.3 Rights of the accused

LEVEL 1:
Define and understand

**1.** Which of the following is the most accurate description of the right to be tried without unreasonable delay?

**A.** The right to be tried without unreasonable delay refers to the right that the accused and prosecution parties have for their case to be heard in a reasonable period of time.

**B.** The right to be tried without unreasonable delay refers to the principle where victims of crime will not have to wait an unreasonable amount of time for a case to commence proceedings.

**C.** The right to be tried without unreasonable delay refers to the right accused parties have for their case to be heard in a reasonable time period.

**D.** The right to be tried without unreasonable delay refers to the right every individual has for their case to be heard in a fixed time period.

**2.** Which of the following is not an element of the right to a fair hearing?

**A.** having accused persons giving evidence so the whole truth emerges

**B.** ensuring criminal trials are conducted in public

**C.** the ability of an accused person to test the reliability of the evidence presented against them

**D.** having an independent decision-maker

**3.** Identify which of the following are true of the right to a trial by jury.

**I.** Jurors are selected at random.

**II.** Juries are used for all criminal offences in Victoria.

**III.** An accused charged with murder can ask to not have a jury.

**IV.** Juries are designed to provide trial by the accused person's peers.

**V.** Juries are independent of all parties to a case.

**A.** I, II, III and V

**B.** I, III and IV

**C.** I, IV and V

**D.** I, III, IV and V

LEVEL 2:
Describe and explain

**4.** Bob is an ex-prime minister who is being charged with robbery. Bob has never committed a crime and has been a law abiding citizen all his life.

Scott is a 20 year old and has also been charged with robbery. However, Scott has been convicted of many crimes before and has spent time in prison.

With regards to the right to be tried without unreasonable delay, explain how and why these cases will be treated differently or similarly. (2 MARKS)

**5.** Describe the accused person's right to a fair hearing. (4 MARKS)

**6.** All accused persons in Victoria have the right to a jury trial, to be tried by a group of six individuals randomly selected from the community.

Is this correct? Justify your response. (3 MARKS)

LEVEL 3:
Apply and compare

**7.** Steve and Jess have recently got into trouble with the law. Steve has been charged with common assault (a summary offence) while Jess has been charged with kidnapping (an indictable offence). Both have pleaded 'not guilty' to these charges.

Based on the information provided compare Steve and Jess's rights as accused persons. (6 MARKS)

**8.** Matthew has been accused, and pleaded 'not guilty' to, a murder charge. Describe two rights that Matthew has as an accused person. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** Section 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that a person charged with a criminal offence has the right to be tried without unreasonable delay.

Explain how this right upholds the principle of fairness and access. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 1 (online), covering these lessons:

- **Lesson 3.1.1 Principles of justice**
- **Lesson 3.1.2 Key concepts in the criminal justice system**
- **Lesson 3.1.3 Rights of the accused**

Check with your teacher when it's time to complete this progress check.

# 3.1.4 Victims' rights

**In the Victorian criminal justice system, laws exist to protect the rights of victims of crime and their families. The challenges facing a victim of crime as the offence is investigated and prosecuted are described here by the Chair of the Victorian Law Reform Commission, The Hon. Philip Cummins AM (a former judge in the criminal division of the Supreme Court):**

> Every victim matters. From the commission of the criminal offence, victims undergo a pathway through the criminal justice process. Each victim's pathway is intensely personal; and yet there are significant commonalities. Too often, the trauma suffered by victims is then compounded by their experience of the criminal trial process. There is an abundance of evidence that this is so.
>
> The criminal trial process needs to respect the legitimate rights of accused persons. These should not be lessened or deflected. But the criminal trial process needs also to respect and fulfil the rights of victims and of the community. These sets of rights, properly viewed, are not exclusive one of the other. They are not in competition. They co-exist.
>
> *Source:* VLRC Victims of Crime Consultation Paper (2015)

In Victoria the *Victims Charter Act 2006* (Vic) creates various rights of victims regarding how crimes are prosecuted and offenders are sanctioned.

This lesson covers VCAA key knowledge point: **'The rights of victims, including: the right to give evidence as a vulnerable witness, the right to be informed about the proceedings, and the right to be informed of the likely release date of the accused'**, which we have broken down into the following concepts:



## Right to give evidence as a vulnerable witness 3.1.4.1

**The right to give evidence as a vulnerable witness provides** that when someone who is considered 'vulnerable' is required to give evidence in court, certain arrangements, deemed allowable and appropriate by the court, should be made to accommodate them in light of their vulnerability.

**How do we define 'vulnerable'?**

Like most legal definitions, who is considered a 'vulnerable' witness will depend on a number of factors including whether the witness is a victim of crime, the nature of the crime they witnessed, their relationship to the accused etc. However, witnesses will generally be considered vulnerable where they are particularly 'at risk' when giving evidence, such as if the witness:

- Is a child, under the age of 18
- Suffers from a mental disability
- Is an alleged victim of a sexual offence
- Is the victim of family violence

Accommodations that can be made for 'vulnerable' witnesses include:

- Witnesses may be able to give evidence via closed-circuit television as they may be intimidated by the atmosphere of a courtroom.
- Witnesses may give evidence behind a screen so they do not have to face the accused.
- Certain individuals may be barred from the courtroom if there is reasonable belief that they could intimidate a witness by their presence alone.
- The court must prevent the defence from asking improper questions to protected witnesses. Improper questions are those that are:
  - Misleading or confusing;
  - Asked in an insulting or belittling tone;

  - Overly annoying, intimidating, offensive, repetitive or humiliating; or
  - Based on a stereotype (such as the victim's gender, sexuality, race, religion)
- The court may order that, in the event the accused represents themselves, the vulnerable witness cannot be questioned by the accused.

**USEFUL TIP** Please note these protections only apply to some witnesses, in criminal proceedings only. These protections do not apply to witnesses or parties to civil disputes.

## Right to be informed about the proceedings 3.1.4.2

**The right to be informed about the proceedings provides** that victims of crime should be knowledgeable about the case in which they are involved.

**What does a 'right to be informed' include?**

The victim has a right to know:

- The offences with which the accused has been charged
- If the charges were withdrawn or changed (and the reasons why)
- Key developments in the case, such as:
  - If bail has been granted to the accused
  - The date and time a trial is set down for
  - Whether an appeal has been lodged following a trial
- Outcomes of a trial, including the verdict and any sanction imposed by the court

This information will be provided to victims of crime by the Office of Public Prosecutions and Victoria Police.

## Right to be informed of the likely release date of the accused 3.1.4.3

**The right to be informed of the likely release date of the accused provides** that victims of some crimes will be notified about the likely release date of the offender.

**The Victims Register is** a government record of victims of particular crimes. Those who are placed on the Victims Register will be notified about the likely release date of the offender.

**A person can be placed on the Victims Register if** they (or their family member) are a victim of a serious offence, such as:

- assault
- armed robbery
- murder/manslaughter
- family violence
- sexual offences
- kidnapping
- threats to kill.

**Regarding an offender's release date**, a victim on the Victims Register will be advised of:

- the length of the offender's sentence (and any changes to the length of the sentence).
- the earliest possible release date.
- whether the offender applies for/is released on parole (and any conditions attached to parole).
- if the offender is on parole, whether parole is cancelled.

## Victims' rights & the principles of justice

### Principle of justice: *Access*

| Strengths of victims' rights – how access is promoted | Weaknesses of victims' rights – limitations in achieving access |
|---|---|
| **Allows evidence to be given via alternative means.** The right to give evidence as a vulnerable witness upholds access as it enables witnesses who may otherwise be too intimidated to participate in a trial a means by which they can still be involved and feel that justice has been achieved; avoids prosecutions being discontinued due to victims' fear of giving evidence.<br><br>**Victims informed about legal processes/rights.** Access includes understanding legal processes and legal rights; the right to be informed about proceedings ensures victims (and their families) can understand and therefore access the criminal justice system. The Office of Public Prosecutions publishes information for victims and witnesses in multiple languages other than English, promoting access to justice by ensuring understanding of the process and such rights to be informed for all victims/witnesses.<br><br>**Multilingual.** Information about the Victims Register is published in many languages other than English, promoting access to all victims of crime (regardless of background). | **Not enforceable.** The rights in the Victims' Charter Act 2006 are not legally enforceable and a victim who feels that their rights have been infringed cannot take civil action. This restricts access to the justice system as it may prevent victims from exercising their rights. |

### Principle of justice: *Fairness*

| Strengths of victims' rights – how fairness is promoted | Weaknesses of victims' rights – limitations in achieving fairness |
|---|---|
| **Prevents secondary victimisation.** The right to give evidence as a vulnerable witness upholds fairness as accomodations are made in light of the fact that such witnesses are particularly sensitive, ensuring that they are comfortable during the process and avoiding their suffering being compounded by the courts' processes.<br><br>**Victim involvement.** Uncertainty about criminal proceedings (the process and outcomes) will add to the suffering of victims and their families; the right to be informed about proceedings ensures police and prosecutors minimise this suffering through keeping victims informed, promoting more fair treatment of victims.<br><br>**Victims informed about the accused.** Uncertainty about an offender's release date may add to the suffering of victims of crime; the right to be informed about the likely release date of the accused ensures victims don't face this uncertainty, which is fair. | **Only some witnesses are protected.** Not all victims are regarded as 'vulnerable' and will not be entitled to the protections afforded to vulnerable witnesses; the trial process may therefore add to their existing suffering. |

**Principle of justice: *Equality***

| Strengths of victims' rights – how equality is promoted | Weaknesses of victims' rights – limitations in achieving equality |
|---|---|
| **Equal treatment.** The right to give evidence as a vulnerable witness upholds equality as all vulnerable witnesses are treated with sensitivity.<br>**Unbiased.** All victims are provided with information about proceedings, regardless of their personal characteristics – promoting equality.<br>**Victims' Register is available to all victims of serious offences.** All victims of serious offences (and their families) can be placed on the Victims Register, regardless of their personal characteristics – promoting equality. | **Victims' Register is not available to everyone.** Only victims of serious offences can apply to be on the Victims' Register to be informed about the accused. This right is therefore limited in achieving equality as it does not extend to victims of less serious offences. |

**USEFUL TIP**

Don't simply assert that victims' rights can promote access, fairness or equality – be sure you can explain how this is achieved.

Consider Question 4b from the 2018 VCAA exam:

> Explain how the rights identified in part a. aim to uphold the principle of access. (4 MARKS)

The examiner's report stated:

> The differentiating factor was the explanation of how the rights aimed to uphold the principle of access. It was not necessary for students to give a description of the right itself before providing this explanation. However, the answer did need to expand on the principle of access: Was it access to processes, information, the courtroom, or something else related to access, that the rights sought to achieve?

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.4: Rights of victims**

## Keen to learn more?

**VLRC Victims of Crime Consultation Paper – The Role of Victims in the Trial,** www.lawreform.vic.gov.au/content/8-role-victims-trial

**Office of Public Prosecutions – Information for Victims & Witnesses,** https://victimsandwitnesses.opp.vic.gov.au/victims/commitment-to-you

**The Victims' Support Agency,** www.victimsofcrime.vic.gov.au

**Victims' Support Agency – Victims Register,** www.victimsofcrime.vic.gov.au/getting-information-about-the-offender-the-victims-register

QUESTIONS

# 3.1.4 Victims' rights

LEVEL 1:
Define and understand

**1.** Jackson walks home from primary school everyday and has noticed that someone has been following him lately so he tells his parents. Jackson's parents fear for his safety, because he is only 10 years old, and report it to the police. The man is taken into custody and charged with stalking.

Just as the accused has the right to be tried without unreasonable delay, Jackson has which of the following rights as a witness?

**A.** Jackson is the alleged victim of a serious offence against the person which means he has the right to give evidence as a prime witness.

**B.** Jackson is under the age of 16 and therefore will be allowed to have a parent or guardian give evidence on his behalf.

**C.** Jackson is the alleged victim of a serious offence against the person which means he has the right to give evidence under protection.

**D.** Jackson is a child and therefore will be allowed to apply to give evidence via closed circuit television as it could be too daunting to be in the courtroom which means he has the right to give evidence as a vulnerable witness.

**2.** Alessandra was attacked when walking home from the bus stop almost six years ago. She gave evidence in court as to what her attacker looked like and what he said to her. She was scared, but decided it was worth it to get him off the streets.

Which of the following is Alessandra not entitled to be informed of?

**A.** the details of her attacker's appeal of the initial decision

**B.** information about new charges that have been made against her attacker

**C.** the outcome of her attacker's bail proceeding

**D.** Both A and B

**3.** Fill in the blank spaces:

The _____ *Act 2006* states the Department of Justice may give to a person included on the _____ certain information concerning the offender. This could include information such as the _____, the _____, and whether the offender has been _____.

**A.** *Victims' Protection*; victims register; length of sentence; likely release date; granted parole

**B.** *Victims' Protection*; victims index; length of sentence; likely defence barrister; granted parole

**C.** *Victims' Charter*; victims register; length of sentence; likely defence barrister; granted parole

**D.** *Victims' Charter*; victims register; length of sentence; likely release date; granted parole

LEVEL 2:
Describe and explain

**4.** Identify two considerations that may be allowed for a 'vulnerable witness' when giving evidence and explain the process of how these considerations maybe implemented. (3 MARKS)

**5.** It has been argued that victims are 'left in the dark' about the criminal cases of their alleged offender.

Explain why this is not true with respect to the Victorian criminal justice system. (3 MARKS)

**6.** The right 'to be informed of the likely release date of an offender' covers a range of facts a victim may be provided. Which victims are entitled to this information?

Provide specific examples of the information a victim can receive. (3 MARKS)

LEVEL 3:
Apply and compare

**7.** Lisa (35), Brianna (8) and Tom (40) have been called to give evidence in a rape trial. We know the following information about them:

- Lisa was the alleged victim of the rape that is the subject of the trial
- Her daughter, Brianna, witnessed the incident
- Tom is the brother of the accused

Based solely on the information provided: (6 MARKS)

- For each witness identify whether they would be considered 'vulnerable'. Justify your conclusions.
- For each of the witness(es) you have identified as vulnerable provide one example of an arrangement that courts could make to accommodate them when giving evidence.

**8.** Leina pressed charges against her ex-boyfriend, Nick, for aggravated assault (an indictable offence). At the conclusion of his trial Nick is sentenced to a term of imprisonment, but is released early on parole due to his good behaviour in prison.

Describe the right that Leina has as a victim being referred to in this scenario. In your answer, describe one right that Nick had prior to being convicted. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** Explain how the right to be informed about proceedings upholds the principles of fairness and access. (5 MARKS)

# 3.1.5 Victoria Legal Aid and community legal centres

**For accused persons charged with criminal offences, the Victorian justice system would appear complex:**

- **A hierarchy of courts, each resolving different matters.**
- **Rules of evidence about what can and cannot be presented in court.**
- **Strict rules of procedure about how evidence is presented.**
- **The criminal law about offences and defences to allegations can be difficult to find as it appears in both legislation and in judges' decisions in earlier cases.**
- **They may need to participate in pre-trial procedures such as sentence indications and plea negotiations.**

**Institutions such as Victoria Legal Aid and community legal centres assist accused persons in a range of ways.**

This lesson covers VCAA Key Knowledge point: **'The role of institutions available to assist an accused, including Victoria Legal Aid and Victorian community legal centres'**, which we have broken down into the following concepts:



## Victoria Legal Aid 3.1.5.1

**Victoria Legal Aid (VLA) is** a government-funded agency that provides free legal advice and information regarding a range of legal disputes (including criminal law matters, family law disputes, Centrelink matters and child protection issues, among other matters).

**VLA funding by governments** is regularly criticised for being insufficient to meet the community's demands for legal services. Because of a lack of funding, a large part of the community is ineligible for legal aid and people are forced to defend themselves in criminal cases.

In general, VLA aims to provide free legal assistance to those in the community who need it most such as those who are very poor and cannot afford a solicitor, homeless, have limited English skills or suffer from mental health issues.

**VLA's role in assisting accused persons includes:**

- **Publishing information** about minor criminal matters and the criminal justice system, which may assist those who are charged with minor offences and will be required to represent themselves.
- **Providing free initial legal advice** to those charged with offences (in person or over the phone).
- **Providing funds to engage legal representation for accused persons who:**
  - Are very poor and unable to afford legal representation (VLA uses strict criteria to decide who it will assist, based on the accused person's assets and income); **and**
  - Meet VLA's merits test (VLA has guidelines that determine which accused people receive legal representation at a trial and an appeal) – given VLA's very limited funds this often means VLA will only represent those charged with serious indictable offences that are likely to result in a prison sentence (if found guilty).
  - VLA may require an accused person to meet some of the costs associated with legal representation (that is, a grant of assistance from VLA may meet only part of the costs of legal representation).
  - This grant of assistance from VLA may be used to pay a lawyer to represent the accused or VLA may appoint one of its lawyers to represent the accused person (see data below).
- **Providing duty lawyers (lawyers based in the Magistrates' Court)**
  - For those who attend court for relatively minor criminal matters but are self-represented, legal practitioners based at the courts (called 'duty lawyers') can provide information (and case-specific advice for those who meet the low-income test).

- In some cases duty lawyers may provide legal representation in court – often only for accused persons held in custody who do not have a lawyer, facing more serious charges (and/or those with mental health issues, a disability or who do not speak English).

**Due to VLA's strict eligibility criteria** (the income/assets test and the merits test) **often only the very poor facing very serious charges will receive a grant of legal assistance.** This will leave many disadvantaged people (who are poor, but not so poor they meet the strict eligibility criteria) charged with criminal offences unable to obtain assistance from VLA. Some of these accused will seek assistance from CLCs (see below).

**CASE STUDY**

Criminal law matters represent a significant proportion of VLA's work. According to its Annual Report, in 2017/18 VLA provided the following support in criminal disputes:

- 51,920 people were granted assistance from VLA for criminal matters (VLA assisted some of these accused persons more than once during the year)
- Minor assistance/legal advice was provided 11,980 times
- Duty lawyer services (based in the Magistrates' Court) assisted accused persons 58,964 times (again, some individuals had this assistance more than once in the 2017/18 year)
- 26,100 grants of legal representation were provided (approximately 7500 of these involved VLA lawyers representing accused persons; over 18,000 of these involved VLA paying for private lawyers to represent accused persons).

*Source:* VLA Annual Report 2017/18 http://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report-2017-18

### VLA & the principles of justice

**Principle of justice: *Access***

| Strengths of VLA – how access is promoted | Weaknesses of VLA – limitations in achieving access |
|---|---|
| **Free information.** VLA publishes information about criminal proceedings and the court system, improving many accused persons' understanding of the legal system. | **Limited information.** Information published by VLA about the legal system is general and limited to some disputes; as such it promotes understanding of the legal system for only some accused persons. |
| **Casework assistance.** Those provided with casework assistance by VLA better understand the criminal justice system and their rights in defending the charges alleged. | **Information is online.** A lot of VLA's information about the criminal justice system is provided online; those with low incomes, the homeless or the elderly may not have access to internet-connected device where they would be able to access this legal information. |

**Principle of justice: *Fairness***

| Strengths of VLA – how fairness is promoted | Weaknesses of VLA – limitations in achieving fairness |
|---|---|
| **Focus on most vulnerable.** VLA's eligibility criteria for a grant of legal assistance/legal representation ensure those most at risk of a serious sanction and least able to afford a private lawyer, are provided with legal representation – ensuring they are better able to present their defence in its best light, promoting fairness. | **Strict eligibility requirements.** VLA's strict eligibility criteria (and very limited budget) mean it is only able to provide legal advice and representation to a small number of accused persons; many accused persons charged with criminal offences do not meet VLA's eligibility criteria but cannot afford a private lawyer; as a result, VLA is limited in its ability to ensure fairness across the criminal justice system. |
| **Duty lawyers.** The provision of duty lawyers in the Magistrates' Court provides advice and assistance to some accused persons, ensuring a fairer hearing for these individuals. | **Limited availability of duty lawyers.** Duty lawyers are not available to all accused persons in the Magistrates' Court. |

**Principle of justice: *Equality***

| Strengths of VLA – how equality is promoted | Weaknesses of VLA – limitations in achieving equality |
|---|---|
| **No discrimination in eligibility.** VLA's eligibility criteria ensure legal support is provided to those in most need, regardless of their personal characteristics (such as race, religion, gender, etc); this promotes equality in the administration of justice.<br><br>**Free information is available to everyone.** All members of society (regardless of their personal characteristics such as religion, wealth, etc) can access VLA's published legal information. | **Assistance is limited.** The strict eligibility criteria for legal assistance mean many accused persons are unable to access support from VLA and remain unrepresented; VLA is therefore unable to ensure equality of access to legal representation for all in the community – it can represent only the very poor, the very rich can afford their own private lawyer, and the 'forgotten middle' may be required to self-represent. |

## Victorian community legal centres (CLCs) 3.1.5.2

**CLCs are described as:** 'not-for-profit, community-based organisations that provide free legal advice, casework and information and a range of community development services to their local' communities, according to the National Association of Community Legal Centres.

*Source:* www.naclc.org.au/about_clcs.php

CLCs can be found in suburbs across Melbourne and in some larger rural centres. Many CLCs have a mix of:

- lawyers employed by the CLC.
- lawyers/law students who donate their time to provide legal assistance to people in need.

Some CLCs provide services to a particular geographic area, whereas other CLCs are set up to give legal support to particular groups in society (the very young, the elderly, refugees, indigenous Australians, etc).

**The role of CLCs in assisting accused persons** includes providing people with:

- information, legal advice and minor assistance
- legal casework services (that is, case-specific advice to an accused person about how to conduct their case in the Magistrates' Court)
- legal representation in a small number of cases.

**CLCs often provide assistance to** accused persons who:

- cannot afford to engage a legal representative
- do not meet VLA's strict criteria for legal assistance.

**Each CLC is independent** and therefore has different criteria regarding who it will assist and what assistance it will provide. For example:

- Barwon Community Legal Service (Geelong area) will only provide legal advice in criminal matters (not representation) for assaults, fines and driving offences.
- Brimbank-Melton Community Legal Centre (Melton, St Albans and surrounding areas) will provide advice and legal information for minor criminal matters, but generally do not provide legal representation.
- Eastern Community Legal Centre (Box Hill and surrounding areas) will provide advice for summary offences only.
- Victorian Aboriginal Legal Service provides free legal advice/information, and in some cases legal representation in court and support in preparing a defence to indigenous Australians across all of Victoria.

As demonstrated by the examples above, many **CLCs provide only limited assistance and advice** (but usually don't provide representation in court) for those **charged with minor criminal matters** (however the exact nature of support provided varies slightly between each CLC).

The Federation of Community Legal Centres publishes (on its website) contact details for all CLCs in Victoria, this helps those needing legal assistance to find the address/phone number of the CLC that serves their local community.

## CLCs & the principles of justice

### Principle of justice: *Access*

| Strengths of CLCs – how access is promoted | Weaknesses of CLCs – limitations in achieving access |
|---|---|
| **Free advice and information.** CLCs provide free legal advice and information, meaning education on the justice system is accessible to all in the CLC's local community; this will assist unrepresented accused people better understand their legal rights in defending themselves and the courts' procedures they will need to navigate when facing charges.<br><br>**Location.** CLCs are located all over metropolitan Melbourne and some provide legal assistance over the phone, promoting accessibility to legal advice | **Limited assistance.** As CLCs usually provide assistance for relatively minor criminal matters, they do not promote access to justice for those charged with very serious criminal matters (other than referring such accused persons to other legal service providers such as VLA).<br><br>**Only available to some geographical areas.** Relatively few CLCs are located in rural parts of Victoria, limiting access to legal information and advice for those in remote areas. |

### Principle of justice: *Fairness*

| Strengths of CLCs – how fairness is promoted | Weaknesses of CLCs – limitations in achieving fairness |
|---|---|
| **Allows better understanding of legal system.** Though the information provided by CLCs to accused persons is often limited, it is preferable to having an accused person self-represent with no understanding of the law and any lawful defences they can raise; as such an accused person who has sought advice from a CLC is in a better position to present their defence in its best light, promoting fairness.. | **Only provide minor assistance and advice.** CLCs often provide legal advice and casework for relatively minor criminal matters (and so cannot assist those defending indictable offences). Further, CLCs often cannot provide legal representation in court, meaning many individuals must still self-represent, reducing their ability to receive a fair trial (as they are less able to test the accuracy of the evidence presented by the prosecution and less aware of lawful defences they can raise). |

### Principle of justice: *Equality*

| Strengths of CLCs – how equality is promoted | Weaknesses of CLCs – limitations in achieving equality |
|---|---|
| **Interpreters.** CLCs often provide an interpreter service to ensure those from non-English speaking backgrounds can access legal assistance, promoting equality in the justice system. | **Legal representation is not available for serious offences.** As CLCs usually provide limited assistance to those charged with minor offences, many poorer individuals charged with indictable offences who do not meet VLA's strict eligibility criteria will need to self-represent (with CLCs often not able to assist these people); as such, access to legal representation remains unequal and affected by accused persons' wealth/ income, despite the services provided by CLCs. |

**USEFUL TIP**

VLA and CLCs provide a range of legal services other than those identified here, assisting individuals in lots of different types of cases such as family violence matters, disputes with Centrelink and refugee applications (to name only a few).

The VCAA Legal Studies Study Design requires students to know only the role of these institutions in assisting accused persons, so that is the focus of this lesson.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.5: Victoria Legal Aid and community legal centres**

## Keen to learn more?

**Victoria Legal Aid – get a lawyer to run your case,** www.legalaid.vic.gov.au/get-legal-services-and-advice/get-lawyer-to-run-your-case

**National Association of Community Legal Centres,** www.naclc.org.au/

**Federation of Community Legal Centres Victoria,** www.fclc.org.au/

**Victoria Legal Aid – Duty Lawyers,** www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-court

**Victorian Aboriginal Legal Service,** https://vals.org.au/legal-services/criminal-law/

QUESTIONS

# 3.1.5 Victoria Legal Aid and community legal centres

LEVEL 1:
Define and understand

**1.** Which of the following is not a way in which Victoria Legal Aid assists accused persons?

**A.** publishing free information about the criminal justice system and criminal laws

**B.** providing legal representation to those who cannot afford a lawyer and face serious criminal charges

**C.** representing all offenders who wish to appeal against the sentence imposed by a magistrate for a summary offence

**D.** providing duty lawyers at Magistrates' Courts to assist some accused persons

**2.** Fill in the blank spaces:

Many CLCs provide only limited assistance and advice (but usually don't provide _____ in court) for those charged with _____ criminal matters (however the exact nature of support provided _____ slightly between each CLC. This legal support is provided by a mix of _____ who are employed by the CLC, with _____ who volunteer to provide legal assistance.

**A.** representation; serious; varies; lawyers; lawyers and law students

**B.** representation; minor; varies; lawyers; lawyers and law students

**C.** help; minor; varies; lawyers; people

**D.** representation; minor; varies; lawyers; police officers

LEVEL 2:
Describe and explain

**3.** Describe two ways VLA can assist an accused person. (4 MARKS)

**4.** It has been reported that 'community legal centres are versatile and can offer creative, but targeted, solutions to legal problems. Having assisted disadvantaged Australians, over 80% of which earn under $26,000 per annum, these non-profit centres work toward empowering the community they serve'. Describe how community legal centres support an accused person and how they seek to uphold access. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** Compare the support provided by Victoria Legal Aid and community legal centres to accused persons. (4 MARKS)

**6.** Victoria, 24, is set to appear in the Magistrates' Court. She is currently homeless and unemployed. Marshall, 40, has been charged with armed robbery (a serious indictable offence), owns numerous assets including his own home and has an annual income exceeding $100,000.

Based on the information provided, identify who is more likely to receive legal representation from Victoria Legal Aid. Justify your answer. (5 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** 'Due to financial constraints, Victoria Legal Aid can only promote access for a limited group of people'.

In light of this statement, discuss the extent to which Victoria Legal Aid promotes access as a principle of justice in Victoria. In your answer, explain how a 20% increase in Legal Aid funding would impact on the achievement of fairness in the criminal justice system. (7 MARKS)

# 3.1.6 Purposes of committal proceedings

**The majority of criminal offences committed in Victoria are summary offences. They are heard and resolved in the Magistrates' Court.**

Jury trials for indictable offences are conducted in the County Court and the Supreme Court (Trial Division). To conduct a jury trial costs the state of Victoria a significant amount of money and jury trials take days (or weeks) to conclude; furthermore, to be an accused person subjected to a jury trial in these higher courts is a stressful and expensive process (given the need to engage legal representation).

Therefore, given these costs, delays and stresses associated with jury trials, in Victoria a filtering process is used to ensure jury trials are only conducted if there is a likelihood the accused person will be found guilty. Committal proceedings are this filter.

This lesson covers VCAA key knowledge point: **'The purposes of committal proceedings',** which we have broken down into the following concepts:



## Purposes of committal proceedings 3.1.6.1

**Committal proceedings:**

- Are conducted in the Magistrates' Court.
- Held only for accused persons charged with indictable offences (for which they have pleaded 'not guilty' or not yet entered a plea).
- Are a step conducted before a person charged with an indictable offence has a jury trial in the County Court or Supreme Court.
- Include the prosecution presenting a summary of the evidence against the accused in a written/documentary format. This is called a hand-up brief. This will include (but is not limited to):
  - Statements given to police by victims/witnesses/the accused;
  - Forensic evidence such as crime scene photographs, DNA evidence linking an accused person to a crime scene/victim or blood-alcohol content of accused persons taken after an assault or car accident;
  - Expert evidence such as the findings of an autopsy (identifying the cause of death in a murder/manslaughter case), or findings from police experts about the cause of a suspicious fire or a fatal car accident.
- Will include a number of (often quick) hearings in the Magistrates' Court, in which:
  - Dates are set for the prosecution to provide the hand-up brief for the accused
  - The accused may ask for permission to cross-examine the prosecution's witnesses (and if this permission is granted, a separate date will be set for the accused to cross-examine such a witness)
  - The accused may apply for bail
  - The magistrate advises the accused and the prosecution if they are satisfied the evidence is of sufficient weight to support a conviction, and the accused will stand trial in the County Court or Supreme Court.

**At the conclusion of a committal proceeding** the magistrate will determine whether the evidence the prosecution has presented is of sufficient weight to support a conviction. In other words, the magistrate decides whether a jury, looking at the prosecution case, could deliver a guilty verdict:

- If so, the accused is committed to stand trial at the County Court or Supreme Court.
- If not, the accused person is discharged.

This process may be described as a magistrate **deciding whether a 'prima facie case' exists**. The term 'prima facie', translating to 'on the face of it', is used to describe a case where there is enough evidence to indicate that prosecution will likely be successful.

**USEFUL TIP**

What doesn't happen in a committal proceeding? A magistrate does **not** decide whether an accused person is guilty or not guilty. To recap – the process is designed to act as a filter:

- Prosecution cases that are strong (where there is enough evidence against an accused person that a jury could deliver a guilty verdict) are sent to trial;
- Prosecution cases that are weak (where there is relatively little evidence and a jury would not be able to say an accused person is 'guilty beyond reasonable doubt') do not get sent to trial.

If the latter happens (which is not common), the police can continue to seek out evidence against an accused person; if new/more evidence emerges, the accused can be charged again and face another committal proceeding.

**The purposes of committal proceedings are** stated in s. 97 of the *Criminal Procedure Act 2009* (Vic). The purposes of a committal proceeding are:

**a)** to determine whether a charge for an offence is appropriate to be heard and determined summarily;

**b)** to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;

**c)** to determine how the accused proposes to plead to the charge;

**d)** to ensure a fair trial, if the matter proceeds to trial.

| Purpose of committal | Explanation |
|---|---|
| **To determine whether there is evidence of sufficient weight to support a conviction** | Committal proceedings help to determine whether the prosecution's evidence is of sufficient weight to support a conviction. That is – whether a jury could deliver a guilty verdict based on the evidence the prosecution has presented.<br>This helps to save time, resources and reduce costs (and therefore uphold the principle of fairness) by ensuring that only prosecution cases in which there is strong evidence of an accused person's guilt proceed to higher courts. This should ensure:<br>• There is no investment made in cases that are likely to be 'thrown out' by a judge anyway due to a lack of evidence (minimising delays for other trials that are based on a substantial prosecution case).<br>• Individuals do not face the stress/cost associated with a jury trial in cases where there is limited evidence and not much chance of a jury delivering a guilty verdict.<br>In doing so, a magistrate is not deciding whether the accused is guilty – they are deciding whether a jury could find an accused person guilty based on the prosecution's evidence (but without all witnesses giving evidence, and without the accused presenting any witnesses/lawful defences – that happens at the trial in the County/Supreme Court). |
| **To determine how the accused plans to plead (guilty/not guilty)** | Determining how an accused will plead at such an early stage of proceedings the court does not need to allocate resources to facilitating a trial (i.e. source a jury) nor does the accused/prosecution need to prepare their cases in fine detail if the case will not proceed to trial, including preparing how to examine every witness, ensuring they are available at the time of the trial, and so on. The earlier this occurs the greater the likelihood that time, money and resources will not be wasted. |
| **To determine whether a charge can/should be determined summarily** | Determining whether a charge for an indictable offence can/should be determined summarily during committal proceedings helps to speed up court proceedings because cases appropriate to be heard in the Magistrates' Court can be resolved there, reducing case backlogs in the higher courts – this reduces costs, saves time and resources (thus helping to provide for fairness). See Lesson 3.1.2 for further information about indictable offences heard summarily. |

*cont'd*

| Purpose of committal | Explanation |
|---|---|
| **Ensuring a fair trial** | Committal proceedings enable the accused to be fully informed of the prosecution's case against them (as they are given the documentary evidence the prosecution has collected); this allows them to better prepare a legal defence, and allows their legal representative to prepare how to cross-examine prosecution witnesses and test the reliability of their evidence. This promotes the achievement of a fair trial. |

**USEFUL TIP** The correct use of legal terminology here is critical – as the Act says 'evidence is of sufficient weight to support a conviction', students of the legal system should use this phrase also!

### Committal proceedings & the principles of justice

**Principle of justice: *Access***

| Strengths of committal proceedings – how access is promoted | Weaknesses of committal proceedings – limitations in achieving access |
|---|---|
| **Separates out cases that don't have enough evidence.** Committal proceedings act as a filter to determine whether or not there is enough evidence to justify sending a case to trial. This promotes access by ensuring that the higher courts are only hearing cases where the prosecution has strong evidence. | **Complex processes.** Committal proceedings (including reviewing the prosecution's hand-up brief) are complicated. Without experience with the processes, and without legal representation, the accused can find it hard to understand – this impacts on the achievement of access to justice, which includes understanding one's legal rights and the courts' processes. |

**Principle of justice: *Fairness***

| Strengths of committal proceedings – how fairness is promoted | Weaknesses of committal proceedings – limitations in achieving fairness |
|---|---|
| **Reduces delays.** Committals save the time and resources of higher courts by filtering out the weak cases that are unlikely to succeed because of insufficient prosecution evidence; by minimising the delays for serious trials, it reduces the stress and anxiety for accused persons, witnesses, victims and their families, which is fair.<br><br>**Ensures transparency.** Allows the accused to be informed of the prosecution's case against them. This could help them decide whether to plead guilty or not guilty, and also help them to prepare their case in its best light, promoting fairness.<br><br>**Upholds presumption of innocence.** The prosecution is required to prove to the court that there is enough evidence to support the conviction at trial. If they cannot do that, the accused is discharged. This supports the principle that the accused is innocent until proven guilty and ensures they do not face the stress and cost of a jury trial that has little prospect of resulting in a guilty verdict (which is fair). | **Accused may still face trial even if there is insufficient evidence.** If the magistrate deems the prosecution's evidence to be insufficient to support a conviction and does not commit an accused person to stand trial, the DPP retains the power to send the accused person to trial anyway (called a 'direct presentment'). Though uncommon, this could lead to unfairness if an accused person stands trial in a case with relatively low likelihood of a guilty verdict, which the committal process has not helped the accused person to avoid. |

**Principle of justice: *Equality***

| Strengths of committal proceedings – how equality is promoted | Weaknesses of committal proceedings – limitations in achieving equality |
|---|---|
| **All accused for indictable offences.** All persons charged with indictable offences are equally granted the benefits of committal proceedings – namely, the opportunity to see the prosecution's case against them and to ensure they don't stand trial if the prosecution case is weak – regardless of their age, income, gender and so on. | **Complex process can disadvantage an accused.** If an accused does not have legal representation they can find it hard to understand committal proceedings, as the rules regarding such proceedings are complicated. Without legal representation the accused can find it hard to understand the process and may be unaware of legal rights to test the prosecution's evidence. This will result in inequality between a very experienced prosecution (the prosecution has the Office of Public Prosecutions, Victoria Police and the state's forensic science resources to assist it in preparing its case) and an inexperienced accused person. |

**USEFUL TIP**

Make sure you know more than one purpose of a committal proceeding **and** can apply your knowledge about committals to the facts of a case.

> After a lengthy police investigation, Benji and two co-accused have been charged with murder. Benji has pleaded not guilty. His committal proceeding in the Magistrates' Court has commenced. Benji's trial is expected to last three months and several witnesses are expected to give evidence at the trial. The prosecution has said that the evidence against Benji is strong. The prosecution believes that the trial will be stressful for the witnesses but that the witnesses want to see that justice is achieved at the trial. Other than to determine if there is evidence of sufficient weight to support a conviction at trial, explain one purpose of the committal proceeding in this instance.

Students need to:

- Know more than one purpose of committals. If you go into the exam knowing only about the 'evidence of sufficient weight to support a conviction' purpose, you won't be able to answer a question like this!
- Explicitly link your answer to Benji's case. Don't just say a purpose of committals is to promote a fair trial – explain that Benji will be more able to get a fair trial because the prosecution's case must be complex (a three month trial suggests there is a lot of evidence/many witnesses) and a committal helps him better understand the evidence against him, allowing him to prepare his defence and his legal representative to prepare how to cross-examine prosecution witnesses.

*Source:* 2018 VCAA Sample Exam Section B Q2b

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.6: Purposes of committal proceedings**

## Keen to learn more?

**Judicial College of Victoria – Victorian Criminal Proceedings Handbook (Chapter 4: Committal Hearings),**
www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27435.htm

**Victoria Legal Aid – Going to court for serious criminal charges,**
www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/serious-criminal-charges

QUESTIONS

# 3.1.6 Purposes of committal proceedings

LEVEL 1:
Define and understand

**1.** A committal hearing was conducted in July 2019 for Dominic Walker, Sam Walker and Ben Fitt after being charged with reckless conduct endangering life. The charges related to a late-night assault in September 2018 (following a Richmond v Hawthorn match at the MCG). Based on the information provided, which best describes the nature of committal proceedings?

**A.** The prosecution's case will be assessed by the magistrate to determine whether Walker, Walker and Fitt are guilty, and then will progress to a trial in order for a jury to find a guilty verdict.

**B.** The prosecution's case will be evaluated on its merits to determine whether there is evidence of sufficient weight against Walker, Walker and Fitt to warrant a jury trial.

**C.** The accused men's lawyer has to prove beyond reasonable doubt that they are innocent in order to avoid going to trial.

**D.** The magistrate has to determine whether a prima facie case exists – that is, if Walker, Walker and Fitt have been treated as innocent until proven guilty in order to maintain the principle of fairness.

LEVEL 2:
Describe and explain

**2.** Most indictable offences are tried in the County Court, in which the average trial is about 12 days long. To ensure these stressful (and very expensive) jury trials are only conducted where there is evidence of sufficient weight to support a conviction, committal proceedings are conducted by the Magistrates' Court. Other than this filtering process, identify three other purposes of a committal proceeding. (3 MARKS)

LEVEL 3:
Apply and compare

**3.** Alfred has been charged with the summary offence of driving without a licence and Sylvia is pleading 'not guilty' to a manslaughter charge.

Which of these parties will need to attend committal proceedings? Justify your conclusions. Describe two purposes of these proceedings. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**4.** 'Advocacy for the abolition of committals is not new. Every few years the role and utility of committal proceedings provokes discussion. Almost without fail, those favouring the abolition of committals point to apparent delays caused by committals in the finalisation of criminal proceedings. While delay in a criminal prosecution is undesirable, the reduction of delay is now pursued almost single-mindedly at the expense of ensuring justice. Underpinning that rationale is the notion that swift justice is sound justice.'

*Source:* Tim Freeman, LIV Journal, 1/7/17, www.liv.asn.au/Staying-Informed/LIJ/LIJ/July-2017/Why-we-need-committal

With reference to fairness as a principle of justice, justify retaining committal proceedings. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress check 2 (online), covering these lessons:

- **Lesson 3.1.4 Victims' rights**
- **Lesson 3.1.5 Victoria Legal Aid and community legal centres**
- **Lesson 3.1.6 Purposes of committal proceedings**

Check with your teacher when it's time to complete this progress check.

# 3.1.7 Plea negotiations and sentence indications

**Relatively few criminal matters progress to contested hearing in the Magistrates' Court or jury trial in the County Court or Supreme Court:**

> **From 2009–10 to 2013–14, 72.4% of proven charges in the Supreme Court and 84.6% of proven charges in the County Court were resolved by a guilty plea.**

*Source:* 'Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts' (Sentencing Advisory Council, 2015.

Many guilty pleas are the result of a negotiation between the prosecution and an accused person (and his/her legal representative). It is also common for a guilty plea to come after the court has provided an indication of whether a guilty plea will (or will not) result in an immediate prison sentence.

This lesson covers VCAA key knowledge point: **'The purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases',** which we have broken down into the following concepts:



**Plea negotiations are** discussions between the prosecution and an accused person, in which the accused may agree to plead guilty to a charge(s) against them, in exchange for:

- The withdrawal of some other charges; and/or
- A reduction in the severity of the charge (such as an accused charged with murder, agreeing to plead guilty to a lesser charge such as manslaughter).

If an accused pleads guilty to lesser charges during this process, the charges must still reflect the severity of the criminal conduct of the accused.

A plea negotiation often also includes the prosecution and accused compiling an agreed set of facts regarding the offence, which is then considered by the court when imposing a sentence (with the guilty plea to lesser/fewer charges).

## Purpose of plea negotiations 3.1.7.1

**The purposes of plea negotiations are to:**

- Speed up proceedings; if there is a possibility a criminal matter can be resolved without the need for a trial it is generally in the best interests of both parties to do so. It also reduces the courts' workloads, minimising delays for matters that do go to trial.
- Avoid the stress and trauma associated with a trial (for victims, their families and witnesses).
- Secure a conviction in cases where witnesses may be reluctant to give evidence and/or some evidence may not be admissible in court; that is, to ensure there is a guilty verdict in cases where a verdict of guilt beyond reasonable doubt may be difficult to achieve at trial.

## Appropriateness of plea negotiations 3.1.7.2

A range of factors need to be used to determine whether a plea negotiation is appropriate in a particular case.

As a general rule, where what the prosecution is offering the accused is disproportionate to the public interest (or what is in the best interests of society as a whole) or does not accurately reflect the offender's wrongdoing, a plea agreement will not be reached.

**Plea negotiations may be appropriate where:**

- The accused is willing to plead guilty.
- Obtaining additional information will provide much needed closure to a victim's family (i.e. revealing the location of a body).
- Victims and witnesses are reluctant to give evidence (or giving evidence will be particularly traumatic for the victim or witnesses).

- If the prosecution believe some witnesses may not be believable when giving evidence before a jury, putting at risk securing a guilty verdict.
- The prosecution fear vital evidence proving an accused person's guilt may be inadmissible at trial, reducing the likelihood of a guilty verdict being secured.

**Plea negotiations may be inappropriate where:**

- The accused is not prepared to plead guilty to any charges.
- The alleged offending is so serious that a conviction for lesser charges is not in the public interest (and the perception the accused 'got off lightly' will be too great).
- The victim (or their family) opposes such an agreement (please note the prosecution will consider this in deciding whether to negotiate a plea, but it is ultimately up to the prosecution to decide whether to enter such an agreement – even if the victim or their family opposes it).

**USEFUL TIP**

It is important to remember that the appropriateness of a plea negotiation will be determined by the nature of a specific case. Students may be required to discuss whether or not a plea negotiation is appropriate in relation to a case study.

For example, the 2018 VCAA Legal Studies exam included the following question:

> Bob, 24, has been charged with four offences, including armed robbery and common assault. The prosecution alleges that:
>
> - Bob robbed a service station with a firearm
> - the offences caused distress to several victims, including a young family and Ada, who was working in the service station
> - Bob was serving a community correction order (CCO) at the time of the offences.
>
> Bob has been cooperative with the police since his arrest. Bob cannot afford legal representation and is concerned about being sent to prison as he has served time in jail for numerous offences, including theft.
>
> A committal hearing was held last week. The magistrate decided that the evidence against Bob was of sufficient weight to support a conviction for the offences. The court ordered that Bob stand trial. The trial is expected to last three weeks. Ada is concerned about giving evidence as she is still distressed about the armed robbery. Bob has pleaded not guilty
>
> Discuss the appropriateness of a plea negotiation in this case. (5 MARKS)

This question required students to consider the perspectives of the stakeholders in this particular case (Bob, Ada, the victims, the prosecution, etc.) and explain why a plea negotiation would/would not be appropriate. Factors that may affect the appropriateness of a plea negotiation in this case include:

- Ada is concerned about giving evidence and may have a negative experience at trial, potentially compromising her evidence and causing secondary victimisation.
- A plea negotiation will save time and resources of the courts as the trial is expected to last three weeks.
- Bob does not want to go back to prison and may therefore be more willing to plead guilty to a lesser sentence.
- Bob does not have a lawyer and plea negotiations can be complex for an unrepresented accused.
- If Bob negotiates and pleads guilty to a lesser sentence, the public may feel that this does not reflect the severity of the crime, and that justice has therefore not been achieved.

A high-scoring response to this question will explain how these factors influence the appropriateness of a plea negotiation in the case, as opposed to simply listing general factors which determine the appropriateness of plea negotiations.

### Plea negotiations & the principles of justice

**Principle of justice: *Access***

| Strengths of plea negotiations – how access is promoted | Weaknesses of plea negotiations – limitations in achieving access |
|---|---|
| **Saves court time and resources.** Plea negotiations allow for cases to be resolved before going to trial, minimising delays and freeing up court resources to make the legal system more accessible for cases which do go to trial. | N/A |

**Principle of justice: *Fairness***

| Strengths of plea negotiations – how fairness is promoted | Weaknesses of plea negotiations – limitations in achieving fairness |
|---|---|
| **Delays are minimised.** Plea negotiations provide for fairness as they may mean a trial is avoided freeing up court resources which may relieve case backlogs; because delays create added stress for accused persons, victims and witnesses, minimising such delays is fair. | **Outcome may not reflect crime.** Plea negotiations may sometimes result in the community feeling that an accused has been 'let off' because they were able to plead guilty to a lesser charge/fewer charges. This could lead to the impression that the outcome was unfair.<br>**Not conducted in public.** Plea negotiations are conducted in private, unlike a trial. A public hearing is an element of a fair trial, so plea negotiations could be seen as undermining the achievement of fairness in this way. However this is a small weakness – an accused is free to refuse to enter a plea negotiation and be tried by jury in public, if they wish. |

**Principle of justice: *Equality***

| Strengths of plea negotiations – how equality is promoted | Weaknesses of plea negotiations – limitations in achieving equality |
|---|---|
| **Personal characteristics not relevant.** An accused person's income, gender and other personal characteristics don't affect whether a plea negotiation takes place. | **Not available to all accused persons.** A plea negotiation will only be possible if the prosecution agrees to one. Therefore, there is not always equal opportunity for all accused to enter into a plea negotiation. |

## Purposes of sentence indications 3.1.7.3

**A sentence indication is** a statement by the court whether a guilty plea will or will not result in an immediate prison term.

Prior to their trial a person charged with an indictable offence can request from the County Court or Supreme Court judge, an indication of whether a guilty plea will be likely, or will not be likely, to lead to an immediate prison term (based on an agreed set of facts). In the Magistrates' Court, a magistrate can give a sentence indication at any time.

If such an indication is given but the accused pleads:

- Not guilty – the application for the sentence indication cannot be used as evidence of guilt.
- Guilty – the court cannot then impose a more severe sanction (for example, the court cannot indicate a non-custodial sentence will be imposed, then imprison an offender who pleads guilty straight away).

**The purposes of sentence indications** are to:

- Put accused persons in a better position to make the decision to plead guilty/not guilty at an early stage in proceedings (by providing extra information about the consequences of doing so).
- Reduce the number of matters in which accused persons plead guilty late in proceedings

## Appropriateness of sentence indications 3.1.7.3

For indictable offences, a sentence indication **is appropriate** if:

- The accused has applied for a sentence indication; and
- The prosecution consents to the application for a sentence indication.

A sentencing indication **is not appropriate** (and will not be given) if the court does not have sufficient information about the impact of the offence on the victim.

**CASE STUDY** **SENTENCE INDICATIONS – SENTENCE ADVISORY COUNCIL REPORT (2010):**

- Considered that sentence indication was a form of 'bargained justice', which suggests an agreement concluded in a way that falls below the standards of transparency, fairness or propriety required of the criminal justice system.
- The **sentence indication scheme**, particularly operating in conjunction with clearly articulated sentence discounts, should facilitate, rather than coerce, a defendant's plea decision and should not involve placing 'expediency before principle' in the administration of justice.

*Source:* www.sentencingcouncil.vic.gov.au/publications/sentence-indication-report-pilot-scheme

### Sentence indications & the principles of justice

**Principle of justice: *Access***

| Strengths of sentence indications – how access is promoted | Weaknesses of sentence indications – limitations in achieving access |
|---|---|
| **Saves court resources.** Earlier guilty pleas reduce the courts' workload, reducing delays for matters that do go to trial – this promotes access for parties to those cases. | N/A |

**Principle of justice: *Fairness***

| Strengths of sentence indications – how fairness is promoted | Weaknesses of sentence indications – limitations in achieving fairness |
|---|---|
| **Accused is more informed.** Enables the accused to make a more informed decision regarding his/her plea, providing for fairness.<br>**Early guilty plea.** By reducing the likelihood of a delayed guilty plea (perhaps part-way through a trial) this scheme should prevent the stress and anxiety for victims and witnesses by reducing the number of contested trials.<br>**Cannot be used as evidence.** A sentence indication does not prejudice a court against an accused person, ensuring fair trial – it is not used as evidence, and if the matter goes to trial a different judge/magistrate conducts the case, ensuring fairness is not undermined by this process. | **Denies victims their 'day in court'.** Victims of crime (and their families) may feel denied the opportunity to hear the accused answer the charges against them at trial. |

**Principle of justice: *Equality***

| Strengths of sentence indications – how equality is promoted | Weaknesses of sentence indications – limitations in achieving equality |
|---|---|
| **Personal characteristics not relevant.** An accused person's income, gender and other personal characteristics don't affect whether a sentence indication is provided. | **Not available to all accused persons.** A judge may refuse to provide a sentence indication, meaning they are not equally accessible to all accused persons. |

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.1.7: Plea negotiations and sentence indications**

## Keen to learn more?

**Champion, J (2014) *The importance of plea agreements: our approach and accountability*,** www.opp.vic.gov.au/getattachment/8eed0322-7d85-40b0-b593-d8ef97aaf41a/The-Importance-of-Plea-Agreements-Our-Approach-and.aspx
**Sentencing Advisory Council: Guilty pleas and sentencing,**
www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/guilty-pleas-and-sentencing
**Judicial College of Victoria: Victorian Sentencing Manual,** www.judicialcollege.vic.edu.au/eManuals/VSM/16057.htm
**Silvester, J (2018) *Let's make a deal* The Age, 1 September 2018,** www.theage.com.au/national/victoria/let-s-make-a-deal-20180830-p500oz.html

QUESTIONS

# 3.1.7 Plea negotiations and sentence indications

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

'The fundamental purpose of plea negotiations is to reach an agreement at an early stage in order to expedite court proceedings and avoid a trial in its entirety. This is accomplished by the prosecutor and _____ making a deal whereby the _____ agrees to plead guilty in exchange for some kind of concession such as an/the _____ of certain _____ or a reduction in their severity.'

**A.** defendant; prosecutor; dismissal; convictions

**B.** prosecutor; defendant; acquittal; charges

**C.** prosecutor; defendant; dismissal; charges

**D.** defendant; defendant; dismissal; charges

**2.** The latin term 'quid pro quo' means 'something for something'. In what way does this philosophy apply to the notion of plea negotiations?

**A.** This philosophy does not apply to plea negotiations as the process disproportionately advantages the prosecution.

**B.** Plea negotiations are generally seen as a transaction between the victim and the defendant whereby the prosecution offers some kind of concession and/or incentive in exchange for a guilty plea (to spare the victim unnecessary trauma) and the outcome is generally favourable for both parties.

**C.** Plea negotiations are generally seen as a transaction between the prosecution and the defendant whereby the prosecution offers some kind of concession and/or incentive in exchange for a guilty plea and the outcome is generally favourable for both parties.

**D.** This philosophy does not apply to plea negotiations as the process disproportionately advantages the defendant.

**3.** Which of the following is correct? The fundamental reason why sentence indications exist is to:

**A.** reduce the number of guilty pleas submitted late in proceedings.

**B.** give the defendant a clear picture of the sentence they are likely to face so that they can make a more informed decision regarding the nature of their plea.

**C.** Neither A nor B.

**D.** Both A and B.

**4.** Jessica has been charged with a number of indictable offences. Both the prosecutor and the judge have consented to give her an indication of her sanction upon her request. Based on the information provided, which statement below is incorrect?

**A.** Given that Jessica has requested a sentence indication and both the prosecutor and the judge have consented Jessica will likely receive one.

**B.** When Jessica receives the sentence indication, she will know if the court is likely to impose a term of imprisonment if she pleads guilty at the first opportunity.

**C.** After receiving the sentence indication, Jessica can decide to enter a guilty plea.

**D.** The judge will give a sentence indication but if Jessica pleads guilty immediately, the judge can impose a more severe type of sentence than was originally indicated.

LEVEL 2:
Describe and explain

**5.** One Saturday evening police were called to a University campus party in response to a call from a student (Jamie) claiming that she had been viciously attacked by another student, Marcus. Marcus is eventually arrested and charged with attempted murder. In light of the information provided, outline one way that a plea negotiation could be beneficial for each of Jamie and Marcus. (3 MARKS)

**6.** Describe one situation in which a plea negotiation is an appropriate way to resolve a criminal dispute, and one situation in which a plea negotiation is not an appropriate way to resolve a criminal dispute. (4 MARKS)

**7.** A legal critic was recently quoted saying the following about sentence indications:

- are provided by the court after a guilty plea has been entered.
- are provided by the court at the request of the prosecution.
- must be provided by the court when requested.

Identify and correct the errors in the above statement. (3 MARKS)

**8.** Describe the purpose of sentence indications. (3 MARKS)

LEVEL 3:
Apply and compare

**9.** Compare the purposes of plea negotiations and sentence indications in criminal proceedings. (3 MARKS)

**10.** Sarah has been charged with culpable driving, having been in a car accident that caused the death of Liam. The prosecution know Liam's family are devastated and want to see Sarah punished severely. Senior Constable Rosie who attended the horrific scene of the accident and interviewed Sarah has since taken stress leave. The backlog of cases in the County Court means the trial will be more than 14 months away, Sarah's boyfriend is reluctant to give evidence about her drinking alcohol prior to the accident. Sarah's barrister approaches the DPP indicating she'll plead guilty to the lesser charge of dangerous driving causing death.

Do you believe resolution by plea negotiation is appropriate in this instance? Justify your response. (5 MARKS)

LEVEL 4:
Discuss and evaluate

**11.**

### Kara Doyle's mother Jenny Doyle angry at DPP over plea deal for Mehmet Torun

**Mark Russell**
The Age, 17 February 2015

The mother of a young woman shot dead by her boyfriend has criticised the Director of Public Prosecutions for not pursuing a murder charge against him and taking the case to trial. Mehmet Torun, 26, had initially been charged with murdering Kara Doyle before the DPP dropped the charge when he offered to plead guilty to the lesser charge of manslaughter.

*Source:* www.theage.com.au/national/victoria/kara-doyles-mother-jenny-doyle-angry-at-dpp-over-plea-deal-for-mehmet-torun-20150217-13gufj.html

To what extent are plea negotiations an effective way to settle criminal disputes? Justify your response. (5 MARKS)

**12.** Ella has been accused of arson and seeks a sentence indication from the presiding judge of the County Court. The Court has detailed information about the impact of the offence and the prosecution does not consent to such an indication being provided.

Based on the information provided:

- Identify whether a sentence indication would be granted in this case. Justify your response. (2 MARKS)
- Explain how plea negotiations uphold the principle of fairness. (3 MARKS)

# 3.1.8 The Victorian court hierarchy and criminal cases

**Within the Victorian criminal justice system there are a range of different courts, hearing different criminal disputes (as well as civil matters, covered in Unit 3 Area of Study 2).**

The Victorian court system is deliberately set up in a hierarchy – a ranking of the courts from 'lowest' to the most superior court. Each court has its own jurisdiction – a set of case types it resolves.

This lesson covers the VCAA key knowledge point: **'The reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals'** which we have broken down into the following concepts:



**A court hierarchy refers to** the arrangement of courts in order from least formal and superior to most formal and superior.

- Essentially, the courts are ranked based on their 'status' and 'authority' to hear different types of matters.
- The ranking of courts is closely related to their 'jurisdiction'. That is, their power to hear and determine particular types of matters.
- The lowest court (the Magistrates' Court) hears a high volume of less serious, less complex matters; these are resolved relatively quickly; the further up the hierarchy we look, the fewer cases each court resolves, but the more complex and time-consuming such cases are.

## Victorian court system — criminal jurisdictions

### SUPREME COURT – COURT OF APPEAL

**Original jurisdiction:** No original jurisdiction

**Appellate jurisdiction:**
- All appeals for crimes originally heard by a judge and jury in the County Court or Supreme Court – Trial Division
- This includes appeals against the sanction imposed, questions of law, and offenders appealing against the conviction as a question of fact.

### SUPREME COURT – TRIAL DIVISION

**Original jurisdiction:** Unlimited criminal jurisdiction, but in practice conducts trials for only the most serious indictable offences, such as murder or attempted murder and terrorism offences

**Appellate jurisdiction:** Appeals from the Magistrates' Court – based on questions of law

### COUNTY COURT

**Original jurisdiction:** Trials for most indictable offences, such as:
- rape
- armed robbery
- serious drug offences
- manslaughter

**Appellate jurisdiction:** Appeals from the Magistrates' Court:
- offenders appealing against the conviction as a question of fact
- appeals by offenders/prosecution on the sanction imposed

### MAGISTRATES' COURT

**Original jurisdiction:**
- Applications for warrants
- Committal hearings (hearings determining a weight of evidence to support a conviction, before a jury trial is held for an indictable offence) – Lesson 3.1.6
- Bail hearings
- Summary offences (speeding, petty theft, etc.) – Lesson 3.1.2
- Indictable offences triable summarily (more serious offences that may be tried like summary offence) – Lesson 3.1.2

**Appellate jurisdiction:** No appellate jurisdiction

**A court's 'jurisdiction' refers to** the boundaries of power a particular court has to hear and determine disputes:

- **'Original jurisdiction' refers to** their power to hear a case 'at first instance' (that is, when a case has never been tried before).
- **'Appellate jurisdiction' refers to** a court's power to hear a case on appeal (that is, once a case has already been tried and a party seeks a review of some aspect of the decision – be it the guilty verdict, the sanction imposed or a question of law).
- **'Criminal jurisdiction' refers to** a court's power to hear criminal matters (the prosecution of criminal offences by the police and Office of Public Prosecutions).
- **'Civil jurisdiction' refers to** a court's power to hear civil matters (disputes between two parties; see Area of Study 2 for more detail).

**USEFUL TIP** This is a topic in which students need to be able to effectively use and understand legal terminology – terms like 'original jurisdiction', 'appeal' and so on will appear in your SACs and your exam, be sure you know what they mean!

| Court | Original criminal jurisdiction | Appellate criminal jurisdiction |
|---|---|---|
| **Magistrates' Court** | • Applications for warrants<br>• Committal hearings – hearings to determine whether there is evidence of sufficient weight to support a conviction, before a jury trial is conducted for an indictable offence (see Lesson 3.1.6)<br>• Bail hearings<br>• Summary offences (minor criminal offences such as speeding, petty theft; see Lesson 3.1.2)<br>• Indictable offences triable summarily (more serious offences that may be tried like a summary offence; see Lesson 3.1.2) | No appellate jurisdiction |
| **County Court** | Trials for most indictable offences, such as:<br>• Rape<br>• Armed robbery<br>• Serious drug offences<br>• Manslaughter | Appeals from the Magistrates' Court:<br>• Offenders appealing against the conviction as a question of fact<br>• Appeals by offenders/prosecution on the sanction imposed |
| **Supreme Court – Trial Division** | Unlimited criminal jurisdiction, but in practice conducts trials for only the most serious indictable offences, such as:<br>• Murder and attempted murder<br>• Terrorism offences | Appeals from the Magistrates' Court:<br>• Based on questions of law |
| **Supreme Court – Court of Appeal** | No original jurisdiction | All appeals for crimes originally heard by a judge and jury in the County Court or Supreme Court – Trial Division<br>This includes appeals against the sanction imposed, questions of law, and offenders appealing against the conviction as a question of fact. |

## Appeals Process 3.1.8.1

**An appeal is** when a matter is heard for a second (or third) time.

In criminal matters appeals may be:

- the prosecution or a convicted offender seeking a review of the sanction imposed (arguing it is insufficient/excessive)
- the prosecution or a convicted offender appealing on the basis the law has been incorrectly applied/interpreted
- a convicted offender appealing the conviction (that is, the guilty verdict) as a question of fact.

Typically, an appellant (a party to a case seeking an appeal) needs to prove they have 'grounds' (reasons) to appeal; an appeal is not an automatic right.

**A court hierarchy is necessary for appeals to operate because** without the courts being ranked from lower to higher courts, it would not be possible to have decisions reviewed by a superior court.

## Specialisation 3.1.8.2

**Specialisation refers to** the courts' judges and staff developing expertise in particular criminal disputes and criminal procedures. This specialisation develops as a result of each court regularly conducting criminal trials (or appeals) of a particular kind.

For example:

- The Supreme Court (Trial Division) has experienced judges (and their associates) with expertise in the law regarding murder and defences to murder, and how to empanel and manage a jury.
- Magistrates have developed skill and experience in knowing whether the evidence presented by the prosecution in a hand-up brief is of sufficient weight to support a conviction in a jury trial for an indictable offence, due to the frequency with which they conduct committal proceedings.

**A court hierarchy delivers specialisation by** assigning each court a defined jurisdiction – a set of criminal matters each court hears regularly.

**USEFUL TIP**

Be careful not to just memorise reasons for a hierarchy. Make sure you can apply this knowledge to a specific case or question.

For example:

> Simon Fortune, 40, was charged with kidnapping. His trial was heard in the County Court of Victoria, and he was found guilty and sentenced. Simon intends to appeal.
>
> Other than appeals, explain one reason why a court hierarchy is beneficial in this case.

- Give only one reason. There are no bonus marks for going beyond what you're asked to do.
- Link to the case – the VCAA exam report stated 'The reference to the case needed to be meaningful, for example, an explanation of how specialisation might assist Simon or the case generally.'

*Source:* 2017 VCAA legal studies exam Q1c

**The court hierarchy & the principles of justice**

**Principle of justice: *Access***

| Strengths of the court hierarchy – how access is promoted | Weaknesses of the court hierarchy – limitations in achieving access |
|---|---|
| **Appeals.** The court hierarchy promotes access to justice by providing for the appeals process which facilitates the review of judicial decisions. The appeals process allows for mistakes to be corrected – the ranking of courts from lower to higher provides access to such reviews of judges' decisions. | **Appeals are not always allowed.** Grounds for appeal must exist (such as the sentence being inadequate) and be considered strong enough to warrant a review by a court. This may render some cases ineligible for review in a higher court and meaning access to such appeals is limited. |

**Principle of justice: *Fairness***

| Strengths of the court hierarchy – how fairness is promoted | Weaknesses of the court hierarchy – limitations in achieving fairness |
|---|---|
| **Specialisation.** The existence of a court hierarchy provides fairness in the criminal justice system due to specialisation. As individual courts are able to develop their expertise in dealing with particular disputes and areas of law frequently, cases are presided over by skilled and knowledgeable judges who are more able to ensure a just/correct outcome, which is fair. | **Cost of appeals.** Some offenders may not be able to appeal to the higher courts if they cannot afford the fees associated with appeals and the legal representation needed, limiting their ability to have mistakes corrected; in such cases the hierarchy does not deliver fairness for these offenders. |

**Principle of justice: *Equality***

| Strengths of the court hierarchy – how equality is promoted | Weaknesses of the court hierarchy – limitations in achieving equality |
|---|---|
| N/A | **Cost of appeals.** Due to the costs associated with an appeal (above) the hierarchy does not deliver equal access to appeals to all offenders (the Office of Public Prosecutions, as a government department, has significant resources to fund an appeal). |

**USEFUL TIP** When describing the reasons for a court hierarchy, don't just assert that a hierarchy allows for appeals (or specialisation) – students need to link this to the organisation/ranking of courts into higher and lower courts, and how this ranking provides for appeals (or specialisation).

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.1.8: The Victorian court hierarchy and criminal cases**

## Keen to learn more?

**Magistrates' Court,** www.victimsof crime.vic.gov.au/going-to-court/victim-impact-statements
**County Court of Victoria,** www.sentencingcouncil.vic.gov.au/
**Supreme Court of Victoria,** www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual
**The Law Handbook: Victorian State Courts,** www.lawhandbook.org.au/2018_01_02_02_victorian_state_courts

QUESTIONS

# 3.1.8 The Victorian court hierarchy and criminal cases

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

'A court _____ facilitates the _____ process by ensuring that when a party is dissatisfied with a/the _____ and has grounds for review, there are avenues available for them to do so'.

**A.** hierarchy; appeals; decision

**B.** system; administrative; party

**C.** hierarchy; appeals; defendant

**D.** system; appeals; party

**2.** Which of the following statements accurately reflects 'specialisation' as a reason for a court hierarchy in Victoria?

**A.** The superior courts (eg. Supreme Court) are free to devote time and resources to long, complex criminal trials without the court being 'clogged up' by also resolving minor disputes.

**B.** The lower courts (eg. Magistrates' Court) can quickly resolve a large number of relatively minor disputes, minimising delays for those charged with minor offences.

**C.** By hearing similar disputes within a set jurisdiction regularly, judges develop skill and expertise in resolving particular criminal disputes.

**D.** None of the above.

LEVEL 2:
Describe and explain

**3.** Your friend Mark has made the following statements regarding court hierarchies:

- Which cases a court can hear when a decision is being challenged is referred to as the court's 'power of judicial review'.
- In the event of an appeal, cases proceed up the court hierarchy without skipping a court.
- If an offender makes an application for appeal, a court must grant this request as it would be unfair to reject such a request.

Identify and correct the errors in Mark's statements. (3 MARKS)

**4.** What is a court hierarchy? How is specialisation facilitated by the court hierarchy? (3 MARKS)

LEVEL 3:
Apply and compare

**5.** In *Fernando v The Queen* [2017] VSCA 208 the Court of Appeal allowed a review of Mr. Fernando's sentence on the grounds that is was 'manifestly excessive' and that the sentencing judge had committed an error.

Mr. Fernando was convicted of one charge of trafficking in a commercial quantity of methylamphetamine and three charges of trafficking in other drugs of dependence.

Based on the information provided:

- Identify in which court the original decision is most likely to have been made. Justify your answer. (2 MARKS)
- There are many reasons for the existence of a court hierarchy. Describe the reason for a court hierarchy that this case highlights. (2 MARKS)

LEVEL 4:
Discuss and evaluate

**6.** 'In 2018 the Court of Appeal held that a sentence of three years and six months imprisonment for two dangerous driving offences (causing death and causing serious injury) was manifestly inadequate. The Court resentenced the offender to a total period of five years and six months' imprisonment with a non-parole period of three years and six months.'

*Source: DPP v Weybury* [2018] VSCA 120, www.supremecourt.vic.gov.au/law-and-practice/judgments-and-sentences/judgment-summaries/dpp-v-weybury-2018-vsca-120

In this case and other criminal matters the existence of a court hierarchy promotes fairness and access. To what extent do you agree? Justify your answer. (5 MARKS)

**7.** 'The Victorian criminal justice system would still operate effectively if only one level of courts existed'. Do you agree with this statement? Justify your answer. (4 MARKS)

# 3.1.9 Key personnel in a criminal trial

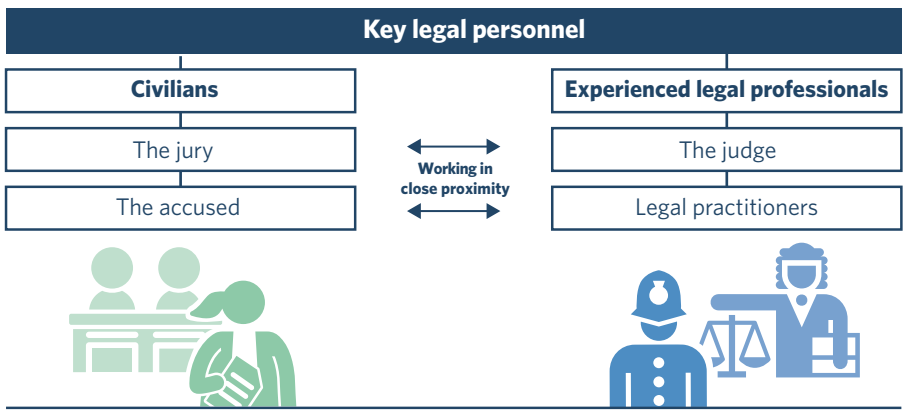
**Most prosecutions in the Victorian criminal justice system do not go to trial, but instead are resolved by a guilty plea followed by the imposition of a sanction.**

When matters do go to trial, key personnel have specific functions to perform. In many ways, these functions promote the achievement of fairness, equality and access in the Victorian justice system.

This lesson covers VCAA key knowledge point: **'The responsibilities of key personnel in a criminal trial, including the judge, jury, parties and legal practitioners'**, which we have broken down into the following concepts:



In a criminal courtroom, there are various personnel involved with **clearly defined** roles. Each individual has a responsibility to uphold the principles of justice and ensure that correct process and procedure is followed **at all times**.




## Responsibilities of the judge 3.1.9.1

**A judge is** an individual (usually with extensive experience as a solicitor or barrister), appointed to conduct trials/hearings and resolve legal disputes in court.

Judges' titles vary – Magistrates sit in the Magistrates' Court, a judge of the County Court is referred to as 'Judge' (Judge Hannan for example, manages criminal matters in the County Court) while judges are referred to by the title 'Justice' in the higher courts (for example Justice Lasry is a judge in the Supreme Court and Justice Bell is a judge in the High Court of Australia).

**A judge is the 'umpire'** of a courtroom – overseeing all personnel, rules of evidence and procedure.

**Responsibilities of the judge in a criminal trial include:**

- Apply the rules of evidence and procedure to ensure only admissible evidence is presented in court and witnesses are examined/cross-examined lawfully.
- Being an independent umpire who can adjudicate without bias or preconceived notions.
- Managing the empanelment of the jury (in the County Court or Supreme Court).
- Give rulings on points of law, such as deciding whether a particular defence may be lawfully argued (where appropriate).
- Directing the jury at the conclusion of the trial (prior to the verdict being delivered):
  - Explain the burden of proof and the standard of proof to the jury;
  - Describing the law that applies to the facts; and
  - Summarising the evidence presented by both parties
- In the Magistrates' Court, the judge (ie: a magistrate) will determine whether the accused is guilty (as a jury will not be present in this court).
- Conduct a plea hearing and determine the sentence if the accused is found guilty.
- Explaining to the court the sanction imposed.

**CASE STUDY** ***R v DA COSTA* [2014] VSC 458**

One responsibility of a judge is the imposition of a sentence at the conclusion of a trial (or after an accused person has pleaded guilty). In superior courts judges will publish the reasoning behind their decisions – see the comments of Justice Lasry when he sentenced Neil Lima Da Costa to a 16 year term of imprisonment. (Further information is in Lesson 3.1.12).

**CASE STUDY** **JUDGES' DUTY TO ENSURE A FAIR TRIAL**

As described in more detail below, those facing trial in the higher courts usually need legal representation to ensure they have a fair trial. Without legal representation, an accused person will have difficulty testing the prosecution's evidence and presenting relevant legal defences to the court and the jury. Furthermore, those charged with sexual offences are not allowed to personally cross-examine victims (due to the protections given to vulnerable witnesses – this questioning can only be done by the accused person's legal representative).

Section 197 of the *Criminal Procedure Act 2009* (Vic) gives judges conducting a jury trial in the County Court and the Supreme Court the power to order VLA to provide legal representation, if:

- An accused person cannot afford a lawyer (and has proven this to the court); and
- The judge believes the accused cannot get a fair trial without legal representation.

### The responsibilities of the judge & the principles of justice

**Principle of justice: *Access***

| Strengths of the responsibilities of the judge – how access is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving access |
|---|---|
| **Law is explained.** Judges' explanation of the law to the jury ensures the accused person also understands the criminal proceedings they are a party to. | **Cannot assist self-represented parties.** Judges remain impartial in that they cannot assist accused persons without legal representation by explaining any lawful defences or advising them how to prepare and present their case; in this respect the judge's independence in a criminal trial does not promote access to justice for unrepresented accused persons. |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the judge – how fairness is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving fairness |
|---|---|
| **Impartial.** Independent judge ensures the trial is conducted without bias, according to the rules of evidence; this ensures fairness as decisions are based on law and reliable facts alone. | **Potential bias.** While judges are impartial judicial officers, they are still subject to personal bias and may unconsciously discriminate against certain parties. However judges are skilled in applying the law and remaining independent, so this is a small weakness.<br><br>Limited control. Judges rely on the parties to present all relevant evidence during a trial; if an accused person has no legal representation this may prevent all relevant facts being presented to the court, as judges cannot actively seek out evidence they may need to deliver a verdict/ensure the jury knows all the facts. If this occurs, it may prevent a decision based on all relevant facts, which can lead to an unfair result. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the judge – how equality is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving equality |
|---|---|
| **Rules of evidence.** Judges ensure rules of evidence and procedure apply equally to both parties during a criminal trial.<br>**Victims'/accused rights.** Judges will apply the rules protecting victims (such as the right to give evidence as a vulnerable witness) and accused persons (such as the presumption of innocence) equally, without discriminating between parties. | N/A |

## Responsibilities of the jury 3.1.9.2

**A jury is** a group of 12 people representing a cross-section of the community, randomly selected from the electoral roll required to deliver a verdict (guilty/not guilty) in trials for indictable offences, on the basis of evidence presented in court.

**A jury is used to deliver a verdict in** trials in the County Court and the Supreme Court (Trial Division).

As stated in Lesson 3.1.3, juries participate in a very small proportion of criminal matters, because:

- Most offences in Victoria are summary offences, resolved in the Magistrates' Court by a magistrate sitting alone, without a jury; and
- Most accused persons charged with indictable offences plead guilty and progress directly to sentencing, without the need to conduct a jury trial.

**Responsibilities of the jury in a criminal trial include:**

- To select a foreperson to communicate on the jury's behalf with the court.
- To be objective
  - Be independent and unbiased when reaching decisions. Potential jurors who believe they cannot remain impartial must ask to be excused during the process of jury empanelment.
- Listen to the evidence, judge's directions and legal representatives' submissions
  - Be alert, take notes, keep track of (often complex) information.
  - Determine which witnesses and evidence they believe/accept as accurate and reliable.
  - Listen to the judge's directions as to the law, the evidence and the decision they need to make.
  - Listen to legal representatives' presentations summarising the prosecution's case and the accused person's defence (as these legal representatives will summarise the evidence they want the jury to accept and the law they want the jury to consider in reaching their decision).
- Determine the verdict (that is a determination of whether the accused is guilty beyond reasonable doubt; if they hold a reasonable doubt they must deliver a verdict of 'not guilty'. In some cases a majority verdict of 11 out of 12 will be accepted by the court.
  - A verdict must be based solely on the evidence presented; jurors must disregard any media reporting of the offence and cannot seek out additional information relating to the offence or the criminal law more generally.
- Keep statements made in the jury room confidential.

**USEFUL TIP** In the past, some students have mistakenly said that the jury is responsible for determining the sanction that is to be applied in a criminal case. Remember that a jury is not responsible for determining an appropriate sanction, and is only needed to determine the guilt of the accused party beyond reasonable doubt. The judge will always decide on the sanction imposed on a guilty offender.

## The responsibilities of juries & the principles of justice

### Principle of justice: *Access*

| Strengths of the responsibilities of the jury – how access is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving access |
|---|---|
| **Plain English.** The presence of juries ensures plain English is used in court, less legal jargon is used (to ensure that the jury understand the court's procedures and the evidence they are being asked to make a decision upon); this ensures accused can understand the process being used against them, which promotes access to justice (by improving understanding of the legal process). | **Limited use.** Very few matters are tried by jury, as most criminal offences committed are summary offences resolved in the Magistrates' Court – so relatively few accused persons can access trial by peers. |

### Principle of justice: *Fairness*

| Strengths of the responsibilities of the jury – how fairness is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving fairness |
|---|---|
| **Trial-by-peers.** In very serious cases juries provide for trial-by-peers. A cross-section of the community is used as decision-maker, so the accused should feel their case has been decided by their equals; this prevents parties feeling they have been oppressed by the state, which promotes fairness.<br><br>**Democratic.** Trial by peers also protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair.<br><br>**Independent.** Juries are independent of all parties to a dispute. They are randomly selected from the community, have no connection to the victim, accused, witnesses, etc.<br><br>**Impartial.** Jurors cannot seek additional information about the case beyond the courtroom. They are instructed to disregard any knowledge they may have of the dispute, are prevented by the Juries Act from seeking additional information about a case and judges can suppress media coverage of a case to ensure jurors do not have preconceived ideas about an accused person (or witnesses). They can therefore be completely impartial which promotes fairness. | **Potential bias.** Jurors may be influenced by what they hear about a party to a case in the media, and may therefore make a decision based on preconceived ideas about the case, not just the evidence heard in court. This is not fair on the accused (and victims of crime).<br><br>**Criminal cases are complex.** Making decisions in legal cases is a complex task undertaken by people with no legal training, creating the risk of an incorrect verdict. In addition, because juries do not need to provide reasons for their decisions there is no certainty they have actually applied the law to the facts correctly. This could be unfair on accused persons and victims of crime.<br><br>**Delays.** The use of juries creates delays, because time is taken to empanel the jury, to explain court procedures and jurors' roles, to slowly explain evidence, to remove juries from courtrooms for legal arguments and the time taken for the jury to reach a decision. Further, there are sometimes hung juries and mistrials due to juror misconduct, requiring a re-trial and further delaying justice – significant delays can be unfair on an accused and victims of crime by compounding the stress involved.<br><br>**Very few matters.** Juries are used in a very small proportion of criminal cases – juries promote fairness in relatively few cases. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the jury – how equality is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving equality |
|---|---|
| **Available to all accused of an indictable offence.** All accused persons charged with indictable offences are entitled to a jury trial, regardless of their wealth, race, education, etc. | **Not always a true cross-section of society.** Some individuals are ineligible or disqualified from jury service; as a consequence, some accused persons may not feel tried by their peers (such as refugees, those from a non-English speaking background and children tried as an adult in the higher courts). This may undermine the equal access to trial by one's peers. |

## Responsibilities of the parties 3.1.9.3

**Parties to a criminal trial are** the prosecution (represented by the police, who prosecute matters in the Magistrates' Court and the Office of Public Prosecutions (OPP) in the superior courts) and the accused (the individual standing trial for allegedly having committed a crime). While some of their roles overlap, there are key distinctions as well.

**Given the judge's independence as an 'umpire' during a trial, the parties retain control over** many aspects of the criminal trial. Note that many of these functions are performed by the parties' legal representatives, who act on the instructions of the party they represent.

**Responsibilities of the prosecution in a criminal trial include:**

- To determine which witnesses to call to give evidence during the trial; the prosecution must call all relevant witnesses to assist the full truth to emerge, and not just those that will help secure a guilty verdict 'at all costs'. For instance: the prosecution cannot decide against calling a witness to a crime because their evidence may lead a jury to have doubts about the accused person's guilt.
- To identify the legal principles relevant to the offence, to present to the court
- To communicate with victims of crime and other witnesses, about the trial process
- If an accused person is found guilty, to make submissions to the court about the appropriate sanction to impose

**Responsibilities of the accused in a criminal trial include:**

- To enter a plea of 'guilty' or 'not guilty'.
- To decide whether to have legal representation; although having legal representation is desirable, an accused may choose to represent themselves.
- To decide which witnesses to call to give evidence that disproves the prosecution's case.
- To decide which lawful defence(s) they wish to put to the court (such as self-defence in a trial for a serious assault).
- To be present at all court proceedings related to their case (except when being tried for offences that can be heard in the absence of the accused, such as some summary offences).
- If an accused person is found guilty at the conclusion of a trial, that person is entitled to put to the court a plea in mitigation – that is, reasons why any sanction imposed should be more lenient. (See Lesson 3.1.12 for further information).

**The responsibilities of the parties & the principles of justice**

**Principle of justice: *Access***

| Strengths of the responsibilities of the parties – how access is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving access |
|---|---|
| **Self-represented parties.** Courts do provide some guidance of a general kind to parties who are representing themselves, regarding courts' procedures. | **Limited assistance for self-represented parties.** Parties without legal representation will struggle to understand how to present legal argument and evidence in its best light, limiting access to justice (which includes individuals understanding their legal rights). |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the parties – how fairness is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving fairness |
|---|---|
| **Party control.** The accused has control of their own case, and is responsible for deciding what facts to present, how, etc.; the accused therefore feels in control of the process, should therefore feel more satisfied with the outcome (feeling that they have been treated fairly). The requirement of the prosecution to present all relevant and reliable evidence (not selecting evidence to pursue a conviction at all costs) should ensure the whole truth emerges during a trial, promoting a fair outcome. | **Self-represented parties.** Unrepresented parties may not present all relevant evidence/lawful defences to the court; they are also less able to test the reliability of the prosecution's witnesses, which can disadvantage their defence. If the accused fails to produce relevant evidence/legal argument/legal defence this may lead to an incorrect outcome, which is unfair. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the parties – how equality is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving equality |
|---|---|
| **Opportunity to present case.** Both parties are given equal opportunity to present their case to the court. | **Availability of legal representation.** Not all parties are equally equipped to present their case to a judge and jury without the assistance of legal practitioners (especially so for recent migrants and others not familiar with the Victorian legal system). |

## Responsibilities of legal practitioners 3.1.9.4

**A legal practitioner is** an individual with legal training, qualified to give advice and appear in court. Generally, a solicitor prepares legal documentation (such as the hand-up brief presented during a committal proceeding) and a barrister is responsible for representing a party in a trial (by making legal arguments, questioning witnesses, summarising prosecution/accused person's case to the judge and jury).

**The prosecution of** a criminal matter in trials before a judge and jury will be put by legal practitioners – solicitors and barristers employed by the Office of Public Prosecutions (OPP).

**An accused person is entitled** to legal representation (they may choose to self-represent, but it is preferable to have legal representation); a court may direct Victoria Legal Aid to provide representation for an accused person in very serious matters.

**USEFUL TIP** The legal practitioners of the Office of Public Prosecutions (OPP) will be involved in the preparation of the prosecution case prior to a trial (such as preparing witnesses for the trial process) and will also participate in plea negotiations with an accused person. The Study Design requires students to understand the responsibilities of legal practitioners during a criminal trial, so that is what's emphasised below.

**Responsibilities of legal practitioners during a criminal trial include:**

- **Opening and closing addresses**
  - The barrister will outline their case at the beginning and end of the trial, including:
    - A summary of the evidence they will present/have presented.
    - The facts they want the court to accept as true based on this evidence.
    - Prosecution barrister will summarise legal arguments why the accused is guilty beyond reasonable doubt.

    - Accused person's barrister will summarise legal arguments for why accused is not guilty (raising lawful defences) and/or challenge whether the prosecution has proven the accused person is guilty beyond reasonable doubt (which may include summarising any doubts raised during the trial about the accuracy of the evidence presented by prosecution witnesses).

- **Present case to judge and jury**
  - The prosecution barrister will present all relevant evidence, by calling witnesses for examination in front of the judge and jury throughout the trial. This means:
    - Asking questions of the witnesses they call, with witnesses' responses informing the court as to the facts in the dispute; and
  - The accused person's legal representative will question witnesses called by the prosecution, to test the accuracy and reliability of the evidence they present in court (called 'cross-examination').The prosecution and accused person's legal practitioners will make submissions to the judge as to whether certain evidence should or should not be put before the jury.
- **If an accused person is convicted, making submissions about the appropriate sanction:**
  - The prosecuting barrister will request a particular sanction should be imposed, with the reasons for such a sanction being imposed.
  - The accused person's legal representative will argue for a more lenient sentence (see Lesson 3.1.12 for further information).

**All legal practitioners** have a duty not to mislead the court and a duty to act with courtesy towards the court and all witnesses.

**All legal practitioners** have a duty to assist the court, by raising all relevant legal principles that the court may need to consider in reaching a verdict (even if such legal principles are in conflict with their client's interests). Legal representatives advise the judge as to which legal principles should be presented to the jury in the judge's final directions.

**Legal representatives for the prosecution** must call all relevant witnesses to assist the court to uncover the full truth in a criminal matter, and cannot select to present only those legal principles and evidence that might help secure a guilty verdict 'at all costs'.

**The responsibilities of the legal practitioners & the principles of justice**

**Principle of justice: *Access***

| Strengths of the responsibilities of legal practitioners – how access is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving access |
|---|---|
| **Accused has a better understanding of legal processes.** Represented parties have their legal practitioner to help them prepare their case and explain the court proceedings. | **Self-represented parties.** Access to justice includes understanding one's legal rights; accused persons without representation may not understand the procedure used in the court proceedings and therefore the courts are less accessible to these individuals. |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of legal practitioners – how fairness is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving fairness |
|---|---|
| **Case is presented in the best possible light.** The use of legal practitioners can increase an accused person's chance of success, as their case is presented in its best light by an expert; they are better able to test the accuracy of the prosecution's evidence, promoting fairness.<br><br>**Overarching obligations.** The duty of the prosecution's legal representatives to present all relevant evidence and legal principles to the court (not solely those that portray the accused in a poor light) helps to ensure the whole truth emerges and the correct outcome occurs, promoting fairness. | **Unrepresented accused persons.** Unequal legal representation (or a trial in which the accused does not have legal representation) may lead to an unfair outcome, as the accused cannot prepare and present a case of equal quality to the prosecution (which will be presented by the expert legal practitioners of the OPP). A self-represented accused person will be less able to test the accuracy of prosecution evidence, as they are not skilled at cross-examination; they may not know which legal defences they can raise.<br><br>**Case may not be presented in the best possible light.** The quality of the presentation of the case may influence the outcome, not solely the facts and the law – this is unfair on the unrepresented/poorly-represented accused persons. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of legal practitioners – how equality is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving equality |
|---|---|
| **Choice of the accused person.** Putting aside financial constraints, accused persons have the capacity to choose their own legal representation.<br><br>**Legal representation is available to everyone.** Equal access to legal representation is also promoted because, to a large extent, legal practitioners must provide their services to all those who seek their assistance (provided they can meet the fees associated and the legal issue is within the lawyers' area of expertise), including those with serious prior convictions or accused of very serious offences. | **Cost.** Some financially disadvantaged accused persons may not be able to afford any/good quality legal representation and may also not be eligible for support from Victoria Legal Aid. This can make the legal contest an unequal one, if parties' cases aren't equally prepared and presented. |

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.1.9: Key personnel in a criminal trial**

## Keen to learn more?

**County Court: Educational Fact Sheets,**
www.countycourt.vic.gov.au/learn-about-court/educational-resources/fact-sheets
**Victoria Law Foundation – Victoria's Legal System,**
www.victorialawfoundation.org.au/sites/default/files/resources/victorias_legal_system_2018.pdf
**Victoria Law Foundation – Juror's Handbook,**
www.victorialawfoundation.org.au/sites/default/files/resources/juror's_handbook_web_2012.pdf
**Judicial College of Victoria – Criminal Proceedings Manual,**
www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm

QUESTIONS

# 3.1.9 Key personnel in a criminal trial

LEVEL 1:
Define and understand

**1.** Which of the following is not a key responsibility of the judge during a criminal trial?

**A.** advising the jury on the applicability of relevant law to the facts of the case before them

**B.** ensuring that courtroom processes and procedures are followed by all individuals present during the trial

**C.** questioning witnesses to draw out the evidence relevant to the offence being prosecuted

**D.** acting as an independent 'umpire' who oversees and adjudicates proceedings without bias, allegiances or preconceived notions

**2.** In a recent criminal trial in the Supreme Court of Victoria a mistrial has occurred due to juror misconduct. Six of the jurors are potentially compromised.

Consider the information in the table below and determine which juror(s) are most likely the reason a mistrial was ordered?

| Name of juror | Descriptor |
|---|---|
| Darren | Did not disclose that he is related to the victim |
| Hannah | Made a pact with three other jurors that they would all vote the same |
| Xue | Spoke privately with the jury foreperson |
| Mikayla | Is the same age as the accused |
| Clare | Did not tell the judge that she went to school with the accused |
| Danni | Took one criminology class in University 20 years prior |

**A.** Darren

**B.** Darren and Clare

**C.** Darren, Hannah, and Clare

**D.** Danni and Darren

**3.** Which of the following is not true of parties to a criminal trial?

**A.** The prosecution must call all relevant witnesses to assist the full truth to emerge, and not just those witnesses that will help secure a guilty verdict 'at all costs'.

**B.** Only the prosecution is permitted to call witnesses that present evidence to the court.

**C.** The accused is responsible for deciding how to plead.

**D.** The prosecution will present to the court the relevant legal principles about the offence being tried.

**4.** Which of the following is not correct regarding the role of legal practitioners in a criminal trial:

**A.** Legal practitioners questioning witnesses to bring out evidence.

**B.** Prosecution and defence barristers have a duty not to mislead the court.

**C.** Legal practitioners determine which evidence is not admissible and won't be presented to the jury.

**D.** Legal practitioners for both parties summarise their case at the start and end of a trial.

LEVEL 2:
Describe and explain

**5.** In a recent criminal trial, the judge helped the accused understand the court proceedings and consequences for certain actions.

Why would this have been allowed, and what would the judge have to be careful about? (2 MARKS)

**6.** Explain one responsibility of a juror. (2 MARKS)

**7.** Parties to a criminal trial retain control over many aspects of the case. Describe three aspects of the trial controlled by the parties. (2 MARKS)

**8.** 'The primary aim of the prosecution is to achieve a guilty verdict'. To what extent do you agree with this statement? Justify your answer. (2 MARKS)

LEVEL 3:
Apply and compare

**9.** Compare the role of the judge and jury in a criminal case. (4 MARKS)

**10.** Distinguish the role of legal practitioners from that of the judge in criminal proceedings. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**11.** In a criminal trial the following responsibilities must be fulfilled:

- ensuring rules of evidence and procedure are followed
- participating in plea negotiations
- must not mislead or deceive the court when preparing and conducting a case

Identify who exercises the responsibilities detailed above in criminal proceedings, and explain how each of these responsibilities seeks to uphold a principle of justice. (5 MARKS)

**12.** In 2011, a Victorian juror in a high profile murder trial was fined $1,200 and put on a 12-month good behaviour bond because he searched the internet for information about legal terminology.

Evaluate the extent to which the use of juries contributes to the achievement of fairness in the resolution of criminal disputes. (7 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 3 (online), covering these lessons:

- **Lesson 3.1.7 Plea negotiations and sentence indications**
- **Lesson 3.1.8 The Victorian court hierarchy and criminal cases**
- **Lesson 3.1.9 Key personnel in a criminal trial**

Check with your teacher when it's time to complete this progress check.

# 3.1.10 The purposes of sanctions

**Sentencing an offender is a complicated process of weighing up a range of factors such as:**

- **The maximum punishment outlined in legislation. For example the maximum penalty a court may impose for a manslaughter conviction is 20 years imprisonment: Section 5, *Crimes Act 1958* (Vic)**
- **The offender's personal circumstances that might explain their actions – did they steal to finance a drug addiction? Did they grow up as a victim of abuse and not know how to manage their emotions and behaviour?**
- **The severity of the crime – was a violent assault planned or in the 'heat of the moment'?**
- **Any prior convictions – a failure to 'learn' from previous sanctions may result in more severe punishment or be proof that a particular offender cannot change their ways; it may suggest the need to protect society from a particular offender**
- **Whether the offender has shown remorse**
- **Whether the offender pleaded guilty, thereby saving court time and resources**
- **The impact of the offence upon the victim (and their family)**
- **Current sentencing practices for similar crimes, to ensure consistency (using sentencing statistics)**

In addition to these many factors, the courts consider the purposes of criminal sanctions when determining a sentence.

When deciding upon the sanction to impose, a court will seek to achieve some (or all) of the following purposes of criminal sanctions (depending upon the circumstances of the case and the offender).

This lesson covers VCAA key knowledge point: **'The purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection'**, which we have broken down into the following concepts:



### Legislation

***Sentencing Act 1991* (Vic) s. 5:**

(1) The only purposes for which sentences may be imposed are—

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes.

## Purpose of rehabilitation 3.1.10.1

**The purpose of rehabilitation means to** sentence criminal offenders in a manner that aims to break the cycle of criminal behaviour (or 'recidivism') so that criminal offending may be prevented or stopped. Where relevant the courts may aim to address any underlying causes of criminal behaviour (such as drug addiction, mental illness, etc) to prevent future offending.

**Why should we endeavour to rehabilitate criminals?**

- While some criminologists argue that criminals are 'born not made,' others vehemently believe the reverse (that 'nurture' plays far more of a role in the development of a criminal psyche).
- Therefore, some people believe that it is particularly important to rehabilitate juvenile offenders in order to stop the cycle of serial criminality.
- Rehabilitation is also encouraged because recidivism statistics suggest that offenders who have undergone some kind of rehabilitation have a better chance of integrating back into society, facilitating more stable family environments and sustaining employment upon their release.

**Why might rehabilitation of criminals be discouraged?**

- Though many criminologists believe society has a far more significant role in shaping criminal behaviour than an individual's inherent characteristics, some argue that criminality is innate and therefore rehabilitation has little to no effect on criminal behaviour.
- There are high costs involved with facilitating rehabilitative services in prisons and juvenile institutions – an expense that some argue is unworthy of investment as people who have committed crimes do not deserve such a luxury at the public's expense.

**Impact on sanction**

**A court aiming to rehabilitate** will impose a sanction that addresses the underlying cause of the criminal behaviour.

**Examples of sanctions which prioritise rehabilitation:**

- **Community correction orders (CCOs)** – the courts will usually impose a CCO rather than a term of imprisonment when the rehabilitation of the offender is of high priority. A CCO may involve alcohol exclusion, a curfew, treatment for drug addiction, or any other condition which aims to address the underlying causes for criminal behaviour.
- **Drug treatment orders (DTOs)** – DTOs are imposed by the Drug Court (division of the Magistrates' Court of Victoria). DTOs involve a sentence of imprisonment – not exceeding two years – which is suspended whilst the participant receives drug and/or alcohol treatment. If the participant successfully completes this treatment, they will not have to serve a term of imprisonment. DTOs focus on the rehabilitation of the offender by acknowledging the negative impact that a prison environment will have on the offender, and allowing them to undertake treatment in the community.
- **Court secure treatment order** – a court secure treatment order allows a person to be compulsorily detained and treated at a mental health service as opposed to a term of imprisonment. This type of order can only be made where imprisonment would have been imposed had the offender not had a mental illness. A court may impose a court secure treatment order if it is satisfied that the offender requires rehabilitative treatment to prevent serious deterioration to their health or to prevent harm to the offender or another person. These orders therefore prioritise the rehabilitation of the offender by shielding them from the harsh environment of prison.
- A shorter prison sentence, compared to an offender who has been judged as unlikely to be rehabilitated.

**CASE STUDY** ***R v KMW & RJB* [2002] VSC 93**

In this case the offenders, aged 14 and 16, pleaded guilty to manslaughter after killing a 'violent alcoholic in circumstances of fear'. The sentencing remarks in this case emphasise the importance of rehabilitation for juvenile offenders. During sentencing the presiding judge said:

> 'The overriding factor which I must and do take into account, is your youth. The law is quite clear that the youth of a first offender, as you both are, should be a primary consideration for a sentencing court and in such circumstances, rehabilitation will usually be the most significant factor in any sentence imposed' and later stated 'I have concluded that the interests of you both and of the community generally, are best served by placing an emphasis on your rehabilitation rather than on retribution or general deterrence. Further, I am persuaded that in pursuing this course, there is nothing to be gained by sentencing you to any further period of detention.'

Given this emphasis on rehabilitation their sanction did not include imprisonment. By comparison, for adult offenders (with less emphasis on rehabilitation) a manslaughter conviction would usually attract a lengthy prison term.

## Purpose of punishment 3.1.10.2

**The purpose of punishment means to** ensure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole. When we look at the purpose of punishment there are two fundamental principles of sentencing that should also be considered: the principles of totality and proportionality.

**The totality principle states** a sentence should be just and appropriate to reflect the entire impact of an offender's crimes where the offender has been convicted of a number of crimes.

**The proportionality principle states** a sentence should reflect the gravity of the offender's criminal behaviour – that is, 'how much' someone should be punished should more or less equate to 'how much' detriment that offender's crimes caused.

**Why punish?**

- As adequate retribution for the harm caused to the victim/society as a whole.
- As justice for the victim and/or justice for the victim's families.
- To ensure victims and/or their families do not feel the need to exact revenge themselves.

**Impact on sanction**

**A court aiming to punish will** impose a more severe sanction (such as a larger fine; imprisonment rather than a community corrections order; a longer period of imprisonment rather than a shorter period).

**CASE STUDY** ***DPP v PAULINO (SENTENCE)* [2017] VSC 794**

In 2017 a Supreme Court jury convicted Paulino of the murder of his wife. It was a particularly violent offence, with Justice Bell stating in sentencing that:

> 'Yet again the court is confronted with family violence of the most extreme kind, one in which the offender is a man and the victim is a woman who is or was his intimate partner, in this case his wife of over twenty years, albeit estranged. The murder was committed in the face of an intervention order obtained by the woman for protection from the man. The crime is one of jealousy, hatred and rage by a male against a woman who just wanted to be equal, independent and free, or more simply just wanted to be.'

Given the severity of the crime, Justice Bell said:

> 'The court condemns family violence in the strongest possible terms and stresses that general deterrence, denunciation and just punishment are strong sentencing considerations in this case. As we will see, it is also necessary to understand the particular gravity and nature of the crime.'

It's clear from this case that many purposes of sanctions will be a focus for a sentencing judge when imposing a penalty. Later, Justice Bell stated Paulino's case 'did not involve an outburst of homicidal rage but a planned and premeditated murder, which only makes the application of the principles of general deterrence, denunciation and just punishment more called for.'

Given the community's concern for acts of family violence and the tremendous suffering caused in this case, the Court determined that 30 years' imprisonment was just retribution for Paulino's offending.

## Purpose of deterrence 3.1.10.3

**The purpose of deterrence means to** 'make an example' of the offender in an effort to sway the offender and/or would-be offenders away from committing similar crimes through the imposition of a criminal sanction.

**Two types of deterrence are:**

- **Specific deterrence** occurs when the offender themselves is discouraged from committing offences of the same or similar character through the provision of a sanction.
- **General deterrence** occurs when individuals other than the offender (the public at large) are discouraged from committing offences of the same or similar character through the provision of a sanction.

**Impact on sanction**

**A court aiming to deter will** impose a more severe sanction (such as a larger fine; imprisonment rather than a community corrections order; a longer period of imprisonment rather than a shorter period). This will usually be accompanied by comments from the court stating that the longer sanction is designed to specifically and/or generally discourage such offending.

**CASE STUDY** ***LEE v R* [2018] VSCA 63**

In 2017 Andrew Lee pleaded guilty to the manslaughter of Patrick Cronin, following a one-punch attack during a fight at the Windy Mile Hotel in Diamond Creek. Patrick Cronin was only 19 years old and trying to remove his friend from a fight when he was hit. According to the Court he presented no threat to Lee or anybody at the time he was hit.

Lee was sentenced to a prison term of 8 years. He appealed, claiming the sanction was excessive. The Court of Appeal rejected this appeal, and in doing so made the following comments about the County Court's desire to discourage similar future offences:

> 'The judge correctly found that general deterrence was an important sentencing consideration. This is because death caused by individuals — particularly young men affected by alcohol — punching defenceless victims to the head has become a serious problem in our community and the courts need to send a clear message that such offending will be met by lengthy periods of imprisonment.'

## Purpose of denunciation 3.1.10.4

**The purpose of denunciation means to** publicly condemn (or criticise) the offender's criminal behaviour. Essentially, it is to highlight the extent to which the offender has transgressed against (or violated) the moral and ethical standards of society.

**Impact on sanction**

**A court aiming to denounce will** impose a more severe sanction (such as a larger fine; a longer period of imprisonment rather than a shorter period). This will usually be accompanied by comments from the court stating the extent of the court's outrage and condemnation regarding the offence in question.

**CASE STUDY** ***LATORRE v R* [2012] VSCA 280**

In 2009 Latorre was sentenced to an 11-year prison term for a range of violent offences, such as multiple threats to kill, assault, blackmail and property damage against four separate victims. His offending included burning the victims' cars, public threats to murder a victim while physically assaulting him and demanding large sums of money with the threat of violence if victims failed to pay.

Latorre appealed against some of the guilty verdicts and sentences imposed. While he was successful in having some convictions overturned, his appeal was not entirely successful – the Court of Appeal revised his sentence down to seven years imprisonment and condemned his conduct in the following way:

> The sentencing judge was correct to denounce the applicant's offending against those complainants in the strongest possible terms. The applicant engaged in high-handed, repetitive standover tactics against several victims who were known to him. The victim impact statements of Nash, his de facto wife, Sam and Frank Rachelle and Antonino Corso indicate that they feared for their lives and for the safety of their families and property. Members of the community are entitled to go about their lawful personal and business affairs free from the type of thuggery that characterised the applicant's offending. That type of conduct has no place in our society and requires a lengthy custodial sentence.

## Purpose of protection 3.1.10.5

**The purpose of protection means to** ensure that offenders who pose a significant risk to the welfare of society (and/or their victims) are removed from the community. The level of protection provided to society should be proportionate to the degree of risk posed by an individual offender.

**Why protect?**

Many legal commentators state this purpose serves a 'utilitarian' benefit of criminal sanctions – that is, depriving one dangerous offender of their freedom to ensure the protection of wider society is going to bring about the 'greatest amount of good for the greatest number of people'.

**Impact on sanction**

**A court aiming to protect will** impose a period of imprisonment rather than a community corrections order or fine; impose a longer period of imprisonment rather than a shorter period.

**CASE STUDY** ***R v PHILLIPS* [2010] VSC 359**

In 2010 Phillips pleaded guilty to the murder of his elderly father. This was not the first act of violence towards his father. Phillips was regarded by the Supreme Court justice as a serious violent offender, given his prior convictions for assaults and threats to kill; as a result, Justice Whelan stated:

> I must regard protection of the community as the principal purpose for which the sentence is imposed. You have shown some remorse but your prospects of rehabilitation are, in my view, not great. There is a pressing need to protect the community from you.

As a consequence he was sentenced to 23 years imprisonment (by comparison the average length of imprisonment for murder at the time was approximately 20 years). The need to protect society from Phillips was the basis for this harsh sanction.

Phillips appealed to the Court of Appeal arguing the sentence was excessive. He did not succeed, with the Court stating 'the sentencing judge was compelled to regard the protection of the community from the offender as the principal purpose for which the sentence was imposed. (See *Phillips v R* [2012] VSCA 140)

**USEFUL TIP** It is important to remember that protection of society is not only achieved through the sanction of imprisonment. Other sanctions, such as a community correction order (CCO) which restricts the behaviour of an offender, can also ensure protection.

**USEFUL TIP** Be sure you can discuss how a particular sanction does achieve a particular purpose and how it might not.

For example:

> 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). Sam meets with lawyers at their office and is advised that there is no precedent for whether high-heeled shoes are an 'offensive weapon'. Provide one sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purposes.
>
> *Source:* 2016 VCAA Exam Q7c

In this case, describe how imprisonment would achieve punishment by depriving Sam of his liberty but perhaps not the rehabilitation he needs to tackle his drug and alcohol addictions that may be causing his offending.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.10 The purposes of sanctions**

## Keen to learn more?

**The Sentencing Advisory Council,** www.sentencingcouncil.vic.gov.au

**The Judicial College of Victoria's Sentencing Manual,** www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual

**Section 5 of the *Sentencing Act 1991* (Vic),** www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/sa1991121/s5.html

QUESTIONS

# 3.1.10 The purposes of sanctions

LEVEL 1:
Define and understand

**1.** Famed criminologist Cesare Lombroso believed 'criminals are born, not made'. If he were alive today which of the following arguments would he most strongly oppose?

**A.** Rehabilitation is very effective. Criminality is a product of genetics (so cannot be changed) so there is no point attempting to rehabilitate them.

**B.** Rehabilitation is an effective process through which we might seek to rewire a criminal's brain, so that they can no longer be a menace to society.

**C.** Rehabilitation is not very effective. Criminality is an inherent characteristic; if people do not 'become' criminals then attempting to adjust their behaviour should have no effect.

**D.** All of the above.

**2.** Fill in the blank spaces:

'The extent to which an offender is _____ for their _____ should be _____ to the _____ caused to society as a whole and/or their _____ so as to ensure offenders face adequate _____ for their crimes'.

**A.** punished; acquittals; proportionate; harm; victims; retribution

**B.** punished; crimes; proportionate; omissions; victims; retribution

**C.** punished; crimes; proportionate; harm; plaintiffs; retribution

**D.** punished; crimes; proportionate; harm; victims; retribution

**3.** Over recent years many Victorian students undertaking VCE Legal Studies have visited prisons such as HM Barwon Prison (maximum-high security) and HM Loddon Prison (medium security), meeting with guards and inmates. After such visits, students frequently describe the experience to their friends and families. If this program prevents future offending, why might that be?

**A.** Participants in the program may be generally deterred (if they meet an offender convicted of the same offence that they have committed) after visiting a prison and their family/friends may be generally deterred after hearing what life is really like in prison.

**B.** Participants in the program may be specifically deterred (if they meet an offender convicted of the same offence that they have committed) after visiting a prison and their family/friends may be generally deterred after hearing what life is really like in prison.

**C.** Participants in the program may be specifically deterred (if they meet an offender convicted of the same offence that they have committed) after visiting a prison and their family/friends may be specifically deterred after hearing what life is really like in prison.

**D.** Both participants in the program and their family/friends may be generally deterred from engaging in criminal behaviour; neither the program participants nor their family/friends are specifically deterred as they themselves are not being sanctioned.

**4.** A man is convicted of selling significant quantities of methamphetamine, including to a group of 15-year-old boys, two of whom died from an overdose in the man's house. At the conclusion of his trial, the sentencing judge comments that 'such heinous crimes are not encouraged nor tolerated by Victorian society and I intend to reflect my extreme disdain for your disgraceful conduct in the sentence I am to impose.' This statement suggests the sanction seeks to:

**A.** generally deter would be offenders from committing similar crimes.

**B.** specifically deter this drug dealer from committing similar crimes.

**C.** denounce the crimes committed by the man.

**D.** punish the man by making an example of him during sentencing.

**5.** Fill in the blank spaces:

'Section 6 of the *Sentencing Act 1991* provides that in sentencing some serious offenders, if the court considers that a sentence of _____ is justified, in determining the length of the sentence the court must regard the _____ of the community from the _____ as the main _____ for which the sentence is to be imposed. The court may, in order to achieve that purpose, impose a sentence _____ than that which is proportionate to the gravity of the offence.'

*Source:* www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#15385.htm

**A.** imprisonment; rehabilitation; prosecution; purpose; shorter

**B.** imprisonment; protection; offender; purpose; longer

**C.** imprisonment; protection; prosecution; purpose; shorter

**D.** imprisonment; punishment; offender; purpose; longer

LEVEL 2:
Describe and explain

**6.** Ben (18 years old) is sentenced to a community corrections order (CCO) following a minor theft to finance his drug addiction; the CCO requires him to attend a drug counselling course. Ash (42 years old) is imprisoned for 16 months following his conviction for selling a drug of dependence.

Define 'rehabilitation' as a purpose of criminal sanctions and explain whether the sentence imposed on Ben or Ash is more likely to achieve rehabilitation. Justify your response. (3 MARKS)

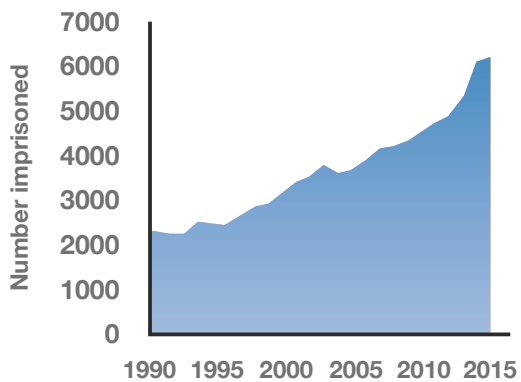
**7.** Describe 'punishment' as a purpose of criminal sanctions. (2 MARKS)

**8.** Using an example, distinguish between specific and general deterrence. (3 MARKS)

**9.** Assume a drug-affected motorist deliberately hit and killed a pedestrian in Melbourne, then fled the scene. Prior to handing down her sentencing decision a Supreme Court judge addressed the court with the following words: 'In the case of this offender we must consider his actions in a broader social context. Such callous disregard for human life offends deeply all members of the Victorian community.'

In your opinion, identify how the judge's opinion is likely to be reflected in the offender's sentence. Justify your conclusion. (3 MARKS)

**10.** Define 'protection' as a purpose of criminal sanctions. What does this graph suggest about courts' approach to protection? (3 MARKS)




**Victoria's prison population: 1990–2015**

*Source:* www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/victoria-prison-population

LEVEL 3:
Apply and compare

**11.** Riyaz Khoja pleaded guilty to culpable driving in the County Court in 2012; he was sentenced to 8 years, 6 months imprisonment. He appealed (unsuccessfully) against the sentence. The Court of Appeal's judgement included the following comment:

'Put simply, at the time of this terrible accident Mr Khoja was suffering from no impairment of mental functioning. He was fully aware of his responsibilities as a driver, not least because his companions were urging him to drive safely. As a young man who was driving under the influence of alcohol, and with a complete lack of care, when he caused the death and the serious injuries, Mr Khoja is precisely the kind of person who may properly be treated as a vehicle for general deterrence in sentencing for this offence. Punishment of offenders is, of course, only one aspect of public education about the dangers of driving under the influence of alcohol. But courts have for many years emphasised the central importance of general deterrence in sentencing for offences of this kind.'

*Source: Rhoja v R* [2014] VSCA 9

Define 'general deterrence' and distinguish this purpose of criminal sanctions from denunciation. Identify the impact of the court's desire to achieve general deterrence upon Khoja's sentence. (4 MARKS)

**12.** Read the following sentencing remark: 'It is my considered opinion that Mr. Anderson poses such a risk to society that I could not, with good conscience, impose any other sentence than that of life in prison.'

**I.** What purpose of sanctions is the judge referring to? Justify your answer. (2 MARKS)

**II.** Describe one other purpose of sanctions. (2 MARKS)

LEVEL 4:
Discuss and evaluate

**13.** In 2016–17 the most frequently imposed sentences in the Victorian Supreme Court and County Court were imprisonment (73.5% of all sentences imposed) and community correction orders (14% of all sentences imposed).

Further, 43.6% of Victorian prisoners released in 2014–15 have since returned to prison within two years.

*Source:* www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/sentencing-outcomes-higher-courts

Identify and describe two purposes imprisonment aims to achieve. In your answer explain what the recidivism rate suggests about the effectiveness of imprisonment at achieving one purpose of sanctions. (6 MARKS)

# 3.1.11 Types of sanctions

**A 'sanction' is a penalty imposed by a court after an accused person is found guilty of an offence or pleads guilty to an offence.**

**A wide range of sanctions may be imposed by courts in Victoria; students are only required to know the following three sanctions and the extent to which they achieve the purposes of criminal sanctions (as described in Lesson 3.1.10).**

This lesson covers VCAA Key Knowledge point: **'Types of sanctions including: Fines, community corrections orders and imprisonment, and their specific purposes',** which we have broken down into the following concepts:



## Purpose of fines 3.1.11.1

**A fine is** a monetary payment the court will order an offender to make, as a penalty for a criminal offence.

In legislation creating criminal offences, fines (and other sanctions) are stated as:

- A maximum penalty that may be imposed (giving magistrates and judges the ability to decide what the appropriate penalty is in a particular case)
- Fines are expressed in penalty units, not set dollar amounts.
- For example:
  - s.30 of the *Road Safety Act 1986* (Vic) creates the offence of driving while disqualified. The maximum penalty is:
    - First offence: 30 penalty units or imprisonment for 4 months.
    - Subsequent offences: 240 penalty units or imprisonment for 2 years.
  - s.21 of the *Occupational Health and Safety Act 2004* (Vic) creates the offence of failing to provide a safe and healthy workplace for employees. If an employer is prosecuted following a workplace accident leading to the injury or death of a worker, the maximum penalty is:
    - 1,800 penalty units, if the business is owned/run by an individual (and that individual business owner is prosecuted).
    - 9,000 penalty units, if the employer is a company (and the company is prosecuted and found guilty).

**A penalty unit is** $165.22 as at 1 July 2019. The dollar value of a penalty unit is increased each year.

**Judges have the ability to decide** whether imposing a fine is an appropriate sanction, and if so, the size of the fine to impose (subject to the maximum fine a court can impose under a particular law).

**The size of the fine imposed will be** influenced by:

- The purposes the court wishes to achieve (to punish, to denounce, etc. – see Lesson 3.1.10)
- Any aggravating or mitigating factors (see Lesson 3.1.12)
- The offender's ability to pay:
  - A large fine imposed on a person with no income or wealth will probably go unpaid, meaning the imposition of the fine is pointless (as the offender effectively goes unpunished).
  - A small fine imposed on an offender with a high income and significant wealth may not do much to punish or deter that particular offender, as it has limited impact on their day-to-day lives.

**The majority of criminal cases are** resolved in the Magistrates' Court, and the majority of sentences imposed by the courts include a fine.

**For criminal prosecutions of businesses** fines are the most frequently imposed sanction.

**USEFUL TIP** The Study Design requires students to 'discuss the ability of sanctions to achieve their purposes'. 'Discuss' means weighing up ways a sanction does achieve punishment, deterrence, etc and ways in which it might not.

**Fines and the purposes of criminal sanctions**

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| **Punishment** | **Punishment is achieved because:**<br>• The offender must forego the goods and services they would have purchased with the money paid to the state; their material standard of living suffers as a result of paying a fine.<br>• Fines must usually be paid in a short time frame, meaning the consequence (the 'harm' the offender feels) is felt almost immediately.<br>• The court can set the size of a fine based on an offender's ability to pay the fine, meaning the court can try to ensure each offender feels retribution (despite their wealth/income).<br>**However:**<br>• The setting of fines to reflect each offender's capacity to pay could be seen as unequal treatment of offenders who commit the same offence – some in the community might not see this as just or fair punishment.<br>• The legislated maximum penalty may not be high enough to punish some offenders who are very wealthy. For example, consider a person with an annual income over $200,000 who is convicted of driving while disqualified. Even if the maximum penalty of 30 penalty units (approx $4,800) is imposed, it may not be adequate retribution or punishment for that offender. See *ASIC v Westpac Banking Corporation*.<br>• In some very serious cases the law may only allow a fine to be imposed as a sanction, but it may not punish offenders enough for their criminal behaviour. |
| **Specific and general deterrence** | **Specific and general deterrence are achieved because:**<br>• The economic loss caused by a fine does discourage an offender from reoffending (achieving specific deterrence).<br>• The economic loss caused by a fine does discourages other members of the community from reoffending (achieving general deterrence).<br>**However:**<br>• The imposition of fines in the Magistrates' Court for summary offences is often not publicised, perhaps reducing the extent to which general deterrence is achieved by fines.<br>• A legislated maximum penalty may not be high enough to discourage wealthy individuals/large corporations from breaching the law. See *ASIC v Westpac Banking Corporation*. |
| **Protection** | **Community protection is not achieved** by a fine, because an offender is not removed from the community as the result of a fine, nor is their behaviour restricted or controlled in any way. |
| **Denunciation** | **Denunciation can be achieved because:**<br>• If a court imposes a very large fine, this will communicate the court's disapproval and condemnation of the offender's behaviour. |

*cont'd*

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| | **However:**<br>• The maximum fine a court is able to impose for a particular offence (such as those above) may not be high enough to 'send a message' about the court's condemnation of the offender.<br>• A court will not impose a fine so large that the offender cannot pay the fine (because a fine the offender has no chance of paying will not punish or deter); if an offender has very limited income or assets with which to pay a fine, the court will therefore not impose a very large fine as a way to achieve denunciation. |
| **Rehabilitation** | **Rehabilitation is not achieved** by a fine. Any underlying causes of criminal offending (such as an offender's drug/alcohol addiction or mental health issues) will not be addressed by a fine. |

**CASE STUDY** ***ASIC v WESTPAC BANKING CORPORATION (NO 3)* [2018] FCA1701**

In 2018 the Federal Court imposed a penalty upon Westpac for breaching the *Australian Securities and Investments Commission Act 2001* (Cth), after the bank unlawfully tried to manipulate a financial measure called the 'bank bill swap rate' (BBSW). The BBSW is an interest rate charged on some borrowing/lending between the big four banks (ANZ, Westpac, Commonwealth and NAB). The BBSW also influences the interest rates charged on loans to businesses, farmers and consumers – so any effort to rig the BBSW can make a bank more profitable and has flow-on effects to many others across the economy.

Note: In 2017 and 2018 the Australian Securities and Investments Commission (ASIC – the government authority that regulates the banking industry and other business activities) actually took legal action against all of the big four banks for unlawfully manipulating the BBSW. ANZ, Commonwealth and NAB admitted their wrongdoing, but Westpac did not and was tried in the Federal Court.

After concluding Westpac had tried to unlawfully manipulate the BBSW four times in 2010, Justice Beach imposed the maximum penalty allowed under the law – $3.3 million. However, given Westpac's annual profit is about $8 billion this is a tiny penalty, which Justice Beach himself acknowledged in his judgement by stating, 'the maximum penalty that can be imposed upon Westpac for its offending is $3.3 million. Clearly this is inadequate, but there we are.'

His Honour also stated that, if permitted to do so by the laws Westpac had breached, he would have imposed a penalty significantly 'above $3.3 million in order to discharge [the objectives of specific and general deterrence]. But I am not free to do so'. Despite the legislation limiting the penalty he could impose, Justice Beach's concluding remarks still aim to achieve deterrence:

> Westpac's misconduct was serious and unacceptable... Westpac has not shown the contrition of the other banks. Moreover, imposing the maximum penalty is the only step available to me to achieve specific and general deterrence. The message that should be sent is that if you manipulate or attempt to manipulate key benchmark rates you are likely to have the maximum penalty imposed, whatever that is from time to time.

## Purpose of CCO 3.1.11.2

**A community correction order (CCO) is** a sanction that is served by the offender while remaining in the community.

**A judge or magistrate will set a time period** for which the offender must comply with the CCO (up to 5 years, depending upon the number of offences committed by the offender).

**There are some serious offences** for which a CCO cannot be imposed, including (but not limited to):

- murder
- trafficking large quantities of illicit drugs
- causing serious injury intentionally, in an act of gross violence

**A CCO cannot** be imposed for very minor offences.

**A CCO may be imposed with a fine or with a period of imprisonment** (the CCO is completed after the offender is released), if the court thinks this is appropriate.

According to s.45 of the *Sentencing Act 1991* (Vic), all offenders on a CCO must:

- not commit offences that are punishable by imprisonment
- report to community corrections centres
- stay in Victoria (unless given permission to leave the state).

**A CCO will include other conditions** the offender must follow. In each case the court will impose conditions that punish and rehabilitate the offender. This may include any of the following:

- Undertaking medical treatment or rehabilitation (for drug or alcohol addiction, for example); this may also include drug/alcohol testing to ensure the offender is complying with the treatment the court has ordered.
- Completing a set number of hours of unpaid community work. For example:
  - rubbish collection in a public park
  - tree planting
  - sorting recycled clothing
  - cooking meals for homeless people
- Staying away from particular locations.
- Not contacting certain individuals.
- Abiding by a curfew set by the court.
- Not consuming alcohol and/or not attending licenced venues such as bars or nightclubs.

**Breaching the conditions** attached to a CCO is an offence; the maximum penalty for doing so is three months imprisonment. Having this possibility of imprisonment 'hanging over' the offender helps ensure he/she follows the conditions stated in the CCO.

**CCOs and the purposes of criminal sanctions**

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| **Punishment** | **Punishment is achieved because:**<br>• A CCO can restrict an offender's movements/actions (see above).<br>• The inconvenience of completing many hours of unpaid community work also provides some retribution for the offender's conduct.<br>**However:**<br>• If the impact of an offence is very severe (such as a violent assault), a CCO may not punish an offender sufficiently, leaving victims, their families and the community feeling justice has not been done. In such cases, imprisonment is a more appropriate sanction. |
| **Specific and general deterrence** | **Specific and general deterrence are achieved because:**<br>• Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans and other aspects of a CCO, it does discourage offenders from reoffending (specific deterrence).<br>• Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans and other aspects of a CCO, it does discourage other members of the community offending (general deterrence). |

*cont'd*

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| | • Specific deterrence can be achieved as judges have a lot of flexibility in setting a CCO's terms (and its length) in a way that will discourage each particular offender.<br>• Breaching a CCO can result in the offender being imprisoned; this discourages the offender from breaching the terms in the CCO.<br>**However:**<br>• A CCO is not as severe a punishment as imprisonment; some in the wider community may not see a CCO as very severe/harsh and may therefore not be discouraged from criminal activity. |
| **Protection** | **Protection is achieved because:**<br>• The offender can be restricted from attending certain places/contacting certain people (including victims and co-offenders), promoting community safety.<br>• The imposition of curfews, alcohol bans and preventing an offender attending a licenced venue can protect society from alcohol-driven violence.<br>**However:**<br>• The offender remains in the community and may not adhere to the conditions of the CCO – therefore community safety is not promoted to the same extent as it is by a term of imprisonment, when the offender's movements are physically constrained. |
| **Denunciation** | **Denunciation is not achieved** by a CCO. A CCO is not as harsh a sanction as imprisonment; a CCO cannot be made so severe that it 'sends a message' about the court's condemnation of the offender. |
| **Rehabilitation** | **Rehabilitation is achieved because:**<br>• A CCO can include treatment for mental health issues and drug/alcohol addiction that cause criminal offending, reducing the risk of reoffending.<br>• Community work builds offenders' self-esteem and provides skills that may be useful in securing employment (many offenders in the Victorian justice system are unemployed and/or homeless; meaningful work is an effective way to prevent criminal offending). |

## Purpose of imprisonment 3.1.11.3

**Imprisonment is** when an offender is held in custody for a given period of time, and it is the most severe penalty a court can impose. When a court imposes a prison term it will usually:

- set a prison term (often known as the 'head sentence')
- provide a minimum period of imprisonment, after which an offender can apply for parole (the non-parole period).

**CASE STUDY** ***R v DA COSTA* [2014] VSC 458**

In the Supreme Court sentencing of Da Costa for culpable driving causing death (explained in more detail in Lesson 3.1.12), Justice Lasry imposed a 'sentence of 16 years imprisonment. I direct that you serve a period of 11 years before you become eligible to apply for release on parole.'

**A sentence to life imprisonment without a non-parole period being set or an indefinite prison sentence** will only be imposed in the most serious cases of violent offending, in which the court decides an offender presents a very significant risk to public safety.

**After the minimum period has been served**, a prisoner may request parole:

- A prisoner may be released on parole if they have behaved well in prison and are not regarded as a threat to public safety.
- A person released into the community on parole will usually be supervised in some way.
- Many prisoners apply for parole, but have their request rejected. These offenders therefore serve their full sentence in prison.

**USEFUL TIP** Remember the rights of victims in Lesson 3.1.4 – victims of serious offences will be advised of such parole applications and decisions.

**Imprisonment and the purposes of criminal sanctions**

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| **Punishment** | **Punishment is achieved because:**<br>• The offender is placed in a very harsh environment, with their movement restricted.<br>• The offender loses most contact with family and friends.<br>• The offender will usually lose any job they hold and therefore any income while in prison. |
| **Specific and general deterrence** | **Specific and general deterrence are achieved because:**<br>• Prison's harsh punishment (described above) will discourage offenders from reoffending (specific deterrence).<br>• Prison's harsh punishment (described above) will discourage members of the community from serious offending (general deterrence).<br>**However:**<br>• Approximately 40% of those released from Victorian prisons reoffend to such a serious extent that they are in prison again within 2 years. This suggests prison is not an effective specific deterrent for many offenders.<br>• Research by the Sentencing Advisory Council suggests that as prison sentences become longer, there is not an increase in the extent to which the general public is discouraged from offending.<br>• Many crimes that lead to prison terms (such as violent assaults, manslaughter and murder) are committed in the 'heat of the moment' and/or when offenders are under the influence of drugs/alcohol – at such times offenders are not considering (and therefore not discouraged by) a possible prison term. |
| **Protection** | **Protection is achieved because:**<br>• The offender is removed from society and the victims of their offending.<br>**However:**<br>• Many prisoners who are released will reoffend, either because:<br>– They are not specifically deterred from reoffending by their prison sentence (see above); and/or<br>– Underlying reasons for offending such as mental health issues or drug/alcohol addiction are not addressed meaning community protection in the long term may be limited. |
| **Denunciation** | **Denunciation is achieved because:**<br>• It is the most severe/harsh sanction a court can impose.<br>• Judges are able to impose a longer prison sentence to demonstrate their condemnation of the offender's criminal conduct. |

*cont'd*

| Purpose of criminal sanctions | Are the purposes of sanctions achieved? |
|---|---|
| Rehabilitation | **Rehabilitation is achieved because:**<br>Prisons do provide some programs to address alcohol and drug dependency, which cause many offenders to commit crime.<br>**However:**<br>• The prison population's need for services to treat drug and alcohol addiction far exceed the services provided; there are often very long waiting lists for access to such services. Many prisoners leave prison with alcohol or drug addiction issues remaining.<br>• If an offender has mental health issues that contributed to their offending, putting that offender in a harsh environment away from family, friends and meaningful work – surrounded by other criminals – will often make such mental health issues worse, not better. |

**USEFUL TIP** When discussing the ability for imprisonment to achieve protection, consider the fact that most offenders are eventually released from prison, at which point they may pose an even greater threat to the community due to the negative impact of imprisonment.

**USEFUL TIP** When defining a sanction (or any legal terminology), don't just repeat the term you are defining!

For example, in the 2017 Legal Studies exam students were asked to define a sanction (for 2 marks). The VCAA examination report said 'repetitious answers were also awarded one mark (for example, stating that imprisonment is when a person is imprisoned).'

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.11: Types of sanctions**

## Keen to learn more?

**Sentencing Advisory Council,** www.sentencingcouncil.vic.gov.au/

**Judicial College of Victoria – Victorian Sentencing Manual,** www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual

**Department of Justice – Fines & Penalties**, www.justice.vic.gov.au/home/justice+system/fines+and+penalties/penalties+and+values/

**Victoria Legal Aid – Fines, the law & your options**, www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-resource-fines-the-law-your-options.pdf

**Sentencing Advisory Council – The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria (2014)**, www.sentencingcouncil.vic.gov.au/publications/imposition-and-enforcement-court-fines-and-infringement-penalties-victoria

**Sentencing Advisory Council – Does Imprisonment Deter? A review of the evidence (2011)**, www.sentencingcouncil.vic.gov.au/publications/does-imprisonment-deter

**Sentencing Advisory Council – Is sentencing in Victoria lenient? (2018),** www.sentencingcouncil.vic.gov.au/publications/sentencing-victoria-lenient

**Victorian Ombudsman – Investigation into the rehabilitation and reintegration of prisoners in Victoria (2015)**, www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-the-rehabilitation-and-reintegr

**Corrections Victoria – Community Work**, www.corrections.vic.gov.au/home/community+corrections/community+work/

QUESTIONS

# 3.1.11 Types of sanctions

LEVEL 1:
Define and understand

**1.** Magda is caught drink-driving and a fine of $1,000 is imposed by the sentencing magistrate. Which of the following purposes are not achieved by this sanction?

**A.** Punishment and general deterrence

**B.** Specific deterrence and general deterrence

**C.** Denunciation and punishment

**D.** Protection and denunciation

**2.** Budding AFL star, Liam, was out in Melbourne celebrating a recent win. While heavily intoxicated Liam got into a scuffle with a rival footballer, Mark, and is facing some minor assault charges. The magistrate believes Liam has a problem with alcohol that needs to be addressed to prevent further offending. Based on the information provided would a CCO be appropriate to sanction Liam should he be convicted?

**A.** It is likely a CCO would be imposed in this case given that the offence with which Liam has been charged is too serious to be adequately sanctioned by a fine alone but not so serious that a term of imprisonment would be appropriate. As he needs to attend counselling for his alcohol addiction it is likely that a court would impose this community-based sentence in Liam's case.

**B.** It is likely that a CCO would be imposed in this case given that the offence with which Liam has been charged is too serious to be adequately sanctioned by a fine alone but not so serious that a term of imprisonment would be appropriate. As he needs to attend counselling for his alcohol addiction it is likely that a court would impose this custodial sentence in Liam's case.

**C.** It is likely that a CCO would be imposed in this case given that the offence with which Liam has been charged is too serious to be adequately sanctioned by a fine alone but not so serious that a term of imprisonment would be appropriate. As he needs to attend counselling for his alcohol addiction it is likely that a jury would impose this custodial sentence in Liam's case.

**D.** It is likely that a CCO would be imposed in this case given that the offence with which Liam has been charged is too serious to be adequately sanctioned by a fine alone but not so serious that a term of imprisonment would be appropriate. As he needs to attend counselling for his alcohol addiction it is likely that a jury would impose this community-based sentence in Liam's case.

**3.** Wayne, 53, has been convicted of aggravated assault. The judge presiding over Wayne's case is trying to determine what sentence to impose considering:

- His extensive criminal history
- The fact he is considered a 'flight risk'
- The violent nature of his crimes
- He has links to often-violent gang members

Would a term of imprisonment be appropriate in Wayne's case in light of the purposes of sanctions?

**A.** A term of imprisonment is appropriate given that he poses a significant risk to society (requiring protection); his extensive criminal history and the nature of his crimes means he should be punished.

**B.** A term of imprisonment is appropriate given that he poses a significant risk to society (requiring punishment); his extensive criminal history and the nature of his crimes means he should be deterred from committing similar offences in the future.

**C.** A term of imprisonment would not be appropriate in Wayne's case; a hefty fine will suffice.

**D.** A term of imprisonment is appropriate given that Wayne is likely to abscond if imprisoned.

LEVEL 2:
Describe and explain

**4.** 'Fines achieve the sentencing purpose of punishment.'

What is a fine? Describe one reason for and one reason against the statement above. (3 MARKS)

**5.** A community correction order (CCO) is a sentence served while the offender remains living in the community. There is a lot of flexibility in the conditions a court can include in a CCO.

Identify three conditions a court may attach to a CCO and one way in which a CCO can achieve rehabilitation. (3 MARKS)

**6.** Define 'imprisonment'. (2 MARKS)

LEVEL 3:
Apply and compare

**7.** In the Victorian Magistrates' Court between 2013 and 2016, 29% of those convicted of driving without a licence were fined between $1,000–$2,000.

*Source:* www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/86_127_18_1_a.tables.html

Upon learning this, a friend says to you 'Fines don't do much in terms of preventing crime, as a speeding fine achieves specific but not general deterrence. Furthermore, a fine can never achieve denunciation.' Do you agree? Justify your response. (4 MARKS)

**8.** The following terms and conditions have been attached to offender 24601's community correction order, following his conviction for armed robbery (he stole a loaf of bread while wielding a machete):

- Must attend anger-management counselling twice a week for 3 months.
- Must complete 125 hours unpaid community work, sorting recycled clothing.
- Must surrender his passport and remain in Victoria.

Explain the purpose/s that this community correction order would serve. (4 MARKS)

**9.** Jeremy is convicted on a number of charges of assault, arson and property damage. Jeremy has expressed no remorse for his actions and while on remand refuses to participate in any courses or counselling. Identify and describe one purpose a term of imprisonment would serve in this case. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**10.** Prison is 'an expensive way of giving the public a break from offenders, before they return to commit more crimes'. With reference to the quote above, discuss the effectiveness of prison to specifically deter offenders and protect the community. (6 MARKS)

# 3.1.12 Factors considered in sentencing

**Upon a court finding an offender guilty (or the accused pleading guilty to an offence), the judge or magistrate must then impose an appropriate sanction. This will require the court to consider not only which sanction to impose (eg imprisonment, a fine, etc), but also how severe the sanction ought to be (eg the duration of any term of imprisonment, the amount of a fine to be paid).**

The court's determination of what is an appropriate sentence requires a judge/magistrate to consider a wide range of factors beyond the purposes of criminal sanctions (that is, the court's desire to punish, rehabilitate, etc.) as discussed above. The court will also consider relevant aggravating factors, mitigating factors, whether a guilty plea has been entered and the contents of any victim impact statements submitted to the court.

The court's deliberations on sentencing will be informed by a sentencing hearing. In such a hearing the prosecution and the offender (or his/her legal representative) will present arguments and facts to the court to inform the court's sentencing decision. For example, the prosecution may advise the court that a more severe sanction is needed due to the offender's prior convictions (an aggravating factor, see below), whereas the offender's barrister may argue the sentence should be more lenient due to the offender's genuine remorse (a mitigating factor, see below).

This lesson covers VCAA key knowledge point: **'Factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements'**, which we have broken down into the following concepts:



## Aggravating factors 3.1.12.1

**Aggravating factors are** aspects of an offence or the offender that render the offending more serious.

**Impact on sentence imposed**

The presence of aggravating factors will push a court toward imposing a more severe sanction – for example, the imposition of a community correction order rather than a fine, or a longer period of imprisonment instead of a shorter prison term.

**Examples of aggravating factors:**

- A crime was planned/premeditated.
- A weapon was used in the course of committing a crime.
- The crime was motivated by hatred or prejudice of a particular group (such as a religious or ethnic group).
- The crime was committed by a group of offenders upon an 'outnumbered' victim.
- The victim of the offence was a particularly vulnerable person (such as an elderly person, a disabled person or a child).
- The offender has prior convictions for similar offences.

**USEFUL TIP** When defining 'aggravating factors' in a SAC or exam, be sure to include an example.

**CASE STUDY** ***R v DA COSTA* [2014] VSC 458**

In early 2014 Da Costa caused a high-speed accident in Oakleigh, hitting pedestrians and two other vehicles. The accident caused three fatalities and a number of very serious injuries. The offender was speeding, sleep-deprived and drug-affected. He was sentenced to 16 years imprisonment (with a non-parole period of 11 years).

In sentencing, Justice Lasry said 'I am satisfied that your consumption of that drug was a contributing factor to your conduct but that your conduct was also entirely conscious and deliberate. That is the most aggravating feature of what you have done.'

He later said:

> Your actions on this night were not part of any momentary lapse of attention as sometimes occurs when a serious motor vehicle incident happens. This shocking collision occurred after the sustained period of driving at life threatening speeds that I have described. The collision occurred a little after 11.30pm on a January evening when you must have realised there would be people and vehicles containing people in the vicinity of this major intersection and the earlier roads on which you had travelled. That is a particularly aggravating feature of what you did. The law says that there are a number of factors which will aggravate the seriousness of a driving offence causing death or serious injury. Many of them apply to you.
>
> Apart from the realisation that there would be people in the vicinity of your driving exposed to serious risk, the following are also relevant:
>
> - Extent and nature of the injuries inflicted;
> - Number of people put at risk;
> - Degree of speed;
> - Degree of intoxication or of substance abuse;
> - Erratic [or aggressive] driving;
> - Length of the journey during which others were exposed to risk;
> - Ignoring of warnings; and
> - Degree of sleep deprivation.
>
> You were alone in the car. However, every time you entered an intersection against a red signal you were ignoring the warning implicit in that signal that if you did not stop there would likely be a serious collision. Indeed, the driving that caused these three deaths and seriously injured three people occurred when you entered the intersection at an absurdly high speed at least 18 seconds after the traffic control signal applicable to you on Dandenong Road had changed to red. The intersection with Warrigal Road is one of the busiest intersections in the Melbourne metropolitan area. It carries a high volume of traffic in multiple lanes. Your driving was bound to cause a catastrophe and it did. There is no explanation from you for what you did and I am left to consider whether your consumption of drugs is in some way an explanation for your conduct. I have no doubt that it contributed to your state of mind but you made a deliberate choice to drive like this over a significant distance. The consequences of your actions were devastating.'

## Mitigating factors 3.1.12.2

**Mitigating factors are** aspects of the crime and/or the offender that makes the offender less culpable – their offending is regarded as less serious.

**Impact on sentence imposed**

The presence of mitigating factors will work to reduce the severity of the sanction imposed by the court.

**Examples of mitigating factors:**

- Genuine remorse.
- The crime was the result of provocation (rather than premeditated).
- The age of the offender (a particularly young offender is likely regarded as more able to be rehabilitated and therefore deserving of leniency).
- An offender having a particularly traumatic personal history (an offender who grew up surrounded by family violence/drug addiction/alcoholism believing criminal behaviour is acceptable).
- Limited/no prior criminal history.
- Cooperating with police during their investigation of the offence.
- Favourable prospects of rehabilitation (such as a person convicted of theft/robbery offences who was offending to finance a drug addiction and has commenced a rehabilitation program before being sentenced).

**USEFUL TIP** When defining 'mitigating factors' in a SAC or exam, be sure to include an example!

**CASE STUDY** ***YOUNAN v R* [2017] VSCA 12**

Younan pleaded guilty to a series of armed robbery and theft offences in the County Court. Sentenced to a maximum prison term of almost 10 years, he appealed to the Court of Appeal on the grounds the sanction was excessive. His legal representatives presented to the Court a number of similar cases in which the presence of mitigating factors had caused a less severe sentence.

The Court of Appeal accepted Younan's argument that his sanction was too severe, referring to the presence of various mitigating factors: 'Despite the very serious nature of this type of offending and the need to give appropriate weight to denunciation and general deterrence, all of the mitigating factors present in the cases referred to were also present in this case.' These included his young age (he was 22), his genuine remorse and the absence of any prior convictions.

The Court of Appeal went on to say:

> There were however two additional mitigating features present, which distinguished this case from all those cited. First, the applicant was willing to assist investigating police. Second, there was the very significant mitigating factor of his frank admissions which provided the only evidence that implicated him in the offending. As was recognised by the sentencing judge, and conceded by the Crown, the prosecution had no evidence to establish the applicant's guilt without his admissions.

With greater emphasis placed on these mitigating factors, Younan's sentence was reduced by the Court of Appeal.

**USEFUL TIP** You could be asked to look at a set of factors considered by a judge, identify whether they are aggravating or mitigating factors and predict the impact on the sentence – make sure you can apply your knowledge of mitigating and aggravating factors to a particular scenario.

## Guilty pleas 3.1.12.3

**A plea of guilty is** a full admission by an accused person of an offence for which they have been charged. An accused person charged with multiple offences may choose to plead guilty to some or all charges. When an accused person pleads guilty a trial will not be conducted – the prosecution does not need to present evidence to persuade the court the accused is guilty of an offence, and the court will instead proceed to sentencing the offender.

**Impact on sentence imposed**

The courts regard a guilty plea as a mitigating factor, reducing the severity of the sanction imposed.

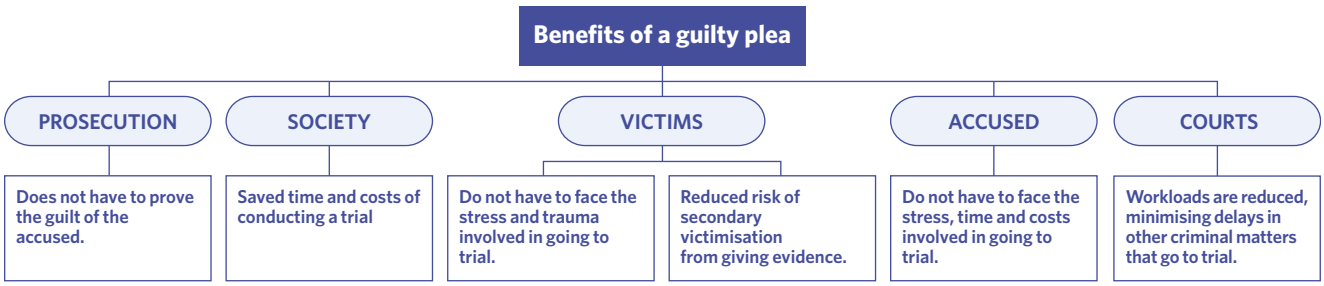
**Why guilty pleas have this impact**

This is due to the public benefits of guilty pleas:

- The community is saved the time and cost of conducting trials,
- Victims and witnesses avoid the traumatic experience of giving and listening to evidence, and
- The courts' workloads are reduced, minimising delays in criminal matters that do go to trial.

In some matters, if a court imposes a less severe sanction because the offender entered a guilty plea, the court is required to state the extent to which they have reduced the sentence as a result of this plea (referred to as a 'sentencing discount'). That is, the court must not only state the sentence imposed, but the sentence that would have been imposed if the offender had pleaded 'not guilty' and was then convicted at the conclusion of a trial.

In general, the earlier in the proceedings the accused person pleads guilty, the greater the discount applied to their sentence. Remember the impact of an early guilty plea is just one factor considered when a court imposes a sentence. While it would usually reduce the severity of a sanction, it will be weighed against other mitigating and aggravating factors when deciding what sentence is appropriate.




**USEFUL TIP** When describing the impact of guilty pleas on sentencing, best answers in a SAC or exam will briefly explain why a guilty plea has that impact.

**CASE STUDY** ***R v DA COSTA* [2014] VSC 458**

In his sentencing Justice Lasry considered

> ...there is no question that you pleaded guilty to these charges at the earliest opportunity. That stands to your credit as an immediate acceptance by you of responsibility for what occurred. That has also alleviated the most difficult experience for family and friends of the victims in this case by expediting the process. There is of course a utilitarian value as well.

By 'utilitarian value', Justice Lasry means the public benefit achieved by avoiding a trial.

Da Costa was sentenced to 16 years imprisonment (with a non-parole period of 11 years).

Justice Lasry concluded his remarks with:

> Pursuant to s. 6AAA of the Sentencing Act, I declare that had you not pleaded guilty to these offences, the sentence I would have imposed on you would have been a total effective sentence of 18 years with a minimum of 13 years to be served before you were eligible to apply for release on parole.

## Victim impact statements 3.1.12.4

**A Victim Impact Statement (VIS) is** a written and/or verbal statement to the court about the impact of an offence upon the victim. 'Impact' may include physical, emotional and/or financial loss caused by an offence, and 'victim' may include those directly impacted by an offence (eg. the person hit during an assault) and other individuals such as their family members. A VIS may include photographs to demonstrate the physical impact of an offence.

**The purpose of a VIS is** to help inform the court of the severity of the offence. If a VIS indicates the crime has had a very significant impact on the victim, this would usually cause the court to increase the severity of the sanction imposed. If a VIS indicates the victim forgives the offender, this may result in the sanction imposed being less severe.

**Impact on sentence imposed**

A VIS will assist the court to understand the impact of the crime, however a victim's statements about what might be an appropriate sanction will not inform the court's sentencing decision. A VIS is one factor considered by the court in imposing a sanction – it will be weighed against other mitigating and aggravating factors presented to the court.

**USEFUL TIP** Clarifying a misconception about VIS: they help the judge understand the impact of the offence and this informs the sentence, but the judge won't be influenced by the victim's perspective on what sanction should be imposed. Keep this in mind in the exam!

**CASE STUDY** ***DPP v HASSAN* [2017] VCC 980**

In 2017 Hassan pleaded guilty to two counts of culpable driving in the County Court of Victoria. In mid-2016 at the age of 20 Hassan caused a car accident in which two individuals died (Nikolic and Deumic) – he had entered an intersection through a red light while travelling 60km/hour above the speed limit.

In her sentencing remarks Judge Hannan assessed the seriousness of the offending, which included a consideration of the impact of the crime. Judge Hannan stated:

> I have received victim impact statements from three daughters of Mrs Nikolic, and from two daughters and a son of Mrs Deumic. In addition, four of the victims read their statements to this court and the two remaining statements were read by the prosecutor. The contents of those statements are raw and compelling. They convey the very real and ongoing impacts of this kind of offending.
>
> The effects have rippled through all aspects of these families lives. For some, their physical health has been affected; for all, the loss haunts them.
>
> The victims have changed forever. There is nothing that can be said or done to change their new reality. It is to be hoped that time can help them heal from that which they should not endure.

After weighing the impact on the victims' families and other mitigating and aggravating factors, Judge Hannan imprisoned Hassan for 8 years and 8 months (with a non-parole period of 6 years and 2 months). He was also fined and disqualified from driving for 5 years.

**USEFUL TIP** Remember the factors described above – aggravating factors, mitigating factors, guilty pleas and VIS – are those that influence sentencing a guilty person (that is, the type and severity of the sanction that is imposed), not to be confused with the evidence considered by the court when deciding whether the accused is guilty or not guilty.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.12 Factors considered in sentencing**

## Keen to learn more?

**Victims Support Agency,** www.victimsof crime.vic.gov.au/going-to-court/victim-impact-statements

**The Sentencing Advisory Council,** www.sentencingcouncil.vic.gov.au/

**The Judicial College of Victoria's Sentencing Manual,** www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual

QUESTIONS

# 3.1.12 Factors considered in sentencing

LEVEL 1:
Define and understand

**1.** In a recent County Court case surrounding the death of an employee at a factory in Melbourne's west, the following details emerged. A small fire was sparked as a result of the deceased employee's own error and spread due to faulty wiring that management was well aware of prior to the fire. The employee became trapped behind a large piece of equipment that should not have been stored in the area as it blocked the exit (and was the responsibility of management to ensure they were always clear). In light of the information provided, consider which of the following options details the factors that would be considered 'aggravating' when imposing a sanction against the business and its managers in this case?

**A.** The deceased employee's error that sparked the fire initially and the fact the equipment was blocking the exit.

**B.** The faulty wiring, the equipment blocking the exit and the fact that management knew about both and did nothing to address these issues.

**C.** The faulty wiring is not management's fault but the equipment should not have been blocking the exit so the plant's management is at fault.

**D.** The deceased employee's error that sparked the fire.

**2.** Jill is injured in a violent assault. The offender Jack is awaiting sentencing. Which of the following is not a mitigating factor in Jack's case?

**A.** Jack had a particularly traumatic childhood and has trouble regulating his response to emotional situations.

**B.** Jack is 19 years old.

**C.** Jack has not shown remorse.

**D.** Jack answered all questions during the police investigation.

**3.** Read the following statements:

- It is in the best interests of an accused person to plead guilty where the evidence against them is weak.
- A guilty plea is not generally considered a mitigating factor.
- Accused persons should not seek legal advice before pleading guilty.
- The advantages of pleading guilty often extend beyond the offender themselves.

The statement above contains errors. Which of the following options best corrects the statements above?

**A.** It is not in the best interests of an accused person to plead guilty where the evidence against them is weak (in fact a weak prosecution case means the accused will be more likely to succeed if she proceeds to trial). As submitting a plea is pretty straightforward there is no need to seek legal advice before doing so, as they are generally considered as a mitigating factor.

**B.** It is in the best interests of an accused person to plead guilty where the evidence against them is significantly stronger than the accused person's defence. An accused person should always seek legal advice before submitting a plea of any kind; guilty pleas are generally considered as a mitigating factor.

**C.** It is in the best interests of an accused person to plead guilty where the evidence against them is significantly stronger than the accused person's defence. An accused person need not seek legal advice before submitting a plea of any kind; guilty pleas are generally considered as a mitigating factor.

**D.** It is in the best interests of an accused person to plead guilty where the evidence against them is significantly stronger than the accused person's defence. An accused person should always seek legal advice before submitting a plea of any kind; guilty pleas are generally considered aggravating factors (as a means by which the accused may manipulate the system).

**4.** The victim in a sexual assault case (Sara) delivers a victim impact statement (VIS) during the County Court trial of the alleged offender, in an attempt to sway the jury towards a conviction. Sara felt relieved after delivering her VIS, was hopeful that it would be factored into the sentencing decisions to come and felt like she could finally move on with her life. In light of the information provided, which of the following statements about victim impact statements is not correct.

**A.** They provide insight into the impact of crime on a victim.

**B.** The details contained within a victim impact statement may act as an aggravating factor when a sentence is imposed.

**C.** Victim impact statements are presented to a jury during the course of a trial.

**D.** Victim impact statements help a victim feel they've been able to 'have their say' in court when a sentence is imposed.

LEVEL 2:
Describe and explain

**5.** Nathan whilst driving drunk, veers onto the wrong side of the road and collides head on with Bec. Bec had been travelling 20km over the speed limit at the time of the crash. The protective barrier that should have prevented Nathan from being able to cross onto the other side of the road was in disrepair as the local council had failed to properly maintain it. Bec has previously had her licence cancelled due to various driving offences. She pleaded guilty to dangerous driving causing injury.

Define 'aggravating factors' and identify the aggravating factors that will affect Bec's sentencing. (2 MARKS)

**6.** What are mitigating factors? Give two examples. (2 MARKS)

**7.** Campbell is charged with arson. At the conclusion of Campbell's committal hearing the presiding magistrate determined there was insufficient evidence to support a conviction and the matter should therefore not proceed to trial. As a result, the prosecution (keen to ensure Campbell is punished for the alleged arson) entered a plea of 'guilty'.

Would this plea stand? Justify your response. (2 MARKS)

**8.** A victim impact statement is presented to the court during the course of a trial, as evidence that a crime has been committed. Its purpose is to educate the prosecution as to the way the victim was affected by the crime.

Identify two errors in this statement and describe the correct procedures (2 MARKS)

LEVEL 3:
Apply and compare

**9.** Distinguish between aggravating and mitigating factors and provide an example of each. (3 MARKS)

**10.** Greg, 50, is convicted of kidnapping his former neighbour Leah after taking her for a walk in a heavily wooded area to an isolated cabin for three days. We know the following information:

- Greg pleaded guilty at the committal hearing for this crime.
- Greg has a history of mental illness with his mental age diagnosed as that of an 8 year old.
- A doctor presented evidence that Leah showed signs of physical assault.
- Greg had no criminal history prior to this conviction.
- The victim (Leah) is only 12 years old.

Explain the likely impact of Greg's plea on his sentence and why his guilty plea has this impact. Beyond his guilty plea, identify the aggravating and mitigating factors considered when Greg is sentenced in this case. Justify your response. (5 MARKS)

LEVEL 4:
Discuss and evaluate

**11.** A legal critic once wrote, 'There are a number of factors that must be considered in sentencing. In doing so, it is paramount that these factors be considered in light of what is fair to those who have been convicted as well as those affected by their wrongdoing.'

What is 'fairness' as a principle of justice? In light of this statement explain how judges can ensure the achievement of fairness by considering guilty pleas and victim impact statements in sentencing. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 4 (online), covering these lessons:

- **Lesson 3.1.10 The purposes of sanctions**
- **Lesson 3.1.11 Types of sanctions**
- **Lesson 3.1.12 Factors considered in sentencing**

Check with your teacher when it's time to complete this progress check.

# 3.1.13 Factors that affect principles of justice (AOS 1)

**At the start of this Area of Study, we described 'justice' in terms of fairness, equality and access.**

To recap, in Lesson 3.1.1 the following comments from former Chief Justice of the Supreme Court of Victoria, the Hon. Marilyn Warren AC, were included:

> What is justice? For different people at different times it means different things.
>
> To the ordinary person 'justice' will often mean due punishment when a criminal is sentenced for a crime. To the popular media 'justice' will generally mean harsh punishment primarily focused on strong retribution and deterrence.
>
> To the accused person justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope.
>
> Immediately after delivery of sentence it often happens that the victim's family and supporters will express their satisfaction or dissatisfaction with the sentence. We sometimes hear the statement 'justice has been done'. We also hear 'justice has been denied to the victim' because the punishment was too lenient.
>
> But the tension for victims is not just between victims' rights and the rights of accused persons, there are also the rights of society enshrined in sentencing laws, for example, the goal of rehabilitation and the mercy shown to young offenders balanced by the goal of deterrence.
>
> *Source:* What is justice? Remarks of the Hon. Marilyn Warren AC Chief Justice of Victoria 20 August 2014, classic.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf

Throughout the Area of Study we have assessed ways fairness, access and equality are achieved. We now look at some problems in the administration of criminal justice, to explore how issues relating to costs, delays and cultural differences impact upon fairness, equality and access.

This lesson covers VCAA Key Knowledge point: **'Factors that affect the ability of the criminal justice system to achieve the principles of justice including: in relation to costs, time and cultural differences',** which we have broken down into the following concepts:



## Costs 3.1.13.1

**Accused persons often face high costs** in defending a criminal charge. Sources of legal costs when defending a criminal charge in the courts include:

- **Solicitors' fees** in the preparation for a criminal trial – a solicitor will be required for the preparation of the accused person's defence, reviewing the prosecution's evidence, planning which witnesses will be called if the matter goes to trial and meeting with witnesses before a trial; this is expensive.
- **Barristers' fees** for the presentation of a defence case at trial – though many criminal charges are resolved prior to a trial being conducted by a guilty plea (perhaps after a sentence indication or through a plea negotiation), cases that must go to trial will often require a barrister to present legal arguments and examine witnesses. Hiring a barrister for this representation is expensive.
- **Witness fees** – if expert witnesses are to be called to give evidence, perhaps to challenge the evidence presented by the prosecution's expert witnesses (such as forensic evidence) they will often charge fees.
- **Appealing to a higher court** – an offender seeking to appeal against the guilty verdict or the sanction imposed will need to pay the filing fee in the appeal court, meet the costs of a solicitor preparing written documentation about the appeal and the costs of a barrister in presenting the legal arguments to the judges in the appeal court.

- **Orders to pay a sum of money to the victim** – when sentencing an offender, the Court may also make an order that the offender pay a sum of money to the victim as compensation for the injury caused and/or as restitution for property stolen, damaged or lost (or to return stolen property itself). Applications for such an order can be made by the prosecution or the victim.
  - Such orders are made in only a small proportion of all cases.
  - Most offenders have limited capacity to pay, so many victims instead seek compensation through the Victims of Crime Assistance Tribunal.
  - If such an order is made, it becomes a debt the offender must pay to the victim.

**Costs can be awarded to accused persons who are found not guilty**; acquitted individuals may ask the Court to award costs in their favour. That is, the Court may order the prosecution to meet the acquitted person's costs. If such an award is made, it may only cover some of the individual's legal costs. If VLA has represented the accused person, the funds will flow back to VLA to meet its costs.

**If a person charged with an indictable offence is discharged at the committal stage,** they can apply to recover their legal costs (however accused persons being discharged at a committal is not common).

**Offenders who successfully appeal** against a conviction and those offenders who must respond to an appeal against the sentence by the DPP may be able to apply to the Appeal Costs Board for an 'appeals costs certificate', to recover from the state some of the costs associated with the appeal process. If VLA represent an offender in such an appeal, the money recovered flows back to VLA (not the person they represented).

**Impact of costs on principles of justice**

**Principle of justice: *Access***

| Impact of costs on achieving access |
| --- |
| **Appeals.** The high costs associated with an appeal (and the legal representation needed to prepare and present an appeal) can discourage individuals from appealing a conviction/sentence, meaning such a review is inaccessible. |
| **Legal representation.** Those who cannot afford legal representation will be less able to understand criminal proceedings in court and their legal rights during a trial, undermining access to justice. |

**Principle of justice: *Fairness***

| Impact of costs on achieving fairness |
| --- |
| **Legal representation.** Accused persons defending themselves because they cannot afford legal representation may not receive a fair hearing (see Lesson 3.1.9). Unequal legal representation (or a trial in which the accused does not have legal representation) may lead to an unfair outcome, as the accused cannot prepare and present a case of equal quality to the prosecution.<br>For instance, an unrepresented accused person will be unlikely to prepare and present a case of equal quality to the prosecution (who are experts in preparing and presenting criminal charges in the courts). They will be less able to test the accuracy of the prosecution witnesses' evidence and they may not know the lawful defences they may be entitled to present.<br>The quality of the presentation of the case may influence the outcome, not solely the facts and the law – this is unfair on an unrepresented/poorly-represented accused person. |
| **Victim compensation.** Many individuals who commit offences are relatively poor (or lose their employment and income if imprisoned) and therefore cannot pay compensation or restitution orders to victims, which may be seen as unfair on victims. |

**Principle of justice: *Equality***

| Impact of costs on achieving fairness |
| --- |
| **Appeals.** If some dissatisfied parties cannot initiate an appeal due to the costs associated, equality before the law is not achieved. |

**The Victorian criminal justice system still achieves fairness, access & equality in a range of ways, despite costs issues; these include:**

- Independent judges ensuring rules of evidence and procedure are followed, promoting fairness.
- Juries as independent decision-makers in serious cases, provided at no expense to the accused person, promote fairness (and access as the state bears the costs of the jury in a criminal case).
- Though VLA's resources are limited, they do provide legal representation to very poor accused persons charged with serious offences, promoting access and fairness.
- Accused persons have control over some aspects of proceedings (such as challenging prospective jurors, deciding which evidence to present in their own defence and selecting their own legal representative), promoting equality of treatment before the courts and enabling them to achieve a fair hearing.
- The use of committal hearings ensures all those charged with serious criminal offences avoid the expense of defending themselves in a jury trial if the prosecution's case is weak.
- If interpreters are needed in the courts, the prosecution organises and pays for this (avoiding costs to the accused person).
- VLA provide duty lawyers to assist some poorer/disadvantaged accused persons facing charges or bail hearing in the Magistrates' Court.
- Judges in the County Court and the Supreme Court have the power to order VLA to provide a lawyer to those who cannot afford legal representation, to ensure they receive a fair trial.

Among many others described throughout this AoS!

**USEFUL TIP** The impact of factors such as costs upon the achievement of fairness/access/equality could be asked about in different ways. For example:

- **'Describe** how costs affect the ability of the criminal justice system to achieve fairness' would require students to explain how costs limit the achievement of fairness.
- **'Discuss** the impact of costs on the achievement of fairness in the criminal justice system' would require students to weigh up ways in costs limit the achievement of fairness and ways in which the criminal justice system achieves fairness, notwithstanding the impact of costs (as 'discuss' requires a weighing of pros and cons).

## Time 3.1.13.2

**Delays are undesirable** in the resolution of criminal cases because:

- For victims of crime (and their family members), the delay before 'justice' is done through the prosecution of an offender compounds their suffering.
- Giving evidence in a criminal trial is very stressful for witnesses; delays awaiting this process can add to the stress felt by witnesses to crime.
- The community remains at risk if those charged with violent offences remain in the community prior to a trial (community protection is improved if matters are resolved more quickly; while a growing number of offenders charged with violent offences are on remand in Victoria, this will not always be the case).
- Awaiting trial with an outcome unresolved is stressful for an accused person (and their family).
- Criminal trials rely on oral evidence, but as memories fade over time the accuracy and reliability of such evidence may be diminished (or evidence lost if memories fade completely).

**Sources of delays in the courts** include:

- Court backlogs, with the Victorian courts' caseload growing more rapidly than the funding for the courts' judges and staff.
- Time taken to appeal judgements and sentences, creating a delay in the final resolution of a case.
- Trial procedures are slow, with legal practitioners' oral arguments and the question-answer process for evidence being presented both taking a lot of time.
- Judges giving directions to juries at the start and end of a trial for an indictable offence can be very time-consuming.
- A hung jury (in which no verdict is delivered) and mistrials (perhaps due to jury misbehaviour) mean re-trials need to be conducted, adding to delays in the resolution of criminal matters.
- Empanelling juries is time-consuming.
- The huge increase in matters about toll road fines being resolved by the Magistrates' Court, which create delays in the resolution of more urgent matters (such as assaults, family violence offences, etc). Processing fines about unpaid toll road journeys is now the most common type of criminal case resolved in the Magistrates' Court – see below.

**CASE STUDY** **Toll road fines in the Magistrates' Court**

EastLink & CityLink are Victoria's two private toll road operators (charging a fee each time a road user drives on their roads). Drivers who fail to pay the toll on time will be invoiced, with additional processing/late payment fees attached. With each reminder notice, an additional fee is attached. Additional fees are attached for every day an unpaid journey is taken on a toll road, meaning outstanding toll road debts can become very large, very quickly.

The failure to pay this invoice is a criminal offence with a fine imposed.

As these fees/fines often become very large, many offenders (who usually have no prior criminal history) cannot pay them; the payment of the fines is then a matter to be resolved through the Magistrates' Court. No other private debts in the Victorian community are pursued as a criminal matter. For example, failing to pay a gas bill isn't a criminal offence; not meeting a monthly payment on a TV purchased on an instalment plan isn't a criminal offence.

Processing the criminal fines/infringements related to unpaid toll road journeys:

- Is now the largest proportion of all criminal matters resolved by the Magistrates' Court (45,000 such cases in 2015/16 alone; compare this to 4,200 such matters in 2005).
- Adds significant delays to the resolution of more urgent matters, such as committal hearings, family violence matters, assaults, etc.

**Impact of time on principles of justice**

**Principle of justice: *Access***

| Impact of time on achieving access |
| --- |
| **Delays may deter victims.** Knowing about the delays in the justice system may prevent victims from making complaints to the police in the first place, limiting access to justice. |
| **Jury trial.** The longer a jury trial, the greater the costs in terms of paying legal representation; therefore, delays drive up costs for accused persons, making access to justice less affordable. |

**Principle of justice: *Fairness***

| Impact of time on achieving fairness |
|---|
| **Delays exacerbate the stress of trial.** Delays compound the suffering of victims; this delay is usually due to factors' beyond the control of the victim, which is unfair for such parties. |
| **Unreliable evidence.** If delays cause evidence to be lost or unreliable due to the passage of time and memories fading, this may lead to incorrect and unjust outcomes, which is unfair. |

**Principle of justice: *Equality***

| Impact of time on achieving equality |
|---|
| **Unrepresented accused persons may not have access to methods which reduce delays.** An unrepresented accused person may not know to apply for a sentence indication; an unrepresented accused person is not to be approached for a plea negotiation – so some accused persons (due to their lack of money to afford a lawyer) may not benefit from these methods designed to promote a more timely resolution of a criminal case, which is unequal. |

**The Victorian criminal justice system still achieves fairness, access & equality in a range of ways, despite delays/time-issues; these include:**

- Sentence indications and plea negotiations encourage early resolution of many criminal matters without a trial.
- Committal proceedings ensure the County Court and Supreme Court are not 'clogged up' by conducting trials in cases where there is no likelihood of a conviction, minimising delays in such cases.
- Relatively few matters are resolved by jury trial, so the delays associated with juries are limited to a small number of criminal cases.

Among many others described throughout this AoS!

## Cultural Differences 3.1.13.3

A number of different groups within society may have difficulty engaging with the justice system due to their cultural background. For example:

**Asylum seekers/refugees/recent migrants**

- Will probably have a lack of knowledge of Victoria's legal system. Consequences:
  - If a victim of crime, may not know they have certain rights as a victim (see Lesson 3.1.4).
  - May not know they are entitled to legal representation if defending a charge in the courts, and/or how to access legal representation; may not know how VLA and/or CLCs can assist (see Lesson 3.1.5).
  - If self-representing, may not know they are entitled to present evidence in their own defence.
- May speak little/no English. Consequences:
  - Difficulty giving evidence at trial, especially if self-representing in defence of a charge. May result in court misunderstanding circumstances relating to an offence, given the reliance on oral evidence in Victorian courts, causing 'incorrect' outcome.
  - If self-representing in defence of a charge, difficulty questioning evidence presented by the prosecution's witnesses and/or difficulty researching and preparing lawful defences to a charge. For example, in a matter about a driving offence or fine, such an accused may not be able to communicate their financial situation effectively, impacting on the size of the fine imposed (see Lesson 3.1.11).
- Refugees may not trust the police, courts, etc. due to traumatic experiences in the country they have had to leave (for example, a refugee/asylum seeker who has sought protection in Australia due to police mistreatment in their home country). Consequences:

- May be unwilling to report crime to police due to lack of trust.
- May be unwilling to speak truthfully to police and/or the courts, instead giving incomplete or inaccurate responses to questioning (perhaps saying what they think is expected, rather than what actually occurred).

**Indigenous Australians**

- Indigenous Australians are over-represented in the criminal justice system and Victorian prisons.
- A history of dispossession and social exclusion by governments has led many in Australia's indigenous communities to not trust those in the criminal justice system.
- Body language and spoken language differences between some indigenous and non-indigenous Australians can include:
  - Some Indigenous Australians minimising eye contact and remaining silent more often than non-indigenous Australians. A lack of eye contact can be misunderstood as dishonesty and evasiveness.
  - Some indigenous Australians' cultural respect for authority can lead to a tendency to answer questions from police/lawyers/the courts in a way they feel is expected, rather than what has actually occurred.

CASE STUDY

## INDIGENOUS AUSTRALIANS AND ORAL EVIDENCE IN VICTORIAN COURTS

Evidence is presented in courts using an oral question-and-answer format (which is also how police gather evidence). This process is complex and difficult for many witnesses from all backgrounds; how this process impacts indigenous Australians has been the subject of considerable research.

The following extracts from Eades, D (2008) 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' summarise some of the issues.

Please note these are some generalisations – there are differences in Aboriginal cultures within Australia; many indigenous Australians do not face the issues articulated below when dealing with the justice system.

**Question-and-answer format in court:**

> 'The interview is not a speech event found in traditional Aboriginal societies, and nor is it typical in non-traditional 21st century Aboriginal societies. Important information is often sought and verified in much less direct ways than by repeated questioning.
>
> This means that many Aboriginal people are less practised in handling repeated questioning than mainstream non-Aboriginal Australians who have been socialised to deal with this from an early age. Further, the common courtroom questioning strategy of lawyers only asking questions for which the interviewer already knows the answer is one that Aboriginal people may be much less familiar with than other Australians.'

**Answering 'yes' to questions from those in authority:**

> 'It has been documented for many decades that Aboriginal people often answer Yes to a question (or No to a negative question) regardless of whether they actually agree with the proposition being questioned'.

**Understanding the role of silence:**

> 'Research with Aboriginal English speakers has found that silence is an important and positively valued part of many Aboriginal conversations...Silence often indicates a participant's desire to think, or simply to enjoy the presence of others in a non-verbal way. This is a difficult matter for most non-Aboriginal people to recognise and learn, because in western societies silence is so often negatively evaluated in conversations. For example, between people who are not close friends or family, silence in conversations, or interviews, is frequently an indication of some kind of communication breakdown.
>
> This difference has serious implications for police, lawyer, and courtroom interviews of Aboriginal people. Aboriginal silence in these settings can easily be interpreted as evasion, ignorance, confusion, insolence, or even guilt. According to law, silence should not be taken as admission of guilt, but it is difficult for police officers, legal professionals or jurors to set aside strong cultural intuitions about the meaning of silence, especially when they are not aware of cultural differences in the use and interpretation of silence.

Further, a misunderstanding of Aboriginal ways of using silence can lead to lawyers interrupting an Aboriginal person's answer.'

**Eye contact means different things to different people:**

'While avoiding eye contact with your interlocutor (that is – a person asking questions) can be a sign of respect in many Aboriginal societies, in the culture of the courtroom, it can be interpreted as evasion and/or dishonesty'.

**CASE STUDY** **THE KOORI COURT IN VICTORIA: CIRCLE SENTENCING**

In 2002 the Magistrates' Court introduced a specialist division called the Koori Court; it has since been expanded into the County Court.

The Koori Court divisions of the Magistrates' Court and the County Court provide a culturally-relevant sentencing method for indigenous Victorians who plead guilty to an offence (except some sexual offences and family violence offences). The Koori Court process:

- Uses a less formal process, in which respected community leaders from the indigenous community are present.
- Involves a discussion between the offender and the respected elder about the impact of their crime upon the victim (and their family), the offender (and his/her family) and the indigenous community they are a part of.
- The magistrate or judge imposes a sanction:
  - Indigenous elders are involved in discussing the crime, but the sentencing itself remains the role of the court; and
  - Sanctions imposed in the Koori Court are no more severe/less severe than sanctions given using a traditional sentencing method.
- The sentencing process causes offenders to rethink their behaviour far more than the usual sentencing methods used by the courts.
- The Koori Court process is very effective at reducing reoffending. It is an excellent example of the criminal justice system being modified to reflect the differences between indigenous and non-indigenous Australians.

For further information, check out www.magistratescourt.vic.gov.au/koori-court and www.countycourt.vic.gov.au/county-koori-court

### Impact of cultural differences on principles of justice

**Principle of justice: *Access***

| Impact of cultural differences on achieving access |
| --- |
| **Unaware of rights.** If refugees do not trust police (due to traumatic experiences in their home country) they may be reluctant to report crimes, undermining access to justice for victims. Recent migrants/refugees unfamiliar with the Victorian legal system will be less aware of their legal rights (as a victim and/or as an accused person). |

**Principle of justice: *Fairness***

| Impact of cultural differences on achieving fairness |
| --- |
| **Unfamiliar with trial process.** Difficulties for some indigenous witnesses, victims and accused persons presenting evidence (as above) may result in the court not correctly understanding the facts in a criminal case, leading to incorrect or unjust verdicts. Refugees/recent migrants will have difficulty giving oral evidence, meaning courts may misunderstand the facts in particular cases, leading to unjust or incorrect outcomes. |

**Principle of justice: *Equality***

| Impact of cultural differences on achieving equality |
| --- |
| **Language barriers.** Those from indigenous background or recent migrants from non-English speaking backgrounds can be less able to present evidence (as victim or an accused person), undermining the equal treatment of all people in the criminal justice system. |

**The Victorian criminal justice system still achieves fairness, access and equality in a range of ways, despite cultural differences; these include:**

- The use of the Koori Court allows more indigenous offenders to have culturally-relevant sentencing that does more to reduce reoffending.
- VLA provides legal representation to all accused persons, including indigenous and migrant accused persons (who meet their criteria).
- Victorian Aboriginal Legal Service is a CLC that provides advice and assistance tailored to the needs of indigenous Victorians.
- The role of the prosecution is to ensure all relevant facts and legal principles are presented to the court, and not to pursue a conviction at all costs. This role in helping the whole truth emerge can overcome difficulties faced by indigenous/migrant victims, witnesses and accused persons who may otherwise have difficulty presenting their evidence in its best light.
- The presumption of innocence and the high standard of proof required for a conviction protect those who have difficulty presenting their evidence or defence, as they do not need to prove their innocence.

Among many others described throughout this AoS!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.1.13: Factors that affect principles of justice (AOS1)**

## Keen to learn more?

**Sentencing Advisory Council – Restitution and compensation orders: Issues and options paper (2018),** www.sentencingcouncil.vic.gov.au/publications/restitution-and-compensation-orders-issues-and-options-paper

**Victoria Legal Aid – A more fair and efficient toll fines system for Victoria: Briefing paper (2016)**, www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/a-more-fair_and-efficient-toll-fines-_system-for-victoria-briefing-paper-october-2016.pdf

**Radio National – Toll Fines overwhelm Magistrates' Courts in Victoria (13 March 2018),** www.abc.net.au/radionational/programs/breakfast/toll-fines-overwhelm-magistrates-courts-in-victoria/9541986

**Law Council of Australia Justice Project: Aboriginal and Torres Strait Islander People Consultation Paper (2017)**, www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf

**Victoria Aboriginal Legal Service – Aboriginal Community Justice Reports Addressing Over–Incarceration (Discussion Paper) (2016),** https://vals.org.au/assets/2017/10/VALS_ACJR_Addressing-Over-Incarceration_Oct_2017FINAL.pdf

**Eades, D (2008) 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' CICrimJust 26,** http://classic.austlii.edu.au/au/journals/CICrimJust/2008/26.html

**Derkley, K (2016) 'Koori Court no soft option' Law Institute Journal,** www.liv.asn.au/Staying-Informed/LIJ/LIJ/October-2016/Koori-Court-no-soft-option

QUESTIONS

# 3.1.13 Factors that affect principles of justice (AOS1)

LEVEL 1:
Define and understand

**1.** Select the option which is most accurate to finish this statement: 'cost is a significant barrier to achieving access in the criminal justice system because':

**A.** individuals seeking legal representation for their trial and/or to appeal to a superior court face expensive legal fees.

**B.** criminal trials are lengthy due to the high standard of proof, which means trials go for longer and accused people need to pay jury fees for an extended period of time.

**C.** A and B

**D.** None of the above.

**2.** Which of the following is incorrect?

**A.** Delays in the criminal justice system are not due to jury selection.

**B.** Delays in the criminal justice system are due to questioning suspects.

**C.** Delays in the criminal justice system are not due to guilty pleas.

**D.** Delays in the criminal justice system are due to sourcing witnesses.

**3.** Which of the following is incorrect?

**A.** Some indigenous Australians will have difficulty with the question-and-answer format of evidence presentation in Victorian courts.

**B.** The Koori Court has not been effective at reducing reoffending.

**C.** Indigenous Australians are overrepresented in the criminal justice system.

**D.** The Koori Court sentencing method results in sanctions that are no more or less severe than those imposed in the mainstream sentencing process.

LEVEL 2:
Describe and explain

**4.** Identify one cost associated with criminal proceedings that may affect the ability of the criminal justice system to achieve the principles of justice. (2 MARKS)

**5.** Identify two reasons why delays are undesirable in criminal proceedings, and one cause of delay in the criminal justice system. (3 MARKS)

**6.** While indigenous cultures within Australia vary and many do not have difficulties interacting with the justice system, some Aboriginal Australians do face challenges in criminal courts that are not faced by non-indigenous victims, witnesses and accused persons.

Describe some of the difficulties faced by some indigenous Australians in giving evidence in court. (4 MARKS)

LEVEL 3:
Apply and compare

**7.** The 2016/17 annual report from Victoria Legal Aid states that: 'as part of [Legal Aid's] commitment to deliver better services for Aboriginal and Torres Strait Islander clients, we employed three Aboriginal Community Engagement officers based in Melbourne, Mildura and Morwell'.

Describe how the appointment of these three Aboriginal Community Engagement officers would help minimise the impact of one factor affecting the ability of the criminal justice system to achieve the principles of justice. In your answer, describe how this appointment promotes equality and fairness. (5 MARKS)

**8.** Costs associated with defending criminal charges undermine the achievement of fairness.

Describe one reason this statement is correct and two ways in which the Victorian criminal justice system still achieves fairness despite the costs associated for accused persons. (6 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** A legal critic once wrote: 'The purpose behind Koori Courts is to improve inclusivity in the hope of combatting the over-representation of Indigenous offenders in prisons'.

To what extent does the Koori Court system uphold the principle of fairness in the criminal justice system? (5 MARKS)

**10.** In the fictional land of Pandora a group of scientists, spearheaded by Mr. Cameron, are colonising and attempting to co-exist with the native Na'vi tribe. Shortly after Mr. Cameron establishes a criminal justice system, based on the Victorian model, in Pandora. The Na'vi are thereafter bound by Victorian law and before long Neytiri, a member of the Na'vi, is charged with armed robbery. We know the following facts about the case:

- Neytiri does not speak English.
- A single court exists in Pandora. Her expected trial date is 18 months from the date she was charged.
- Neytiri has no money.

Describe how the disadvantages Neytiri faces will affect the ability of the criminal justice system to uphold the principles of access or fairness. (6 MARKS)

# 3.1.14 Criminal Justice Reform

**In Lesson 3.1.13 we explored how issues relating to costs, time (that is, delays) and cultural differences can undermine the achievement of justice in criminal disputes in Victoria.**

The Victorian legal system is continuously reformed to promote the achievement of fairness, access and equality in the resolution of criminal disputes and further reforms remain possible.

This lesson covers VCAA key knowledge point: **'Recent reforms and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice',** which we have broken down into the following concepts:

| | |
|---|---|
| Recent reforms | 3.1.14.1 |
| Recommended reforms | 3.1.14.2 |

## Evaluating the ability of the criminal justice system to achieve the principles of justice

**USEFUL TIP**

The study design requires students to evaluate the ability of the criminal justice system to achieve the principles of justice – that is, to weigh strengths and weaknesses and reach an overall conclusion about the extent to which fairness, access and equality are achieved in criminal matters.

**Some** key points to include in such an evaluation are summarised below, with further detail provided in the relevant lessons throughout this Area of Study.

### Access in the criminal justice system: Strengths & weaknesses

**Principle of justice: *Access***

| Strengths – how access is promoted | Weaknesses – limitations in achieving access |
|---|---|
| **Jury trials.** Jury trials are accessible to all accused persons charged with indictable offences, as the state bears the cost (and an accused person tried in the County Court or Supreme Court cannot choose not to have a jury trial in that court). | **Costs.** Less financially able offenders cannot afford to pursue an appeal due to filing fees and necessity of legal representation. |
| **Victims' rights.** Accommodations in giving evidence for vulnerable witnesses promotes access as it enables witnesses who may otherwise be too intimidated to participate in a trial a way they can still be involved; avoids prosecutions being discontinued due to victims' fear of giving evidence. | **Role of legal practitioner.** Parties without representation may not understand how to complete court documents, or the procedure followed in the court proceedings. |
| **CLC assistance.** CLCs provide free legal advice and information, meaning education on the justice system is accessible to all in the community; this will assist unrepresented accused people better understand their legal rights in defending themselves and the courts' procedures they will need to navigate when facing charges. | **VLA provides limited advice.** Information published by VLA about the legal system is general and limited to some disputes; as such it promotes understanding of the legal system for only some accused persons. |
| | **Online information.** A lot of VLA's information about the criminal justice system is provided online; those with low incomes, the homeless or the elderly may not have access to an internet-connected device where they would be able to access this legal information. |

*cont'd*

| Strengths – how access is promoted | Weaknesses – limitations in achieving access |
|---|---|
| **Availability of CLCs.** CLCs are located all over metropolitan Melbourne and some provide legal assistance over the phone, promoting accessibility to legal advice.<br><br>**Role of legal practitioner**. Represented accused have their legal practitioner to help them prepare their case and explain the court proceedings. Better understanding of criminal proceedings leads to greater access to justice. | **Legal Aid is not available for a lot of accused persons.** Legal Aid funds are very limited, with Victoria Legal Aid not able to support all accused persons who need assistance (often only able to support very poor accused, charged with relatively serious criminal offences).<br><br>**Sentence indications can be refused.** In some cases a sentence indication will be refused, through no fault of the accused – so access to this to inform a plea is not accessible to all accused in all cases. |

### Fairness in the criminal justice system: Strengths & weaknesses

**Principle of justice: *Fairness***

| Strengths – how fairness is promoted | Weaknesses – limitations in achieving fairness |
|---|---|
| **Jury trials.** Use of juries in trials for indictable offences ensures decision-makers are independent (with a range of safeguards in jury empanelment and management to ensure they remain independent), which is fair.<br><br>**VLA criteria.** VLA's eligibility criteria for a grant of legal assistance/legal representation ensure those most at risk of a serious sanction and least able to afford a private lawyer are provided with legal representation – ensuring they are better able to present their defence in its best light, promoting fairness.<br><br>**Duty lawyers.** The provision of duty lawyers in the Magistrates' Court provides advice and assistance to some accused persons, ensuring a fairer hearing for these individuals.<br><br>**Victims' rights.** The Victims' Charter and the associated rights of victims (such as being informed about proceedings) promote fair and consistent treatment of victims and their families.<br><br>**Role of the judge.** Judges' ability to consider mitigating/aggravating factors and victim impact statements in sentencing allows judges to impose sanctions that are appropriate to the facts of each case; to have outcomes reflect the unique circumstances of every victim and offender is fair. | **Legal representation in court.** Unrepresented parties may not present all relevant evidence to the court, which can disadvantage their defence; if accused persons fail to produce relevant evidence/legal argument/legal defence due to lack of legal representation this may lead to an incorrect outcome, which is unfair.<br><br>**Cost of appeals.** Costs associated with appeals (filing fees and legal representation) can mean offenders may not be able to appeal to have incorrect decisions corrected.<br><br>**Limited availability of VLA.** VLA's strict eligibility criteria (and very limited budget) mean it is only able to provide legal advice and representation to some accused persons; many accused persons charged with criminal offences do not meet VLA's eligibility criteria but cannot afford a private lawyer; as a result, VLA is limited in its ability to ensure fairness across the criminal justice system.<br><br>**Limited assistance provided by CLCs.** CLCs often provide legal advice and casework for relatively minor criminal matters (and so cannot assist those defending indictable offences). Further, CLCs often cannot provide legal representation in court; meaning many individuals must still self-represent, reducing their ability to receive a fair trial (as they are less able to test the accuracy of the evidence presented by the prosecution and less aware of lawful defences they can raise). |

**Equality in the criminal justice system: Strengths & weaknesses**

**Principle of justice: *Equality***

| Strengths – how equality is promoted | Weaknesses – limitations in achieving equality |
|---|---|
| **Rights of the accused.** Rights of accused (including the right to be tried without unreasonable delay and the right to a fair hearing) apply equally to all accused persons, irrespective of the circumstances of their case/ the crime they are accused of/gender/age/etc.<br><br>**Right to a fair hearing.** Right to fair hearing upholds equality as the same fundamental rules of evidence and procedure apply to all accused persons, regardless of age, race, wealth and so on. All accused persons are entitled to a decision-maker free from bias, and the ability to test the evidence led against them.<br><br>**Role of the judge.** Both parties are subject to the same rules of evidence and procedure in the courtroom.<br><br>**Role of the jury.** Both parties have a number of challenges they can use to influence the composition of the jury.<br><br>**Interpreter services.** CLCs often provide an interpreter service to ensure those from non-English speaking backgrounds can access legal assistance, promoting equality in the justice system.<br><br>**Opportunity to present case.** Both parties are given equal opportunity to prepare and present their case to the court in its best light. | **Right to trial by jury.** The right to trial by jury is not equally accessible to all accused persons, only those charged with indictable offences.<br><br>**Cost of appeals.** Appeals are expensive (due to filing fees and need for legal representation), so parties' financial position may impact on how equally accessible an appeal is.<br><br>**Role of legal practitioner.** Some financially disadvantaged parties may not be able to afford any/ good quality legal representation, leading to unequal presentation of cases at trial.<br><br>**Cultural difficulties.** Indigenous Victorians are overrepresented in Victorian prisons, and the criminal justice system needs greater reforms to reduce this – a person's race/background should not make them more likely to be in prison. |

## Recent and recommended reforms to the criminal justice system 3.1.14.1, 3.1.14.2

In Lesson 3.1.13 we explored how costs, time and cultural differences impact upon the achievement of fairness, access and equality.

Below, for each of these factors affecting the achievement of justice we describe a recent change and a recommended change (to address the factor in question).

**USEFUL TIP** For each recent and recommended change, be sure to describe the change and explain the change's impact on fairness, access and/or equality in criminal cases. It is not enough to simply describe the change to the criminal justice system and assume the teacher or examiners will know which principles of justice it will improve!

### COSTS

### Recent reform

**In 2018/19 Victorian State Budget, the government increased its funding of Victoria Legal Aid by $37.3million** (over the following 4 years).

There is growing demand for VLA's services. For example:

- In 2016/17 the number of clients supported by VLA increased 4% from the prior year
- Duty lawyer services provided to accused persons appearing in court for summary offences has risen 12% from 2013/14 to 2016/17
- Grants of legal assistance (that is, VLA providing a lawyer or funds to pay for a lawyer) for people charged with summary offences has risen 32% from 2013/14 to 2016/17

This funding boost allows VLA to provide more assistance to more accused persons.

### Impact of this reform on principles of justice

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **Greater availability of legal aid.** With greater funds VLA is able to provide advice and information to more accused persons – if they have a better understanding of their legal rights and the court process, access to justice is improved. | **Funding is still limited.** Many individuals will still not receive support from VLA as this funding boost is insufficient, given the demand for VLA's services; many disadvantaged accused persons will still not gain information about their legal rights. |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Legal assistance allows accused persons to present in the best possible light.** If more accused persons who cannot afford a lawyer receive legal advice or representation from VLA as a result of this funding boost, they are better able to prepare their defence, test the prosecution's evidence and explain any mitigating factors when they are sentenced – these all promote a fair hearing for accused persons (who would otherwise be unrepresented). | **Strict eligibility criteria remain in place.** Despite the boost, VLA's funding is still insufficient and many individuals needing legal representation cannot receive it (as they cannot afford their own lawyer but are not so poor they meet VLA's strict eligibility criteria). (See recommendation below) |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **More people can access legal assistance.** Equality before the law requires all individuals to be able to access justice regardless of their wealth, whether they are homeless, etc. This reform allows VLA to serve more accused persons, moving the justice system closer to equality before the law. | **Still not available for everyone.** Many individuals in the community will still not be able to access the legal advice and representation they need due to their socioeconomic status, undermining the achievement of equality before the law; though this funding boost improves VLA's ability to support accused persons, it is not sufficient. |

## Recommended reform

**A huge additional boost in Legal Aid and CLC funding.** In August 2018 the Law Council of Australia's *The Justice Project* recommended a $390 million per year increase in legal aid funding across Australia.

Please note:

- This recommendation is for funding to rise across all Australian states/territories, not just Victoria.
- Such a funding boost would help legal aid providers assist many more individuals in a range of disputes (such as family law matters, civil disputes, disputes with Centrelink – not just criminal law matters).

According to the Law Council of Australia:

- 'Tens of thousands of people are left unrepresented because only a tiny proportion are now eligible for legal aid... And it isn't just Australia's most disadvantaged missing out. Many middle-class Australians can't afford to pay for legal representation and are forced to front the court alone.'

- 'Commonwealth, state and territory governments should invest significant additional resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, $390 million per annum.'

*Sources:* www.lawcouncil.asn.au/media/media-releases/senate-calls-for-legal-aid-funding-increase-post-budget, www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Recommendations%20and%20Group%20Priorities.pdf

In Victorian criminal matters, the impact of such a reform would allow:

- VLA to provide many more grants of legal assistance (providing a VLA lawyer or funds to pay for a lawyer) to more accused people standing trial and more offenders wishing to appeal their conviction/sentence.
- VLA to relax the very strict eligibility criteria that currently mean only extremely poor accused persons facing trial for serious charges receive assistance, providing support for a bigger range of accused persons.
- Support CLCs to provide more assistance and advice regarding minor legal issues.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **More Legal Aid available to accused persons.** With significantly increased funds VLA would be able to provide advice and information to more accused persons – if these individuals have a better understanding of their legal rights and the court process, access to justice is improved. | **Other barriers to justice.** There are other barriers to accessing justice in Victorian courts, such as language barriers that make court proceedings and police interviews difficult to understand – different reforms other than more funding for VLA are needed to improve these access issues. |
| **CLCs more widely available.** With greater funds CLCs would be able to help more members of the community be better informed about their legal rights, defences to minor disputes and the court system, increasing access. | |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Accused persons can present their case in the best possible light.** If many more accused persons who cannot afford a lawyer receive legal advice or representation from VLA as a result of this proposed funding boost, they are better able to prepare their defence, test the prosecution's evidence and explain any mitigating factors when they are sentenced – these all promote a fair hearing for accused persons (who would otherwise be unrepresented). | **Other barriers to justice.** Other barriers to a fair trial in the Victorian courts may remain, such as the risk of jurors being prejudiced against an accused; these risks are relatively small, and ensuring adequate legal representation for more accused persons (through this recommended reform) removes many of the barriers to a fair trial. |
| **Assists offenders who cannot afford a private lawyer.** The inability to afford a barrister to prepare and present an appeal is a barrier to many offenders appealing their sentence/conviction – this reform would allow more offenders in such a situation to appeal to the higher courts, ensuring mistakes are corrected – which is fair. | **Not likely to occur.** Commonwealth governments have generally decreased funding for legal aid and the 2019/20 Commonwealth government's budget documents indicate it has net debt of $361 billion – so such a substantial increase in funding seems unlikely. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Legal Aid is more widely available.** Equality before the law requires all individuals to be able to access justice regardless of their wealth, whether they are homeless, etc. This proposed reform allows VLA to serve more accused persons (the poor, those with mental health issues, facing homelessness), moving the justice system closer to equality for all Victorians before the law. | **Other aspects of the justice system also need to be reformed.** Other reforms are also needed to ensure greater equality before the law – for example, indigenous Australians are over-represented in Victorian prisons, so other strategies are needed to ensure equality before the law is achieved (not just more funding for VLA and CLCs). |

## TIME (DELAYS)

### Recent reform

**2020 emergency power to conduct judge-only trials in the County Court & Supreme Court (Trial Division)**

In response to the pandemic and the restrictions imposed by government, the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) amended the *Criminal Procedure Act 2009* (Vic) to permit judge-only trials for indictable offences, when:

1. The accused is charged with offences under Victorian law (not Commonwealth offences); and
2. The accused consents to trial by judge alone (rather than a jury trial); and
3. The accused has been given legal advice about waiving their right to a jury trial; and
4. The County Court/ Supreme Court decides it is in the interests of justice to conduct a trial by judge alone.

The temporary change in criminal procedure was intended to ensure the justice system continues to resolve serious criminal matters during periods of restrictions/lockdown related to coronavirus outbreaks. Delays to the resolution of all indictable offences in which an accused person pleads 'not guilty' throughout lockdown periods would:

1. Create a backlog of criminal trials that would continue to delay outcomes beyond the end of the pandemic;
2. Add to the stress/trauma of victims and other witnesses waiting to give evidence and/or awaiting a resolution of the serious criminal matter they have reported to police; and
3. Add to the stress/trauma of accused persons awaiting trial, particularly those on remand.

Applications for judge-alone trials could not be submitted after 26 April 2021 - this was a short-term reform. In late 2021 due to further lockdowns and the impact on the courts' trial work, organisations such as LIV supported the re-introduction of judge-alone trials.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths – how access is promoted | Weaknesses – limitations in achieving access |
|---|---|
| **Legal advice required.** Access to justice includes an accused person knowing and understanding their legal rights. This reform ensured an accused person understood his/her right to a jury trial - the court had to be satisfied the accused had received legal advice prior to granting a trial by judge alone. | **Less civic participation.** Participating in a jury is an act of civic duty - individuals participate in the administration of justice in their community and in doing so learn about the criminal justice system. Fewer jury trials meant less participation and associated understanding of the judicial system. |

**Principle of justice: *Fairness***

| Strengths – how fairness is promoted | Weaknesses – limitations in achieving fairness |
|---|---|
| **Preventing anxiety caused by delay.** Delays add to the trauma and stress felt by victims, witnesses and accused persons prior to a serious criminal matter being resolved at trial. The reform enabled some criminal matters to proceed during times of strict COVID-related restrictions. Judges in the County Court identified avoiding delay as a reason for granting trials by judge-alone.<br><br>**Evidence may otherwise be lost over time.** Criminal trials rely on oral evidence, however delays may cause memories to fade and become less reliable. The reform allowed trials for some indictable offences to proceed, limiting the risk of evidence becoming less certain due to extensive delays.<br><br>**Complex matters.** Very complex matters involving technical evidence (fraud, OHS violations prosecuted by WorkSafe, etc) may be better suited to judge-alone trials, in which the law and evidence are weighed by judges with legal experience and training.<br><br>**Fair trials protected.** The right to a jury trial promotes fairness in the criminal justice system; this reform requires an accused person to consent to trial by judge alone and the court must also believe trial by judge alone will not compromise the interests of justice. As such the role of juries in promoting fairness more broadly in criminal matters is protected. | **Small number of matters.** Few cases proceeded to judge-only trials in the County Court and Supreme Court. Since 2020/21 the court system as a whole has experienced a significant backlog in outstanding matters and this reform has had an impact on a relatively small number of criminal trials. If an accused person did not consent to a trial by judge alone (or the court rejected an application for such a trial) the victim, witnesses and accused all face significant stress and anxiety due to delay and uncertainty regarding the resolution of the case.<br><br>**Temporary.** This legislation does not create the option for judge-alone trials in Victoria beyond the pandemic, it was a short-term emergency measure which concluded 26 April 2021. The underlying causes of delay in criminal matters more generally (such as the under-resourcing of the courts relative to rising case numbers, the time taken to obtain forensic reports, the time taken to examine and cross-examine witnesses during a trial) are not addressed by this reform. |

**Principle of justice: *Equality***

| Strengths – how equality is promoted | Weaknesses – limitations in achieving equality |
|---|---|
| **All accused persons.** It is open to all accused persons awaiting trial in the County Court and Supreme Court to apply for trial by judge-alone regardless of age, ethnicity, financial standing, etc. | N/A |

## Recent reform

**Changes to appeals from the Magistrates' Court to the County Court (abolishing de novo appeals).**

Currently, when an offender found guilty in the Magistrates' Court appeals to the County Court, the County Court conducts the entire trial again - all victims, witnesses, etc give evidence again. The appeal is a new hearing in the County Court (a 'de novo' appeal).

In 2019, the *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) was passed to abolish de novo appeals of criminal cases to the County Court. The new procedure is intended to reduce the burden on witnesses and victims - such appeals will be determined based on transcripts of the evidence presented in the Magistrates' Court, the magistrate's reasons for the decision (and the reasons for the sentence imposed), and arguments presented to the court by lawyers for the prosecution and the offender.

In March 2021 the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) postponed the introduction of the new appeals procedure (a response to the COVID-19 pandemic and the consequent changed priorities in the justice system). The new appeals process commences 1/1/2023.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Appeals are still available.** The ability to appeal the sentence or the guilty verdict is maintained by this reform; access to a review of a magistrate's decision is not reduced. | **The appeals process is still complicated.** Presenting the legal grounds for an appeal is complex, requiring legal representation to ensure an appellant's case is presented in its best light; this reform will not make the legal representation needed for a well-presented appeal more accessible (or less important to have). |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Evidence is only presented once.** The reform prevents witnesses and victims needing to give evidence in court multiple times, minimising stress and anxiety for such parties. This is fair for those individuals.<br>**Fewer delays.** Without needing to hear all evidence anew, the County Court should be able to resolve appeals more quickly, minimising delays for offenders which is fair. | **Applies to very few matters.** With only 2% of criminal matters in the Magistrates' Court appealed to the County Court, this reform will reduce delays for a very small number of cases (on appeal) and will reduce only slightly the delays for other matters heard in the County Court.<br>**Impact of pandemic**. Due to COVID-19 the new appeals process won't be implemented until 2023; moreover, at such time the County Court may still be moving through the significant backlog of cases caused by the pandemic's impact on the justice system (with trials being delayed during periods of lockdown/restrictions) - undermining/offsetting any benefit to the Court flowing from this reform. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Appeals are still available to all offenders.** All offenders retain the right to appeal to the County Court against the guilty verdict and/or the sentence; the process changes but equal access to appeals does not. | **Very few matters will be affected.** Only a very small proportion of cases are appealed from the Magistrates' Court to the County Court (approximately 2%). This is also a small proportion of the County Court's workload. |

## Recommended reform

**Abolish peremptory challenges/prosecution stand-asides in the process of empanelling a jury.**

Currently an accused person can challenge (and the prosecution can stand-aside) a small number of prospective jurors during the empanelment process. The parties to a criminal case:

- Know very little about each potential juror
- Do not question jurors prior to their empanelment; and
- Do not need to give reasons for such a challenge/stand aside.

This proposal would prevent parties 'skewing' the representativeness of a jury (for example, an accused person might challenge the women who are randomly selected to be on their jury, making it more male-dominated and therefore not representative of the wider community) and reduce the time taken to empanel a jury.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Less complex for unrepresented accused persons.** The processes in the courtroom would become easier to understand for an accused person if they do not need to perform such a task at the start of a trial. | N/A |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Reduces delays.** Delays add to the suffering of victims/witnesses/accused persons, which is unfair.<br>**Parties cannot influence jury composition.** A jury is intended to involve a cross-section of the community acting as a decision-maker, this reform ensures parties cannot influence the jury to make it younger/older/less diverse than the general population, which is fair. | **Limited impact on delays.** The law already limits how many challenges can occur, so this reform only reduces delays slightly (and only in jury trials, which are a small proportion of the total amount of criminal matters).<br>**Accused is not involved in jury selection.** Participation in jury selection helps an accused person feel more confident in the trial process and the outcome, which is fair – this reform removes that involvement. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **No accused person will be disadvantaged by jury selection.** Some accused persons may understand their right to challenge better than others; this reform ensures all accused persons are tried by a genuinely randomly-selected jury, which promotes equality before the law. | **Only reduces delays in jury trials.** Jury trials only occur in a small number of cases, so this proposed reform does not reduce delays for the large number of accused persons awaiting a hearing in the Magistrates' Court – it has an unequal impact on delays. |

## CULTURAL DIFFERENCES

### Recent reform

**County Koori Court expansion**

In July 2018 a new County Koori Court was opened in Shepparton, following the County Koori Court being established in Morwell (2008), Melbourne (2013) and Mildura (2016).

The Koori Court provides a different sentencing approach for indigenous Victorians who plead guilty (for some, but not all offences).

According to the County Court's Chief Judge Peter Kidd:

> The Shepparton County Koori Court represents a significant step towards improving the justice outcomes for the Koori community in our State. A justice system which supports the participation of Elders and Respected Persons from local Aboriginal communities, results in better engagement with the system by Aboriginal Victorians and better helps offenders address the causes of their offending and helps prevent re-offending,
>
> *Source:* www.countycourt.vic.gov.au/news-media/news/new-koori-court-shepparton

**The Koori Court sentencing process** involves respected community elders discussing with the offender the reasons for their offending and the impact of their crime on the victim, the offender, the offender's family and the local indigenous community.

**This sentencing conversation causes the offender to re-think their behaviour** much more than during a more traditional sentencing hearing. The County Court judge then imposes a sanction, which is often imprisonment. The sanctions imposed are not more/less severe than those imposed in the County Court using a traditional sentencing hearing, however the sentencing process has proven effective at reducing reoffending.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **More culturally-relevant sentencing available.** Provides access to this culturally-relevant (and very effective) sentencing approach to more indigenous Victorians in regional areas. | **More expansion is needed.** Future expansion into other rural parts of Victoria will be necessary to ensure greater access to the Koori Court across the state. |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Supports Indigenous community.** Fairness requires each individual offender having their own personal circumstances accounted for; the Koori Court sentencing process promotes fairness for indigenous offenders by supporting their rehabilitation and reducing the risk of reoffending, in a way that is appropriate for indigenous people who consent to participating in the court. | **Only available where there has been a guilty plea.** The Koori Court process only applies to those who plead guilty, and not for all offences – therefore some indigenous Victorians (such as those who plead 'not guilty') do not have their sentencing conducted in a way that reflects their connections to their community. |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **Koori Court is more accessible for rural areas.** Access to justice and appropriate criminal law processes shouldn't be determined by where an offender lives (eg. Melbourne shouldn't be better served than rural areas); this reform provides more equal access to the Koori Court process in Victoria. | **Further reforms are needed to address overrepresentation.** Indigenous Victorians remain overrepresented in the criminal justice system, despite the effectiveness of the Koori Court process; other reforms are needed to reduce offending. |

## Recommended reform

**Ensure the new Sentencing Guidelines Council includes experts on how indigenous Victorians interact with the legal system.**

In 2017 the Victorian Government announced it would create (in 2018/19) the Sentencing Guidelines Council, to provide guidance to the courts about sentencing for crimes, so sentences reflect community expectations about crime, punishment and rehabilitation.

The Council will include legal experts and members of the wider community.

Given the over-representation of indigenous Australians in Victorian prisons (making up 3% of Victoria's population but 8% of the prison population), VLA recommend the Council should include:

- Those with expertise in working with indigenous Australians charged with criminal offences and/or
- Representatives from the Koori Court/County Koori Court and/or
- Indigenous elders/respected community leaders.

To ensure sentencing options suggested better support in indigenous offenders to be rehabilitated and deterred from reoffending, as clearly too many indigenous Victorians are in prison.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Better support for indigenous Victorians.** This reform will create great access for indigenous Victorians by providing greater support for the rehabilitation and deterrence of offenders, with the aim to reduce overrepresentation. | N/A |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Sentencing guidelines will address cultural differences.** Sentencing practices and options need to be designed in a way that reduces overrepresentation, and that will require expertise in how the legal system treats indigenous Victorians – will ensure sentencing guidelines developed by Council are better at reducing indigenous reoffending/ rehabilitating offenders.<br>**Needs of the Indigenous community reflected in sentencing.** Fairness requires individual offenders' circumstances reflected in sentencing; this reform should promote sentencing guidelines that reflect the needs of indigenous Victorians. | **Reforms that address areas outside of sentencing are necessary to reduce overrepresentation.** Other reforms are needed to reduce offending, other than just better sentencing options after offences committed. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Overcomes cultural barriers.** This reform will promote equality by attempting to remove cultural barriers that limit access to the justice system for indigenous Victorians, allowing them a more equal opportunity to be sentenced in a way which reflects their cultural values and attitudes. | N/A |

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.1.14: Criminal justice reform**

## Keen to learn more?

**Victoria Legal Aid – Law Reform Advocacy**
www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities
**Sentencing Council – A Sentencing Guidelines Council for Victoria – Final Report (2018)**
www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/A_Sentencing_Guidelines_Council_for_Victoria_Report.pdf

QUESTIONS

# 3.1.14 Criminal justice reform

LEVEL 1:
Define and understand

**1.** Which is the most likely impact of the recent expansion of the County Koori Court to sit in Shepparton?

**A.** It should not reduce reoffending, because the sanctions imposed in the Koori Court are often less severe than those imposed by the mainstream sentencing process in the County Court.

**B.** It should reduce reoffending, because the sanctions imposed in the Koori Court are often more severe than those imposed by the mainstream sentencing process in the County Court (providing greater specific deterrence).

**C.** It should reduce reoffending for indigenous offenders who plead guilty, because the sentencing process requires a greater reflection on the reasons for the crime and its impact on the victim and the community.

**D.** It is unlikely to have a meaningful impact on overall offending, because Shepparton is the only location the County Koori Court conducts sentencing hearings.

**2.** Consider a proposal to remove the accused person's peremptory challenges and the prosecution's stand-asides when a jury is empanelled. Which of the following would be likely outcomes of such a reform?

**I.** Juries in the County Court and Supreme Court would be more representative of the wider community.

**II.** The time taken to conduct jury trials would be reduced significantly.

**III.** Accused persons may feel less in control of the trial process and therefore the outcome.

**IV.** A relatively small proportion of all criminal matters in Victoria would be impacted.

**A.** I

**B.** I and IV

**C.** II, III and IV

**D.** I, III and IV

LEVEL 2:
Describe and explain

**3.** Benji has been charged with theft. He does not have enough money for a lawyer and is unsure what to do. Outline one recent or recommended reform that would assist Benji and explain how the reform enhances the ability of the criminal justice system to achieve greater access as a principle of justice. (3 MARKS)

**4.** In 2019 the Victorian Parliament passed legislation to change how appeals from the Magistrates' Court are conducted by the County Court. Describe this recent reform. (2 MARKS)

LEVEL 3:
Apply and compare

**5.** A popular recommendation for reform to the criminal justice system for many years has been to replace jury trials with a panel of judges.

Assume this change was put in place, discuss how this would impact on the ability of the criminal justice system to uphold the principle of fairness. (8 MARKS)

**6.** In 2018 the Law Council of Australia's Justice Project recommended an increase in Legal Aid funding (across Australia) of $390 million per year.

With respect to criminal matters, to what extent would an increase in Legal Aid funding better uphold the principle of equality? Justify your answer. (5 MARKS)

**7.** Before a criminal trial starts in the County Court or the Supreme Court, a group of potential jurors is brought into the courtroom. This group is called a 'jury panel'. These people will be given information about the case, including the names of the accused, the victim and key witnesses and the offences being prosecuted. Based on the information presented, individuals in the jury panel may ask the judge to be excused from participating – for example, a potential juror may feel they are unable to be impartial, because they know a key witness.

An officer of the court then randomly selects names of members of the jury panel, who stand up and walk to the jury box. Before this person is seated in the jury box, an accused person can call 'challenge' and this person will be excluded from the jury. This is called a peremptory challenge, and in a trial for one accused person he/she can challenge up to 3 potential jurors in this way. The prosecution can likewise call out 'stand aside' to exclude up to 3 potential jurors from sitting in the jury.

This process continues until 12 jurors are empanelled. Sections 38 & 39 of the Juries Act 2000 (Vic) empower the prosecution and the accused to influence the composition of the jury in this way. The accused and the prosecution do not give reasons for these peremptory challenges and stand asides.

The jury empanelment process was reviewed by the Victorian Law Reform Commission in 2013/14.

Discuss how a proposal to abolish peremptory challenges and stand asides would impact upon the achievement of fairness in the criminal justice system. (6 MARKS)

LEVEL 4:
Discuss and evaluate

**8.** Discuss the impact of one recent reform to the criminal justice system upon the achievement of fairness. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 5 (online), covering these lessons:

- **Lesson 3.1.13 Factors that affect principles of justice (AOS1)**
- **Lesson 3.1.14 Criminal justice reform**

Check with your teacher when it's time to complete this progress check.

AOS QUESTIONS

# The Victorian criminal justice system

LEVEL 5
Bringing it all together

**1.** During sentencing in a recent Supreme Court matter the judge made the following comments: 'There are no winners in this case. The crime in question is one of the most calculated I have ever seen with the influence of all aggravating factors overwhelming any factors that would support leniency in this sentence of imprisonment'.

**a)** What type of offence did the offender commit? Justify your answer. (2 MARKS)

**b)** Describe two ways the offender's legal representation would have contributed to the achievement of fairness as a principle of justice. (4 MARKS)

**c)** Looking at the comments of the judge, what conclusion can be drawn about the length of the sentence imposed? (2 MARKS)

**2.** In 2019 the Victorian Parliament passed legislation to reform the process for conducting appeals from the Magistrates' Court. The following is an extract from the second reading speech of Attorney–General Jill Hennessy MP:

> De novo appeals of summary matters have a significant impact on victims and witnesses, as they must give evidence twice: first at the original hearing and then again, on appeal. This may re-traumatise the person, or the case may not proceed if they are not willing, or able, to give their evidence again. Sometimes, appeals are used to harass the victim. These outcomes are inconsistent with the objectives of a modern criminal justice system.
>
> *Source:* Victorian Parliamentary Debates, Legislative Assembly, 17/10/2019, page 3687

**a)** How does this recent reform impact on victims of crime? Describe two rights of victims in criminal proceedings in Victoria. (4 MARKS)

**b)** Discuss how the existence of a court hierarchy contributes to the achievement of fairness in the Victorian criminal justice system. (4 MARKS)

**3.** In 2018 the Sentencing Advisory Council published the results of the Victorian Jury Sentencing Study – a research project in which Victorian jurors were asked:

- Their opinion on the sentence they would impose after finding an accused person guilty, but before the sanction was imposed by the court; and
- To respond to the sanction imposed by the judge.

Jurors tended to favour much less severe sanctions than those imposed by judges in many cases, challenging the often-repeated claim that courts are 'out of touch' or 'soft' on crime in Victoria.

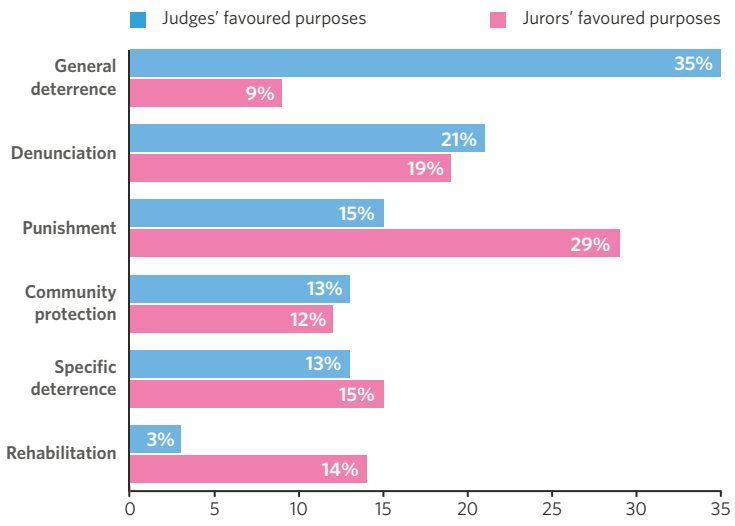
During this process, each juror was asked their opinion on which sentencing purpose was most important. This was then contrasted with judges' discussion of the most important sentencing purposes to be achieved in each case. The results appear below:

**Sentencing purposes**

Jurors were asked what they thought was the most important purpose for the sentence, and this was compared with the discussion of purposes in the judge's sentencing remarks.

While judges most often prioritised **general deterrence**, jurors favoured **punishment**.

Jurors and judges ranked the purposed of denunciation, community protection and specific deterrence **relatively similarly**.




*Attribution:* Analysis © Copyright State of Victoria, Sentencing Advisory Council, 2018. Data is drawn from two sources.

i. Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Measuring Juror's Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) Punishment and Society 180 and Kate Warner, Julia Davis, Caroline Spiranovic and Arie Freiberg, 'Why Sentence? Comparing the Views of Judges, Jurors and the Legislature on the Purposes of Sentencing in Victoria, Australia', Criminology & Criminal Justice, Advance access publication 2017

ii. Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study, Trends and Issues in Crime and Criminal Justice no. 407 (2011)

**a)** Distinguish between the sentencing purposes favoured by jurors and judges. (3 MARKS)

**b)** How would the sentencing purpose that is most important to judges impact upon the sentences they impose? (2 MARKS)

**c)** Aside from these sentencing purposes, describe two other factors that can affect the sentence imposed. (4 MARKS)

**4.** James, 22, has been charged with intentionally causing serious injury. The prosecution alleges that:

- James repeatedly punched and kicked his victim, Eric, at a nightclub.
- The assault resulted in minor but permanent brain damage for Eric and caused a lot of distress for witnesses and Eric's family.
- James was out on bail at the time that the offence was committed.

James claims that he was provoked by Eric and only acted in retaliation to Eric's abusive manner and language. James has been cooperative with police throughout the investigation process. James has had several prior convictions of a similar nature and, having served time in prison, he is concerned about being sentenced to a further term of imprisonment.

In a committal hearing that took place last week, the magistrate found that there was sufficient evidence to support a conviction for the offence. James has pleaded 'not guilty' and will stand trial.

**a)** Identify the court that would most likely hear this case. Justify your answer. (3 MARKS)

**b)** Explain one reason for a court hierarchy in James' case. (3 MARKS)

**c)** Distinguish between aggravating and mitigating factors in sentencing, and provide an example of each in James' case. (4 MARKS)

**d)** Discuss the ability of imprisonment to both rehabilitate James and protect the community if James is found guilty and sentenced to a term of imprisonment. (6 MARKS)

*Adapted* from 2018 VCAA exam Section B Question 1

**5.** Oliver has been charged with culpable driving causing death and has pleaded 'not guilty'. His committal proceedings in the Magistrates' Court took place last week. Oliver's trial is expected to last several months and will involve a number of witnesses, including family members of the deceased victim, who will need to give evidence. The witnesses have suffered significant pain and loss as a result of the offence and do not want to be exposed to the trauma of a trial in court. However, they want to see justice achieved for the victim and Oliver punished appropriately for his actions.

**a)** Describe the relationship between the presumption of innocence and the burden of proof in a criminal trial. (3 MARKS)

**b)** Other than to determine if there is evidence of sufficient weight to support a conviction at trial, explain one purpose of the committal proceedings in this instance. (3 MARKS)

**c)** Explain one reason why a plea negotiation would be appropriate in determining Oliver's case and explain one reason why it would not. (6 MARKS)

**Time for some exam practice!**

You've finished the Area of Study. Now would be a great time to visit Edrolo online and check out:

- **Our skills masterclass**
- **Unit 3 AOS 1: Topic Test**

Just get the 'OK' from your teacher first.

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# UNIT 3 AOS 2: THE VICTORIAN CIVIL JUSTICE SYSTEM

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

## KEY KNOWLEDGE

*Key concepts*

- the principles of justice: fairness, equality and access
- key concepts in the Victorian civil justice system, including:
  - the burden of proof
  - the standard of proof
  - representative proceedings
- Resolving a civil dispute
- factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues
- the purposes and appropriateness of Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) in resolving civil disputes
- the purposes of civil pre-trial procedures
- the reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals
- the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners
- judicial powers of case management, including the power to order mediation and give directions
- the methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness
- the purposes of remedies
- damages and injunctions, and their specific purposes

*Reforms*

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

## KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse factors to consider when initiating a civil claim
- explain the purposes of pre-trial procedures, using examples
- explain the reasons for the Victorian court hierarchy in determining civil cases
- discuss and justify the appropriateness of institutions and methods used to resolve a civil dispute
- discuss the responsibilities of key personnel in a civil trial
- discuss the ability of remedies to achieve their purposes
- discuss recent reforms and recommended reforms to the civil justice system
- evaluate the ability of the civil justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

# 3.2.1 Principles of justice (AOS 2)

**The Victorian justice system is designed to deliver justice to all parties to civil disputes. However, in the words of former Chief Justice Supreme Court of Victoria Marilyn Warren:**

**'What is justice? For different people at different times it means different things.'**

In this Area of Study students assess whether the Victorian legal system delivers justice as defined by fairness, equality and access.

This lesson covers VCAA Key Knowledge point: **'The principles of justice: fairness, equality and access'**, which we have broken down into the following concepts:



## Access 3.2.1.1

**'Access' is defined** in the VCAA Legal Studies Study Design as ensuring individuals and businesses or organisations in society having an 'understanding of legal rights and an ability to pursue their case'.

**In Victoria's civil justice system** this means (in practice):

- Those who suffer injury knowing that they have a legal right to seek a remedy, such as financial compensation (including knowing whether such a right exists).
- Knowing which dispute resolution body or process (the courts, VCAT or some non-judicial resolution such as a mediation) through which to seek redress for a civil wrong that has caused injury.
- Knowing how to commence and conduct a civil proceeding to remedy an injury that has occurred.
- Injured persons being able to afford the fees associated with pursuing a remedy through the courts, VCAT or a less-formal dispute resolution process such as mediation.
- If defending a claim for compensation, knowing how to present evidence that disproves the injured party's claims.
- If defending a claim for compensation, knowing what lawful defences may apply that reduce your liability (for example, knowing that after a car accident a defendant may be able to argue lawfully that the plaintiff contributed to their own injury).
- Unsuccessful parties knowing whether they have a right to appeal against the outcome, including the amount of damages (compensation) awarded; knowing to which court such an appeal may be made and being able to afford the fees attached to an appeal.
- Plaintiffs and defendants understanding the procedures in court, the legal arguments and evidence presented by legal practitioners and witnesses.

## Fairness 3.2.1.2

**'Fairness' is defined** in the VCAA Legal Studies Study Design as ensuring 'fair legal processes are in place, and all parties receive a fair hearing'.

**In Victoria's civil justice system** this means (in practice):

- All plaintiffs in civil disputes have an opportunity to present evidence and legal argument that persuades the court/VCAT of their entitlement to a remedy for some injury caused by the defendant (to present their case in its best light).
- All defendants in civil disputes have an opportunity to present evidence and legal argument that persuades the court/VCAT they are not liable for the plaintiff's injury and/or to test the accuracy of the evidence presented by the plaintiff (to present their defence in its best light).
- The outcomes of civil disputes are based upon the law and the facts; decisions are not based on bias (prejudice) for or against parties based on their race, gender, age, political beliefs, etc.
- Resolution with minimal delays, as delays can compound the suffering of those awaiting a remedy and cause anxiety to those defending a civil claim.
- Decision-makers must be independent of parties to disputes and witnesses.

**USEFUL TIP** In your responses, avoid using the word 'fair' to define 'fairness'. Instead try using words such as 'impartial', 'unbiased' or 'equitable' in the definition.

'Fairness' is defined as ensuring unbiased legal processes are in place, and all parties receive an impartial hearing.

## Equality 3.2.1.3

**'Equality' is defined** in the VCAA Legal Studies Study Design as ensuring 'all people are treated equally before the law, with an equal opportunity to present their case'.

**In Victoria's civil justice system** this means (in practice):

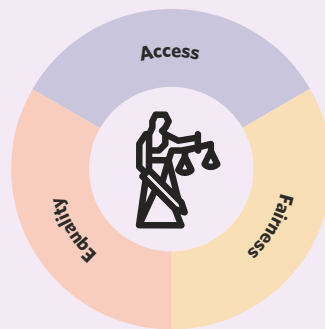
- Plaintiffs and defendants being treated in the same manner by all those within the courts, VCAT, mediation services, etc. regardless of their age, gender, religion, disability, etc.
- Similar cases should have similar outcomes; in particular, awards of damages for similar injuries should be of a similar amount.
- Procedures in court (for example, about the presentation of evidence) are applied equally to all who come before the courts.
- Juries (when used) across all cases being given similar instructions about the law and the decision they need to make.

**USEFUL TIP** In your responses, avoid using the word 'equal' to define 'equality'. Instead try using words such as 'the same', 'like' or 'equivalent' in the definition.

'Equality' is defined as ensuring all people are treated the same before the law, with a like opportunity to present their case.

**USEFUL TIP** When discussing the strengths and weaknesses of legal bodies and processes, you will often also need to consider how these bodies/processes contribute to the achievement of the principles of justice.

- When considering whether **access** is upheld through the legal system, it will be coloured purple.
- When considering whether **fairness** is upheld through the legal system, it will be coloured orange.
- When considering whether **equality** is upheld through the legal system, it will be coloured red.




**USEFUL TIP** Revisit this lesson throughout your study of the civil justice system in Unit 3, AOS2 – it provides a way to evaluate the strengths and weaknesses of Victoria's civil dispute resolution processes.

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.1: Principles of justice (AOS2)**

### Keen to learn more?

**Rule of Law Institute of Australia,** www.ruleoflaw.org.au/guide/index.html

**VGSO–Right to a fair hearing,** humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-24-fair-hearing

**Hon. Warren, M (2014) What is Justice? 2014 Newman Lecture,** classic.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf

QUESTIONS

# 3.2.1 Principles of justice (AOS2)

LEVEL 1:
Define and understand

**1.** Which of the following does not promote the achievement of fairness in civil disputes?

- **A.** All plaintiffs in civil disputes have an opportunity to present evidence and legal argument that persuades the court/VCAT of their entitlement to a remedy for some injury caused by the defendant (to present their case in its best light).
- **B.** All defendants in civil disputes have an opportunity to present evidence and legal arguments that persuade the court/VCAT they are not liable for the plaintiff's injury and/or to test the accuracy of the evidence presented by the plaintiff (to present their defence in its best light).
- **C.** Procedures in court (for example, about the presentation of evidence) are applied equally to all who come before the courts.
- **D.** Decision-makers are independent of parties to disputes and witnesses.

**2.** Unknown to the patrons of a library, the roof was faulty. During a heavy rainfall, part of the roof collapsed onto two individuals inside the library. One of the individuals was a wealthy professional basketball player who speaks limited English, whilst the other was an elderly man on the old-age pension. Both of them lost a foot due to the roof collapse. The individuals separately took the company that built the library roof to court. Which of the following options would uphold the principle of equality?

- **A.** The remedy awarded to the basketball player should be greater than the remedy awarded to the elderly gentleman due to the larger impact the injury had on the basketball player's career.
- **B.** The remedy awarded to the elderly gentleman should be greater than the remedy awarded to the basketball player as he is presumably more frail than the basketball player.
- **C.** Both should be able to take legal action to seek compensation regardless of their personal circumstances, such as their wealth and language background.
- **D.** The remedy awarded to both individuals should be the same as they both were able to acquire appropriate legal representation.

**3.** Which of the following options best upholds 'the principle of access'?

- **A.** During civil pre-trial procedures, both parties are given an opportunity to be aware of the case against them.
- **B.** The availability of a range of bodies allow for individuals who may not be able to afford going to the courts to have their dispute heard.
- **C.** Legal representation can often help parties have their case presented in its best light.
- **D.** Mediation and conciliation make use of an experienced third party.

LEVEL 2:
Describe and explain

**4.** Define 'fairness' as a principle of justice, and identify two ways the civil justice system achieves fairness. (3 MARKS)

**5.** Define 'equality' as a principle of justice, and identify two ways the civil justice system achieves equality. (3 MARKS)

**6.** Define 'access' as a principle of justice, and identify two ways the civil justice system achieves access. (3 MARKS)

LEVEL 3:
Apply and compare

**7.** Distinguish between the principle of access and the principle of equality. (4 MARKS)

# 3.2.2 Key concepts in the civil justice system

**Civil proceedings in the Victorian justice system cover a very broad range of disputes, from relatively minor to very serious. Civil disputes can include:**

- **Landlords seeking to recover unpaid rent from a tenant.**
- **A person defamed on Twitter seeking compensation for the damage done to their reputation.**
- **An injured worker seeking compensation for their physical injury from their employer (and perhaps WorkSafe Victoria).**
- **Injured motorists seeking compensation from the TAC for their financial costs and physical injury.**
- **A business seeking money for goods they have provided to a customer who didn't pay them.**
- **A group of individuals seeking compensation for loss caused by a bushfire.**
- **A group of bank customers seeking to recover money from a bank who charged them fees for a service they did not provide.**

**To discuss these civil proceedings properly, we must first know some key legal studies terminology.**

This lesson covers VCAA Key Knowledge point: **'Key concepts in the civil justice system, including: burden of proof, standard of proof and representative proceedings'**, which we have broken down into the following concepts:



## Burden of proof 3.2.2.1

**'Burden of proof' refers to** the party who is responsible for proving the facts of the case. In a civil matter the burden of proof rests with the plaintiff.

### Burden of proof

**Criminal Cases**

Burden of proof rests with **prosecution**

**Civil Cases**

Burden of proof rests with **plaintiff**

**Example 1: Plaintiff suing**

Morgan Price is a famous actor in Hollywood. Lot's Wife (a popular magazine) published a series of articles, stating he lied about his age and background to land high-paying Hollywood roles. Morgan Price wants to sue Lot's Wife, stating they are 'a bunch of idiots with no media qualifications whatsoever'. He filed a statement of claim in the County Court for $4 million, claiming lost wages and damage to his reputation. Morgan Price has the responsibility to prove he has been defamed and has suffered harm as a result of the articles published by Lot's Wife.

**Example 2: Defendant counter-suing**

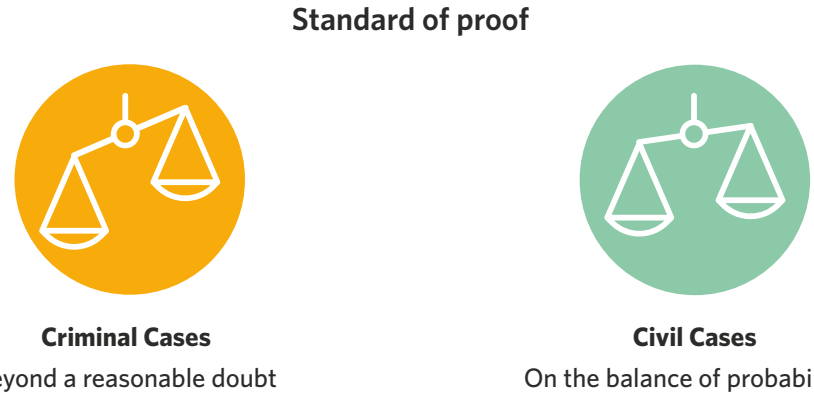
Lot's Wife is counter-suing Morgan Price for defamation, claiming Morgan Price has published untrue statements about the level of education their reporters have. Lot's Wife has the responsibility to prove they have been defamed and suffered harm from Morgan Price's comments.

**The burden of proof in civil claims can shift** from the plaintiff to the defendant. In the hypothetical case above, the plaintiff (Morgan Price) has to prove they have suffered the initial harm due to the defendant's (Lot's Wife) actions. Secondarily, the defendant (Lot's Wife) has to prove they have suffered harm due to the plaintiff's (Morgan Price) actions.

## Standard of proof 3.2.2.2

**The term 'standard of proof' means** the level of evidence required to win the case.

**In a civil matter the 'standard of proof' is** 'on the balance of probabilities'. This means the version of the facts presented by the plaintiff is more likely to be correct.




**USEFUL TIP** The civil standard of proof (on the balance of probabilities) is a lower standard of proof than the criminal standard of proof (beyond a reasonable doubt).

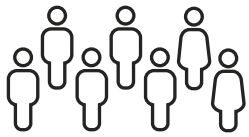
**CASE STUDY** If a jury is present in a civil dispute, a judge may explain the burden and standard of proof in this way:

> The plaintiff brings this claim. As the claimant, she must prove it. That is, the plaintiff carries what the law calls the burden of proof. The plaintiff must prove what may be called the ingredients of her claim.
>
> The burden that the plaintiff carries is this: she has to satisfy you that it is more probable than not that the allegations which she makes are true. This is a civil, not a criminal case. In a criminal case, the prosecution must prove the guilt of the accused person beyond reasonable doubt. That is a high burden of proof, higher than in a civil case such as this. Here, the plaintiff has to satisfy you, after considering all the evidence, simply that it is more probable than not that a particular allegation is correct.
>
> The scales of justice have a little pan on either side. Imagine the evidence for the plaintiff about an issue in one pan, and the evidence for the defendant in the other. If the scales tilt a little in the plaintiff's favour, she had satisfied the burden of proof concerning that matter. If they tilt the other way, or are level, then she has failed to do so.
>
> *Source:* Judicial College of Victoria Civil Juries Charge Book, www.judicialcollege.vic.edu.au

## Representative proceedings 3.2.2.3

**Representative proceedings are** when a group of people come together to lodge a single civil action. This is otherwise known as a class action. There are 3 criteria that must be satisfied for an action to be classified as a representative proceeding in the Supreme Court:

### Criteria for a class action

1. 
7 or more people claiming loss

2. 
Arising out of the same or related facts

3. 
Identical legal issue to be decided

**There are certain types of cases** for which representative proceedings are appropriate:

- Workplace accidents (eg. if there is a chemical spill and a group of workers suffer from poisoning).
- Medical malpractice (eg. if one doctor operates without a license on multiple patients).
- Financial malpractice (eg. assume a bank charges thousands of customers a small fee for financial advice that the bank did not actually provide).

**Representative proceedings** are particularly appropriate where a large number of claimants have suffered a relatively small loss. For example:

- Assume a bank charges 5,000 customers for financial services it does not provide.
- Each customer is 'out of pocket' $300.
- For this relatively small financial loss, an individual plaintiff may deem it too expensive and time consuming to take legal action against the bank individually.
- If all 5,000 customers take action together seeking to recover their loss, this is far more cost effective (and time-efficient for the court).

In a case such as this, representative proceedings are appropriate.

**A lead plaintiff** initiates proceedings on behalf of the entire group. The resolution of this plaintiff's claim is seen as determining the defendant's liability for other members of the group taking action. Continuing the bank example above – assume the court finds one customer is legally entitled to compensation, this would have the effect of deciding that all other members of the group facing the same situation are also entitled to compensation.

**CASE STUDY** In 2018 a $4.2 billion class action was launched on behalf of 250,000 owners and residents who lived in the Lacrosse building in Docklands, Victoria. The claim is against various construction companies seeking compensation for harm caused by combustible cladding (the fact that the buildings were made of flammable materials that fuelled fires).

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.2: Key concepts in the civil justice system**

### Keen to learn more?

**Judicial College of Victoria Civil Juries Charge Book,** www.judicialcollege.vic.edu.au

**Hughes D (2018) Class action seeks 42b compensation over flammable cladding,**

www.afr.com/real-estate/class-action-seeks-42b-compensation-over-flammable-cladding-20180410-h0yk9n

**Class Actions: Supreme Court of Victoria,** www.supremecourt.vic.gov.au/law-and-practice/class-actions

QUESTIONS

# 3.2.2 Key concepts in the civil justice system

LEVEL 1:
Define and understand

**1.** A large financial services company called PMA initiates legal action in the Magistrates' Court against Hannah, a customer who has not paid fees owed to PMA. It wants to recover $1,000 in fees for 2018. Hannah launches a counterclaim as she believes PMA has been charging her fees every year since 2012 but providing no service for these fees, and wants to be compensated.

Which party has the burden of proof?

**A.** The burden of proof lies with the party who is bringing the case. Therefore, the plaintiff must prove that Hannah is in the wrong.

**B.** As Hannah raised a counterclaim, PMA no longer needs to prove that Hannah owes them funds. Therefore, Hannah has the burden of proof.

**C.** On the balance of probabilities, PMA must prove that Hannah owes them unpaid fees and Hannah must prove her claim of fees for no service being provided. Therefore, both parties have the burden of proof.

**D.** The burden of proof lies with the party who is bringing the case. Therefore, PMA must prove that Hannah has not fulfilled her obligations to pay their fees.

**2.** Michael assaulted Barbara. In a criminal trial, Michael was found not guilty. Subsequently, Barbara sues Michael. Michael is then found liable to pay damages to Barbara. Is the aforementioned scenario possible?

**A.** Yes. 'On the balance of probabilities' is a stricter standard of proof than 'beyond a reasonable doubt'. Therefore, a person can be found not guilty in a criminal case and liable in a civil dispute.

**B.** Yes. A jury, which delivers a verdict in a criminal trial, has no experience in applying the law. Therefore, a jury is more likely to make an error in a criminal case than a judicial officer, who makes a determination, in a civil case. Hence, a person can be found not guilty in a criminal case and liable in a civil dispute.

**C.** Yes. Beyond a reasonable doubt is a stricter standard of proof than on the balance of probabilities. Therefore, a person can be found not guilty in a criminal case and liable in a civil dispute.

**D.** No. If a person is found not guilty in a criminal case, they are exempt from civil liability for that same accusation.

**3.** Ten consumers bought socks from Robert. After wearing the socks, nine consumers develop severe skin disorders. These consumers intend to sue Robert. Can a representative proceeding be commenced?

**A.** No. Although two or more people have claims against Robert and those claims relate to the same facts, different issues need to be decided.

**B.** Yes, because seven or more people have claims against Robert, those claims relate to the same facts, and the same issues need to be decided.

**C.** No. Although the claims relate to the same facts, and the same issues need to be decided, fewer than ten people have claims against Robert.

**D.** Yes, because ten or more people have claims against Robert and those claims relate to the same facts.

LEVEL 2:
Describe and explain

**4.** 'The burden of proof does not always rest with the plaintiff in civil cases'. Is this statement correct? Justify your answer. (3 MARKS)

**5.** Distinguish between the standard of proof in criminal cases and civil disputes. (3 MARKS)

**6.** Define 'representative proceedings' and describe three benefits of representative proceedings. (4 MARKS)

LEVEL 3:
Apply and compare

**7.** Justify the existence of the burden and standard of proof in civil proceedings. (4 MARKS)

**8.** Explain the extent to which representative proceedings are similar to standard civil proceedings. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** Discuss the extent to which the burden resting on the plaintiff upholds the principle of fairness in our civil justice system. (5 MARKS)

# 3.2.3 Factors to consider when initiating a civil claim

**An individual or business who has suffered emotional/physical injury or financial loss due to the actions of another person/business may be able to pursue civil action against that person/business to be compensated for their loss. Prior to doing so, a potential plaintiff should consider a number of factors to determine whether initiating civil proceedings is an appropriate step.**

This lesson covers VCAA Key Knowledge point: **'Factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues'**, which we have broken down into the following concepts:



**USEFUL TIP**

**There are five factors to consider when initiating a civil claim.**

Use the acronym **CLENS** to remember the five factors a party should consider prior to initiating civil proceedings.

**C**osts

**L**imitations of action

**E**nforcement issues

**N**egotiation options

**S**cope of liability

## Negotiation options 3.2.3.1

**Negotiation is** when the parties to a civil dispute (with or without their legal representation present) discuss ways to resolve the dispute by agreement, or have their legal representatives negotiate on their behalf.

Possible avenues for negotiation include:

- The parties themselves negotiate a resolution.
- The parties engage a mediator to guide the discussion and resolution.
- The parties engage a conciliator with (expert knowledge of the issues in dispute) to guide the discussion and suggest resolutions.

**USEFUL TIP**

Don't worry about knowing the difference between mediation and conciliation – this is covered later in Area of Study 2!

### Appropriateness of negotiation options

Negotiation options **are** appropriate when;

- Both parties consent to the option.
- Parties want to maintain a working relationship.
- Parties want to negotiate before they consider court action.
- Parties want reduced costs, time delays and stress.
- Parties would like some control over the outcome.

Negotiation options **are not** appropriate when:

- One party won't consent to the negotiation option.
- There is a history of violence or animosity (bad blood) between the parties, or an imbalance of bargaining power (parents vs. international company).
- Parties have already tried and failed to negotiate.
- Parties want their day in court to be vindicated (proved right).

**CASE STUDY** Assume Dion is offended by a comment about his religious beliefs made at work by a coworker, Bec. He wants an apology and a promise it will not happen again. Given they will have a continuing relationship and may want to resolve the dispute quickly with no cost or legal representation, negotiating a resolution may be appropriate (rather than initiating civil proceedings against Bec).

**CASE STUDY** Assume Sophie is a Yr 11 student injured at work (she works part-time at a gym). Sophie seeks compensation from her employer for her injury. Her employer refuses to discuss the issue with Sophie as they believe they have done nothing wrong, and as a large Australia-wide business they see Sophie as just another young employee they can do without. In this case, negotiating a resolution is less appropriate and initiating civil proceedings is likely the best way for Sophie to seek compensation for her injury.

## Costs 3.2.3.2

**Costs are** the amount of money that has to be paid to resolve a legal dispute. Broadly, the more complex a legal dispute and the longer it takes to resolve, the greater the cost to the parties.

**A person/business commencing civil action will face costs from multiple sources:**

- employing a legal representative. In general, the best legal representation is the most expensive. This legal representative is employed to
  - advise them on whether they are entitled to a legal remedy for their injury or loss
  - prepare legal documentation to commence proceedings (such as pleadings – see Lesson 3.2.5)
  - represent them in court, if the matter proceeds to trial
- filing documentation that commences proceedings (in court and/or VCAT).

Regarding costs, a party planning to start legal proceedings should also consider:

- If unsuccessful, the court may order them to pay some/all of the defendant's costs (adding to the financial burden of taking legal action).
- If successful, the court may order the defendant to pay their costs; however, in many cases such an award of costs will only cover part of the plaintiff's total legal expenses.

The fees to commence civil proceedings increase as a party moves up the court hierarchy.

**Civil proceedings court fees**

For example, court filing fees – the cost to lodge documents at the court:

- Magistrates' Court – $145–$680
- County Court – over $800
- Supreme Court – $1,000–$4,000

## Limitation of actions 3.2.3.3

**The limitation period is** the legal time-frame in which a plaintiff needs to bring their civil action.

**The reason for a limitation period is** that civil cases should be brought to court in a timely manner. This ensures disputes can be resolved in a timely manner, evidence is readily available and the defendant does not have cases pending for an unlimited amount of time.

**The defendant must raise limitation of actions as a defence** if they believe the plaintiff has not commenced legal proceedings within the relevant time limit.

Applications for extensions can be made if the plaintiff has suffered a disability, personal injury or defamation.

The time frame within which different types of civil actions must be commenced are stated in the *Limitations of Actions Act 1958* (Vic). The following table includes examples of the time within which certain cases must be initiated.

**Various limitation periods**


**CASE STUDY I** From the start of 2015 Victoria rented an apartment from Kate. In August and September 2015 Victoria forgot to pay the rent to Kate, and in October she moved out. In August 2018 Kate approached a solicitor seeking advice as to whether she could take legal action against Victoria for the unpaid rent in 2015; she is well inside the legislated time limit (6 years) to commence legal action for unpaid rent and should be able to commence proceedings.

**CASE STUDY II** Khodr is a football star who plays for Greater Western Queensland. A television show, Today Today, ran a story stating Khodr was dealing drugs to his teammates for some extra cash on the side. Khodr saw a lawyer 6 months after this story aired, claiming his reputation has been harmed. Khodr met with his lawyers several times, but no letters were sent to Today Today outlining the claim. Khodr's claim against Today Today has lapsed due to the 12 month time limit expiring. If Khodr initiates proceedings in the Supreme Court, Today Today can seek to have the claim struck out on the basis that the limitation period to commence a defamation action has expired.

## The scope of liability 3.2.3.4

**The 'scope of liability' refers to** who/how many people are liable for harm caused to the plaintiff and how responsible that party is/those parties are.

- Possible plaintiff: Any party who has suffered injury, with standing to sue the defendant/s.
- Possible defendants: Any party who infringes the plaintiff's rights in whole or in part.
  - For example: employer, insurer, anyone involved in wrongdoing.

A party considering civil action will need to determine which party (or parties) are responsible for their injury in order to determine against whom they should take legal action.

**The 'extent of liability' is** considering whether possible defendants are wholly (100%) or partly (anything less than 100%) responsible for the harm caused to the plaintiff. The extent of their responsibility will determine the amount of damages and other remedies to be awarded to the plaintiff.

**Additional points for a plaintiff to consider in deciding who is liable for injury caused:**

- **A worker is usually not legally responsible for injury caused during the performance of their job.** Instead, legal action would be taken against their employer – an employer is responsible for any injury or loss caused by their employees during the course of their work. For example:
  - A patient suffers serious side-effects after an operation because not enough care was taken during her treatment. Rather than taking legal action against every doctor and nurse who treated her as part of their job, the injured plaintiff takes action against the hospital (for whom the doctors/nurses were working when the injury occurred).
  - A construction company is paid to renovate a house, but one of its builders was careless when installing some windows. These need to be replaced at significant cost to the homeowner. Rather than seeking a remedy from the individual builder who was installing the windows as part of his job, the homeowner will likely take action against the construction company who the builder was working for.
- **Businesses in Victoria are insured against risks such as workplace injury by WorkSafe Victoria** (and insurance companies connected to WorkSafe). Most businesses pay an insurance premium to WorkSafe, which will usually meet some/all financial compensation coming from a workplace accident. For example:
  - A factory worker who is injured at work may take legal action against their employer if unsatisfied with the compensation they receive for their pain and medical expenses. Such a case will likely involve compensation being provided by WorkSafe and associated insurance companies, so legal action will include WorkSafe and the insurance company as defendants.
- **The Transport Accident Commission (TAC) provides compulsory insurance for all road users** in Victoria (paid for as part of car owners' registration fees). For example:
  - A pedestrian is hit by a motorist who was texting while driving. The pedestrian may seek damages against the negligent driver, but may also take legal action to seek compensation against the TAC, if the TAC rejects an initial application for compensation.
- **A person who has their reputation damaged by a newspaper article may be able to sue a range of people who published the defamatory material.** For example:
  - The journalist who wrote the article may be liable to compensate the plaintiff (although as they wrote the defamatory material in the course of their job, they may not be responsible – see above); and
  - The newspaper who published the article and employ the journalist may be liable (and should be named as the defendant); and
  - Any person who shares the defamatory article on Facebook and Twitter has also published the content and may be named as a defendant (in addition to the newspaper), as they have contributed to the damage to the plaintiff's reputation.

**CASE STUDY**

Assume Maysa was employed by Balloons & Baskets, a hot air balloon company in the Yarra Valley. In order to prepare the hot air balloons for take off, the liquid propane gas cylinders had to be tested. While Maysa was testing one of the cylinders, it exploded.

Maysa suffered burns to 70% of her body, while Caleb (a customer) suffered burns to 30% of his body. While investigating the incident, it was discovered Balloons & Baskets did not provide Maysa with the appropriate level of training to safely test the cylinders. The report also found that the manager had instructed Maysa not to test the cylinders without his supervision.

The plaintiffs could be the customer and Maysa, as they both suffered harm as a result of the actions of Balloons & Baskets.

The defendants could be Maysa, the manager and Balloons & Baskets:

1. The manager failed to supervise Maysa, his employee, while performing work-related tasks – so the manager may be seen as responsible for the injury.
2. Maysa had been instructed not to test the cylinders in her manager's absence – so we could argue she is responsible.
3. Balloons & Baskets failed to adequately train Maysa to test the cylinders.

Rather than the customer taking action against Maysa and the manager, the responsibility for the incident most likely rests with Balloons & Baskets. In addition, an employee such as Maysa and her manager usually cannot be sued independently for incidents that occur in the course of their employment; rather, an employer is legally responsible for any consequences of the actions of their employees.

In this instance, liability most likely rests with Balloons & Baskets.

## Enforcement issues 3.2.3.5

**The ability to enforce the outcome of legal proceedings refers to** the capacity of a defendant to fulfill their legal obligation to compensate the plaintiff (if a court should hold the defendant responsible for the plaintiff's suffering).

Assume a plaintiff is seeking damages to compensate their loss. Prior to commencing proceedings they should consider the defendant's capacity to pay any damages that may be awarded.

- If the defendant is bankrupt or an unemployed individual, they may be unable to pay damages (if the plaintiff is successful).
- If the defendant is a company, they may not have any assets with which to pay damages to a successful plaintiff.
- If the defendant is in prison or overseas, it will be difficult to enforce the payment.

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.3: Factors to consider when initiating a civil claim**

### Keen to learn more?

***Limitation of Actions Act 1958* (Vic) sections 5 and 19,**
www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/loaa1958226/

**Fees – Supreme Court of Victoria,** www.supremecourt.vic.gov.au/forms-fees-and-services/fees

**The Law Handbook – Legal Representation,** www.lawhandbook.org.au/2018_02_01_00_legal_representation

QUESTIONS

# 3.2.3 Factors to consider when initiating a civil claim

LEVEL 1:
Define and understand

**1.** Harry (a law student) and Meghan (a DJ), who have been neighbours for one week, are involved in a dispute. Meghan often hosts loud parties and Harry believes Meghan should reduce the volume. Harry is willing to take any steps to resolve the dispute. Meghan is eager to resolve the dispute outside of a court or tribunal. Is negotiation a suitable option?

**A.** No. The parties may distrust each other because they have only known one another for a week. Moreover, Harry's belief is unreasonable as Meghan is likely to suffer financial loss by agreeing.

**B.** No. The parties are likely to distrust each other because they have only known one another for a week. Moreover, there is a gross power imbalance between the parties.

**C.** Yes. Harry's belief is reasonable and both parties want to resolve the dispute.

**D.** Maybe. Harry's belief is reasonable and both parties want to resolve the dispute. However, there is a gross power imbalance between the parties.

**2.** After court-ordered mediation failed, Kerry's claim against Evelyn was filed at the Magistrates' Court. At court, Kerry, who was self-represented, requested a jury. Kerry's use of legal advice and expert witnesses ultimately led to a finding that Evelyn is liable. Kerry was subsequently awarded costs. What costs did Kerry incur in the legal case?

**A.** mediation fee, court filing fee and expert witness fee

**B.** mediation fee, court filing fee, court hearing fee and expert witness fees

**C.** mediation fee, court filing fee, court hearing fee, jury costs and expert witness fees

**D.** mediation fee, court filing fee, court hearing fee, legal fees, jury costs and expert witness fees

**3.** The period of time that may elapse before someone is entitled to commence a civil action depends heavily on:

**A.** whether the claim involves the commission of a summary or indictable offence.

**B.** who the plaintiff is.

**C.** who the defendant is.

**D.** the nature of the claim.

**4.** Fill in the blank spaces:

A party considering _____ action will need to determine which party (or parties) are _____ for their injury in order to determine against whom they should take legal action. The 'scope of _____' refers to who/how many people are liable for harm caused to the _____ and how responsible that party is/those parties are.

**A.** civil, responsible, action, defendant

**B.** criminal, responsible, liability, plaintiff

**C.** civil, responsible, liability, plaintiff

**D.** civil, guilty, liability, defendant

**5.** In early 2018, Telstra initiated a civil claim against Ben in the Victorian Supreme Court for a defamatory claim he made in late 2017. Ben is currently unemployed and self-represented. In this case, what enforcement factors will Telstra need to consider?

**A.** Ben may be unable to pay damages (no money to afford a lawyer to defend himself).

**B.** Limitation of actions (1 year limitation imposed on defamation claims) and Ben may be unable to pay damages (no money to afford a lawyer to defend himself).

**C.** Costs (fees for legal representation, court fees, and costs orders), limitation of actions (1 year limitation imposed on defamation claims), and Ben may be unable to pay damages (no money to afford a lawyer to defend himself).

**D.** Power imbalance between the parties (so parties are not on equal footing to negotiate), costs (fees for legal representation, court fees, and costs orders), limitation of actions (1 year limitation imposed on defamation claims), and Ben may be unable to pay damages (no money to afford a lawyer to defend himself).

LEVEL 2:
Describe and explain

**6.** Explain why it may be beneficial for a dispute to be resolved through negotiation. (3 MARKS)

**7.** What costs might affect a party deciding whether to initiate a civil claim? How might this affect the decision to start proceedings? (3 MARKS)

**8.** What is the 'limitation of actions?' Describe two reasons why limitation of actions exists. (3 MARKS)

**9.** Last year a manufacturing defect at a factory (Toy Barn) in Melbourne resulted in unsafe toys being sold. Three children were injured by the toys and their parents are considering legal action. The initial investigation yielded showed the site manager John was operating the machine at the time and not paying much attention to what he was doing.

Who should the parents take action against? Justify your conclusions. (3 MARKS)

**10.** Describe one enforcement issue that should be considered before initiating a civil claim. (3 MARKS)

LEVEL 3:
Apply and compare

**11.** Elliot's mobile phone service provider has told him that damage that occurred to his phone is not covered by his insurance policy. He is thinking about suing his friend James who caused the damage, or perhaps trying to sue the telecommunications company since he thought he was paying for the best insurance available.

Advise Elliot as to factors he should consider when initiating a civil claim. (4 MARKS)

**12.** Explain why a plaintiff should consider the scope of liability and limitation of actions before initiating a civil claim. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**13.** 'There are such an overwhelming number of factors to consider when deciding whether or not to initiate a civil claim that many individuals choose not to try to enforce their civil rights.'

Describe two factors a plaintiff should consider and discuss the impact of limitations of actions on the achievement of fairness. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 1 (online), covering these lessons:

- **Lesson 3.2.1 Principles of justice**
- **Lesson 3.2.2 Key concepts in the civil justice system**
- **Lesson 3.2.3 Factors to consider when initiating a civil claim**

Check with your teacher when it's time to complete this progress check.

# 3.2.4 CAV and VCAT

**Many civil disputes in the Victorian community are relatively minor, and can be resolved without the need to take action through the courts.**

**Providing fast, low-cost and informal mechanisms to resolve smaller disputes is critical to ensuring all Victorians can access the justice system when minor legal disputes arise. Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) provide an avenue for the resolution of relatively minor civil disputes.**

This lesson covers VCAA Key Knowledge point: **'CAV and VCAT' including: Purpose of CAV, appropriateness of CAV, purpose of VCAT and appropriateness of VCAT,** which we have broken down into the following concepts:



## Purposes of CAV 3.2.4.1

**CAV (Consumer Affairs Victoria) is** a civil complaint body.

**CAV hears disputes between** landlords and tenants, and consumers and businesses.

**CAV will not hear disputes between** businesses, or from landlords against tenants.

**CAV provides a forum for resolving disputes using** conciliation. Parties must first attempt to settle the dispute themselves. If this is unsuccessful, CAV will provide the service of a conciliator. See Lesson 3.2.9 for further information about conciliation.

**The main purposes of CAV (regarding the resolution of civil dispute) are to:**

- Provide information about consumer laws to the public.
- Conciliate disputes arising under consumer laws.

CAV also will advise the government about consumer affairs legislation and conduct legal action against businesses who breach consumer protection laws in Victoria.

| CAV Case-load data | 2017–2018 | 2018–2019 | 2019–2020 |
|---|---|---|---|
| **Disputes finalised** | 6,827 | 6,752 | 12,826 |
| **Information and advice provided through telephone services** | 304,048 | 295,955 | 234,632 |

Source: CAV Annual Reports, www.consumer.vic.gov.au/annual-report/previous-annual-reports

### CAV's dispute resolution jurisdiction

CAV can assist to resolve the following types of disputes through conciliation:

- A complaint by a consumer against a business (CAV do not resolve complaints by a business against a customer), who believes the *Australian Consumer Law & Fair Trading Act* has been breached. For example:
  - A consumer who believes they were misled about the quality of the product they purchased, or paid for a product that was faulty (and is seeking a refund).
  - A family paid a plumber to conduct repairs in their bathroom, but the quality of the work was very poor.
  - A motorist pays for their car to be repaired, but believes the repairs have not been carried out correctly.
  - A consumer purchases clothing after seeing a sample, but the clothing delivered doesn't match the sample and the consumer wants a refund.

- A complaint by a tenant against a landlord (CAV does not resolve complaints by a landlord against a tenant), who believes the *Residential Tenancies Act* has been breached. For example:
  - A tenant requests a repair to the property, but the repair work is not done.
  - A landlord gives notice to vacate a property but the tenant feels the time frame in which to vacate is too short.

## Appropriateness of CAV 3.2.4.2

**CAV is appropriate when:**

- The dispute is within jurisdiction (see above).
- Parties have tried to negotiate a settlement themselves.
- Both parties are willing to attend and participate in conciliation (a consumer/renter may seek out assistance from CAV with a complaint like those above, but CAV cannot compel a business or landlord to attend/participate in conciliation).

**CAV is not appropriate when:**

- Court system has already ruled on the matter.
- There is a better way to resolve the dispute.
  - For example: Water billing issues should be heard by the Energy and Water Ombudsman Victoria.
- Parties have not tried to negotiate a resolution.
- One party is unwilling to participate in conciliation (CAV cannot compel parties to attend and participate in conciliation).

**CASE STUDY** **DISPUTE THAT IS APPROPRIATE FOR CAV**

Evan is a tenant renting an apartment in Brunswick. The landlord, Simone, has given him 60 days notice to vacate (leave) the property for no reason. Simone is supposed to give Evan 120 days notice. Evan and Simone tried to negotiate a suitable time period, but it was unsuccessful.

This case is appropriate for CAV, as the parties have tried and failed to negotiate a time frame themselves.

**CASE STUDY** **DISPUTE THAT IS NOT APPROPRIATE FOR CAV**

Katey purchased a home in Wangaratta at auction for $1.2 million from Taleb. Katey had to pay $120,000 at auction, with the balance of $1.08 million due in 60 days. Katey did not pay the balance on the due date. Taleb took Katey to court, and the County Court ruled that Katey had to pay the overdue balance. Katey is not happy with this outcome, and wants the matter heard by CAV.

This case is not appropriate for CAV, as the court system has already ruled on the matter.

**USEFUL TIP**

It is important for students to be able to apply this knowledge about when CAV is/is not appropriate to a specific set of facts. Consider Q2 in the 2018 VCAA exam:

> Kai is in a dispute with his landlord. The landlord refuses to repair the pipes in the bathroom and has declined Kai's requests to meet to resolve the matter. Kai has been advised that Consumer Affairs Victoria (CAV) is the most appropriate body to resolve this dispute. Explain one reason why CAV may not be the most appropriate body to resolve this dispute. (3 MARKS)

The VCAA examiner's report highlighted the need to link back to the facts in the question:

> To receive full marks, a full explanation was required, along with correct use of the stimulus material. Many students did not achieve full marks because they provided general responses and did not properly use the stimulus material, or they explained why another body (such as the Victorian Civil and Administrative Tribunal) was appropriate but not why Consumer Affairs Victoria (CAV) was not appropriate.

The most popular response given was that CAV cannot compel a party to attend conciliation, and **given the landlord's refusal so far to resolve the dispute, it was unlikely that CAV could help Kai resolve the dispute**.

The section in **bold** (added by the author) demonstrates how you can tie your response back to the stimulus material.

### Strengths and weaknesses of CAV

**Principle of justice: *Access***

| Strengths of the CAV – how access is promoted | Weaknesses of CAV – limitations in achieving access |
|---|---|
| **Free.** CAV is an accessible method of dispute resolution because it provides free services to all members of the Victorian public.<br>**Informal.** Informal process of conciliation used; supports any continuing relationship between the parties (eg. between a landlord and tenant). | **Limited jurisdiction.** Many disputes cannot be resolved using conciliation at CAV. |

**Principle of justice: *Fairness***

| Strengths of CAV – how fairness is promoted | Weaknesses of CAV – limitations in achieving fairness |
|---|---|
| **Mutually acceptable solution.** Parties retain control over any decision, with resolution based on finding a solution rather than determining who is right/wrong.<br>**Timely.** CAV provides a quicker method of dispute resolution which allows the parties to reach a just outcome without experiencing the stress and delay associated with a trial (or hearing at a tribunal). This is fair because parties do not have to wait long periods of time for a resolution. | **Cannot force parties to attend and participate in conciliation.** If a landlord/business refuses to attend conciliation at CAV (eg. they believe they have acted lawfully and have no case to answer), the tenant or consumer will need to pursue legal action in VCAT (or a court). This may be unfair if one party is willing to come to a resolution through conciliation but the other is not.<br>**Cannot enforce decisions.** There is a risk that an agreement reached by conciliation at CAV will not be adhered to as there is no legal mechanism to ensure the agreement is followed. |

**Principle of justice: *Equality***

| Strengths of the CAV – how equality is promoted | Weaknesses of CAV – limitations in achieving equality |
|---|---|
| **Conciliator.** CAV uses a conciliator to facilitate discussion and make suggestions to the parties in a civil dispute. This promotes equality as it ensures that both parties have the same opportunity to present their point of view and come to a mutually acceptable resolution. | **Not available for all parties.** CAV has a limited jurisdiction and is only available as a means of dispute resolution for a small proportion of civil matters. Additionally, if one party to a civil dispute elects not to participate in conciliation with CAV, the other party will not be able to gain a resolution through this body of dispute resolution. Thus, the ability to access CAV's services is not given equally to all civil parties. |

## Purposes of VCAT 3.2.4.3

**VCAT is** the Victorian Civil and Administrative Tribunal with the power to hear limited types of civil and administrative disputes. It is made up of the President (a Supreme Court justice), Vice-Presidents (County Court judges) and members.

**The purpose of VCAT is** to provide Victorians with a low cost, accessible, efficient and independent tribunal that delivers high quality dispute resolution.

### VCAT's purpose

| | |
|---|---|
| Low cost | • Many disputes don't require legal representation (parties present their own case).<br>• Fees in many VCAT lists (civil claims, residential tenancies) are very low – a claim relating to goods and services under $15,000 is approximately $217; filing a claim under $15,000 relating to a residential tenancy is $65.30 (as of August 2019).<br>• Some VCAT lists have no application fee.<br>• Fees waived in some cases for those in financial hardship (or fee payment postponed).<br>• Some lists do require legal representation, but use mediation/compulsory conference to settle disputes without hearing, therefore minimising cost.<br>• VCAT's fees are in a three-tier model, with different application fees for different claimants starting proceedings with VCAT:<br>– Standard application fees.<br>– Corporate application fees (higher than the standard fee); apply to incorporated businesses initiating a VCAT claim.<br>– Fees for Health Care Card holders (often no fee in many cases); apply to those in financial difficulty. |
| Efficient | • Hearings are very short.<br>• Many cases resolved at compulsory conference or mediation, are resolved very quickly.<br>• There are approximately 50,000 residential tenancy disputes each year; such cases are resolved on average within two weeks.<br>• Few pre-hearing steps (compared to a court), so there is limited time between initiating a claim and resolution at VCAT.<br>• Disputes about goods and services (Civil Claims List) resolved on average within 11 weeks. |
| Accessible | • Low costs (above) designed to ensure everyone can access civil dispute resolution.<br>• There are VCAT offices in Melbourne, the suburbs and rural Victoria.<br>• Informal procedures (especially by comparison to courts); formality of courts may discourage individuals from pursuing a claim, VCAT's informal/supportive environment addresses this.<br>• VCAT assists parties to prepare a case, with instructions on how to lodge their application, prepare their evidence and what to bring to a hearing. |

### VCAT's jurisdiction

Disputes heard at VCAT include (but are not limited to):

- Claims by residential landlords and tenants where the *Residential Tenancies Act 1997* has been breached, such as:
  - landlord claiming unpaid rent.
  - tenant challenging the time frame in which they have been directed to vacate a rented property.
- Claims of unlawful discrimination and breaches of the *Equal Opportunity Act 2010*, such as:
  - a worker claiming they were dismissed due to their religious beliefs.
  - a woman claiming she was refused service in a cafe because she was breastfeeding.

- Claims by businesses and consumers that allege the *Australian Consumer Law & Fair Trading Act 2012* has been breached, such as:
  - A consumer seeking a remedy from a business who provided faulty goods, and did not take enough care to ensure they were fit for purpose.
  - A consumer claiming a business deliberately misled them about the quality of a product.
  - A buyer claiming a car salesman made false statements about a car's maintenance history.
  - A business claiming another business they sold goods to have not paid the outstanding debt for those items.

| VCAT | VCAT RESOLVES DISPUTES USING THESE METHODS | |
|---|---|---|
|  | **Mediation (Lesson 3.2.9)** | Using a mediator appointed by VCAT or a VCAT member, parties attempt to resolve dispute by agreement |
|  | **Compulsory conferences (Lesson 3.2.9)** | During private conciliation with a VCAT member, parties attempt to resolve dispute by agreement |
|  | **A hearing** | Parties present evidence and legal arguments regarding the plaintiff's claim for a remedy. VCAT reaches binding decision (heard by VCAT member, Vice-President or President) |

VCAT hearings resolve disputes through binding decisions handed down by the members. Such an outcome may also include an order for the defendant to pay a sum of money to the plaintiff (for example, a refund if the dispute is about goods and services) or perform some act (for example, repairing a rental property if the dispute is between a landlord and tenant). Decisions may be appealed on questions of law. Each year VCAT concludes about 85,000 civil disputes.

| VCAT Case-load data | Cases initiated (2019–2020) |
|---|---|
| Planning and Environment list | 2,259 |
| Human Rights list | 510 |
| Residential Tenancies list | 49,022 |

## Appropriateness of VCAT 3.2.4.4

**VCAT is appropriate where:**

- The cases fall within their jurisdiction (see above).
- Parties are unable to resolve dispute another way.
- Parties are happy to appeal only on questions of law.
- Parties prefer an informal dispute resolution process.

**VCAT is not appropriate where:**

- The cases are outside their jurisdiction (such as representative proceedings, defamation claims, personal injury claims due to a car or workplace accident).
- Parties are willing to negotiate.
- Parties want greater ability to appeal.
- Parties prefer legal representation to conduct their case.
- The claim is for a very large amount of damages, court may be more appropriate.
- The case involves a complex legal issue, therefore it is better resolved by legal argument by barristers and decided by a judge, given their expertise.

**CASE STUDY** **NOT AN APPROPRIATE MATTER FOR VCAT**

Shannon wanted to sue Abdul, owner of Time for a Watch?, for a faulty watch sold to her. When she contacted him about her faulty watch, he stated that she'd have to sue him to get her money back. Shannon saw a lawyer and sent a letter to Abdul. He is now willing to try and negotiate a settlement.

This case would not be appropriate for VCAT because the parties are willing to negotiate. However, this case would be appropriate for CAV, as the dispute is between a business and consumer, and they are willing to negotiate.

**CASE STUDY** **AN APPROPRIATE MATTER FOR VCAT**

SuperHeroes R' Us is a business that rents superhero-themed costumes to the public. They lease a shop in Moorabbin from Hui Yin. Hui Yin wanted to evict Superheroes R' Us without notice. The parties tried unsuccessfully to negotiate a solution.

This case would be appropriate for VCAT because the parties cannot resolve their dispute another way, and retail leases fall within VCAT's jurisdiction. This is not appropriate for CAV as the dispute is between two businesses.

### Strengths and weaknesses of VCAT

**Principle of justice: *Access***

| Strengths of the VCAT – how access is promoted | Weaknesses of VCAT – limitations in achieving access |
|---|---|
| **Low cost.** Dispute resolution through VCAT is relatively cheap due to the methods of dispute resolution used, and therefore promotes access to justice.<br><br>**Less formal.** VCAT is less formal which also promotes access to justice.<br><br>**Supportive.** VCAT provides information and support to parties to civil disputes when submitting an application and preparing for their hearing. | **Limited jurisdiction.** VCAT can only resolve civil matters within its jurisdiction; some civil matters must proceed to the courts (such as representative proceedings).<br><br>**Increasing costs.** Costs in some VCAT lists are increasing. This may make VCAT inaccessible for some people in society. |

**Principle of justice: *Fairness***

| Strengths of VCAT – how fairness is promoted | Weaknesses of VCAT – limitations in achieving fairness |
|---|---|
| **Binding.** Outcomes at VCAT are legally binding. This promotes fairness for the parties as it ensures that no party will neglect to uphold an agreement settled upon at VCAT.<br><br>**Supportive methods.** VCAT encourages parties to resolve matters through methods such as mediation, which is cheaper and a more supportive approach; this control over the outcome allows the parties to feel the outcome is fair. | **No juries.** VCAT cannot use juries and therefore do not provide for a trial by one's peers. This can seem unfair for parties who wish to have their case decided by a jury, representing a cross-section of society.<br><br>**No legal representation.** Legal representation allows a party's case to be presented in its best light – this provides for the best chance of winning as an expert presents the law and facts on a party's behalf; VCAT often requires parties to self-represent, which can create difficulties for those from a non-English speaking background, the poorly educated, etc. This may be unfair for such parties. |

*cont'd*

| Strengths of VCAT – how fairness is promoted | Weaknesses of VCAT – limitations in achieving fairness |
|---|---|
| **Timely.** Disputes in VCAT are resolved more quickly due to having few pre-hearing steps, there is no serious backlog of cases (as in the courts) and the lack of strict rules of procedure results in quicker hearings (the trial process in court is very slow). The average time taken to resolve disputes in VCAT's busiest list (Residential Tenancies List) is 2–4 weeks. This promotes fairness because parties are able to have their case resolved quickly and with less stress. | **Appeals.** There is a limited right to appeal VCAT decisions, which may be seen as unfair to parties dissatisfied with the outcome of their case. |

**Principle of justice: *Equality***

| Strengths of the VCAT – how equality is promoted | Weaknesses of VCAT – limitations in achieving equality |
|---|---|
| **Flexible.** The role of a VCAT member is flexible enough to ensure that unrepresented parties have an equal opportunity to understand processes and present their case. | **Not available for all disputes.** VCAT has a limited jurisdiction and cannot resolve large and complex disputes, such as class actions. Thus, it is not equally available to all parties of a civil dispute. |

**USEFUL TIP**

When asked to decide whether VCAT is or is not an appropriate place to resolve a particular dispute, don't use a memorised response – apply your knowledge of VCAT to the specifics of the case in front of you. For example, 2017 Exam Q7c:

> Sam purchased high-heeled shoes from Snazzy Heels. She was walking home from work and the heel on the left shoe broke. Sam fell backwards and suffered significant spinal injuries. She wants to sue Snazzy Heels and the local designer for over $1 million for past and future medical expenses, pain and suffering, humiliation, and past and future loss of income. Sam has been advised that either a court or the Victorian Civil and Administrative Tribunal (VCAT) could resolve this dispute. Do you think that Sam's dispute should be resolved by a court or by VCAT? Give reasons for your answer. (6 MARKS)

The VCAA examiners' report said:

> Many students, once they had stated that a court/VCAT should hear the dispute, then went on to explain the weaknesses of the chosen body – thus effectively diluting their arguments as to why that body was the better choice. This type of response appeared to be a prepared response, which did not directly address the question, and therefore was not awarded full marks. Students who were able to support their response with adequate reasons scored more highly. Many students were able to draw out the various elements of Sam's case to justify their response. For example, many stated that a court should hear this dispute because of its size and complexity, and because the doctrine of precedent and the right to appeal would assist the parties.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.4 CAV and VCAT**

## Keen to learn more?

**VCAT – Fees**, www.vcat.vic.gov.au/resources/goods-and-services-fees
**VCAT – Annual Report,** www.vcat.vic.gov.au/news/vcat-annual-report-2016-17-now-available
**VCAT – Resolving cases by agreement,** www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement
**CAV – Dispute Resolution,** www.consumer.vic.gov.au/contact-us/resolve-your-problem-or-complaint/overview
**Law Handbook – Small claims: VCAT's Civil Claims List,** www.lawhandbook.org.au/2018_07_04_06_small_claims_vcats_civil_claims_list

QUESTIONS

# 3.2.4 CAV and VCAT

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces: CAV helps resolve disputes raised by _____ effectively, often using _____ , _____ cost.

**A.** businesses; a phone call; without

**B.** consumers or tenants; conciliation; without

**C.** consumers; legal proceedings; without

**D.** consumers or tenants; in-person conciliation; at a low

**2.** Kerry paid Michael $3,000 to repair her car. Kerry is unsatisfied with the work; Michael agrees the work wasn't of a good quality and offers to repair the damage for a further $1,000 (an offer that is rejected by Kerry). Kerry and Michael are both willing to participate in conciliation.

Is CAV an appropriate dispute resolution body in this case? Choose the **best** option.

**A.** No, because this case is outside CAV's jurisdiction. CAV cannot assist in cases between consumers and suppliers where the amount paid for goods or services is less than $10,000.

**B.** Yes, because this case is within CAV's jurisdiction and both parties are willing to participate.

**C.** No, because this case is outside CAV's jurisdiction, there has been a delay and Kerry rejected Michael's offer.

**D.** Yes, because disputes about repairs to vehicles should first go to CAV before progressing further.

**3.** Which feature of VCAT is **least likely** to uphold the principles of justice?

**A.** VCAT has the capacity to resolve all civil cases quickly and at low cost.

**B.** Parties only pay a low filing fee, and there are no hearing fees for some claims.

**C.** Throughout VCAT, the average time from application to resolution is very short.

**D.** VCAT conducts hearings in many metropolitan and regional locations across Victoria.

**4.** Tony is a landlord who has a dispute relating to rent with Bill (his tenant). Although the issue is trivial, Tony and Bill have been unable to negotiate a resolution. Bill would prefer the matter to be resolved in an informal setting but Tony is unwilling to discuss the matter with Bill any further.

Is VCAT an appropriate dispute resolution body in this case? Choose the **best** option.

**A.** Yes. This is because this claim is within VCAT's jurisdiction, the claim is minor, the parties were unable to resolve the dispute themselves, Bill prefers informality.

**B.** Yes. This is because this claim is within VCAT's jurisdiction, the claim is minor, the parties were unable to resolve the dispute themselves.

**C.** No. This is because this claim is within VCAT's jurisdiction and the claim is minor but given Tony's unwillingness to participate VCAT is not an appropriate dispute resolution body.

**D.** No. This is because this claim is outside VCAT's jurisdiction as VCAT does not accept claims from landlords.

LEVEL 2:
Describe and explain

**5.** Explain how CAV promotes the principle of access. (2 MARKS)

**6.** Outline the jurisdiction of Consumer Affairs Victoria in providing dispute resolution services. (1 MARK)

**7.** Explain one way in which VCAT seeks to provide lower-cost dispute resolution than the courts. (3 MARKS)

**8.** Describe one instance in which VCAT is an appropriate dispute resolution body for a civil case and one instance in which VCAT is not an appropriate dispute resolution body. (3 MARKS)

LEVEL 3:
Apply and compare

**9.** Ellen is a tenant who sustained serious injuries when she was hit by a faulty railing which fell from the balcony of her rental property in Altona North. She is claiming the total cost of the loss she has suffered as a result of her injuries is $300,000.

Would this be a dispute that is appropriate for Consumer Affairs Victoria (CAV) to assist with? Justify your answer. (4 MARKS)

**10.** Explain the differences between the purposes of Consumer Affairs Victoria and the Victorian Civil and Administrative Tribunal. (5 MARKS)

LEVEL 4:
Discuss and evaluate

**11.** Consider the following information about the Residential Tenancies List at the Victorian Civil and Administrative Tribunal. To what extent does VCAT promote fairness and access? (6 MARKS)

VCAT's Residential Tenancies Hub is an online system, accessible via the VCAT website. It lets an applicant pay their application fee online, provides a VCAT reference number and hearing date immediately (in most cases), and withdraw your application if they resolve the renting dispute before a hearing.

**Fees**

There are no application fees for:

- bond matters registered with the Residential Tenancies Bond Authority
- matters regarding residential accommodation provided by a disability service provider
- matters regarding private supported residential services other than an order to vacate.

For a dispute between $1–15,000 there is a fee of $65.30 for standard applicants and no fee for Health Care Card holders.

Hearing fees do not apply for the following matters:

- a claim under $15,000
- bond matters registered with the Residential Tenancies Bond Authority
- matters regarding residential accommodation provided by a disability service provider

In 2016–2017 the average time taken to finalise a case in this list was two weeks. 80% of cases were finalised within four.

Of cases listed for compulsory conference or mediation, 80% resolved pre–hearing.

*Sources:* VCAT website, www.vcat.vic.gov.au/resources/renting-a-home-fees and VCAT Annual report, www.vcat.vic.gov.au/resources/annual-report-2016-17

**12.** 'It is increasingly important to make sure the most vulnerable Victorians can access information and advice to exercise their consumer rights. CAV does not take action on behalf of individuals to obtain redress. For systemic issues, they may adopt a multifaceted compliance strategy using several tools in combination, to target an entire industry.'
– Adapted from the Consumer Affairs Victoria Annual Report 2016–2017

Evaluate the role and appropriateness of Consumer Affairs Victoria in helping Victorians achieve fairness, equality and access. (7 MARKS)

# 3.2.5 Purposes of civil pre-trial procedures

**Civil pre-trial procedures are compulsory legal steps that both the plaintiff and defendant must undertake before a trial. These legal procedures:**

- **Initiate the civil dispute resolution process.**
- **Identify the civil law that the plaintiff believes has been breached by the defendant.**
- **State the remedy the plaintiff seeks, to compensate them for their injury and/or loss.**
- **Identify how the defendant plans to defend the claim against them (if they intend to do so).**

**Civil pre-trial procedures include pleadings and discovery.**

This lesson covers VCAA Key Knowledge point: **'the purposes of civil pre-trial procedures',** which we have broken down into the following concepts:



## Purposes of civil pre-trial procedures 3.2.5.1

**Pleadings are** a series of documents lodged in court by both parties that outline each party's claim. For example:

- Writ – The plaintiff files this document with the court (and a copy is provided to the defendant); this informs the court and the defendant that he/she is being sued in a particular court.
- Statement of claim – The plaintiff files this document in court (and with the defendant), which outlines the legal nature of their claim, the material facts and the remedy being sought.
- Statement of defence – The defendant files this document with the court (and the plaintiff) outlining how it plans to defend the claim made by the plaintiff.

**USEFUL TIP** Please note the focus of the Study Design is on the **purpose** of pre-trial procedures – that is, their role, what they are designed to achieve. However, students should be able to briefly demonstrate how the pre-trial steps achieve these purposes.

**CASE STUDY** Katherine undergoes minor surgery to remove her appendix, but is in significant pain for months following the operation. She discovers that her doctor (Anna) has accidentally left a pair of surgical scissors in her abdomen. Katherine intends to sue Anna for negligence, claiming her pain and suffering was due to Anna's failure to exercise sufficient care during the operation.

Through her legal representative Katherine will file in the County Court a writ and statement of claim (copies of which are provided to Anna) indicating that she is suing Anna for negligence (that is the legal basis for the claim), in the County Court of Victoria. These pleadings will also summarise the key facts in the dispute and identify which remedy Katherine seeks.

There are complex rules that must be followed by the parties regarding the format and content of pleadings.

**Discovery is the process in which** parties establish the facts of the case and the evidence that will be used to prove those facts. It is the process whereby parties seek evidence from the opposing party.

This includes (but is not limited to) documents or evidence the parties will rely on as evidence to support their claim. For example, this may include medical records, handwritten notes, video surveillance, etc.

**These documents will be exchanged** between the parties, with copies provided to the court prior to a trial. A party must provide a document sought by the opposing party, even if it adversely affects their case (and their chances of winning the dispute).

**CASE STUDY** Continuing the medical example above, Katherine may seek to discover documents regarding Anna's notes following the surgery, any x-rays or medical imaging conducted during the operation and the hospital's procedures for recording the medical equipment present in an operating theatre before/after any operation. Anna may seek discovery of Katherine's medical records showing her suffering after the operation. These documents would be exchanged by the parties, with copies provided to the court. Anna must provide documentary evidence sought by Katherine, even if it damages her chances of winning. For example, the x-rays Katherine has sought (taken during the operation) may show the surgical scissors inside her abdomen.

**The purposes of pre-trial procedures are:**

| Purpose | How pleadings and discovery promote each purpose |
|---|---|
| Encouraging an early settlement | Each party develops an understanding of the strength of the opposing party's case; this encourages parties to settle before a trial (perhaps at mediation). |
| Ensuring the trial runs smoothly as parties and the court are fully informed | The legal issues are clarified and the facts/evidence are stated; there are no surprises during a trial (as stipulated by the Supreme Court Rules). Parties (and their legal representatives) are able to better prepare their arguments and how to examine and cross-examine witnesses. Therefore, the hearing runs more smoothly.<br>As stated in Lesson 3.2.8, judges have broad powers to manage how trials are conducted. Pre-trial procedures ensure the court is informed about all legal arguments and evidence to be presented in a trial, better allowing the judge to give directions about how the trial should be conducted. For example, the judge is better able to decide which witnesses need to give oral evidence, what facts they should be examined on, what facts the parties agree on and don't need to present evidence on, etc. |

**Civil pre-trial procedures and the principles of justice**

**Principle of justice: *Access***

| Strengths of civil pre-trial procedures – how access is promoted | Weaknesses of civil pre-trial procedures – limitations in achieving access |
|---|---|
| **Saves court time and resources.** By encouraging early settlement of disputes (as parties are aware of legal issues and the strength of each other's case) these pre-trial steps minimise costs, helping ensure that the courts are more accessible as a dispute resolution body. | **Complex.** Law regarding content and format of pleadings and discovery is complex. Legal representation is necessary to complete these steps appropriately, placing those who cannot afford legal representation at a disadvantage in seeking to access the courts to resolve civil matters. |

**Principle of justice: *Fairness***

| Strengths of civil pre-trial procedures – how fairness is promoted | Weaknesses of civil pre-trial procedures – limitations in achieving fairness |
|---|---|
| **Minimises delays.** Clarifying legal issues and facts before trial ensures that the trial runs smoothly and more quickly. This minimises delays and promotes fairness for those seeking compensation (as delays compound suffering). | **Complexity.** As noted above, pre-trial procedures are complex to complete with strict rules and deadlines to be adhered to. Those without legal representation will have difficulty completing these steps. |

*cont'd*

| Strengths of civil pre-trial procedures – how fairness is promoted | Weaknesses of civil pre-trial procedures – limitations in achieving fairness |
|---|---|
| **Parties can present their case in the best possible light.** As each party better understands the legal issues and evidence being relied upon by their opponent, they are better able to prepare and present their own case in its best light, which is fair.<br>**Eliminates any element of surprise.** It would be unfair to allow parties to be surprised at trial by evidence/legal arguments they have not prepared for; civil pre-trial steps prevent this occurring. | **Delays in discovery.** If one party completes the discovery process slowly and/or there is a very large volume of evidence to be found and supplied to the other party (and the court) this can delay the resolution of the case, adding to the stress and anxiety faced by the parties. However, as you will see in Lesson 3.2.8 there are processes the courts can use to minimise this issue – so this is a small weakness. |

**Principle of justice: *Equality***

| Strengths of the civil pre-trial procedures – how equality is promoted | Weaknesses of the civil pre-trial procedures – limitations in achieving equality |
|---|---|
| **Applies to all parties.** All parties to civil disputes are required to complete civil pre-trial procedures to clarify the legal issues in the dispute and facts/evidence they will rely on (this is irrespective of whether they are wealthy, a recent migrant, a corporation, etc.).<br>**Both parties must participate in discovery.** Both the plaintiff and defendant are required to provide documents sought by their opponent during the pre-trial discovery process, even if such documents adversely affect their chances of success at trial. | **One party may be disadvantaged.** Given the technical requirements surrounding pleading and discovery, if parties have legal representation of differing quality (or one party is unrepresented) this may mean the discovery process is completed more favourably for one party than the other, not due to the merits of the case but the skill of their respective legal representatives. This can be a cause of unequal participation in the justice system. This inequality will be worsened if an unrepresented party is from a non-English speaking background. |

**USEFUL TIP**

In the exam it is common to see questions bringing together separate parts of the course.

For example in 2014 Question 12 was 'Discuss the extent to which the Victorian Civil and Administrative Tribunal (VCAT) can overcome two weaknesses of civil pre-trial procedures (8 marks)'.

This required students to consider shortcomings of pretrial procedures (do they always promote fairness, access and equality?) and then a discussion of ways in which VCAT may/may not be able to overcome these weaknesses.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.5: Purposes of civil pre-trial procedures**

## Keen to learn more?

**Commencing Civil Proceedings – Magistrates' Court,** www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/commencing-civil-proceedings

**Supreme Court of Victoria – Starting a legal action,** www.supremecourt.vic.gov.au/going-to-court/representing-yourself/starting-a-legal-action

QUESTIONS

# 3.2.5 Purposes of civil pre-trial procedures

LEVEL 1:
Define and understand

**1.** Which combination of purposes do pleadings and discovery both achieve? Choose the **best** option.

**A.** Achieve fairness, avoid taking an opponent by surprise, assist in reaching an out-of-court settlement, and give the court a record of all the relevant documents.

**B.** Achieve fairness, avoid taking an opponent by surprise, and assist in reaching an out-of-court settlement.

**C.** Prevent fairness, avoid taking an opponent by surprise, assist in reaching an out-of-court settlement, and set the limits to the dispute.

**D.** None of the above.

LEVEL 2:
Describe and explain

**2.** Describe two purposes of one civil pre-trial procedure. (2 MARKS)

LEVEL 3:
Apply and compare

**3.** Explain the differences between the purposes of discovery and exchange of evidence. (4 MARKS)

**4.** 'The Black Saturday bushfire class actions of Kilmore East–Kinglake settled for $494.67 million in December 2014, and the Murrindindi case was settled in February 2015 for $300 million. Resolution of these thousands of individual claims comes almost eight years after catastrophic fires swept across many regions of Victoria, resulting in the deaths of 173 people. After deductions for litigation expenses and costs associated with the administration of the settlement, claimants in the two class actions will receive a share of $698.5 million. The two class actions have been highly complex and multi-faceted. In a media release, Justice Forrest said "that if these two major class actions had not settled, the Court would have needed to hear and determine thousands of claims – a process that may have lasted years".'

*Source:* www.supremecourt.vic.gov.au/court-approves-distribution-of-almost-700m-in-2009-black-saturday-bushfire-class-actions

Comment on the extent to which this scenario illustrates the purpose(s) of civil pre-trial procedures. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** 'Duncan sent me a letter claiming $20,000 but I didn't know why. Next, his lawyer then sent me a writ and a statement of claim, which said I was being sued for damaging his reputation with my posts on Instagram. From that document, my lawyer and I were able to prepare a defence, saying my posts could be defended because what I said about Duncan was true.'

'I saw on my bank statement that I was being charged fees for financial advice but never received any advice from my bank. I emailed the customer complaints office of my bank and they said that if I wanted to be compensated I'd have to take legal action against the bank. After my lawyers sent legal documentation starting proceedings in the Supreme Court and the evidence I was going to present showing the fees being charged, the bank's lawyer then rang my lawyer and suggested we try mediation. At the end of a three hour mediation, the bank and I agreed on a confidential settlement in which I was given financial compensation.'

With reference to these cases, describe how civil pre-trial procedures uphold the principles of justice. (6 MARKS)

**6.** Evaluate the process of pleadings with reference to the principles of justice. (7 MARKS)

# 3.2.6 The Victorian court hierarchy and civil cases

**Victorian courts are organised into a hierarchy – a system in which some courts are superior to others, dealing with more complex and serious matters. Broadly speaking, the lower courts deal with a high volume of less serious/complex matters; the superior courts resolve relatively fewer cases that are more complex and serious.**

Victorian legislation determines which disputes are resolved in each court. For example:

- Disputes concerning very small sums of money are usually resolved in the Magistrates' Court.
- Claims for compensation for workplace injuries are usually resolved in the County Court.
- Representative proceedings are conducted in the Supreme Court.
- An appeal from a decision in the County Court will be heard in the Court of Appeal.

In some claims for damages a plaintiff may be able to choose between initiating proceedings in the County Court or the Supreme Court – Trial Division, as both courts have an unlimited jurisdiction (that is, can resolve claims concerning any amount of money). This decision will be made by a plaintiff in consultation with their legal representative. Furthermore, cases initiated in one court may sometimes be transferred to another court.

The organisation of courts into this hierarchy results in each court having its own jurisdiction – a set of case types it resolves frequently.

This lesson covers VCAA key knowledge point: **'The reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals'**, which we have broken down into the following concepts:



## Appeals Process 3.2.6.1

**An appeal is** the legal process that a dissatisfied party should pursue to have the court's decision reviewed in a higher court.

A party dissatisfied with the outcome of a civil dispute is not automatically entitled to have the decision reviewed on appeal. Rather, they must be granted leave (permission) to appeal and have legal grounds for doing so.

**Grounds for an appeal include** appealing on points of law, questions of fact or the remedy awarded.

As the High Court of Australia can hear appeals from the decisions of the Court of Appeal, it is to be regarded as part of the Victorian court hierarchy:

- Please note that parties dissatisfied with the decision of the Court of Appeal do not have an automatic right to appeal to the High Court; the High Court will only grant permission (eg. leave) to hear civil appeals if:
  - there is a question of law of public importance, or
  - there are differing opinions on the law and it requires clarification.

## Victorian court system — civil jurisdictions

**HIGH COURT**

**Original jurisdiction:** No original jurisdiction

**Appellate jurisdiction:** Appeals from the Court of Appeal

**SUPREME COURT – COURT OF APPEAL**

**Original jurisdiction:** No original jurisdiction

**Appellate jurisdiction:** Appeals from County and Supreme Court (Trial Division) — questions of law, fact or amount of damages, with leave; VCAT (President or Vice-President) — questions of law

**SUPREME COURT – TRIAL DIVISION**

**Original jurisdiction:** Claims for unlimited amounts (in practice, civil claims greater than $100,000)

**Appellate jurisdiction:** Appeals from VCAT and Magistrates' Court — questions of law

**COUNTY COURT**

**Original jurisdiction:** Claims for unlimited amounts (in practice, civil claims greater than $100,000)

**Appellate jurisdiction:** No appellate jurisdiction

**MAGISTRATES' COURT**

**Original jurisdiction:** Claims up to $100,000

**Appellate jurisdiction:** No appellate jurisdiction

**CASE STUDY** ***BAUER MEDIA PTY LTD v WILSON [NO.2]* [2018] VSCA 154**

In 2017 Rebel Wilson sued Bauer Media for defamatory articles published about her in its magazines. The Supreme Court (Trial Division) awarded her $4.7 million in damages as compensation for the harm done to her reputation and loss of earnings.

In 2018 Bauer Media appealed to the Court of Appeal, arguing this damages payout was excessive. In June 2018 the Court of Appeal upheld this appeal, reducing the damages awarded to Wilson to $600,000.

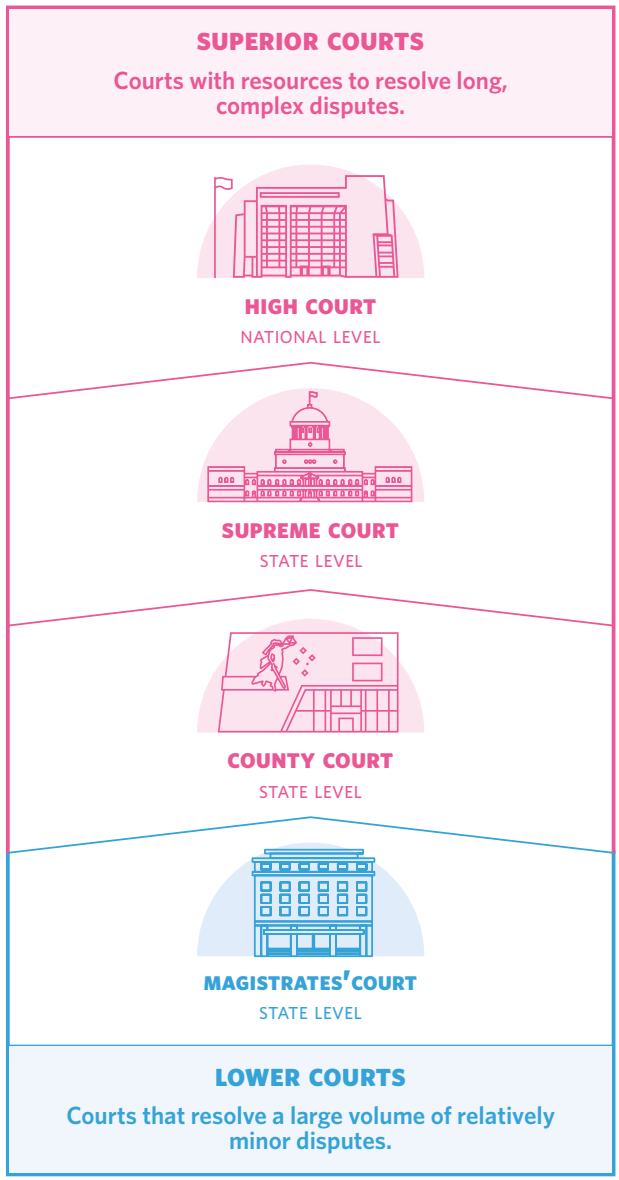
In late 2018 the High Court of Australia rejected Wilson's effort to have the Court of Appeal's decision overturned.

This case is an example of the superior courts' ability to review decisions made in lower courts and ensure mistakes are corrected. Such review by superior courts would not be possible if the courts were not organised into a hierarchy.

## Administrative convenience 3.2.6.2

**Administrative convenience is** the benefit we derive from the organisation of cases according to how serious or complex the matters are:

- The superior courts (eg. the Supreme Court) are free to devote time and resources to long, complex disputes without the court being 'clogged up' by also resolving minor disputes.
- The lower courts (eg. the Magistrates' Court) can quickly resolve a large number of relatively minor disputes, minimising delays for parties to such disputes.




**USEFUL TIP**

It is important to remember that **specialisation** (a reason for the court hierarchy explored in Unit 3 AoS 1) and **administrative convenience** are **not** the same thing.

**Specialisation refers to** the expertise that the courts develop in hearing certain types of cases.

**Administrative convenience refers to** the ability for the courts to distribute resources more effectively by organising cases according to how serious or complex they are.

### The court hierarchy & the principles of justice

**Principle of justice: *Access***

| Strengths of the court hierarchy – how access is promoted | Weaknesses of the court hierarchy – limitations in achieving access |
|---|---|
| **Administrative convenience.** Parties have access to the correct court for their matter. The courts in the Victorian hierarchy publicise the range of disputes within their jurisdiction, assisting plaintiffs to understand in which court to commence proceedings. | **Cost of appeals.** Limited in that the party seeking to appeal must bear the cost of the application and legal fees. |

**Principle of justice: *Fairness***

| Strengths of the court hierarchy – how fairness is promoted | Weaknesses of the court hierarchy – limitations in achieving fairness |
|---|---|
| **Appeals are available to everyone.** All parties have the same opportunity to appeal a court's decision (provided they have legal grounds to appeal). This ensures any errors are corrected, which is fair.<br>**Consistent processes.** Although their processes vary slightly, all courts provide a public, independent process for resolving civil disputes.<br>**Minimising delays.** The administrative convenience achieved by separating cases across the hierarchy minimises delays. The hierarchy being organised in this way therefore promotes fair treatment of the parties (as delays add to the stress/suffering of parties to a dispute). | **Cost of appeals.** The party seeking to appeal must bear the cost of the application and legal fees. Some dissatisfied parties may be unable to afford to lodge an appeal, meaning incorrect decisions (or inappropriate awards of damages) are not corrected. |

**Principle of justice: *Equality***

| Strengths of the court hierarchy – how equality is promoted | Weaknesses of the court hierarchy – limitations in achieving equality |
|---|---|
| **Right to appeal.** Both plaintiffs and defendants have the right to appeal.<br>**Similar cases resolved in a like manner.** Each case is heard in the appropriate court; similar cases are resolved in the same way within a given court. | **Cost of appeals.** An appeal may not be available to some parties if they can not afford the cost of application and additional legal fees. This limits equality before the law, if particular legal processes are not available to the poor. |

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.6 The Victorian court hierarchy and civil cases**

### Keen to learn more?

**Court Services Victoria,** www.courts.vic.gov.au/court-system
**The Magistrates' Court,** www.magistratescourt.vic.gov.au
**The County Court of Victoria,** www.countycourt.vic.gov.au
**The Supreme Court of Victoria,** www.supremecourt.vic.gov.au
***Bauer Media Pty Ltd v Wilson (No 2)* [2018],** www.supremecourt.vic.gov.au/law-and-practice/judgments-and-sentences/judgment-summaries/bauer-media-pty-ltd-v-wilson-no2-2018-1

QUESTIONS

# 3.2.6 The Victorian court hierarchy and civil cases

LEVEL 1:
Define and understand

**1.** John wishes to appeal the decision of a VCAT Vice-President because the law was applied incorrectly. Which of the following is correct?

John's appeal will be heard in:

**A.** the Magistrates' Court.

**B.** the County Court.

**C.** the Supreme Court – Trial Division.

**D.** the Supreme Court – Court of Appeal.

**2.** Which of the following statements does not accurately reflect 'administrative convenience' as a reason for the court hierarchy in Victoria?

**A.** The superior courts (eg Supreme Court) are free to devote time and resources to long, complex disputes without the court being 'clogged up' by also resolving minor disputes.

**B.** The lower courts (eg Magistrates' Court) can quickly resolve a large number of relatively minor disputes, minimising delays for parties to such disputes.

**C.** By hearing similar disputes within a set jurisdiction regularly, judges develop skill and expertise in resolving particular legal issues.

**D.** None of the above.

LEVEL 2:
Describe and explain

**3.** Explain how the appeals process upholds the principle of fairness. (2 MARKS)

**4.** Distinguish between administrative convenience and specialisation. (2 MARKS)

LEVEL 3:
Apply and compare

**5.** 'Our court hierarchy is unnecessarily complex. The justice system would be more effective if all courts could hear all cases.'

Explain why the Victorian courts are structured into a hierarchy. (4 MARKS)

**6.** A controversial journalist, Hamish Hamer, was accused of defaming the Prime Minister by calling him a 'pig'. He was held to be liable by a jury in the Supreme Court. On appeal, he claimed that it was not possible he was liable for defamation, as he was simply presenting his 'honest opinion'. The Court of Appeal agreed and upheld Hamer's appeal. The Prime Minister's office was outraged and began immediately preparing to have the High Court restore the original jury decision.

Justify the existence of the court hierarchy in relation to this dispute. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** In the case of *Trkulja v Google Inc* [2015] VSC 635, the plaintiff brought an action for defamation against Google due to an image search of his name bringing up images of Trkulja alongside images of Melbourne mob figures such as Tony Mokbel and autocomplete searches of his name associating him with terms such as 'is a former hit-man', 'criminal' and 'underworld' through the autocomplete function.

Google sought to have this set aside, as they argued they cannot be held to be a 'publisher'. The single judge of the Supreme Court of Victoria held that a search engine can be a publisher for the purpose of defamation law in Australia. Upon appeal, the Court of Appeal upheld the appeal, ruling that Google cannot be a publisher of defamatory material that results from the automated operation of a search engine.

In *Trkulja v Google LLC* [2018] HCA 25, the High Court held that Google could be a publisher, and sent the original defamation claim back to the Victorian Supreme Court to be tried.

*Source:* Annual report, Supreme Court of Victoria, www.supremecourt.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/11/bd/59b3f58ba/SCV_AnnRep_2016-17_web.pdf

Describe how this case illustrates the capacity of the court hierarchy to promote fairness. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 2 (online), covering these lessons:
Lesson 3.2.4 CAV and VCAT
Lesson 3.2.5 Purposes of civil pre-trial procedures
Lesson 3.2.6 The Victorian court hierarchy and civil cases
Check with your teacher when it's time to complete this progress check.

# 3.2.7 Responsibility of key personnel in a civil trial

**The vast majority of civil claims initiated by plaintiffs in the Victorian courts do not go to trial, but instead settle out-of-court prior to trial (perhaps at court-ordered mediation or during a private negotiation by the parties' legal representatives during the pleadings and discovery stages).**

**When matters do go to trial, key personnel have specific functions to perform. In many ways, these functions promote the achievement of fairness, equality and access in the Victorian justice system.**

This lesson covers VCAA Key Knowledge point: **'the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners'**, which we have broken down into the following concepts:



## Responsibilities of the judge 3.2.7.1

**A judge is** an individual (usually with extensive experience as a solicitor or barrister), appointed to conduct trials/hearings and resolve legal disputes in court.

Judges' titles vary – magistrates sit in the Magistrates' Court, a judge of the County Court is referred to as 'Judge' (Judge Hannan for example, manages criminal matters in the County Court) while judges are referred to by the title 'Justice' in the higher courts (for example Justice Dixon is a judge in the Supreme Court and Justice Bell is a judge in the High Court of Australia).

**Judges' responsibilities in a civil trial include:**

**Managing the trial**

- Judges apply the rules of evidence and procedure to ensure only admissible evidence is presented in court and witnesses are examined/cross-examined lawfully.
- They ensure the trial is run on time and use resources efficiently; this can include judges using their powers of case management to:
  - Set the order in which witnesses give evidence.
  - Minimise the time for the hearing by:
    - Limiting the number of witnesses
    - Setting a time limit for how long a witness may be questioned
    - Limiting cross-examination time
    - Limiting the topics that witnesses may be questioned on
  - Direct which evidence must be given orally, and which may be presented in written format.
  - Order proceedings to be live-streamed online, so members of a representative proceeding can follow the trial.

**Determining the liability of the defendant**

- In the absence of a jury, the judge must determine whether the plaintiff has proven (on the balance of probabilities) that the defendant caused their injury.
  - As juries are rarely used in civil trials in the County Court and Supreme Court (and never used in the Magistrates' Court) this role usually falls to the judge.
  - In some matters (such as defamation) a jury will determine whether the defendant caused the plaintiff's injury, but the judge then has the task of awarding damages.
- Judges provide written and publicly available reasons for their decisions at the conclusion of the trial. It contains information about legal principles, as well as who is responsible and what remedy is to be awarded.

**Directing a jury (if present)**

- A judge instructs a jury on what decision they must reach (that is, the judge will direct the jury as to who has the burden of proof in the case, and the standard of proof that must be met) and will summarise the evidence presented during the trial.

**Remaining impartial** throughout the trial

**CASE STUDY** ***WILSON v BAUER MEDIA PTY LTD* [2017] VSC 521**

The jury determined that Bauer Media was liable for defaming Rebel Wilson and causing harm to her reputation. The judge then determined the amount of damages to be awarded.

The judge's decision regarding damages can be found in the judgment (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521), which is summarised below:

**General damages:** The judge determined the extent of the publication of the comments and the seriousness of the defamation caused her physical and mental harm.

- Physical harm; stress sore above her lip, eczema, urinary tract infection, trouble sleeping.
- Mental stress; crying at work, extreme stress, locking her phone away to avoid messages and outline material causing her distress.

**Aggravated damages:** The judge concluded that the harm was aggravated and increased by the conduct of Bauer Media and the extent of the distress caused to Rebel Wilson.

**Special damages:** Justice Dixon decided Wilson should be awarded $3,917,472 in damages to compensate her for lost earnings (deciding she missed employment opportunities due to the impact of the defamatory publications).

**Total sum of damages Justice Dixon awarded:** $4,567,472

*Please note: Bauer successfully appealed this award of damages, which was substantially reduced by the Court of Appeal. Wilson unsuccessfully appealed this decision to the High Court of Australia.*

**The responsibilities of the judges and the principles of justice**

**Principle of justice: *Access***

| Strengths of the responsibilities of the judge – how access is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving access |
|---|---|
| **Manage the trial.** Judges' ability in civil trials to actively manage proceedings (setting time limits for examination of witnesses, limiting the number of witnesses, etc) minimises costs in civil trials and thereby ensures the civil justice system remains more accessible. | **Cannot assist self-represented parties.** Despite actively intervening in the conduct of a case, judges remain impartial in that they cannot assist parties without legal representation by explaining their legal rights, advising them how to prepare and present their case; in this respect the judge's independence in a civil trial does not promote access to justice. |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the judge – how fairness is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving fairness |
|---|---|
| **Impartial.** Independent judge ensures trial conducted without bias, according to the rules of evidence; this ensures fairness as decisions are based on law and facts alone. | **Potential bias.** While judges are impartial judicial officers, they are still subject to personal bias and may unconsciously discriminate against certain parties. However judges are skilled in applying the law and remaining independent, so this is a small weakness. |

*cont'd*

| Strengths of the responsibilities of the judge – how fairness is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving fairness |
|---|---|
| | **Limited control.** Judges rely on the parties to present all relevant evidence during a trial; if parties have no legal representation this may prevent all relevant facts being presented to the court, as judges cannot actively seek out evidence they may need to deliver a verdict. If this occurs, it may prevent a decision based on all relevant facts, which can lead to an unfair result and/or award of damages. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the judge – how equality is promoted | Weaknesses of the responsibilities of the judge – limitations in achieving equality |
|---|---|
| **Rules of evidence.** Judges ensure rules of evidence and procedure apply equally to all parties during a civil trial. | N/A |

## Responsibilities of the jury 3.2.7.2

**A jury** is a collection of six individuals randomly selected from the electoral roll who decide questions of fact and reach a decision in a case.

**It is not common** for juries to be used in civil trials in Victoria.

**The jury's responsibilities include:**

**Being objective**

- Be independent and unbiased when reaching decisions. Potential jurors who believe they cannot remain impartial must ask to be excused during the process of jury empanelment.

**Listening to the evidence, the judge's directions and legal representatives' submissions**

- Be alert, take notes, keep track of (often complex) information.
- Determine which witnesses and evidence they believe/accept as accurate and reliable.
- Listen to the judge's directions as to the law, the evidence and the decision they need to make.
- Listen to legal representatives' presentations summarising the plaintiff's and defendant's cases (the evidence they want the jury to accept and the law they want the jury to consider in reaching their decision).

**Deciding liability and damages**

- Decide whether the defendant is responsible for the plaintiff's harm (based on whether the plaintiff has proven their case on the balance of probabilities), and calculate damages (in some matters).

**CASE STUDY** ***WILSON v BAUER MEDIA PTY LTD* [2017] VSC 521**

The jury decided that Bauer Media was responsible for Rebel Wilson's harm. However, they did not calculate damages as juries are not permitted to calculate damages for defamation cases.

All of these comments can be found in the judgment (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521), which is summarised below:

- The jury of six women found Bauer Media liable for defamation. They found the defendants' articles conveyed defamatory imputations.
- The jury did not accept any of the defences argued by Bauer Media.

### The responsibilities of the jury and the principles of justice

**Principle of justice: *Access***

| Strengths of the responsibilities of the jury – how access is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving access |
|---|---|
| **Plain English.** The presence of juries ensures plain English is used in court, less legal jargon is used (to ensure that the jury understand the court's procedures and the evidence they are being asked to make a decision upon); this ensures plaintiffs and defendants can understand the process being used, which promotes access to justice (by improving understanding of the legal process). | **Cost.** Additional fees are required for jury trials, meaning it may not be financially viable for some parties to request them. This financial constraint means trial by jury may not be accessible for some parties.<br><br>**Limited use.** Many civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is further limited. |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the jury – how fairness is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving fairness |
|---|---|
| **Trial-by-peers.** In very serious cases juries provide for trial by-peers. A cross-section of the community is used as the decision-maker, so the parties in a civil case should feel their case has been decided by their equals; this prevents parties feeling they have been oppressed by the state, which promotes fairness.<br><br>**Democratic.** Trial by peers also protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair.<br><br>**Independent.** Juries are independent of all parties to a dispute. They are randomly selected from the community, have no connection to the plaintiff, defendant, witnesses, etc.<br><br>**Impartial.** Further, jurors cannot seek additional information about the case beyond the courtroom. They are instructed to disregard any knowledge they may have of the dispute, are prevented by the *Juries Act* from seeking additional information about a case and judges can suppress media coverage of a case to ensure jurors do not have preconceived ideas about a defendant (or witnesses). They can therefore be completely impartial which promotes fairness. | **Potential bias.** Jurors may be influenced by what they hear about a party to a case in the media, and may therefore make a decision based on preconceived ideas about the case, not just the evidence heard in court. This is not fair on the parties.<br><br>**Civil cases are complex.** Making decisions in legal cases is a complex task undertaken by people with no legal training, creating the risk of an incorrect verdict. In addition, because juries do not need to provide reasons for their decisions there is no certainty they have actually applied the law to the facts correctly. This could be unfair on plaintiffs and defendants in civil matters.<br><br>**Delays.** The use of juries creates delays, because time is taken to empanel the jury, to explain court procedures and jurors' roles, to slowly explain evidence, to remove juries from courtrooms for legal arguments and the time taken for the jury to reach a decision. Further, there are sometimes hung juries and mistrials due to juror misconduct, requiring a re-trial and further delaying justice – significant delays can be unfair on defendants, on plaintiffs seeking compensation and witnesses by compounding the stress involved.<br><br>**Very few matters.** Juries are used in a very small proportion of civil cases – juries promote fairness in relatively few cases. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the jury – how equality is promoted | Weaknesses of the responsibilities of the jury – limitations in achieving equality |
|---|---|
| **Available to all parties.** Both parties have the capacity to request a jury trial in a civil dispute. | **Not always a true cross-section of society.** Some individuals are ineligible or disqualified from jury service; as a consequence, some parties to civil cases may not feel tried by their peers (such as refugees or those from a non-English speaking background). This may undermine the equal access to trial by one's peers. |

## Responsibilities of the parties 3.2.7.3

**A party is** a person or company bringing their case or defending their case in court. There can be multiple plaintiffs and defendants.

**Each party's responsibilities during the trial include:**

**Opening and closing address**

- The parties must outline their case at the beginning and end of the trial.

**Present case to judge (and jury)**

- The parties must present all evidence to the judge (and jury) throughout the trial.
- In practice this presentation of evidence and legal arguments is conducted on the parties' behalf by their legal representatives.

In Victoria, the *Civil Procedure Act 2010* (Vic) is designed to ensure all civil matters are resolved in as timely and cost-effective a manner as possible. This means parties (and their legal representatives) have certain obligations during the trial:

- act honestly
- only make claims that have a proper basis
- only take steps to resolve or determine the dispute
- cooperate in the conduct of the civil proceeding
- not mislead or deceive
- use reasonable endeavours to resolve the dispute
- narrow the issues in dispute
- ensure costs are reasonable and proportionate
- minimise delay
- disclose the existence of documents critical to the dispute.

*Source:* Judicial College of Victoria – Civil Procedure Bench Book '2.2 What are the overarching obligations?'

**The responsibilities of the parties and the principles of justice**

**Principle of justice: *Access***

| Strengths of the responsibilities of the parties – how access is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving access |
|---|---|
| **Self-represented parties.** Courts do provide some guidance of a general kind to parties who are representing themselves, regarding courts' procedures. | **Legal Aid funds are very limited.** Victoria Legal Aid is often not able to support parties to civil disputes. Parties without legal representation will struggle to understand how to present legal argument and evidence in its best light, limiting access to justice (which includes individuals understanding their legal rights). |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the parties – how fairness is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving fairness |
|---|---|
| **Party control.** Parties have control of their own case, and are responsible for deciding what facts to present, how, etc; parties therefore feel in control of the process and should feel more satisfied with the outcome (feel that they have been treated fairly). | **Self-represented parties.** Unrepresented parties may not present all relevant evidence to the court, which can disadvantage themselves and the other side. If parties fail to produce relevant evidence/legal argument/legal defence this may lead to an incorrect outcome, which is unfair. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of the parties – how equality is promoted | Weaknesses of the responsibilities of the parties – limitations in achieving equality |
|---|---|
| **Opportunity to present case.** Both parties are given equal opportunity to present their case to the court. | **Availability of legal representation.** Not all parties are equally equipped to present their case to a judge and jury without the assistance of legal practitioners.<br>**Role of the judge.** Judges' interventions in managing the trial (deciding order of witnesses, etc. – see Lesson 3.2.8) may impact on a party's perception of whether they have been treated equally. |

## Responsibilities of legal practitioners 3.2.7.4

**A legal practitioner** is an individual with legal training, qualified to give advice and appear in court. Generally, a solicitor prepares legal documentation (such as pleadings) and a barrister is responsible for representing a party in a trial (by making legal arguments, questioning witnesses, summarising their client's case to the judge and/or jury).

**The responsibilities of legal practitioners include:**

**Opening and closing address**

- The barrister will outline their case at the beginning and end of the trial, including:
  - A summary of the evidence they will present/have presented.
  - The facts they want the court to accept as true based on this evidence.
  - Plaintiff's barrister will summarise legal arguments explaining why the defendant is legally responsible for their client's injury.
  - Defendant's barrister will summarise legal arguments for why the defendant is not liable (such as a lawful defence that applies) and/or question whether the plaintiff has proven on the balance of probabilities that the defendant caused his/her injury.

**Present case to judge and jury**

- The barrister will present all evidence in a favourable way for their client. They present evidence by examining witnesses and written documents in front of the judge (and jury, if present) throughout the trial. This means:
  - Asking questions of the witnesses they call, with witnesses' responses informing the court as to the facts in the dispute; and
  - Questioning witnesses called by the opposing party, to test the accuracy and reliability of the evidence they present in court (called 'cross-examination').
- Plaintiff's legal representative will make submissions to the court as to what the appropriate remedy should be.

- Defendant's legal representative will make submissions to the court as to why any remedy imposed should be minimised; for example, he/she may argue the injury suffered by a plaintiff is less severe and therefore a smaller award of damages is appropriate.

**CASE STUDY** ***WILSON v BAUER MEDIA PTY LTD* [2017] VSC 521**

The legal practitioners for Rebel Wilson included barristers who appeared in court during the trial. They proved that Bauer Media was responsible for defaming Rebel Wilson. They presented evidence by examining witnesses in front of the judge and jury. The barristers showed evidence of the emotional harm caused to their client during examination-in-chief. This painted the case in the best light for Rebel Wilson, as she was able to demonstrate the distress she felt at the defamatory comments.

All of these comments can be found in the judgment (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521, pg. 43), which is summarised below:

- While Rebel Wilson gave evidence, she was shown the internal communications (emails) between Bauer Media employees about her soon-to-be-published article.
- Rebel Wilson was asked questions by her legal practitioner: 'So, as you sit here today realising that that is what was going on, how do you feel about it?'
- Rebel Wilson: 'I just feel so distraught about why would these (people) coordinate... an orchestrated attack on me? I feel very attacked and hurt by it... It is just that they're laughing about the pain that they were about to inflict on me.'

In Victoria, the *Civil Procedure Act 2010* (Vic) is designed to ensure all civil matters are resolved in as timely and cost-effective a manner as possible. This means parties' legal representatives have certain obligations during the trial:

- act honestly
- only make claims that have a proper basis
- only take steps to resolve or determine the dispute
- cooperate in the conduct of the civil proceeding
- not mislead or deceive
- use reasonable endeavours to resolve the dispute
- narrow the issues in dispute
- ensure costs are reasonable and proportionate
- minimise delay
- disclose the existence of documents critical to the dispute.

*Source:* Judicial College of Victoria – Civil Procedure Bench Book '2.2 What are the overarching obligations?'

**The responsibilities of the legal practitioners and the principles of justice**

**Principle of justice: *Access***

| Strengths of the responsibilities of legal practitioners – how access is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving access |
|---|---|
| **Plaintiff and defendant have a better understanding of legal processes.** Represented parties have their legal practitioner to help them prepare their case and explain the court proceedings.<br><br>**Cost options.** Some law firms using a 'no win, no fee' arrangement and litigation-funders do provide assistance for those with limited funds to engage the legal representation required to access the courts as a method of dispute resolution. | **Self-represented parties.** Access to justice includes understanding one's legal rights; parties without representation may not understand the procedure used in the court proceedings and therefore the courts are less accessible to these individuals. |

**Principle of justice: *Fairness***

| Strengths of the responsibilities of the legal practitioners – how fairness is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving fairness |
|---|---|
| **Case is presented in the best possible light.** The use of legal practitioners can increase a party's chance of success, as their case (including evidence, legal argument and lawful defences to an action) is presented in its best light by an expert. This promotes fairness. | **Unrepresented parties.** Unequal legal representation (or a trial in which one party does not have legal representation) may lead to an unfair outcome, as each party cannot prepare and present a case of equal quality; the quality of the presentation of the case may influence the outcome, not solely the facts – this is unfair on the unrepresented/ poorly-represented party. |

**Principle of justice: *Equality***

| Strengths of the responsibilities of legal practitioners – how equality is promoted | Weaknesses of the responsibilities of legal practitioners – limitations in achieving equality |
|---|---|
| **Choice of the parties.** Putting aside financial constraints, all parties to civil proceedings have equal capacity to choose their own legal representation.<br>**Legal representation is available to everyone.** Equal access to legal representation is also promoted because, to a large extent, legal practitioners must provide their services to all those who seek their assistance (provided they can meet the fees associated and the legal issue is within the lawyers' area of expertise). Equality of access is promoted by legal practitioners not being able to reject those who seek their assistance. | **Cost.** Some financially disadvantaged parties may not be able to afford any/good quality legal representation. This can make the legal contest an unequal one, if parties' cases aren't equally prepared and presented. |

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.7: Responsibilities of key personnel in a civil trial**

## Keen to learn more?

**Judicial College of Victoria – Civil Procedure Bench Book,** www.judicialcollege.vic.edu.au/eManuals/Civil/index.htm#30884.htm

**Victoria Law Foundation – Victoria's Legal System,** www.victorialawfoundation.org.au/sites/default/files/resources/victorias_legal_system_2018.pdf

**Office of Public Prosecutions – Victims & Witnesses,** https://victimsandwitnesses.opp.vic.gov.au/

QUESTIONS

# 3.2.7 Responsibility of key personnel in a civil trial

LEVEL 1:
Define and understand

**1.** In a civil trial, during the examination process, the judge asks a witness to clarify his evidence. Then, the judge excludes the admission of hearsay evidence by another witness. At the trial's conclusion, the judge sums up the case to the jury and the court later decides the plaintiff has established his/her claim against the defendant and awards damages.

Which responsibilities has the judge performed in this case?

**A.** management of the trial, decided on the admissibility of evidence, and attended to the jury

**B.** management of the trial, decided on the admissibility of evidence, attended to the jury, and determined liability and remedy

**C.** management of the trial, decided on the admissibility of evidence, attended to the jury, determined liability and remedy, and made a decision on costs

**D.** None of the above

**2.** In a civil trial, a number of jurors slept when evidence was being given and, while the judge was summing up, some jurors played Sudoku. The jury's decision on the defendant's liability was also swayed by a civil trial which recently made headlines.

Which responsibilities has the civil jury failed to perform in this case?

**A.** be objective, listen to and remember evidence, and understand summing up

**B.** be objective, listen to and remember evidence, and understand directions and summing up

**C.** be objective, listen to and remember evidence, understand directions and summing up, and decide on liability

**D.** None of the above

**3.** When reasonable steps taken by a plaintiff to resolve a dispute were unsuccessful, the dispute proceeded to a hearing. The plaintiff began by giving an outline of their case and then gave further details through witnesses. After the plaintiff summarised their case, the court determined that the defendant was not liable.

Which roles did the plaintiff perform?

**A.** make an opening and closing address, present the case to the judge or jury, and comply with the overarching obligations

**B.** make an opening and closing address, present the case to the magistrate, and comply with the overarching obligations

**C.** make an opening and closing address, present the case to the judge, and prove the facts of the case (on the balance of probabilities)

**D.** make an opening and closing address, present the case to the magistrate, comply with the overarching obligations, prove the facts of the case (on the balance of probabilities)

**4.** Which of the following is not a key responsibility of legal practitioners during civil proceedings?

**A.** to uphold their client's interests

**B.** to not mislead or deceive the court when presenting their client's case

**C.** to pursue a not-guilty verdict

**D.** to convince the judge/jury to 'find for' their client

LEVEL 2:
Describe and explain

**5.** Explain one responsibility of the judge in a civil trial and how it upholds one principle of justice. (3 MARKS)

**6.** Compare the responsibilities of a criminal and civil jury. (2 MARKS)

**7.** Your friend Sarah made the following errors in her last SAC:

- The burden of proof rests with the prosecution in civil proceedings
- The plaintiff in a civil case hopes to secure a conviction
- The defendant must ensure they comply with the *Limitation of Actions Act 1958* when initiating a civil claim

Outline why each of the above statements are incorrect. (3 MARKS)

**8.** Describe two responsibilities of legal practitioners in a civil trial. (4 MARKS)

LEVEL 3:
Apply and compare

**9.** Former Liberal frontbencher Sophie Mirabella has been awarded $175,000 in damages over a defamatory newspaper article which incorrectly claimed she pushed her political rival Cathy McGowan out of a photo opportunity. After a six-day trial held in Wangaratta, a jury took less than an hour to find the 'Benalla Ensign' newspaper had defamed Mrs Mirabella. In handing down his judgement, Judge Macnamara found the defamatory article had caused 'significant hurt' to Mrs Mirabella's reputation and caused her 'great distress.'

*Source:* www.abc.net.au/news/2018-05-16/sophie-mirabella-awarded-damages-over-defamatory-article/9762404

Explain the role of the judge in this case. (3 MARKS)

**10.** 'South Australia and the Australian Capital Territory have abolished civil jury trials.'

*Source:* www.lawreform.vic.gov.au/content/2-jury-trials-victoria-0

Justify the existence of a jury in a civil trial in Victoria. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**11.** Evaluate the extent to which the responsibilities of the parties and their legal representation contributes to enhancing fairness in the civil justice system. (5 MARKS)

**12.** The owners of 'Bean and Ground' Cafe are being sued by multiple employees for failing to pay the appropriate wages. As part of preparing for their first meeting with their legal representatives, the owners discover emails between themselves and another cafe owner from a few years ago, asking about the rates paid at other cafes and the chances of getting in trouble if the minimum wage is not paid to all their staff.

Discuss whether the owners should tell their lawyers about this email. In your response, identify the overarching obligations that apply to the parties and their lawyers in a civil dispute before a court. (4 MARKS)

# 3.2.8 Judicial powers of case management

**The *Civil Procedure Act 2010* (Vic) has the following overarching purpose (stated in section 7 of the Act):**

**'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'**

**This Act empowers judges to actively intervene in how parties (and their legal representatives) conduct their disputes prior to a trial and during a trial.**

**Judges will intervene in ways that are designed to ensure cases are resolved in as fast a manner as possible, minimising costs and delays for all parties to a dispute.**

This lesson covers VCAA Key Knowledge point: **'judicial powers of case management, including: power to order mediation and power to give directions'**, which we have broken down into the following concepts:



## Power to order mediation 3.2.8.1

Section 66(1) *Civil Procedure Act 2010* (Vic):

> 'A court may make an order referring a civil proceeding or part of a civil proceeding to appropriate dispute resolution.'

In the definitions section of the Civil Procedure Act, this includes mediation.

**The purpose of this power is to** assist parties in coming to a fast and cost-effective resolution. Parties can be referred to mediation at any time before the trial and in the early stages of the trial.

**It is common for parties in most civil proceedings** in Victorian courts to be directed by judges to attend mediation prior to a trial.

**CASE STUDY**

**(FORMER) CHIEF JUSTICE OF THE SUPREME COURT OF VICTORIA – THE HON. MARILYN WARREN AC:**

'The primary ADR method employed in Victoria has been mediation. It has been extraordinarily successful. It is now accepted as part of the justice system. In the Supreme Court of Victoria, (almost) no civil case... goes to trial without at least one round of mediation. The technique has resulted in the court's contested matters sitting at about five per cent of its filed civil cases.'

*Source:* Warren M (2009) ADR and a different approach to litigation, www.supremecourt.vic.gov.au/contact-us/speeches/adr-and-a-different-approach-to-litigation

See Lesson 3.2.9 for more information about how mediation is used to resolve civil disputes.

### Power to order mediation & the principles of justice

**Principle of justice: *Access***

| Strengths of the power to order mediation – how access is promoted | Weaknesses of the power to order mediation – limitations in achieving access |
|---|---|
| **Available to all parties.** Almost all parties to a civil dispute have access to mediation through the pre-trial stage. | N/A |
| **Minimises costs.** Directions to attend mediation minimise the time for which parties need to engage legal representation and often avoid the need for a trial – this minimises costs, ensuring the courts remain more accessible for parties pursuing civil claims/defending civil claims. | |

**Principle of justice: *Fairness***

| Strengths of the power to order mediation – how fairness is promoted | Weaknesses of the power to order mediation – limitations in achieving fairness |
|---|---|
| **Saves parties time and money.** Many civil disputes settle at mediation before they reach the trial stage, saving parties time and money.<br><br>**Avoids trial.** Judges directing parties to mediation prior to trial often results in a successful resolution of the dispute without the stress and delay associated with a trial, which is fair for the parties seeking compensation (as delays have the effect of compounding their suffering). A further flow-on benefit is that matters which don't settle at mediation and do need to go to trial are resolved more quickly. | **Not suitable for all disputes.** Some disputes may not be able to find a resolution through mediation – for example, if one party is not willing to negotiate, if there is hostility between the parties, if the issue is particularly large and complex. In these cases, ordering parties to attend mediation will just create further delays before trial. This is a small weakness – the significant financial and time savings mean most parties will be willing to attempt mediation prior to trial and a party's non-compliance with a court's direction to attempt mediation may result in that party being required to meet the other party's legal costs. |

**Principle of justice: *Equality***

| Strengths of the power to order mediation – how equality is promoted | Weaknesses of the power to order mediation – limitations in achieving equality |
|---|---|
| **Available to all parties.** All parties are able to participate in this dispute resolution method. | N/A |

## Power to give directions 3.2.8.2

Section 47 of the *Civil Procedure Act 2010* (Vic) states that to achieve the efficient and timely resolution of civil cases:

> 'the court may give any direction or make any order it considers appropriate.'

**The overarching purpose of this power is** to give judges the ability to maintain control of the proceedings by ordering parties to do certain things before and during the trial.

**This is a very broad power.** It can include pre-trial directions to:

- identify at an early stage the real issues in dispute
- encourage the parties to cooperate, settle the whole or part of the proceedings, or use alternative methods of dispute resolution (such as mediation)
- require the parties' legal representatives to attend pre-trial conferences to clarify the issues that are in dispute (and avoid evidence being presented on facts the parties actually agree on)
- control the case's progress by fixing timetables (for example, timetables for discovery and production of documents to be completed by), dealing with multiple issues on one occasion, not requiring parties to attend, or making use of technology.

**Judges may also make directions about the conduct of a trial,** such as:

- the order in which witnesses give evidence
- minimising the time for the hearing by:
  - limiting the number of witnesses
  - setting a time limit for how long a witness may be questioned
  - limiting cross-examination time
  - limiting the topics that witnesses may be questioned on
- directing which evidence must be given orally, and which may be presented in written format
- ordering proceedings be live-streamed online, so members of a representative proceeding can follow the trial.

**Parties should comply with judges' directions** to actively participate in mediation and other directions that seek to minimise the time taken to resolve a civil case (and the costs associated with a dispute).

**If a party does not comply** with a judge's directions in the conduct of a civil matter, the court may:

- dismiss the plaintiff's claim
- dismiss the defendant's defence, and find in favour of the plaintiff
- reject any evidence the plaintiff/defendant wishes to present to the court
- direct one party to pay part/all of the other party's costs (an adverse costs order).

**CASE STUDY** **SELF-REPRESENTED LITIGANT ADVICE**

**What orders may be made at a directions hearing?** After the judge hears from all parties, orders may be made addressing any of the following:

- the date the trial will start and how long it might take
- times for the parties to complete pleadings (statement of claim, defence, counterclaim, defence to counterclaim and any further and better particulars of these documents)
- that written and sworn lists of documents be provided to the other parties (discovery)
- that the parties attend mediation
- when fees for trial are to be paid and by whom
- any other orders necessary to be made to ensure that the trial runs smoothly and is ready to proceed on the allocated date.

Failure to comply with a directions order may result in judgment being entered against the defaulting party or the Court may strike out the action.

Once the trial date is scheduled, the parties must be ready to proceed on that date; an adjournment will only be granted if good reason is shown.

*Source:* A Guide for Self-Represented Litigants in the Civil Jurisdiction of the County Court, www.countycourt.vic.gov.au/news-media/media-releases/county-court-provides-more-assistance-self-represented-litigants

**CASE STUDY**

Assume Jeremy has a serious allergic reaction when his doctor (Duncan) prescribes medication. Jeremy takes legal action, claiming Duncan did not exercise sufficient care when assessing his illness and prescribing the medication. He is seeking damages as compensation for his pain and suffering.

After Jeremy files his statement of claim in the County Court, the judge directs Jeremy and Duncan to attend mediation to attempt an early resolution. Duncan refuses to actively participate in the mediation.

At trial, Duncan is successful and Jeremy is not awarded the damages he seeks. Usually, the losing party in a civil dispute would pay part/all of the opposing party's costs; however, in this case the judge does not award costs in Duncan's favour, as he failed to follow the earlier direction to participate in mediation. This has meant the dispute was not resolved as quickly as it ought to have been.

**Power to give directions & the principles of justice**

**Principle of justice: *Access***

| Strengths of the power to give directions – how access is promoted | Weaknesses of the power to give directions – limitations in achieving access |
|---|---|
| **Saves court time and resources.** Directions minimise the time it takes to resolve disputes, which should restrict the time for which parties engage legal representation and reduce the time taken for a trial – this minimises costs, ensuring the courts remain more accessible for parties pursuing civil claims/defending civil claims. | **Self-represented parties.** Unrepresented parties may have trouble understanding why judges place limitations on the number of witnesses that may be called. |

**Principle of justice: *Fairness***

| Strengths of the power to give directions – how fairness is promoted | Weaknesses of the power to give directions – limitations in achieving fairness |
|---|---|
| **Timely.** Parties may have their issue resolved in a timely manner as judges can force parties to comply with deadlines.<br><br>**Minimises delays.** Judges' directions pre-trial and during the trial minimise delay associated with a trial, which is fair for the parties seeking compensation (as delays have the effect of compounding their suffering).<br><br>**Parties are aware of the case against them.** A judge has the power to order that parties disclose all documents which will be used as evidence, or to limit what type of evidence may be used at trial. This ensures that both parties are aware of the case against them and promotes fairness by allowing them to prepare a defence to the opponent's arguments. | **Complexity of directions.** Unrepresented parties may find it difficult to understand and comply with such directions. As described below this impacts on equality, but it may also undermine the achievement of fairness if this lack of understanding means important evidence is not disclosed when required. |

**Principle of justice: *Equality***

| Strengths of the power to give directions – how equality is promoted | Weaknesses of the power to give directions – limitations in achieving equality |
|---|---|
| **Applies to all cases.** Judges' broad powers of case management can be applied to all parties, in all cases. | **Self-represented parties.** Unrepresented parties may be disadvantaged compared to represented parties as they are less able to understand and comply with judicial directions. |

**USEFUL TIP**

The link between fairness and judicial powers of case management was asked about in the 2018 VCAA exam, and students found it hard! It's not enough to simply assert that powers of case management promote fairness (or access or equality) – the connection between the two must be explained.

The examiners' report included the following comments.

Some of the issues evident in student responses were:

- Some students did not know what case management powers are.
- Some students could not explain how the use of case management powers achieved fairness. Many students wrote that giving directions was 'fair' or enabled the parties to be treated 'fairly' without expressing what 'fair' or 'fairly' meant. Students who scored highly were able to express what fairness was by reference to features such as being treated impartially and without fear or favour, having an opportunity to present your case at trial, or in the case of being ordered to attend mediation, having the opportunity to resolve the dispute without incurring the costs of trial. However, these are not the only ways to explain what fairness means. Students are encouraged to think broadly about what it means for there to be 'fairness' in a civil dispute.
- Some students confused the role of the judge generally with case management powers. There is a distinction between the general role or responsibilities of a judge in a trial or case (acting impartially, deciding on admissibility of evidence) and the powers a judge has to manage a case (which effectively is a sub-set or feature of the role of the judge).

Many students who achieved full marks explained the power to give directions or the power to order mediation, and how these powers achieved fairness. For example, the power of the court to give directions (before or during trial) allows greater ability for the parties to know the case that is put against them, thus achieving the principle of fairness.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.8: Judicial powers of case management**

## Keen to learn more?

**Judicial College of Victoria: Civil Procedure Bench Book,** www.judicialcollege.vic.edu.au/eManuals/Civil/index

QUESTIONS

# 3.2.8 Judicial powers of case management

LEVEL 1:
Define and understand

**1.** Maria has a dispute with a neighbour (Evelyn). Maria expects that, if the dispute goes to court, the legal costs will be significant and there will be substantial delays. The parties have not had a chance to discuss the issues involved.

Should a trial judge order the parties to mediation?

**A.** No. The dispute is unsuitable for mediation because courts only direct complex legal issues to mediation, even though it would facilitate a cost-effective resolution of this dispute.

**B.** Yes. The dispute is suitable for mediation because the relationship between the parties will continue. Mediation will also facilitate a cost-effective and timely resolution of the dispute.

**C.** Yes. The dispute is suitable for mediation because the matter is urgent. Mediation will also facilitate a cost-effective and timely resolution of the dispute.

**D.** None of the above

**2.** Without attending mediation, Peter instigated a civil claim against Charlie. After Peter anticipated substantial pre-trial delays as he knows Charlie won't provide the documents he needs, he decided to alter the amount of damages sought. Peter also wants to call 10 expert witnesses. The judge, however, seeks to ensure the trial is conducted in a timely manner. Which directions are most appropriate in this case?

**A.** Directions to the parties limiting the number of witnesses that a party may call.

**B.** Directions to the parties about participating in mediation, limiting the number of witnesses that a party may call and directing Charlie to admit liability.

**C.** Directions to the parties about participating in mediation, timetabling and limiting the number of witnesses that a party may call.

**D.** None of the above

LEVEL 2:
Describe and explain

**3.** Explain how the power to order mediation helps to uphold the principle of access. (3 MARKS)

**4.** Describe the power to give directions in civil proceedings. In your answer, identify two directions a judge may give other than attending mediation. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** The plaintiff Gina is the executor of her sister Bridie's estate. Gina has brought negligence proceedings against the concrete company Bridie worked for, alleging she died of asbestosis. Gina proposes to call 34 expert witnesses. The court does not make any order regarding the number of witnesses. The issue of causation is most complicated, so the court significantly limits the time to be taken on it at trial. The court does not have any responsibilities under the *Civil Procedure Act 2010* (Vic) as it is up to the parties themselves to comply with the rules of managing a civil claim.

Identify three errors in the above extract and provide the correct definition, process or procedure. (3 MARKS)

**6.** A local council is bringing civil proceedings against landscape gardening company, 'Turf R Us', for laying down astroturf that does not drain properly. 'Turf R Us' are yet to provide any copies of relevant documents that relate to the key issues in dispute.

Outline the likely role of the judge in this case, given their powers of case management and predict an outcome if 'Turf R Us' does not comply. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** Evaluate the extent to which judicial powers of case management contribute to achieving the principles of justice. (7 MARKS)

**8.** 'Without effective judicial control the adversarial process is likely to... degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply.'

*Source:* Lord Woolf, Access to Justice report, UK

Do you think judicial powers of case management contribute to achieving fairness in our civil justice system? (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 3 (online), covering these lessons:

- **Lesson 3.2.7 The responsibilities of key personnel in a civil trial**
- **Lesson 3.2.8 Judicial powers of case management**

Check with your teacher when it's time to complete this progress check.

# 3.2.9 Methods used to resolve civil disputes

**When parties take legal action in the courts and VCAT the dispute may be resolved at the conclusion of a hearing or trial, with an independent third party considering the evidence presented by each side and determining which party is successful. However it is very common for the parties to first attempt to reach a resolution to their dispute using an alternative process, such as conciliation or mediation.**

Furthermore, in some cases parties with a legal dispute may not take action in the courts (or VCAT) at all and may attempt to use conciliation or mediation to resolve the dispute, independent of the courts and VCAT. For example, disputes raised by consumers at Consumer Affairs Victoria may be resolved by conciliation.

It is also common for contracts between two businesses to include an agreement to resolve any disputes using a process such as arbitration, rather than going through the courts.

These alternatives to dispute resolution using a trial or hearing are often referred to as 'alternative dispute resolution' or 'appropriate dispute resolution'.

This lesson covers VCAA Key Knowledge point: **'The methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness'**, which we have broken down into the following concepts:



**USEFUL TIP** The term 'alternative dispute resolution' or 'appropriate dispute resolution' is used in some parts of this lesson (and often in public discussion of the legal system) to collectively describe methods other than judicial determination, such as mediation, conciliation and arbitration. However, in your responses it is best to refer to the methods individually, rather than describing them in a collective way.

## Mediation 3.2.9.1

**Mediation is** a cooperative, non-judicial dispute resolution process involving an independent third party (mediator). The mediator encourages the two parties to communicate, which should ensure the parties voluntarily come to a resolution.

**The resolution reached in mediation is** non-binding. This can be enforceable if the parties sign a deed of settlement. It is common for parties who have commenced proceedings in the courts, but reach a resolution to a dispute by agreement at mediation (without the need for a trial) to present this resolution to the court, which issues orders made by consent of the parties, rendering the outcome binding.

Legal representation is often not used in mediation, and the mediator ensures the negotiation is conducted in a less formal, supportive environment. The emphasis in mediation is on reaching a resolution, not presenting evidence of who may be right/wrong.

**Appropriateness of mediation**

**Is appropriate** when:

- continuing relationship needs to be maintained
- parties are willing to discuss issues
- there is admission of responsibility
- parties prefer privacy and confidentiality

**Not appropriate** when:

- parties are highly emotional, as negotiation becomes more difficult
- parties are unwilling to discuss issues – an agreed settlement is unlikely

- there is a history of violence or threats
- there is a power imbalance – creates a risk that one party will 'give up too much' in mediating a settlement

Animosity between the parties means reaching an agreement at mediation **may** be inappropriate in many cases, but not all. The time and cost savings may mean parties in such a case are willing to put aside their ill-feeling in order to mediate a resolution.

**USEFUL TIP** Don't confuse dispute resolution bodies (the courts, VCAT and CAV – **where** civil disputes are resolved) with the methods used to resolve disputes (such as mediation, arbitration, conciliation and conducting hearings/trials – **how** civil disputes are resolved).

**Mediation used to resolve disputes by:**

| Courts | VCAT |
|---|---|
| Magistrates' Court, County Court and Supreme Court have the power to order parties to attend mediation as a pre-trial procedure or at any time during the trial. | Has the power to order parties to attend mediation. |

**CASE STUDY** In disputes between an injured worker and their employer (and WorkSafe) regarding the extent of their injury and how much compensation they may be entitled to, the County Court first sends all such matters to mediation to attempt to resolve the dispute without the need for a costly, lengthy trial.

### Mediation and the principles of justice

**Principle of justice: *Access***

| Strengths of mediation – how access is promoted | Weaknesses of mediation – limitations in achieving access |
|---|---|
| **Low cost.** Mediation is accessible as it is far lower cost than a trial (as paying a mediator is far cheaper than the cost of paying a court to conduct a trial, legal representation needed for a much shorter period – if at all).<br>**Informal.** Mediation is conducted in a more supportive, non-adversarial manner compared to a trial; the intimidating nature of a trial may discourage some individuals from pursuing a case through the courts, mediation's supportive tone promotes access to justice by overcoming this issue.<br>**Private.** The public nature of a trial can prevent some parties taking legal action if the subject of the dispute is sensitive; mediation is private and this promotes access to dispute resolution in such cases. | **Self-representing.** Given legal representation is often not used in mediation, some injured persons may find the need to present their own case intimidating – perhaps discouraging them from pursuing a remedy. This is a small weakness, given mediation is conducted in a supportive manner and the defendant will also (usually) not be represented. |

**Principle of justice: *Fairness***

| Strengths of mediation – how fairness is promoted | Weaknesses of mediation – limitations in achieving fairness |
|---|---|
| **Party control.** Mediation gives the parties the ability to control the outcome of their dispute, which should ensure they feel the outcome is fair. | **Not suitable for all disputes.** Some disputes may not be able to find a resolution through mediation – for example, if one party is not willing to negotiate, if there is hostility between the parties, if the issue is particularly large and complex. In these cases, attempting mediation will just create further delays before trial, which may be unfair.<br>This is a small weakness – the significant financial and time savings mean most parties will be willing to attempt mediation prior to trial and a party's non-compliance with a court's direction to attempt mediation may result in that party being required to meet the other party's legal costs. |

**Principle of justice: *Equality***

| Strengths of mediation – how equality is promoted | Weaknesses of mediation – limitations in achieving equality |
|---|---|
| **No party is disadvantaged.** Unrepresented parties should not be disadvantaged in the same way as they are in a court, as the mediator guides the discussion and there are no formal rules of evidence/procedure to navigate.<br>**Legal representation is equal.** In many cases a mediator will only permit legal representation if both parties have a lawyer; otherwise both parties will self-represent. | **Language barriers.** Parties from a non-English speaking background may have difficulty participating in a mediation process. |

**CASE STUDY**

In 2008 research commissioned by the Department of Justice found:

- Thousands of cases in the County and Supreme Courts are sent to mediation prior to a trial being conducted.
- Approximately 80% of mediation participants were satisfied with mediation as a way of resolving disputes.
- Those participating in mediation find the process and outcomes easy to understand.
- On average, parties using mediation to resolve their dispute believed they had saved approximately $30,000 in legal costs by doing so.

*Source:* Mediation in the Supreme and County Courts of Victoria: a summary of the results

Although this research was conducted in 2008, the use of mediation by the courts has continued in the same way since this time and the benefits of mediation are just as applicable now.

The use of mediation in this way not only benefits the parties to disputes that settle at mediation, but dramatically reduces the number of contested trials conducted by the courts – reducing the backlog of cases and delays for those matters that do go to trial.

## Conciliation 3.2.9.2

Conciliation is a non-judicial resolution process involving an independent third party (conciliator) with specialist knowledge about the type of dispute in question. The conciliator encourages the two parties to communicate, and can offer suggestions and solutions, which should ensure the parties voluntarily come to a non-binding resolution. This can be enforceable if the parties sign a deed of settlement.

As in mediation, legal representation is often not used in conciliation, and the conciliator ensures the negotiation is conducted in a less formal, supportive environment. The emphasis in conciliation is on reaching a resolution, not presenting evidence of who may be right/wrong.

### Appropriateness of conciliation

**Is appropriate** when:

- there is a continuing relationship
- parties are willing to discuss issues
- there is admission of responsibility
- parties prefer privacy and confidentiality

**Not appropriate** when:

- parties are highly emotional
- parties are unwilling to discuss issues
- there is a history of violence or threats
- there is a power imbalance

**Courts can refer parties to attempt conciliation** prior to a trial. Section 66(1) of the *Civil Procedure Act 2010* (Vic) states 'A court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution' and 'appropriate dispute resolution' includes conciliation (s.3 of the *Civil Procedure Act*). However, courts more commonly direct parties to attempt mediation.

**Conciliation used to resolve disputes by:**

| Courts | VCAT | CAV |
|---|---|---|
| Magistrates' Court, County Court and Supreme Court have the power to order parties to attend conciliation. | Has the power to order parties to attend compulsory conferences (uses conciliation as the process). | Has the power to use conciliation to resolve disputes (primary dispute resolution method). |

### Conciliation and the principles of justice

**Principle of justice: *Access***

| Strengths of conciliation – how access is promoted | Weaknesses of conciliation – limitations in achieving access |
|---|---|
| **Low cost.** Conciliation is accessible as it is far lower cost than a trial (as paying a conciliator is far cheaper than the cost of paying a court to conduct a trial, legal representation needed for a much shorter period – if at all). | **Self-representing.** Given legal representation is often not used in conciliation, some injured persons may find the need to present their own case intimidating – perhaps discouraging them from pursuing a remedy. This is a small weakness, given conciliation is conducted in a supportive manner and the defendant will also (usually) not be represented. |

*cont'd*

| Strengths of conciliation – how access is promoted | Weaknesses of conciliation – limitations in achieving access |
|---|---|
| **Informal.** Conciliation is conducted in a more supportive, non-adversarial manner compared to a trial; the intimidating nature of a trial may discourage some individuals from pursuing a case through the courts, conciliation's supportive tone promotes access to justice by overcoming this issue.<br>**Private.** The public nature of a trial can prevent some parties taking legal action if the subject of the dispute is sensitive; conciliation is private and this promotes access to dispute resolution in such cases. | |

**Principle of justice: *Fairness***

| Strengths of conciliation – how fairness is promoted | Weaknesses of conciliation – limitations in achieving fairness |
|---|---|
| **Party control.** Conciliation gives the parties the ability to control the outcome of their dispute, which should ensure they feel the outcome is fair. | **Not suitable for all disputes.** Some disputes may not be able to find a resolution through conciliation – for example, if one party is not willing to negotiate, if there is hostility between the parties, if the issue is particularly large and complex. And/or one party may be unwilling to adhere to any agreement made, and in these cases the parties will need to go to trial, which may be unfair on the party willing to negotiate and stick to any agreed outcome.<br>This is a small weakness – the significant financial and time savings mean most parties will be willing to attempt conciliation prior to trial and adhere to any agreements reached. |

**Principle of justice: *Equality***

| Strengths of conciliation – how equality is promoted | Weaknesses of conciliation – limitations in achieving equality |
|---|---|
| **No party is disadvantaged.** Unrepresented parties are not disadvantaged (by comparison with a trial), as the conciliator guides the discussion and suggests solutions.<br>**Legal representation is equal.** In many cases a conciliator will only permit legal representation if both parties have a lawyer; otherwise both parties will self-represent. | **Language barriers.** Parties from a non-English speaking background may have difficulty participating in a conciliation process. |

**CASE STUDY**

VCAT resolves disputes using a wide range of methods. Many VCAT disputes are resolved by agreement between the parties without the need to conduct a hearing. VCAT uses both mediation and conciliation as methods to resolve disputes in this way.

For example, during 2017/18 over 2,550 VCAT disputes were sent to be resolved by mediation or a compulsory conference (a meeting with a VCAT member whereby the case is resolved by conciliation).

55% of these cases were resolved during the mediation or conciliation process.

*Source:* VCAT Annual Report 2017/18

## Arbitration 3.2.9.3

**Arbitration is** a non-judicial resolution process involving an independent third party (arbitrator) who listens to parties present evidence and makes a binding decision.

Arbitration is less formal than a trial, without the strict rules of evidence and procedure used by the courts in conducting a civil trial.

It is most commonly used by parties to large commercial contracts to resolve disputes without the need to resort to the courts. That is, many commercial agreements between businesses will include a requirement that any dispute between the parties be resolved by arbitration.

**CASE STUDY**

Assume AshLand (a property developer) engages CathCon (a large commercial construction company) to build a large apartment tower. The contract between these two parties will include terms regarding when the construction is paid for, the quality of the materials used, due dates for completing certain stages of the building, etc.

It is common for such a contract to also include a clause stating that any disputes arising between the parties will be resolved by arbitration.

Assume CathCon believes AshLand has failed to make a payment for 20% of the total fee by an agreed date. AshLand refused to pay as it believes CathCon has fallen behind the agreed building schedule. An independent arbitrator would be engaged to hear and resolve the dispute, without the need to initiate proceedings in the courts.

### Appropriateness of arbitration

**Is appropriate** when:

- parties agree to arbitrate (this may include the parties having a contractual arrangement to arbitrate disputes that arise during a commercial transaction)
- the matter is less than $10,000 issued in the Magistrates' Court
- the case requires a binding and enforceable decision

**Not appropriate** when:

- parties do not agree to arbitrate
- parties are comfortable navigating complex court rules of evidence and procedure

**Arbitration used to resolve disputes by:**

| Courts | VCAT |
|---|---|
| This is a compulsory dispute resolution in the Magistrates' Court for disputes under $10,000. The County Court and Supreme Court have the power to order parties to attend arbitration with party consent. | Arbitration is not conducted in VCAT, however it has the power to order parties to attend arbitration. |

### Arbitration and the principles of justice

**Principle of justice: *Access***

| Strengths of arbitration – how access is promoted | Weaknesses of arbitration – limitations in achieving access |
|---|---|
| **Saves time and costs for parties.** Parties are able to utilise cheaper and faster dispute resolution methods. Arbitration is usually less costly to parties than taking action in the courts.<br>**Private.** Arbitration is a private way to resolve a dispute (unlike a trial); this makes it more desirable to parties in many cases. | N/A |

**Principle of justice: *Fairness***

| Strengths of arbitration – how fairness is promoted | Weaknesses of arbitration – limitations in achieving fairness |
|---|---|
| **Party control.** As in a civil trial, parties retain control over the evidence and legal arguments they present. As a result, parties can present their case in its best light and should therefore be more satisfied with the outcome. | **One party may be disadvantaged.** If one party has legal representation in an arbitration but the other does not, represented parties will have an unfair advantage over unrepresented parties: they will be more able to present their case in its best light during the arbitration. |

**Principle of justice: *Equality***

| Strengths of arbitration – how equality is promoted | Weaknesses of arbitration – limitations in achieving equality |
|---|---|
| **Magistrates' Court.** The court provides access to arbitration for parties to minor disputes regardless of their language background, wealth, etc. (There is only a small group of cases for which arbitration won't be provided in the Magistrates' Court, such as disputes in which a local council is trying to recover unpaid rates). | **Self-represented parties.** Unrepresented parties and those from a non-English speaking background are disadvantaged, as they may not understand the procedures that have to be followed in arbitration (although such procedures are less complex than in a trial). |

**Comparing mediation-conciliation-arbitration**

| | Mediation | Conciliation | Arbitration |
|---|---|---|---|
| **Third Party Name** | Mediator | Conciliator | Arbitrator |
| **Third Party Role** | Facilitate discussion | Facilitate discussion and suggest solutions | Listens to evidence and hands down decision |
| **Decision-Maker** | Parties | Parties | Arbitrator |
| **Resolution** | Not binding (unless made binding by deed of settlement or court makes orders with consent of the parties) | Not binding (unless made binding by deed of settlement or court makes orders with consent of the parties) | Binding |
| **Use by Courts** | Yes (power to refer) | Yes (power to refer, but not commonly used) | Yes – Magistrates' Court for claims under $10,000 |
| **Use by VCAT** | Yes | Yes (compulsory conferences) | No (power to refer) |
| **Use by CAV** | No (power to refer) | Yes (primary method) | No |

**USEFUL TIP** When discussing methods of dispute resolution in previous exams, a number of common mistakes arise. Note the following comments from the 2016 VCAA Legal Studies Examination Report:

> Some common misconceptions remain about mediation and arbitration. First, it is not always the case that mediation is inappropriate for parties where there is animosity. Second, while mediation may not result in a formal binding order from the court, it is common for the parties to sign terms of settlement upon agreeing the outcome. Such terms may then create a binding contract between the parties, which would be enforceable if one of the parties later breached that contract.
>
> Finally, students should recognise that arbitration is often not automatically available to parties in dispute. Other than arbitration in the Magistrates' Court for small claims, arbitration is normally used in commercial disputes where the parties have agreed by contract to resolve by arbitration any dispute that may arise.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.9: Methods used to resolve civil disputes**

## Keen to learn more?

**Mediations at VCAT,** www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/mediations

**Victorian Bar – Commercial Arbitration,** www.vicbar.com.au/public/brief-barrister/alternative-dispute-resolution/commercial-arbitration

**Sourdin, T and Balvin, N (2009) Mediation in the Supreme and County Courts of Victoria: a summary of the results ADR Bulletin: Vol. 11: No. 3, Article 1,** epublications.bond.edu.au/adr/vol11/iss3/1

QUESTIONS

# 3.2.9 Methods used to resolve civil disputes

LEVEL 1:
Define and understand

**1.** Neighbours Brad and Sarah have had a dispute about the height of the fence between their houses. They decide to have a third party, Simone, assist them in resolving the dispute. Simone guides Brad and Sarah through the stages of the process, by moving them on to the next step when she thinks both parties have had their say. She encourages both parties to talk about the issues themselves and develop options and solutions by themselves. However, when Sarah starts getting angry and interrupting Brad, Simone intervenes and reminds her to let him have his say and be respectful of him by not interrupting.

Which method of dispute resolution is being used in the above scenario?

**A.** conferencing
**B.** arbitration
**C.** mediation
**D.** conciliation

**2.** Which of the following options does not apply to conciliation?

**A.** An enforceable decision is made by the disputing parties in all cases.
**B.** The third party will ensure both parties are heard when discussing possible solutions to the dispute.
**C.** It upholds the principle of access by being a low-cost alternative to a trial as a method to resolve a dispute.
**D.** The third party can recommend possible solutions to the parties, who ultimately reach an agreement themselves to resolve the case.

**3.** Steve and Kylie were in a dispute about whether Steve, a concreter, should be paid the full amount of money for completing Kylie's driveway that was not completed in time for her daughter's birthday. She argues that therefore she should not have to pay the full amount. To resolve the dispute, they both sit down in a room with an independent third party, in a process that lacks the strict rules of evidence and procedure used in a court. Neither of them has legal representation. In the end a decision is made that the next time Kylie uses Steve, she will be given a discount. Kylie, as a result, is immediately bound to pay Steve the full amount for the job that he did, and he is bound to provide the discount for the next lot of work done.

What is distinctive about this scenario that suggests Steve and Kylie are using arbitration as opposed to another alternative dispute resolution method?

**A.** the absence of legal representation
**B.** the lack of strict rules of evidence and procedure
**C.** the fact that Kylie is legally bound to pay back Steve
**D.** none of the above

LEVEL 2:
Describe and explain

**4.** Describe mediation as a method of dispute resolution. (3 MARKS)

**5.** Describe conciliation as a method of dispute resolution. (3 MARKS)

**6.** Describe arbitration as a method of dispute resolution. (3 MARKS)

LEVEL 3:
Apply and compare

**7.** Madeleine had been working at Baking Deelight for two years when she was injured in an accident using the automatic bread slicer. She cut her hand and couldn't sit her upcoming SACs at school. She wants compensation but her employer is reluctant to pay.

Would this case be appropriate for mediation? Justify your response. (4 MARKS)

**8.** To what extent are conciliation and arbitration similar? (4 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** Daniel had asked his landlord to investigate a leak in the bathroom several times, over the phone and in writing, but nothing had been done. Eventually one night he was sitting downstairs in his lounge room when his bath crashed through his roof from upstairs. Luckily no one was injured, but he wishes to obtain compensation for his damaged flat screen television, which the bath fell onto, the cost of accommodation in a nearby hotel whilst his house is repaired, and general shock.

Evaluate the appropriateness of using conciliation to resolve this civil dispute. (5 MARKS)

**10.** 'Methods of alternative dispute resolution are always preferable and should be attempted in every instance.'

Discuss this statement. (7 MARKS)

# 3.2.10-11 Purposes of remedies

**A party initiating civil proceedings seeks to have their physical/emotional/financial loss compensated for in some way. While the actions giving rise to a civil case cannot be undone (for example, the injury sustained in a car accident, the harm caused by negligent medical treatment or the psychological suffering caused by racial discrimination cannot be undone), at the conclusion of a civil dispute the court aims to compensate the plaintiff for this suffering (and if possible, minimise the impact of the defendant's actions).**

The courts use civil remedies to return the plaintiff to the position they were in prior to the injury being caused by the defendant.

This lesson covers VCAA key knowledge point: **'the purposes of remedies' and 'damages and injunctions, and their specific purposes'**, which we have broken down into the following concepts:



**USEFUL TIP** Use the term 'remedies', not 'compensation'. Remedies are awarded by a court; compensation is what a remedy tries to achieve for a successful plaintiff.

## Purpose of remedies 3.2.10.1

**Remedies are** orders from the court (or VCAT) upholding the plaintiff's civil rights by providing relief for the injury they have suffered.

**Remedies awarded by courts and VCAT include** damages and injunctions.

**The overarching purpose of all civil remedies is to** restore the plaintiff to the position they were in before the harm occurred.

## Purpose of damages 3.2.11.1

**Damages are** an award of monetary compensation to the plaintiff, against the defendant.

Damages can be classified into different categories:

1. **Compensatory** Damages;
   - Specific: Have a precise value and are easily quantifiable.
     - For example, medical bills, damage to property, lost items.
   - General: Do not have a precise value and are not easily quantifiable.
     - For example, pain and suffering, loss of quality of life, shortened life expectancy.
   - Aggravated: Further compensation for humiliation and insult.
     - For example, loss of reputation, humiliation, distress.
2. **Exemplary** Damages: Large monetary value to punish defendant. Not commonly awarded in Victoria.
   - For example, cruelty, revenge, disregarding the plaintiff's rights.
3. **Nominal** Damages: Small amount awarded to show plaintiff was legally right, usually valued at $1.
   - For example, tainted reputation but no substantial damage, touching a person without causing harm.

The payment of damages to a plaintiff may be the result of a judge determining that the defendant should make such a payment of damages to restore the plaintiff, or it may be the result of a settlement reached out-of-court during mediation.

**The purposes of damages**

- **Compensatory** damages aim to reimburse and compensate the plaintiff for the loss suffered.
- **Exemplary** damages aim to punish defendant.
- **Nominal** damages aim to reflect that the plaintiff was legally right.

**CASE STUDY** **POKEMON AWARDED $1 IN DAMAGES**

Pokemon sued Redbubble for copyright infringement. Redbubble used Pokemon's main character, Pikachu, on merchandise for online sales. The Federal Court awarded Pokemon $1 in nominal damages, as the merchandise was not available for purchase within the official universe and produced no royalties.

This reflects the purpose of nominal damages as the plaintiff, Pokemon, was proved legally right, but did not suffer any harm.

**Purposes of damages**

| Damages | Purpose Achieved | Purpose Not Achieved |
|---|---|---|
| **Compensatory** | | |
| ***Specific*** | Returns plaintiff to financial position. Reflects the financial loss endured by each individual plaintiff. | Does not remove experience of suffering harm. |
| ***General*** | Some money as compensation to recognise harm suffered. | Cannot place value on pain and suffering; impossible to objectively measure a monetary figure all plaintiffs would agree is sufficient for the harm they suffered. |
| ***Aggravated*** | Additional sum of money to recognise humiliation. | Does not reverse humiliation. |
| **Exemplary** | Punishes defendant, deterrence for others. | Cannot reverse harm suffered. |
| **Nominal** | Recognition of infringed rights. | Very little monetary compensation for infringed rights. |

## Purpose of injunctions 3.2.11.2

**Injunctions are** court orders compelling a party to do something, or preventing a party from doing something.

1. **Mandatory** injunctions force parties to do something.
   - For example, demand a written apology.
2. **Restrictive** injunctions prevent parties from doing something.
   - For example, prevent a property from being sold.

**Injunctions** may be short-term or operating indefinitely.

- **Interlocutory** injunctions are temporary.
  - For example, a short-term injunction to prevent the demolition of a house, until a court can resolve a dispute regarding whether the owner is or is not entitled to demolish it.
- **Perpetual** injunctions are permanent.
  - For example, an injunction instructing a publisher not to print a defamatory book.

**The purpose of injunctions** is to change a situation for the benefit of the plaintiff. This may include:

- Restoring the plaintiff to the position they were in before the defendant infringed their rights.
  - For example, a mandatory injunction requiring an apology for a defamatory publication.
- Preventing harm to the plaintiff
  - For example, a restrictive injunction preventing the construction of a building that, if built, would block out all natural light in an existing home.

**Purposes of injunctions**

| Injunctions | Purpose Achieved | Purpose Not Achieved |
|---|---|---|
| **Mandatory** | The defendant is forced to start/complete an action to benefit the plaintiff. | The change has occurred too late to save the plaintiff from suffering harm through the defendant's inaction. |
| **Restrictive** | The defendant must stop doing an action, preventing harm to the plaintiff. | Harm may have already occurred to the plaintiff, providing limited benefit. |

**CASE STUDY**

**TELSTRA GRANTED INJUNCTION AGAINST OPTUS**

The Supreme Court granted Telstra an injunction against Optus regarding misleading advertising. A P3 Connect report demonstrated that Optus was the leader in voice, whereas Telstra was the leader in data performance. Optus' advertisement stated that it had the best internet in Australia, a claim Telstra say is not supported by the data. The Supreme Court granted an interlocutory restrictive injunction, forcing Optus to remove their advertisement.

This restrictive injunction fulfills its purpose, as Optus was forced to stop showing the advertisements, preventing further harm to Telstra.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 3.2.10: Purposes of remedies** and **Lesson 3.2.11 Damages and injunctions**

## Keen to learn more?

**Duke J (2017) Pokémon awarded $1 in damages against Redbubble,**
www.smh.com.au/business/companies/pokemon-awarded-1-in-damages-against-redbubble-20171219-p4yxvr.html

**Department of Justice: Compensation for personal injury,**
www.justice.vic.gov.au/home/justice+system/compensation+for+personal+injury

QUESTIONS

# 3.2.10-11 Purposes of remedies

LEVEL 1:
Define and understand

**1.** Jeremy trespasses onto Duncan's property, but didn't do any damage to it. Duncan is successful in pursuing a trespass case against Jeremy in the courts and is awarded $1 in damages. What type of damages is this demonstrating and which option best describes the purpose of these damages?

**A.** nominal; to recognise that Duncan had been wronged by upholding his civil rights without actually needing to be compensated

**B.** exemplary; to highlight that what he did was unacceptable by denouncing his actions, and therefore deter others from also infringing on these rights

**C.** nominal; to demonstrate to the other party that Duncan had no need for the money

**D.** compensatory; to reimburse Duncan for the loss caused to his property as a result of Jeremy's trespass

LEVEL 2:
Describe and explain

**2.** Rebel Wilson was awarded $4.5 million from Bauer Media for defaming her in their Woman's Day articles (as decided in the Supreme Court of Victoria, before the decision was appealed).

Identify the type of remedy that was awarded to Wilson and one purpose that this award may have served. (2 MARKS)

LEVEL 3:
Apply and compare

**3.** 'Before such an award can be made, the plaintiff must show that the conduct of the defendant lacked good faith, or was improper, or was unjustifiable. A leading judge explained it this way: "The jury can take into account the motives, the conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite, or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride."'

*Source:* www.judicialcollege.vic.edu.au/eManuals/CJCB/index.htm#45350.html

A court reporter heard a judge say this to a jury. Identify the type of damages being referred to and justify your response. (3 MARKS)

**4.** Define and distinguish between compensatory and exemplary damages. (5 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** 'Cheques totalling more than $496 million have been mailed out to Black Saturday survivors as part of a class action settlement, eight years after the devastating bushfires. This is on top of the personal injury money distributed to survivors last year which saw around 1,800 claimants receive payments totalling more than $192.4 million. This brings the total money paid to Black Saturday survivors in Australia to $688.5 million. However, some victims say the amount "is partial compensation" only.

The Black Saturday bushfires killed 173 people, including 119 in the Kilmore East-Kinglake fire, and 40 in the Murrindindi fire complex. The Murrindindi fire all but wiped out the town of Marysville.'

*Source:* Adapted from www.theage.com.au/national/victoria/black-saturday-survivors-receive-payments-totalling-496-million-20170330-gvaeox.html

Do you think damages are only ever 'partial compensation'? (5 MARKS)

**6.** 'Sometimes a plaintiff may need to seek a variety of remedies in order for the overall purpose of civil law remedies to be achieved.'

Do you agree? Justify your response. (6 MARKS)

### Time for some exam practice!

You're ready for Progress Check 4 (online), covering these lessons:

- **Lesson 3.2.9 Methods used to resolve civil disputes**
- **Lesson 3.2.10 Purposes of remedies**
- **Lesson 3.2.11 Damages and injunctions**

Check with your teacher when it's time to complete this progress check.

# 3.2.12 Factors that affect principles of justice (AOS 2)

**At the start of this Area of Study, we explained the Victorian justice system is designed to deliver justice to all parties to civil disputes. Throughout this Area of Study you have assessed whether the Victorian legal system delivers justice as defined by fairness, equality and access.**

We turn now to issues that may prevent the achievement of fairness, access and equality before the law.

According to Fiona McLeod SC, President of the Law Council of Australia:

> 'Access to justice is a bedrock principle for our society and a means of protecting, promoting and defending the rule of law and human rights of all people. It is a core tenet of our modern democracy, yet unfortunately there are many who are missing out.
>
> A person's formal right to justice and equal treatment before the law is of no value if he or she cannot effectively access the legal system or secure protection of basic rights," Ms McLeod said.
>
> Whether it is the pressures upon court resourcing and long backlogs, lack of access to legal advice or representation, or laws and practices that compound unfairness, the inequity experienced by many can have a devastating impact upon their lives.'
>
> *Source:* www.lawcouncil.asn.au/media/media-releases/the-justice-project-to-uncover-systemic-flaws

This lesson covers VCAA key knowledge point: **'Factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility',** which we have broken down into the following concepts:



## Costs 3.2.12.1

**Parties often incur high costs** in resolving civil disputes – both those pursuing their rights as a plaintiff, and those defending themselves as a defendant incur significant costs.

**Sources of legal costs** when resolving cases through the courts include:

- **Solicitors' fees** in the preparation for a civil trial – the complex rules regarding the pre-trial stages such as pleadings and discovery create a need for legal representation; this is expensive.
- **Barristers' fees** for the presentation of a civil case at trial – though most civil claims initiated in the court settle prior to a trial being conducted (perhaps at mediation), cases that must go to trial will often require a barrister to present legal arguments and examine witnesses.
- **Witness fees** – if expert witnesses are to be called to give evidence, they will often charge fees.
- **Fees to file** court documents – filing documents for each stage of pre-trial proceedings, (such as a writ, statement of claim, statement of defence, etc) attracts a fee.
- **Using a jury** – a party may request a jury to preside over a jury trial (although this is not common); the party requesting the jury must usually bear the expense of the jury.
- **Appealing to a higher court** – a party seeking to appeal the outcome or damages awarded will need to pay the filing fee in the appeal court, meet the costs of a solicitor preparing written documentation about the appeal and the costs of a barrister in presenting the legal arguments to the judges in the appeal court.

**This can amount to tens of thousands of dollars**. For example (correct as at mid-2018):

- Filing fees in the Magistrates' Court: $147.40-$702.30
- Plaintiff filing a writ in the County Court/defendant filing a counterclaim: $865.60
- Jury trials in the County Court: $784.60 for the first day of the trial, $563.40 per day thereafter
- Application for leave to appeal to the Court of Appeal: $3,720.90

**CASE STUDY**

### *WILSON v BAUER MEDIA PTY LTD* [2017] VSC 521

As a relatively long trial in the Supreme Court, Wilson's trial is not necessarily typical of the costs associated in all civil disputes – certainly not all barristers charge $9,000 per day for their services.

However the case does exemplify the high costs that can be associated with legal representation. The news report below appeared before Bauer appealed to the Court of Appeal, so the costs to both parties have certainly risen since this article was published in March 2018. The following appeared in ABC News Online:

> 'It was revealed Ms Wilson's barrister, Matthew Collins QC, was paid $9,000 per day of her 22-day trial — a total of $198,000.
>
> Ms Wilson had offered to settle for $200,000 before the case went to trial.
>
> The court heard Ms Wilson incurred the majority of her legal costs after the settlement was rejected by Bauer Media, including more than $500,000 in solicitors fees.'

*Source:* http://www.abc.net.au/news/2018-03-08/rebel-wilson-defamation-bauer-media-1.3m-legal-costs/9526842

**CASE STUDY**

### BLACK SATURDAY REPRESENTATIVE PROCEEDINGS

A number of representative proceedings have been conducted in the Supreme Court of Victoria on behalf of victims of the Black Saturday bushfires in February 2009.

These were complex proceedings with many plaintiffs. While the use of representative proceedings minimised the total costs for all plaintiffs (compared with each plaintiff taking action against the defendants separately), costs to solicitors and the courts were still very significant, as reported in *The Age* in March 2017:

> In 2014 and 2015, the Victorian Supreme Court approved nearly $800 million in payments to residents in the Kilmore East-Kinglake and Murrindindi class actions.
>
> Of this, nearly $100 million will be swallowed up in court and other legal costs.

*Source:* www.theage.com.au/national/victoria/black-saturday-survivors-receive-payments-totalling-496-million-20170330-gvaeox.html

**At the conclusion of a civil matter courts will make costs orders**.

- Usually, a court will order the 'losing' party to pay their own costs and some/all of the other party's costs also.
- A person/business considering initiating a civil claim should consider (see Lesson 3.2.3):
  - The up-front costs they will need to bear, as above
  - The risk of losing, and having to also meet the defendant's costs
  - Even if successful, the costs awarded by the court (to be paid by the defendant) may not cover all legal expenses, leaving the plaintiff with out-of-pocket costs (meaning at least part of the damages awarded will be directed to covering legal expenses)

**Legal Aid is available to a very limited degree** for financially disadvantaged parties.

- For example, VLA will provide some assistance for parties with migration matters, centrelink payments and parties with cognitive disabilities.
- VLA's resources are so limited it can usually only provide legal representation in court for persons charged with serious indictable offences, rather than in civil proceedings.

**Costs for pursuing civil matters at VCAT are not always low**:

- Some lists have relatively high fees for filing a claim. For example:
  - A person seeking a review of a planning decision about a multi-dwelling property worth over $1 million will pay a filing fee over $1100, hearing costs exceed $350 per day).
  - Parties pursuing and defending cases in VCAT's planning list will often engage legal representation (unlike many other disputes in VCAT).
- Legal representation is used in some lists (such as planning disputes).
- The costs charged at VCAT are higher for businesses than individuals initiating a claim.

### Impact of costs on principles of justice

**Principle of justice: *Access***

**Impact of costs on achieving access**

**Cost of proceedings.** The high costs associated with proceedings (both costs to the court and legal representation) can discourage individuals from initiating civil proceedings in the first place. Though some plaintiffs may choose to self-represent to minimise their expenses (impacting fairness), even the courts' filing fees alone (and risk of paying the defendant's costs) may discourage injured parties from initiating proceedings.

**Costs may prevent a defendant fighting a claim.** The high costs associated with defending a civil claim may encourage some defendants to settle rather than challenge a claim, limiting defendants' access to justice in the courts.

**Cost of VCAT.** The high costs in some VCAT lists may discourage individuals from pursuing particular types of claims, restricting access to justice.

**Higher costs for businesses.** The higher costs for incorporated businesses for initiating a claim at VCAT may discourage some small businesses from initiating proceedings.

**Cost of using a jury.** Access to a jury in a civil proceeding may be discouraged by the high costs.

**Cost of appeals.** High costs of filing an appeal (and the legal representation needed to present an appeal) may discourage parties dissatisfied with the outcome from appealing to a superior court, undermining these parties' access to a just outcome.

**Principle of justice: *Fairness***

**Impact of costs on achieving fairness**

**Legal representation.** Unequal legal representation (or a trial in which one party does not have legal representation) may lead to an unfair outcome, as each party cannot prepare and present a case of equal quality.

For instance, an unrepresented defendant will be unlikely to prepare and present a case of equal quality to a plaintiff who can meet the high costs of legal representation. They will (for example) be less able to test the accuracy of the plaintiff's witnesses' evidence; they may not know the lawful defences they may be entitled to present.

The quality of the presentation of the case may influence the outcome, not solely the facts and the law – this is unfair on the unrepresented/poorly-represented party.

**Principle of justice: *Equality***

**Impact of costs on achieving equality**

**Costs.** If some injured parties cannot initiate proceedings in the courts (and in some VCAT lists) due to the costs associated, equality before the law is not achieved.

The Victorian civil justice system still achieves fairness, access and equality in a range of ways, despite costs issues; these include:

- Independent judges ensuring rules of evidence and procedure are followed, promoting fairness.
- Judicial powers of case management minimise delays and costs, promoting fairness and access.
- Access to VCAT remains very low-cost for most disputes, promoting access.
- All parties have control over many aspects of proceedings, promoting equality of treatment before the courts and enabling them to achieve a fair hearing.
- The use of dispute resolution methods such as mediation prior to trial promote access as they are low-cost and relatively informal.

Among many others described throughout this AoS!

**USEFUL TIP** The impact of factors such as costs upon the achievement of fairness/access/equality could be asked about in different ways. For example:

- '**Describe** how costs affect the ability of the civil justice system to achieve fairness' would require students to explain how costs limit the achievement of fairness.
- '**Discuss** the impact of costs on the achievement of fairness in the civil justice system' would require students to weigh up ways in which costs limit the achievement of fairness **and** ways in which the civil justice system achieves fairness, notwithstanding the impact of costs (as 'discuss' requires a weighing of pros and cons).

## Time 3.2.12.2

**Delays are undesirable** in the resolution of civil disputes because:

- For an injured party seeking compensation for loss or injury, the delay compounds their suffering. Consider for example:
  - An injured worker awaiting compensation for their lost income and medical expenses.
  - A small business that provided goods and wasn't paid, taking legal action against the non-paying customer, and the impact of non-payment on the firm's employees.
- Awaiting trial with an outcome unresolved is stressful for a defendant.
- Trials rely on oral evidence, but as memories fade over time the accuracy and reliability of such evidence may be diminished.

**Sources of delays in the courts** include:

- Pre-trial procedures of pleadings and discovery take time to complete (although judicial case management should limit the extent of such delay – see Lesson 3.2.8).
- Court backlogs, with the courts' caseload growing more rapidly than the funding for the courts' judges and staff.
- Time taken to appeal judgements/damages awarded, creating delay in the final resolution of a case.
- Trial procedures are slow, with legal practitioners' oral arguments and the question-answer process for evidence being presented both taking a lot of time (although judicial case management should limit the extent of such delay, as judges can set time limits for questioning of witnesses, which witnesses are examined, and so on – see Lesson 3.2.8).

| Court | Timeliness 2019–2020 |
|---|---|
| Magistrates' Court – all civil claims | 77% claims finalised within 6 months |
| County Court – common law claims | 51% claims finalised within 12 months |
| County Court – commercial claims | 61% claims finalised within 12 months |
| Supreme Court (Trial division) – common law claims | 59% claims finalised within 12 months |
| Supreme Court (Trial division) – commercial law claims | 82% claims finalised within 12 months |

Source: 2019/20 Annual reports of Magistrates' Court, County Court & Supreme Court

**VCAT delays include:**

- waiting times for certain VCAT lists.

| VCAT Delays | Weeks until Final Hearing |
|---|---|
| Planning Disputes | 25-26 |

**VCAT waiting times tend to be less than court waiting times:**

- There are fewer pre-hearing steps to be completed prior to a hearing/ trial (the complex pleadings and discovery steps used in courts do not occur in VCAT disputes involving residential tenancies, civil claims about goods and services, and so on).
- Hearings in VCAT are less formal and relatively short compared to trials in the courts.

**Impact of time on principles of justice**

**Principle of justice: *Access***

| Impact of time on achieving access |
| --- |
| **Delays may deter injured parties from initiating a claim.** The delays in the justice system may discourage injured parties from initiating legal action in the first place, limiting access to justice. |
| **Pre-trial procedures.** The longer the pre-trial procedures and hearings are conducted, the greater the costs in terms of paying legal representation and filing fees with the court; therefore delays drive up costs, making access to the courts less affordable. |

**Principle of justice: *Fairness***

| Impact of time on achieving fairness |
| --- |
| **Delays exacerbate the stress of trial.** Delays compound the injury/suffering for those seeking compensation; delay that is often due to factors beyond the control of the injured party, which is unfair for such parties. |
| **Unreliable evidence.** If delays cause evidence to be lost or unreliable due to the passage of time and memories fading, this may lead to incorrect and unjust outcomes, which is unfair. |

**Principle of justice: *Equality***

| Impact of time on achieving equality |
| --- |
| **Inconsistent dispute resolution times.** Some injured persons see their disputes resolved very quickly (such as residential tenants and landlords at VCAT) whereas others face significant delays (such as those in planning disputes at VCAT) – this is unequal. |
| **Judicial powers of case management.** Judges in the courts may use their powers of case management differently, with some more actively intervening to reduce delays than others, creating a risk of unequal treatment for parties in the courts. |

The Victorian civil justice system still achieves fairness, access and equality in a range of ways, despite delays/time-issues; these include:

- Judicial powers of case management ensure pre-trial procedures and trials are conducted in a timely manner.
- Use of mediation prior to a trial (and use of conciliation at VCAT allow disputes to be resolved early, by agreement between the parties.
- Many VCAT lists hear and resolve disputes in a very timely fashion, with short hearings and relatively few steps to complete prior to a hearing.
- CAV allows minor disputes involving consumers to be resolved quickly.
- Very few civil matters involve a jury trial, so the delays caused by juries impact on very few plaintiff and defendants.

Among many others described throughout this AoS!

## Accessibility 3.2.12.3

In addition to costs (discussed above) access to justice can be limited due to a range of issues identified below.

**Access to civil dispute resolution can be limited by:**

- The complex organisation of the legal system, with injured persons having to determine whether to pursue a claim in VCAT or the courts.

If pursuing through the courts, plaintiffs must determine in which court to seek a remedy; this can be especially difficult for:

- Recent migrants and refugees
- Those with limited formal education
- Those unable to afford legal representation

- The complexity of the procedures used in the courts (both pre-hearing and during a trial, such as the formal pleadings documentation, directions hearings and question-answer format of presenting evidence):
  - Those who self-represent will have difficulty understanding the procedures
  - Those with legal representation will be somewhat better off in that their case is prepared and presented in its best light, but may still have difficulty understanding the law and legal procedures used in their dispute. Particular instances of this include:
    - Recent migrants
    - People with limited formal education
    - Those from a non-English speaking background
- While VCAT encourages self-representation to minimise formality and costs this may create difficulties in understanding VCAT's procedures and adequately preparing/presenting a case in its best light, in particular for:
  - The very young or the elderly
  - Recent migrants/those from a non-English speaking background
  - Individuals with mental health conditions or a disability
- Though VCAT conducts hearings in many regional towns and the courts conduct circuits to regional towns, plaintiffs and defendants in remote/rural communities in Victoria do have greater difficulty accessing legal advice and dispute resolution bodies (compared to those in metropolitan Melbourne).

**Parties who are unable to access the appropriate services may not receive adequate remedies for their injury;** a legal right to compensation is worthless if an injured party cannot take the required steps to obtain such a remedy, adding to the injustice.

**Language barriers and a lack of understanding about the legal system can be a barrier to migrants** accessing justice, as stated in the following excerpts from the Final Report of the Justice Project (published by the Law Council of Australia in 2018):

- Low levels of English language proficiency impede access to legal information and support services amongst recent arrivals, particularly women. Many who are refugees may also have low levels of literacy in their own language.
- Australia's complex legal language can alienate those with low language and literacy levels, and sometimes even those with high language ability.
- A low level of English proficiency may impact upon individuals' ability to engage with the legal system at every stage: dealing with police, engaging support services, completing forms and understanding paperwork, communicating with legal and court staff, participating in proceedings and understanding court orders.
- A limited knowledge of the Australian legal system and how to access legal help is a consistently cited barrier for many recent arrivals in accessing justice.

*Source:* The Justice Project Final Report Pt 1: Recent arrivals to Australia (August 2018) www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Recent%20Arrivals%20to%20Australia%20%28Part%201%29.pdf

### Impact of accessibility on principles of justice

**Principle of justice: *Access***

| Impact of accessibility on achieving access |
| --- |
| **Lack of understanding.** The barriers identified above mean that some individuals may be a participant in a civil case as a plaintiff, but not understand the legal process they are participating in, undermining access to justice. The barriers identified above may prevent a defendant from understanding how to challenge the evidence presented by a plaintiff, or how to raise a lawful defence – this limits the defendant's access to justice. |

*cont'd*

**Impact of accessibility on achieving access**

**People are deterred from initiating civil proceedings.** A lack of understanding of the legal system means some injured persons (for example, refugees and recent migrants) will not know they can seek a remedy from the legal system, meaning they do not initiate proceedings.

**Self-representation.** Fear of self-representation at VCAT may discourage the very young, the elderly and/or recent migrants from making a claim at VCAT (or from defending a claim at VCAT), rendering VCAT less accessible as a dispute resolution body for these parties.

**Principle of justice: *Fairness***

**Impact of accessibility on achieving fairness**

**Disadvantaged parties.** Self-represented parties in VCAT and the courts from non-English speaking backgrounds, recent migrants or those with limited education may not be able to present their case in its best light (due to difficulty understanding the law and the processes followed); this may influence the outcome of the dispute and prevent a truly fair hearing.

**Principle of justice: *Equality***

**Impact of accessibility on achieving equality**

**Certain groups may be discouraged from approaching the civil justice system.** These barriers identified above may prevent injured individuals with a legal entitlement to a remedy from pursuing legal action, due to their personal characteristics (being from a non-English speaking background, etc); this undermines the achievement of equality in the civil justice system.

The Victorian civil justice system still achieves fairness, access and equality in a range of ways, despite access issues; these include:

- VCAT publishes information about its procedures in a range of languages.
- VCAT conducts hearings at over 50 venues across Victoria.
- Courts provide plain-English guides to assist self-represented parties in understanding the courts' pre-trial and trial processes.
- Community legal centres and Victoria Legal Aid publish free plain-English information about civil procedures.
- Representative proceedings can provide access to dispute resolution for relatively small claims (which a single plaintiff may not be able to afford to pursue).

These are just a few examples among many others that have been described throughout this AoS.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.12: Factors that affect principles of justice (AOS 2)**

## Keen to learn more?

**The Justice Project: Law Council of Australia,** www.lawcouncil.asn.au/justice-project
**Everyday Law – Legal Costs,** www.everyday-law.org.au/legal-costs
**Gittins R ( 2017) Defeated by high legal costs: the terrible injustice most of us could face,** www.smh.com.au/opinion/defeated-by-high-legal-costs-the-terrible-injustice-most-of-us-could-face-20170829-gy68pr.html

QUESTIONS

# 3.2.12 Factors that affect principles of justice (AOS 2)

LEVEL 1:
Define and understand

**1.** Complete the following sentence: Costs associated with the civil justice system may have the following consequences:

**I.** parties represent themselves

**II.** injured parties decide not to pursue a civil remedy

**III.** dissatisfied parties appeal to VCAT due to its lower fees

**IV.** dissatisfied parties do not appeal to superior courts

**A.** I and II

**B.** II and III

**C.** I and IV

**D.** I, II and IV

**2.** Which of the following factors does not affect the ability of the Victorian civil justice system to achieve the principles of justice as much as it would affect the Victorian criminal justice system?

**A.** Time spent preparing for trial

**B.** Time spent gathering evidence

**C.** Time spent listening to opening and closing statements

**D.** Time spent assembling a jury

**3.** One's ability to access the civil justice system can be impacted by:

**A.** where they live.

**B.** their knowledge of the law.

**C.** their knowledge of the English language.

**D.** all of the above

LEVEL 2:
Describe and explain

**4.** Describe how VCAT seeks to diminish cost as a barrier to access to the civil justice system. (3 MARKS)

**5.** Identify two causes of delays and one reason why delays are a concern in the resolution of civil cases. (3 MARKS)

**6.** In most VCAT hearings the parties represent themselves. How can this be seen as promoting access but also be a barrier to access in some cases? (3 MARKS)

LEVEL 3:
Apply and compare

**7.** Tim is a contract gardener who is currently unemployed and living in Shepparton. He is very concerned about a local council planning decision to approve a four storey apartment complex next door to his rental property, which he thinks will block the sunlight to his backyard and his prized vegetable garden. He wants to challenge the planning decision.

Explain two factors which may impact on the ability for the system to deliver on the principles of justice for Tim. (4 MARKS)

**8.** Consider a party with limited finances or available time. Why is it possible for them to access justice? (4 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** 'Tens of thousands of those who need help most are slipping through the cracks of our justice system every year.'

*Source:* Fiona McLeod, ABC News, 3 Aug 2017, http://www.abc.net.au/news/2017-08-03/how-the-justice-system-is-failling-vulnerable-australians/8770292

Identify one factor and discuss the extent to which it impacts on the ability of the civil justice system to achieve the principles of justice for all. (5 MARKS)

**10.** 'Costs are the biggest hurdle for individuals looking to enforce their civil rights.'

Discuss the extent to which you agree with this statement. (6 MARKS)

# 3.2.13 Recent and recommended reforms

**In Lesson 3.2.12 we explored how issues relating to costs, time (that is, delays) and accessibility issues can undermine the achievement of justice in civil disputes in Victoria.**

The Victorian legal system is continuously reformed to promote the achievement of fairness, access and equality in the resolution of civil disputes and further reforms remain possible.

This lesson covers VCAA key knowledge point: **'Recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice',** which we have broken down into the following concepts:



## Evaluating the ability of the civil justice system to achieve the principles of justice

**USEFUL TIP** The Study Design requires students to evaluate the ability of the civil justice system to achieve the principles of justice – that is, to weigh strengths and weaknesses and reach an overall conclusion about the extent to which fairness, access and equality are achieved. **Some** key points to include in such an evaluation are summarised below, with further detail provided in the relevant lessons throughout this Area of Study.

### Access in the civil justice system: Strengths & weaknesses

**Principle of justice: *Access***

| Strengths – how access is promoted | Weaknesses – limitations in achieving access |
|---|---|
| **Representative proceedings.** Representative proceedings increase access for plaintiffs, as small but similar claims can be pursued more efficiently as a group. | **Representative proceedings.** Only account for a tiny proportion of civil matters, provides better access in very few instances. |
| **Costs.** Parties with more financial means can afford better quality representation to increase the chances of winning a case, parties may be eligible for legal aid if they are less financially able. | **Costs.** Less financially able parties cannot afford to pursue a claim due to courts' fees and necessity of legal representation. |
| **CAV.** Free conciliation service available to civil litigants in disputes between consumers and businesses. | **CAV and VCAT.** Parties whose case does not fall within their jurisdiction cannot use these methods of resolving their dispute; costs in some VCAT lists can be high, and therefore less accessible. |
| **VCAT.** Cheaper and faster than the courts; process less intimidating, more supportive. | **CAV.** Parties cannot be forced to participate in conciliation; jurisdiction is narrow. |
| **Pre-trial procedures.** Pre-trial procedures such as pleadings and discovery encourage early settlement, minimising costs and thereby ensuring justice more accessible. | **Appeals.** Reviewing decisions in higher courts is costly and not always available to financially disadvantaged parties. |
| **Role of legal practitioner.** Represented parties have their legal practitioner to help them prepare their case and explain the court proceedings. | **Role of the jury.** Additional fees are required for jury trials, which may make it not be financially viable for some parties to request them. |
| **Mediation, conciliation and arbitration.** Parties are able to utilise cheaper, faster and confidential dispute resolution methods (compared to the court system); process less intimidating than court. | **Role of legal practitioner.** Parties without representation may not understand how to complete court documents, or the procedure followed in the court proceedings. |
| | **Power to give directions.** Unrepresented parties may have trouble understanding why judges place limitations on the number of witnesses that may be called. |

*cont'd*

| Strengths – how access is promoted | Weaknesses – limitations in achieving access |
|---|---|
| **Role of the judge.** Judges' ability in civil trials to actively manage proceedings (setting time limits for examination of witnesses, limiting the number of witnesses, etc) minimise costs in civil trials and thereby ensure the civil justice system remains more accessible. | **Legal Aid.** Legal Aid funds are very limited, with Victoria Legal Aid often not able to support parties to civil disputes (often only able to support those charged with relatively serious criminal offences). |

### Fairness in the civil justice system: Strengths & weaknesses

**Principle of justice: *Fairness***

| Strengths – how fairness is promoted | Weaknesses – limitations in achieving fairness |
|---|---|
| **Burden of proof.** Plaintiff has to prove their case, defendant not required to prove they are not liable.<br><br>**Pleadings.** Facilitate early settlement as the case may be strong enough for one party to consider settling before trial.<br><br>**Appeals.** Existence of a court hierarchy ensures parties have the opportunity to have their decision reviewed by a higher court and have mistakes corrected.<br><br>**Independent decision-maker.** Independent judge ensures that trials are conducted without bias, according to the rules of evidence; this ensures fairness as decisions based on law and facts alone.<br><br>**Party control.** Parties have control of their own case, and are responsible for deciding what facts to present, how to present, etc.; parties therefore feel in control of the process, should therefore feel more satisfied with the outcome (feel that they have been treated fairly).<br><br>**Role of legal practitioners.** The use of legal practitioners can increase a party's chance of success, as their case is presented in its best light by an expert. This promotes fairness.<br><br>**Judicial powers of case management.** Power of judges to order mediation and to direct pre-trial procedures such as pleadings and discovery – civil issues may settle before they reach the trial stage, preventing delay in compensation for plaintiff's suffering.<br><br>**Damages.** Returns the plaintiff to the position they were in prior to harm being caused.<br><br>**Injunction.** The defendant is forced to start, complete or stop an action to benefit the plaintiff, which is fair.<br><br>**All issues and facts known.** Due to pleadings and discovery, parties understand legal arguments and evidence to be presented by the other party; understanding (and preparing for) the case to be presented by the opposing party is fair. | **Enforcement issues.** The liable party may not have the capacity to pay damages, meaning injury of plaintiff goes uncompensated – this is unfair.<br><br>**Role of the jury.** Juries can add to delay in resolution of a case, compounding the plaintiff's suffering.<br><br>**Role of the parties.** Unrepresented parties may not present all relevant evidence to the court, which can disadvantage themselves and the other side.<br><br>**Damages.** Cannot always return the plaintiff to the position they were in pre-harm.<br><br>**Injunctions.** Harm may have already occurred to the plaintiff, providing limited benefit.<br><br>**Time.** Waiting for a civil dispute to be resolved (due to pre-trial procedures and court backlogs) can cause harm to the parties.<br><br>**Legal representation in court.** Unrepresented parties may not present all relevant evidence to the court, which can disadvantage themselves; if parties fail to produce relevant evidence/legal argument/ legal defence due to lack of legal representation this may lead to an incorrect outcome, which is unfair.<br><br>**Legal representation allows party's case to be presented in its best light.** Gives best chance of winning as an expert presents the law and facts on a party's behalf but VCAT often requires parties to self-represent, which can create difficulties for those from a non-English speaking background, the poorly educated, etc. This may be unfair for such parties.<br><br>**Appeals.** Limited right to appeal from VCAT decisions, which may be seen as unfair to parties dissatisfied with the outcome. |

**Equality in the civil justice system: Strengths & weaknesses**

**Principle of justice: *Equality***

| Strengths – how equality is promoted | Weaknesses – limitations in achieving equality |
|---|---|
| **Limitation of actions.** Applies to all parties bringing a case. | **Limitation of action.** Defendants have to raise this in court for it to apply. A less resourced party (unable to afford a lawyer) may not know to raise this issue in court. |
| **VCAT.** Binding decision on both parties. | **VCAT.** Limited grounds of appeal if one party wants to review the decision; ability to appeal from VCAT more restricted than ability to appeal from courts. |
| **Pleadings.** Reduce surprises as the other side has knowledge of the legal arguments and main facts before the trial and parties are able to prepare their arguments ahead of time. | **Pre-trial procedures.** Pleadings and discovery processes are complex, parties without representation less able to complete as effectively as those with legal representation (especially if also from a non-English speaking background). |
| **Appeals.** Both plaintiffs and defendants have the right to appeal. | **Cost of appeals.** Appeals are expensive (due to filing fees and need for legal representation), so parties' financial position may impact on how equally accessible an appeal is. |
| **Role of the judge.** Both parties are subject to the same rules of evidence and procedure in the courtroom. | **Cost of jury.** Costs associated with jury trial fall to the party electing to use a jury – so not equally accessible to those with limited funds. |
| **Role of the jury.** Both parties have a number of challenges they can use to influence the composition of the jury. Either party can elect to have a jury. | **Role of legal practitioner.** Some financially disadvantaged parties may not be able to afford any/ good quality legal representation, leading to unequal presentation of cases at trial. |
| **Mediation/conciliation.** Usually no legal representation, mediator/conciliator ensures parties have equal opportunity to discuss issues and possible resolution. | **Self-represented parties.** Not all parties are equally equipped to present their case to a judge and jury without the assistance of legal practitioners. |
| **Opportunity to present case.** Both parties are given equal opportunity to prepare and present their case to the court in its best light. | |

## Recent and recommended reforms to the civil justice system 3.2.13.1, 3.2.13.2

In Lesson 3.2.12 we explored how costs, time and accessibility impact upon the achievement of fairness, access and equality.

Below, for each of these factors affecting the achievement of justice we describe a recent change and a recommended change (to address the factor in question).

**USEFUL TIP** For each recent and recommended change, be sure to describe the change **and** explain the change's impact on fairness, access and/or equality. It is not enough to simply describe the change to the justice system and assume the teacher or examiners will know which principles of justice it will improve!

### COSTS

**Recent reform #1**

**Contingency fees in Supreme Court class actions** are now permitted. In most circumstances, the legal fees charged by a law firm representing plaintiffs will be based on the amount of work done in preparing and presenting a case (that is, a monetary amount billed per hour). The fear of incurring significant costs may be a barrier to initiating proceedings.

In 2020, Victorian legislation was passed permitting the use of contingency fees in a small range of cases - in Supreme Court representative proceedings, if requested by the plaintiff and permitted by the court.

Contingency fees are:

- A set % of the damages awarded to the plaintiffs, rather than a fee calculated based on the work undertaken; and
- Payable only if the plaintiffs' claim is successful (that is, a 'no win, no fee' basis).

If such an arrangement is in place and the group of plaintiffs is unsuccessful, the plaintiffs' law firm will be required to meet the defendant's legal expenses.

This reform follows 2018 recommendations by the Victorian Law Reform Commission regarding contingency fees.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **Removes some fear of costs as a barrier to litigation.** Injured persons considering legal action face the risk of significant expense if they are unsuccessful (especially a lead plaintiff in a representative proceeding) which discourages such persons from pursuing a remedy in the courts. Contingency fees allow the financial risk to be absorbed by the plaintiff law firm, meaning such adverse costs fears are no longer a disincentive to court action. | **Applies to very few matters.** A ban on such %-based contingency fees being charged by plaintiff lawyers remains in place for all other civil disputes - the reform applies only to representative proceedings in the Supreme Court, which therefore has no impact on the costs facing plaintiffs in all other civil matters (such as workplace injury cases, taxation disputes, defamation claims, estate disputes, etc). |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Court-supervised.** In negotiating the % of the damages to be paid to the plaintiff law firm, there is a risk the power-imbalance between plaintiffs and the firm (which better understands the law and the likely outcome of the dispute) may mean an arrangement that is unfair to the group of plaintiffs. However this concern and the potential for conflicts of interest should be overcome by the new law requiring the Supreme Court to approve such an arrangement. | **Conflict of interest.** If plaintiffs' legal representatives have a financial interest in the outcome of the dispute, this may have (or may be perceived to have) an impact on the legal advice they provide to the plaintiffs they represent. For example:<br>• Assume a plaintiff firm advises their clients to settle out-of-court (prior to a trial) for a sum far below that which was claimed.<br>• 12 months later the plaintiffs learned the firm was cash-strapped at the time due to a larger-than-unexpected taxation bill.<br>• Was the advice to settle truly in the plaintiffs' best interest? It may be difficult to know; a perception of a conflict of interest may be difficult to undo.<br>This is likely a small issue however, due to the Court's supervision of the costs arrangement. |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **Non-discriminatory.** All members of a class action in the Supreme Court can derive the benefits of this reform, regardless of age, language background, etc. | N/A |

**Recent reform #2**

**Covid-related federal and state government funding boosts for legal aid and community legal centres.** The 2020 epidemic caused:

- Rising unemployment and under-employment across Victoria, combined with
- Greater demand for legal assistance in areas regarding employment rights, debt and tenancy/ housing disputes.

This greater need for legal services among a growing number of financially-vulnerable Victorians was exacerbated by the inability to seek legal assistance in person.

In May 2020:

- The Victorian Government announced a $17.5 million funding boost for VLA and CLCs.
- The Federal Government announced a $63.3 million funding boost (Australia-wide) for legal aid services.

These significant funding boosts supported VLA and CLCs to:

- Provide additional support services to individuals needing - but unable to afford - legal advice and assistance; and
- Invest quickly in new technology to provide such services remotely.

**Impact of this reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **Legal services are affordable for the most vulnerable.** A larger number of Victorians need legal assistance during the pandemic whilst simultaneously a growing number of Victorians face financial strain. This funding reform ensures such assistance is available.<br><br>**Remoteness not a barrier.** The pandemic prevented individuals from accessing legal services in person; this reform ensured access to legal advice and assistance for individuals right across Victoria by investing in technology to provide such assistance remotely. This promotes access to those in lockdown/ isolation plus the very ill/elderly who may be concerned about their exposure to the coronavirus beyond the lockdown periods. | **Sufficiency of funding boost is hard to assess.** Whether this resourcing for VLA and CLCs is sufficient to meet the higher demand for legal services as a result of the pandemic will not be known until after-the-fact; at a time when government funds are stretched, some vulnerable Victorians may therefore continue to have difficulty accessing legal assistance in 2021 and beyond. |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Fair hearing.** If many more injured parties and defendants who cannot afford a lawyer receive legal advice or representation from VLA as a result of this funding boost, such injured parties are better able to present their case, defendants are better able to prepare their defence and test the other party's evidence – these all promote a fair hearing for plaintiffs and defendants (who would otherwise be unrepresented). | **Other causes of unfairness - especially delay - will remain.** This reform addresses some issues arising from the coronavirus pandemic, but it does not (and cannot) resolve the delays caused in conducting civil hearings and trials as a result of lockdowns, isolation and social distancing requirements. Although the Victorian COVID-19 Omnibus Emergency Measures 2020 legislation allows some County Court and Supreme Court cases to be decided based on written submissions and without hearings, this applies to only some matters. Delays add to the stress endured by injured parties awaiting a remedy and those defending a civil claim, which is unfair; future reforms will be needed to reduce the backlog of hearings in VCAT and the courts arising from the pandemic and minimise such stress and cost. |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **Legal Aid will be available to more parties.** Equality before the law requires all individuals to be able to access justice regardless of their wealth, whether they are homeless, etc. This reform allows VLA and CLCs to serve more plaintiffs and defendants (the poor, those with mental health issues, those facing homelessness), moving the justice system closer to equality for all Victorians before the law. | N/A |

**Recommended reform #1**

**Greater assistance for self-represented parties.** The Productivity Commission has recommended courts have plain-language forms and greater guidance about processes (such as pleadings) and the time limits that apply for completion of certain pre-trial steps; court staff should be trained to assist self-represented parties.

While VCAT provides assistance to parties in preparing their application, what evidence to bring to the hearing, etc, the courts currently provide limited support for self-represented parties.

**Impact of this proposed reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Better understanding.** Parties will be able to better understand basic court procedures. Not knowing how to pursue a claim limits access to justice for injured persons; this proposal reduces that barrier. | **Unrepresented parties may still face difficulties.** Parties without representation may still have trouble understanding complex pre-trial procedures, depending on how actively supported they are by such a reform. |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Self-represented parties will not be disadvantaged.** Those without legal representation are less able to prepare and present their case in its best light; greater assistance for self-represented parties would ensure a more even contest between parties. | **Language barriers.** Some parties may not understand English well enough to understand the plain language forms, nor to communicate with trained staff, even if such assistance is provided more readily in courts.<br>**Bias.** Court staff actively assisting a party without legal representation may be seen as less impartial. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Less inequality between represented and unrepresented parties.** Unrepresented parties will not be as disadvantaged in pursuing or defending a civil claim as they have some assistance. Well resourced, regular users of the court system (such as big businesses and government departments) are at an advantage in being able to pursue/defend civil claims, such a reform would reduce the imbalance between such parties and those who self-represent. | **There will still be a 'gap' between represented and unrepresented parties.** Parties who self-represent are on unequal footing with represented parties, as a lawyer is able to explain processes and procedures to their client and provide specific advice on how to proceed. More support to self-represented parties closes this 'gap', but a party with representation will still be at an advantage with a skilled expert presenting their case. |

**Recommended reform #2**

**A huge additional boost in Legal Aid and CLC funding.** In August 2018 the Law Council of Australia's 'The Justice Project' recommended a $390 million per year increase in legal aid funding across Australia.

**USEFUL TIP** Please note this recommended reform was also discussed in the context of reforming the criminal justice system in Victoria. See Lesson 3.1.14.

The recommendations of the Law Council's Justice Project apply to improving the achievement of justice in civil and criminal disputes.

**Please note:**

- This recommendation is for funding to rise across all Australian states/territories, not just Victoria.
- Such a funding boost would help legal aid providers assist many more individuals in a range of disputes, including but not limited to civil law matters.

According to the Law Council of Australia:

- 'Tens of thousands of people are left unrepresented because only a tiny proportion are now eligible for legal aid... And it isn't just Australia's most disadvantaged missing out. Many middle-class Australians can't afford to pay for legal representation and are forced to front the court alone.'
- 'Commonwealth, state and territory governments should invest significant additional resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, $390 million per annum.'

*Sources:* www.lawcouncil.asn.au/media/media-releases/senate-calls-for-legal-aid-funding-increase-post-budget, www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Recommendations%20and%20Group%20Priorities.pdf

In Victorian civil matters, this impact of such a reform would allow:

- VLA to provide many more grants of legal assistance (providing a VLA lawyer or funds to pay for a lawyer) to more injured parties seeking a remedy that cannot afford to initiate proceedings.
- VLA to relax the very strict eligibility criteria that currently mean only extremely poor accused persons facing trial for serious charges receive assistance, providing support for a bigger range of individuals in civil matters (as well as criminal matters).
- Support CLCs to provide more assistance and advice regarding minor civil disputes.

**Impact of this proposed reform on principles of justice**

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Greater availability of Legal Aid.** With significantly increased funds, VLA would be able to provide advice and information to more parties to civil disputes – if these individuals have a better understanding of their legal rights and the court process, access to justice is improved.<br><br>**Greater availability of CLCs.** With greater funds CLCs would be able to help more members of the community be better informed about their legal rights to a remedy, defences to minor disputes and the court system, increasing access. | **Other barriers to justice exist.** There are other barriers to accessing justice in Victorian courts, such as language barriers that make court proceedings difficult to understand – different reforms other than more funding for VLA are needed to improve these access issues. |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Fair hearing.** If many more injured parties and defendants who cannot afford a lawyer receive legal advice or representation from VLA as a result of this funding boost, they are better able to prepare their defence, test the other party's evidence – these all promote a fair hearing for plaintiffs and defendants persons (who would otherwise be unrepresented). | **Other barriers to a fair trial.** Other barriers to a fair trial in the Victorian courts may remain, such as the risk of jurors being prejudiced against a plaintiff or defendant; these risks are small, and ensuring adequate legal representation for more parties (through this recommended reform) removes many of the barriers to a fair trial. |
| **Appeals would be more accessible.** The inability to afford a barrister to prepare and present an appeal is a barrier to many parties in civil cases appealing a decision – this reform would allow more parties in such a situation to appeal to the higher courts, ensuring mistakes are corrected – which is fair. | **Unlikely to occur.** Commonwealth governments have generally decreased funding for legal aid and the 2019/20 Commonwealth government's budget documents indicate it has net debt of $361 billion – so such a substantial increase in funding seems unlikely. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Legal Aid will be available to more parties.** Equality before the law requires all individuals to be able to access justice regardless of their wealth, whether they are homeless, etc. This proposed reform allows VLA to serve more plaintiffs and defendants (the poor, those with mental health issues, those facing homelessness), moving the justice system closer to equality for all Victorians before the law. | **Other reforms are also needed to ensure greater equality before the law.** Some groups in society (such as recently-arrived refugees) may not understand or trust in the legal system due to their previous experiences – so other strategies are needed to promote equality before the law (not just more funding for VLA and CLCs), boosting these groups' understanding of the law and legal processes in Victoria. |

## TIME

### Recent reform

**Simpler enforcement of VCAT orders.** Historically, if an unsuccessful defendant to a dispute resolved at VCAT did not follow an order to pay damages to the plaintiff, that plaintiff must take steps in the courts (which takes time, is costly as the court will charge a fee, and involves the completion of documentation with the relevant court) to have the VCAT order enforced.

The Victorian Access to Justice Review (2016) recommended VCAT orders are more easily enforceable, with VCAT orders automatically registered in the courts (removing a party's need to submit documentation and meet costs for the court to enforce a VCAT order).

In 2018 this reform was implemented with the passage of the *Justice Legislation Amendment (Access To Justice) Act 2018* (Vic).

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **Quicker enforcement.** Successful parties can enforce VCAT orders as soon as there is non-compliance, without the need to submit further documentation at the courts. | **Unsuccessful parties may not be able to comply.** Parties may still have trouble enforcing VCAT decisions if the unsuccessful party is unable to pay/comply. |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Minimises delays.** Successful parties will experience less delay in enforcing their VCAT order. This is fair as delay in the enforcement of an order compounds the party's suffering. | **There may still be some delays.** Parties may still suffer delays if the unsuccessful party refuse to comply with the enforceable VCAT order. |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **Available to all parties.** Any successful party can enforce a VCAT order more easily. | N/A |

### Recommended reform

**Abolition of juries in civil disputes.** The process of empanelling a jury, having judges give directions to the jury and the jury's deliberations all add to the delay in the resolution of civil cases. Removing a jury removes these delays.

In the media in 2018 it has been reported some plaintiffs in defamation cases are avoiding the Victorian (and NSW) courts and initiating proceedings in the Federal Court, to avoid trial by jury:

> 'The Federal Court's newfound popularity is widely attributed to perceived strategic or practical advantages in that court, including the fact a trial by jury is highly unlikely and the case may be resolved more quickly.'
>
> *Source:* www.smh.com.au/national/the-new-battleground-emerging-in-defamation-feuds-20180618-p4zm87.htm

This article refers to both NSW and Victorian courts; the benefits of such a reform are applicable in the Victorian courts.

### Impact of this proposed reform on principles of justice

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Prevents parties who cannot afford a jury from being disadvantaged.** Parties selecting a jury trial must pay for the jury; this means it is not accessible to all parties due to their financial circumstances. The removal of juries reduces trial costs, making justice more accessible.<br>**Minimises costs.** By reducing the time taken to conduct a trial itself, this minimises the courts' hearing fees and the days for which parties must pay a barrister to represent them, reducing overall costs – promoting access to justice. | N/A |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Fewer delays.** Reduces delays, which can compound the suffering for plaintiffs (which is unfair). | **Impacts very few matters.** Relatively few civil cases are resolved using trial by jury; this reform benefits very few plaintiffs and defendants.<br>**No trial-by-peers.** Removes the right to trial by peers, which promotes fairness as juries are independent and representative of community values. |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Prevents parties who cannot afford a jury from being disadvantaged.** Currently only those who can afford a jury will select it; abolishing juries (removing this choice) ensures equality of treatment by having all civil cases tried by judge alone. | N/A |

## ACCESSIBILITY

### Recent reform

**Greater use of technology (2018)**. The Supreme Court provided information (via a practice note) regarding increased use of technology in civil proceedings. Parties can email the court, file documents online and conduct discovery online. Representative proceedings can now be live-streamed so all plaintiffs can see proceedings in their case.

**The Supreme Court (E-Filing and Other Amendments) Rules 2018** came into effect on the 2nd of July 2018, amending the Rules of the Supreme Court to state that all documents sought or required to be filed in a proceeding in the Commercial Court, the Common Law Division or the Costs Court shall be filed in an electronic filing system in operation in the Court. This means that the pre-trial process of discovery can also be handled digitally in some circumstances.

**It is aimed at improving access to justice**, because using technology rather than hard copy processes will reduce time and costs by reducing copying and manual review of documents. This is specifically the case for matters which attract significant volumes of paper evidence and documentation to be filed and provided in copies to the other side.

### Impact of this reform on principles of justice

**Principle of justice: *Access***

| Strengths of the recent reform – how access is promoted | Weaknesses of the recent reform – limitations in achieving access |
|---|---|
| **Online services.** People who are not located close to the Supreme Court can access their services online.<br>**Minimises costs.** Costs of civil disputes are minimised as this process is cheaper and faster than manual copying and provision of documents, promoting access to justice. | **People may not have access to internet/technology.** People without internet access (for example in rural areas) or with low digital literacy may struggle with the online system and are not benefited by this reform. |

**Principle of justice: *Fairness***

| Strengths of the recent reform – how fairness is promoted | Weaknesses of the recent reform – limitations in achieving fairness |
|---|---|
| **Timely.** Documents can be accessed in a more timely manner due to their online submission. | **Lengthy processes remain.** Use of online submission does not negate the necessity for lengthy pre-trial procedures and legal representation to ensure they are completed in accordance with the Supreme Court's rules of procedure. |

**Principle of justice: *Equality***

| Strengths of the recent reform – how equality is promoted | Weaknesses of the recent reform – limitations in achieving equality |
|---|---|
| **Available to all parties.** Any plaintiff or defendant can use these services. | **Advantage for represented parties.** Legally represented parties may have an advantage in using the system as their representatives are more familiar with the system. |

### Recommended reform

**Greater government investment in technological innovation to provide information about the legal system**. In August 2018 The Justice Project recommended governments invest in technological solutions to better deliver information about the legal system and legal services to those from diverse language backgrounds, including recent arrivals and indigenous Australians.

Lack of legal awareness is a barrier to accessing justice, greater education and information about the legal system is a significant way to improve access to justice.

### Impact of this proposed reform on principles of justice

**Principle of justice: *Access***

| Strengths of the recommended reform – how access is promoted | Weaknesses of the recommended reform – limitations in achieving access |
|---|---|
| **Promotes better understanding of rights.** Migrants and indigenous Australians with limited English will have a better understanding of their legal rights and the legal system; they will be more able to pursue remedies for injury and have greater trust in the legal system. | **Some people do not have access to technology.** Some individuals may have limited access to technology due to cost or being in remote areas may not achieve greater understanding of (and access to) the legal system as a result of this reform. |

**Principle of justice: *Fairness***

| Strengths of the recommended reform – how fairness is promoted | Weaknesses of the recommended reform – limitations in achieving fairness |
|---|---|
| **Greater assistance for migrants.** Recent arrivals and those with limited literacy/English skills will better understand their legal rights, court processes and how to access other support services. Such parties will be better able to prepare and present a case, and know how to access legal services and support. | **Complexity in the law.** Complicated legal issues with still require legal representation to pursue a remedy/defend a claim, which may remain inaccessible to disadvantaged groups in the community (despite this recommended reform). |

**Principle of justice: *Equality***

| Strengths of the recommended reform – how equality is promoted | Weaknesses of the recommended reform – limitations in achieving equality |
|---|---|
| **Promotes legal education of migrants/Indigenous Australians.** This reform is targeted at reducing the disadvantages currently faced by recent migrants and indigenous Australians with limited literacy levels, promoting equality before the law. | **Some people do not have access to technology.** As above, those who cannot access such technology (due to cost or being in remote areas) may not achieve the benefit of this reform. |

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 3.2.13: Recent and recommended reforms**

## Keen to learn more?

**Access to Justice Arrangements: Inquiry Report,** www.pc.gov.au/inquiries/completed/access-justice/report
**Engage Victoria: Access to Justice,** www.engage.vic.gov.au/accesstojustice
**Enforcing VCAT orders,** www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/enforcing-vcat-orders
**Law Council of Australia: Justice Project Final Report (2018),** www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Recommendations%20and%20Group%20Priorities.pdf
**Whitbourn M (2018) *The new battleground emerging in defamation feud*,** www.smh.com.au/national/the-new-battleground-emerging-in-defamation-feuds-20180618-p4zm87.html
**Department of Premier and Cabinet Media Release: *New Laws For Better Access To Justice* (27 March 2018),** www.premier.vic.gov.au/new-laws-for-better-access-to-justice/

QUESTIONS

# 3.2.13 Recent and recommended reforms

LEVEL 1:
Define and understand

**1.** In 2020 new laws permitted the use of contingency fees. The purpose of this reform is to:

**A.** Encourage law firms to take on civil claims with limited likelihood of success.

**B.** Make civil proceedings more accessible to all plaintiffs in the Victorian courts.

**C.** Reduce the overall cost of taking a civil claim through the courts.

**D.** Remove concerns about legal costs as a barrier to injured persons starting legal proceedings in representative proceedings, therefore promoting access to justice.

**2.** There are consistent pushes for more Legal Aid funding, with the Law Council of Australia recommending in 2018 a $390 million per year increase in Legal Aid funding across Australia. Which of the following is not a consequence of this proposal?

**A.** Many more injured parties and defendants who cannot afford a lawyer receiving legal advice or representation from VLA. They will be better able to prepare and present their claim and their defence in its best light.

**B.** Fewer individuals will need to self-represent in defending a civil claim.

**C.** Appeals from decisions in lower courts should become more accessible to those who cannot afford a private lawyer in a civil case.

**D.** Representative proceedings will become more common.

LEVEL 2:
Describe and explain

**3.** In 2020 legislation was passed to permit the use of contingency fees in some civil matters in the Supreme Court.

Describe this reform to the civil justice system. (2 MARKS)

**4.** 'Abolishing juries in civil cases will reduce delays.'

Is this statement correct? Justify your response. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** Describe and compare the impact of two recent and/or recommended reforms aimed at enhancing the ability of the civil justice system to achieve the principles of justice. (6 MARKS)

**6.** 'If you are from middle Australia and you want to embark on a substantial piece of litigation, you really have to put your house on the line.'

*Source:* Robert McClelland, Former Federal Attorney General, www.aec.gov.au/Elections/federal_elections/2016/files/vic-results-map-2016.pdf

Describe one recent or recommended reform that has the purpose of addressing the challenge identified in the above quotation. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** Discuss two recent reforms and two recommended reforms designed to improve the extent to which the civil justice system can achieve the principles of justice. (8 MARKS)

**8.** Disadvantaged people face a number of barriers in accessing the civil justice system, which make them both more susceptible to, and less equipped to deal with, legal disputes. If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged.

*Source:* 'Access to Justice Arrangements', Productivity Commission Inquiry Report Volume 1, 5 September 2014

Analyse the impact of recent and recommended reforms on improving problems with accessing the civil justice system. (7 MARKS)

### Time for some exam practice!

You're ready for Progress Check 5 (online), covering these lessons:

- **Lesson 3.2.12 Factors that affect principles of justice in civil proceedings (AOS 2)**
- **Lesson 3.2.13 Recent and recommended reforms**

Check with your teacher when it's time to complete this progress check.

AOS QUESTIONS

# The Victorian civil justice system

LEVEL 5
Bringing it all together

**1.** Describe how costs can undermine the achievement of the principles of justice. How do civil pre-trial procedures and judicial powers of case management promote access to justice? (8 MARKS)

**2.** Morgan is attempting to lodge a personal injury claim against his previous employer, Sharyn. We know the following information about the case:

- Morgan suffered third degree burns after operating a machine he was not licensed to use.
- Morgan is now unemployed and has no savings.
- Morgan sustained his injuries after the machine caught fire (as the management team had negligently left flammable materials lying around).
- When he contacted his employer's legal representative they suggested resolving the dispute by mediation, however Morgan knows that Sharyn has since closed the business and gone overseas.

Based on the information provided:

**a)** Explain two relevant factors Morgan should consider when initiating this claim. (4 MARKS)

**b)** Would damages or an injunction achieve the purposes of civil remedies in this case? Justify your response. (3 MARKS)

**3.** In 2015, Mikayla (a homeless woman) is charged with intentionally causing serious injury after violently assaulting Anna. In 2018 Anna decides to initiate civil proceedings against Mikayla to seek out compensation for the injury caused. Anna asks her lawyer (Anthony) for advice about starting proceedings, and he tells her that 'it might be too late'. In 2019 Mikayla is imprisoned, with the judge aiming to punish Mikayla. In a separate judgement, the court awards Anna $50,000 in damages.

**a)** Identify and outline the legal concept Anthony is referring to. (2 MARKS)

**b)** Describe the role of one institution that could have assisted Mikayla as an accused person. (2 MARKS)

**c)** Distinguish between the purposes of sanctions and remedies in this case. (3 MARKS)

**4.** Amanda is a well-known politician. She has commenced a civil proceeding in the County Court against a magazine publisher for defamation. Amanda has elected to have the trial heard by a jury of six.

**a)** Outline the burden and standard of proof in this case. (2 MARKS)

**b)** Describe two responsibilities of the jury in Amanda's case. (4 MARKS)

**c)** Explain one way in which the judge's use of case management powers in this dispute could achieve the principle of access. (3 MARKS)

**d)** Identify one remedy that may be awarded to Amanda if she is successful in her claim and discuss the ability of this remedy to achieve its purposes in Amanda's case. (6 MARKS)

*Adapted* from 2018 VCAA exam Section A Question 5

**5.** Discuss the extent to which the use of a judge and jury in criminal and civil trials helps the justice system achieve the principles of fairness and access. (10 MARKS)

*Adapted* from 2018 VCAA sample exam Section A Question 8

**Time for some exam practice!**

You've finished the Area of Study. Now would be a great time to visit Edrolo online and check out:

- **Our skills masterclass**
- **Unit 3 AOS 2: Topic Test**

Just get the 'OK' from your teacher first

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# UNIT 4 AOS 1: THE PEOPLE AND THE AUSTRALIAN CONSTITUTION

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

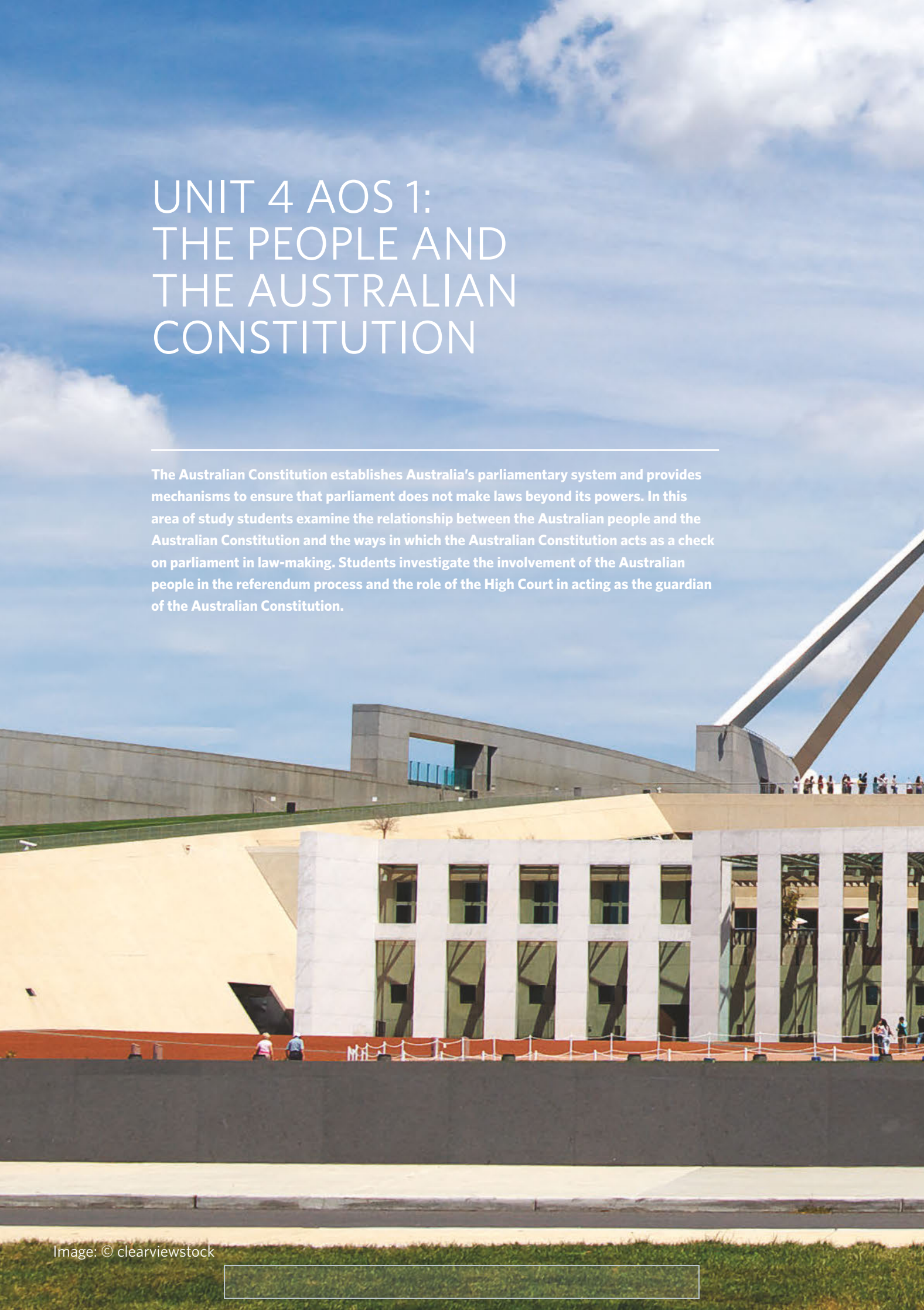


Image: © clearviewstock

## KEY KNOWLEDGE

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

## KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- compare the constitutional law-making powers of the state and Commonwealth parliaments, using examples
- discuss the significance of section 109 of the Australian Constitution
- evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making
- analyse the ability of the Australian people to protect or change the Australian Constitution
- discuss the significance of High Court cases involving the interpretation of the Australian Constitution
- discuss the impact of international declarations and treaties on the interpretation of the external affairs power
- synthesise and apply legal principles to actual scenarios.

# 4.1.1 Roles of the Crown and the Houses of Parliament in law-making

**Australians live in a democratic society, meaning the laws that govern our day-to-day lives are created by individuals that we elect. Regular elections allow members of the community to either re-elect law-makers they approve of, or remove these individuals and replace them with different law-makers who promise to govern society in a different way.**

The Australian Constitution (and each state's Constitution) sets up this system of democratic government. Indeed, section 1 of the Australian Constitution creates the Commonwealth Parliament as the national law-making body:

> The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

Australia's system of government is referred to as a 'constitutional monarchy' – the Crown is the Head of State, and elected representatives make laws and manage government departments (to deliver government services such as a police force, public transport, healthcare, national defence and so on). These elected representatives are members of bicameral parliaments, meaning a law-making body with two houses (or chambers) – two separate groups of law-makers who must both approve of new laws.

This lesson covers VCAA Key Knowledge point: **'The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making'**, which we have broken down into the following concepts:



## Role of the Crown – Commonwealth Level 4.1.1.1

According to section 2 of the Constitution:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

**Therefore, the Crown's representative in the Commonwealth Parliament is the Governor-General**. He/she is appointed by the Queen on the advice of the Prime Minister.

**The roles of the Governor-General in law-making include:**

- **Giving royal assent to legislation, which means** signing a bill (a proposed law) on behalf of the Crown after it has been approved by both houses of the Commonwealth Parliament. This is a necessary final step for a bill to become law and usually happens on the advice of the Prime Minister.
- **Withholding royal assent, which means** the Governor-General can (according to section 58 of the Constitution) refuse to grant royal assent to a bill, but this does not happen in practice.
- **Suggesting amendments to legislation after it has passed both houses of Parliament**, prior to giving the bill royal assent. This power is also granted to the Governor-General by section 58 of the Constitution, but has been used very rarely (only 14 times) since the Parliament first sat in 1901.
  - This occurs if a bill has passed both houses of Parliament and (before receiving royal assent) a mistake in the legislation is found. A minister would advise the Governor-General to return the bill to the Parliament with the suggested change.

**USEFUL TIP** Be careful with your Legal Studies terminology here: throughout Unit 4 you will learn about the role of a governor, the Governor-General and the Attorney-General – they all sound pretty similar, don't mix them up!

## Role of Senate in law-making 4.1.1.2

**The Senate is** the upper house of Commonwealth Parliament. The Senate comprises 76 elected law-makers from across Australia.

**The structure of the Senate includes:**

- 12 Senators directly chosen from each state, each elected for a term of 6 years; and
- 2 Senators from each mainland territory (that is, the Northern Territory and the Australian Capital Territory), each elected for a term of 3 years.

**The roles of the Senate in law-making include:**

- **Initiating legislation**, which refers to the introduction of new bills to be debated and passed. However, please note:
  - Most legislation is introduced in the House of Representatives.
  - Bills that intend to impose taxation or spend Commonwealth revenue cannot be initiated in the Senate; section 53 of the Australian Constitution requires such bills to be initiated in the House of Representatives.
- **Reviewing legislation.** As most legislation is initiated in the House of Representatives by the party controlling the majority of seats in that house, most bills pass through the House of Representatives with ease. The Senate's role is to ensure new bills are debated and scrutinised, to ensure new laws are appropriate and will achieve their purpose. As the Senate more commonly includes many independents and Senators from smaller political parties, this allows for a wider range of perspectives to be considered when debating new bills. The Senate's review function will often result in new bills being amended.
- **Acting as a states' house.** The Constitution guarantees all states equal representation. The Senate's role as the states' house is to ensure that bills that favour larger states (which elect most members of the House of Representatives) are not passed at the expense of the smaller states.

**CASE STUDY** In *Victoria v Commonwealth* [1975] 134 CLR 81 the High Court said this about the role of the Senate:

> 'It is evident from the terms of the Constitution that the Senate was intended to represent the States, parts of the Commonwealth, as distinct from the House of Representatives which represents the electors throughout Australia.
>
> It was intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.'

This statement of Chief Justice Barwick is a summary of the deliberate intention of those who wrote the Constitution to ensure the Senate reviewed legislation in light of each state's needs and interests.

**Effectiveness of the Senate in achieving these roles**

| | |
|---|---|
| **Role as states' house** | **Largely not achieved**<br>Despite equal representation in the Senate for all 6 states, Senators often vote for/against legislation as dictated by the leaders of their political parties rather than based on the needs/interests of the state they represent.<br>Senators from minor parties (or independent Senators) may vote for/against a bill based on its impact on their home state, but this would be the exception, not the rule. |

| Role as house of review | Usually achieved |
|---|---|

**Review function achieved** if the Senate majority is controlled by the opposition or minor parties/independents who hold the balance of power:

- Legislation cannot be rushed through without debate.
- Government bills will be debated and reviewed before being voted upon.
- Opposition/minor party Senators will often demand amendments in return for supporting a bill; this ensures adequate review.
- This is referred to as a 'hostile Senate'.

A Senate majority controlled by the opposition or minor parties holding the balance of power is the normal situation in Australia.

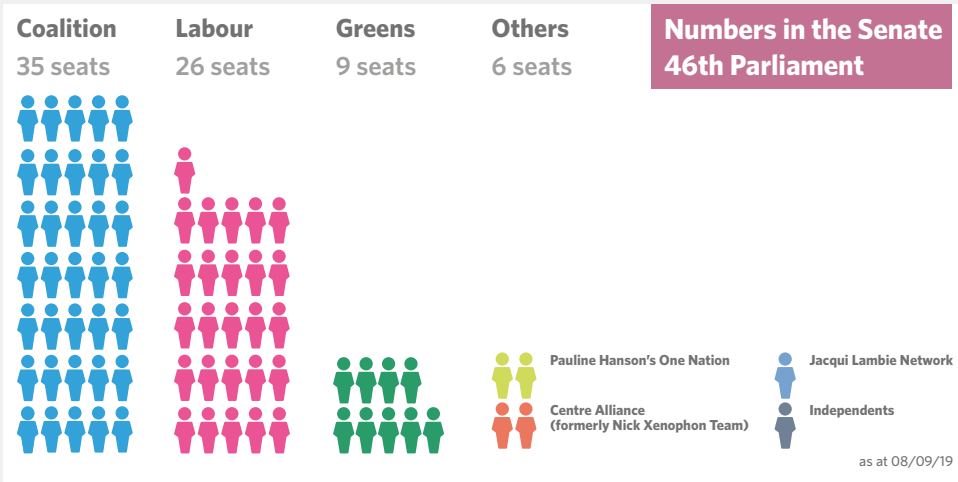
**Review function is not achieved** if the Senate majority is controlled by the government:

- Legislation can be rushed through with little debate.
- Government do not need to agree to amendments from opposition or minor party Senators in order to secure their support for a bill (as their support is not needed).
- This may be referred to as a 'rubber stamp' Senate

A Senate majority controlled by the government (that is, the same party holding a majority in both the Senate and the House of Representatives) is rare.

**CASE STUDY**

The Senate in 2019 is composed in the following way:




*Source:* https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition

Note the following:

- A bill needs the support of at least 39 Senators to be passed
- No single party has a majority. The Liberal/National Coalition (in government at the time of writing) cannot rush through legislation that has been approved in the House of Representatives.
- Likewise, the Labor Party cannot on their own block legislation from passing through the Senate.
- The 'balance of power' is therefore held by the 15 Senators from minor parties – if Labor vote against a government bill in the Senate, the decisions of these 15 Senators will determine whether a bill passes through the Senate (or is rejected).
- For bills introduced by the Liberal/National government to be passed through the Senate, they need either:
  - The support of the Labor opposition; or
  - The support of at least 5 of the 15 Senators from minor parties.

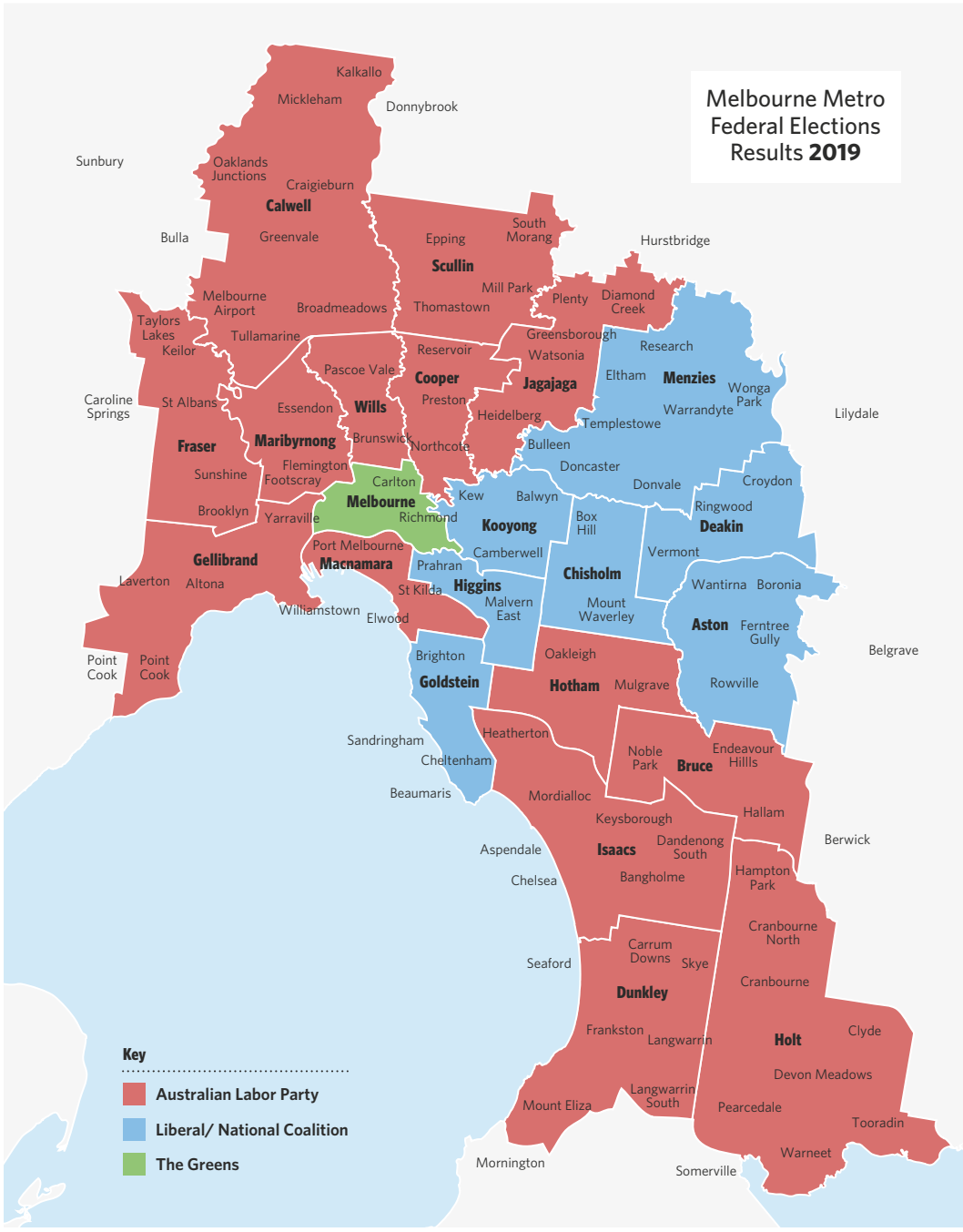
As a result, the Senate debates and reviews government bills very thoroughly, with the government frequently amending bills in return for the support of Labor or minor party Senators.

## Role of House of Representatives in law-making 4.1.1.3

**The House of Representatives is** the lower house of the Commonwealth Parliament. The House comprises 151 elected members from across Australia.

**The structure of the House of Representatives:**

- This house comprises 151 members.
- Each member of the House of Representatives is elected for a term of approximately three years (the Prime Minister has some discretion regarding the timing of elections for the Commonwealth Parliament).
- Each of these 151 members represents a division (or 'electorate' or 'seat') – a geographical area with approximately 100,000–120,000 voters residing within the area. At an election, the voters within a division choose one person to be that community's representative in the House of Representatives.
- Given how Australia's population is distributed, some states (like New South Wales and Victoria) have many more electoral divisions than other states (such as Tasmania), meaning the more populous states elect more members of the House of Representatives.




Source: https://www.aec.gov.au/Elections/federal_elections/2019/files/maps/2019-aec-A3-VIC-maps.pdf

### What role do political parties play?

- Almost all members of the House of Representatives are members of political parties, such as the Liberal Party of Australia, the Australian Labor Party, etc.

**CASE STUDY** **TIM WILSON**

**Federal Member for Goldstein**

- Tim Wilson is a member of the House of Representatives.
- He is the representative for the division of Goldstein.
- At the 2019 election the 104,000 voters in the division of Goldstein chose Tim Wilson to be their representative; he may or may not be re-elected at the next election.
- Tim Wilson is a member of the Liberal Party of Australia.

**Federal electoral division of GOLDSTEIN**


Image: Adapted from Tetiana Ch/Shutterstock.com

Source: Australian Electoral Commission, https://aec.gov.au/Electorates/Redistributions/2017/vic/final-report/files/maps-a4/2018-AEC-Victoria-A4-Goldstein-Final.pdf

### How is government formed?

- The political party (or coalition of parties) that control the majority of seats in the House of Representatives forms government. The leader of this party becomes the Prime Minister.
- Some members of the House of Representatives who are also members of the governing party (or coalition of parties) will be appointed to be Ministers. Ministers are responsible for running the government departments that provide essential services such as the defence force, welfare payments such as the old-age pension and so on.

**CASE STUDY** **JOSH FRYDENBERG**

**Federal Member for Kooyong**

- Josh Frydenberg is a member of the House of Representatives
- He is the representative for the division of Kooyong
- At the 2019 election the 105,000 voters in the division of Kooyong chose Josh Frydenberg to be their representative; he may or may not be re-elected at the next election
- Josh Frydenberg is also a member of the Liberal Party of Australia
- As at 31/8/2019 the Liberal/National Coalition controls the majority of seats in the House of Representatives
- Josh Frydenberg – as a member of this governing coalition of parties – has been appointed as the Treasurer (the minister leading the Treasury) – the government department responsible for Australian economic management and the administration of the government's taxation and spending activities.

**Federal electoral division of KOOYONG**


Image: Adapted from Tetiana Ch/Shutterstock.com

Source: Australian Electoral Commission,https://aec.gov.au/Electorates/Redistributions/2017/vic/final-report/files/maps-a4/2018-AEC-Victoria-A4-Kooyong-Final.pdf

Please note that Senators may also be appointed as Ministers. Such Senators will be members of the political party that controls the majority of seats in the House of Representatives, however it does not matter whether their political party controls the majority of seats in the Senate.

**The roles of the House of Representatives in law-making include:**

- **Initiating most new legislation**, which means the introduction of new bills to be debated and passed. Most legislation is introduced by Ministers – many of whom are usually members of the House of Representatives. As a consequence, most new laws (and proposed changes to existing laws) begin in the House of Representatives.
- **Initiating all legislation that imposes taxation or spends Commonwealth revenue** as section 53 of the Australian Constitution requires such bills to be initiated in the House of Representatives.
- **Representing the people in law-making**. Members of the House of Representatives are directly chosen by the people in their community and will often receive correspondence from those living within their electoral division.As representatives of that community they should reflect the opinions and perspectives of those within their electorate when introducing, debating or suggesting amendments to legislation. If they fail to do so, they risk being voted out of office at the next election.

**CASE STUDY**

At the 2019 election, members of the Liberal/National Coalition won 77 of 151 seats in the House of Representatives. The members of the Coalition therefore formed government, with many Coalition members of the House of Representatives becoming ministers in charge of government departments. As stated above, most legislation is introduced by the government, and most bills are initiated in the House of Representatives rather than the Senate. For example, in 2017:

- The House of Representatives considered 218 bills in total.
- Only 15 of these 218 bills were initiated in the Senate before being presented to the House.
- 185 of these 218 bills were introduced into the House by members of the government, rather than by other members of the House of Representatives.

*Source:* www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics

## Role of the Crown – Victorian Level 4.1.1.4

**The Crown's representative in the Victorian parliament is the Governor**. He/she is appointed by the Queen on the advice of the Premier of Victoria.

**The roles of the Governor in law-making include:**

- **Giving royal assent to legislation, which means** signing a bill (a proposed law) on behalf of the Crown after it has been approved by both houses of the Victorian Parliament. This is a necessary final step for a bill to become law and usually occurs on the advice of the Premier.
- **Suggesting amendments to legislation after it has passed both houses of parliament**, prior to giving the bill royal assent. This power is granted to the Governor by section 14 of the *Constitution Act 1975* (Vic).

## Role of Legislative Council in law-making 4.1.1.5

**The Legislative Council is** the upper house of the Victorian parliament. The Legislative Council comprises 40 elected law-makers from across Victoria.

**The structure of the Legislative Council includes:**

- 5 Councillors directly chosen from 8 regions in Victoria.
- All 40 members of the Legislative Council face re-election every four years.

**The roles of the Legislative Council in law-making include:**

- **Initiating legislation**, which means the introduction of new bills to be debated and passed. However, please note:
  - Most legislation is introduced in the Legislative Assembly.
  - Legislation that imposes taxation or spends Victorian government revenue cannot be initiated in the Legislative Council, nor can such bills be amended in the Council or blocked by the Legislative Council (although the Council may return such legislation to the Legislative Assembly with suggested changes). Such legislation that allows the government to fund schools, hospitals, build roads and so on must be initiated in the Legislative Assembly.
- **Reviewing legislation.** As most legislation is initiated in the Legislative Assembly by the party controlling the majority of seats in that house, most bills pass through the Assembly with ease. The role of the Legislative Council is to ensure new bills are debated and scrutinised, to ensure new laws are appropriate and will achieve their purpose. As the Legislative Council more commonly includes independents and Councillors from smaller political parties, this allows for a wider range of perspectives to be considered when debating new bills. The Legislative Council's review function will often result in new bills being amended before they are approved and become law.

## Role of Legislative Assembly in law-making 4.1.1.6

**The Legislative Assembly is** the lower house of Victorian Parliament. The Assembly comprises 88 directly elected law-makers from across Victoria.

**Key aspects of the structure of the Legislative Assembly include:**

- 88 members, each elected for a term of 4 years (with Victorian elections held on the last Saturday in November, every 4 years).
- Each of these 88 members represents a division (or 'electorate' or 'seat') – a geographical area with approximately 40,000 voters residing within the area.

- Given the distribution of Victoria's population, most electorates are within metropolitan Melbourne.
- Almost all members of the Legislative Assembly are members of political parties, such as the Liberal Party of Australia, the Australian Labor Party, etc.
- The political party (or coalition of parties) that control the majority of seats in the Legislative Assembly forms government. The leader of this party becomes the Premier.
- Some members of the Assembly who are also members of the governing party (or coalition of parties) will be appointed to be Ministers. Ministers are responsible for running the government departments that provide essential services in Victoria such as public transport, the police force, schools and hospitals.

Note that members of the Legislative Council may also be appointed as Ministers. Such Councillors will be members of the political party that controls the majority of seats in the Legislative Assembly, but it does not matter whether their political party does or does not control the majority of seats in the Council. Under Victorian law, up to 6 ministers can be appointed from within the Legislative Council.

**The roles of the Legislative Assembly in law-making include:**

- **Initiating most new legislation**, which means the introduction of new bills to be debated and passed. Most legislation is introduced by Ministers – most of whom are usually members of the Assembly. As a consequence, most new laws (and proposed changes to existing laws) begin in the Legislative Assembly.
- **Initiating all legislation that imposes taxation or spends Victorian government revenue** as the Victorian Constitution explicitly prevents such bills being initiated in the Legislative Council.
- **Representing the people in law-making.** Members of the Assembly are directly chosen by the people in their community and will often receive correspondence from those living within their electoral division. As representatives of that community they should reflect the opinions and perspectives of those within their electorate when introducing, debating or suggesting amendments to legislation. If they fail to do so, they risk being voted out of office at the next election.

**CASE STUDY**

At the 2018 election, members of the Australian Labor Party won 55 of 88 seats in the Legislative Assembly. The members of the ALP therefore formed government, with many Labor members of the Assembly becoming ministers in charge of government departments. As stated above, most legislation is introduced by the government, and most bills are initiated in the Legislative Assembly rather than the Legislative Council. For example, in 2017:

- The Legislative Assembly considered 79 bills in total.
- Only 4 of these 79 bills were initiated in the Legislative Council before being presented to the Legislative Assembly.
- 73 of these 79 bills were introduced into the Legislative Assembly by members of the government, rather than by other members of the Assembly.

*Source:* parliament.vic.gov.au/images/stories/downloads/Statistics/Assembly_statistics_54_-_12-14_December_2017.pdf

**USEFUL TIP**

There are many similarities between the Victorian and Commonwealth Parliaments – both are bicameral, government is formed in the lower house of each parliament and the upper houses are restricted in their ability to introduce and change legislation that relates to government revenue. Despite these similarities, be careful to ensure you can name each house correctly and describe its roles using the right terminology – you'll lose easy marks if you call the lower house of the Victorian Parliament 'the House of Representatives'!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.1: Roles of the Crown and the Houses of Parliament in law-making**

## Keen to learn more?

**Parliamentary Education Office,** www.peo.gov.au/

**Parliamentary Education Office – Making a Law,** www.peo.gov.au/learning/fact-sheets/making-a-law.html

**The Australian Constitution,** ausconstitution.peo.gov.au/index.html

**The Parliament of Australia: About Parliament,** www.aph.gov.au/About_Parliament

QUESTIONS

# 4.1.1 Roles of the Crown and the Houses of Parliament in law-making

LEVEL 1:
Define and understand

**1.** Which of the following statements about the role of the Crown in the Commonwealth Parliament is incorrect?

- **A.** The Governor-General has the ability to withhold royal assent.
- **B.** The Governor gives royal assent to bills passed through the House of Representatives and the Senate.
- **C.** The Governor-General gives royal assent to bills passed through the Parliament.
- **D.** The Governor-General may suggest amendments to legislation after it has passed the House of Representatives and the Senate.

**2.** Identify the incorrect statement from the options below.

- **A.** A member of the Senate can initiate a bill.
- **B.** Each state is represented by 12 senators, and each territory is represented by 2 senators.
- **C.** The Senate scrutinises legislation by reviewing.
- **D.** The Senate can amend and reject all bills.

**3.** Which of the following best describes why the House of Representatives is sometimes referred to as 'the house of government'?

- **A.** After an election, the political party that has the most members in the House of Representatives forms the Federal government of the day.
- **B.** Most laws are initiated by the House of Representatives.
- **C.** The leader of the political party that has the most members in the House of Representatives (the government) becomes the Prime Minister.
- **D.** If the government loses support of the House of Representatives it must resign.

**4.** Which of the following statements is incorrect?

- **A.** The Governor gives royal assent to legislation passed through the Legislative Council and the Legislative Assembly.
- **B.** The Governor is appointed on the advice of the Premier of Victoria.
- **C.** The Crown at the Victorian level can dismiss a Premier.
- **D.** The Crown at the Victorian level is appointed on the advice of the Prime Minister.

**5.** The principle of representative government refers to a government that represents the views of the majority of voters. Which role of the Legislative Council upholds this principle directly?

- **A.** Acting as the House of Government. As the Legislative Council determines the government, it ensures that elected ministers make laws that are in line with the community's values.
- **B.** Initiating laws. The Legislative Council can introduce and pass laws that they believe are in line with the views of the majority.
- **C.** Acting as the States' House.
- **D.** Acting as the House of Review.

**6.** The Victorian Legislative Assembly is similar to the House of Representatives because:

- **A.** it comprises 88 members, like the House of Representatives.
- **B.** it is responsible for the formation of government.
- **C.** it comprises 150 members, like the House of Representatives.
- **D.** only members of government introduce bills in this house.

LEVEL 2:
Describe and explain

**7.** Identify and explain one role of the Governor-General. (2 MARKS)

**8.** Explain the role of the Senate as the 'States' House', and outline a possible disadvantage that would arise if the number of senators for each state was proportionate to the population of that state. (4 MARKS)

**9.** Explain the House of Representatives' role in initiating laws. (2 MARKS)

**10.** Explain the role of royal assent. (2 MARKS)

**11.** A member of the Legislative Council attempts to initiate a new law. However, another member, Frank, says that this is not allowed as this is a role of a lower house of Parliament.

Is Frank's statement correct? Justify your answer. (3 MARKS)

**12.** Adam, a Victorian father, posts on Facebook about how the Victorian parliament always makes laws that represent his views and the views of his community.

Explain the role of the House of Government, and how this role allows for the Legislative Assembly to make laws that represent the views of the majority. (3 MARKS)

LEVEL 3:
Apply and compare

**13.** In which house of the Commonwealth Parliament is most legislation introduced, and why? Compare the roles of the Senate and the House of Representatives in law-making. (5 MARKS)

**14.** The following passage contains errors.

> The Commonwealth Parliament today passed legislation to lower the voting age to 16. The Prime Minister introduced the bill by submitting it to the Governor for royal assent, after which it was passed by both the lower house (the House of Representatives) and the upper house (the Legislative Council).

Correct the errors in this passage. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**15.** At the time of Federation, the Senate was designed to serve two key purposes: to act as 'the states' house', and as a house of review.

Discuss whether it achieves these purposes. (6 MARKS)

# 4.1.2 Division of Constitutional law-making powers

**Australia's federal system of government has layers – a national parliament that is responsible for passing legislation that affects the entire nation and state parliaments that pass laws to govern the communities within each state. This federal system is established by the Australian Constitution, which divides law-making responsibilities between the Commonwealth Parliament and each state Parliament.**

This federal system allows for some laws to be the same all over Australia (for example, the 10% Good & Services Tax is applied to products all over Australia in the same way under Commonwealth legislation), whilst other laws on a particular topic will vary from state-to-state (such as laws governing how to obtain a driver's licence, which differ slightly in every state).

Sections 51 & 52 of the Australian Constitution grant the Commonwealth Parliament the ability to make laws regarding a range of matters (referred to as 'specific powers' or 'enumerated powers'). The law-making powers of Commonwealth Parliament and state parliaments are further classified below.

This lesson covers VCAA Key Knowledge point: **'The division of Constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers' and 'Significance of section 109 of the Australian Constitution',** which we have broken down into the following concepts:



## Exclusive powers 4.1.2.1

**Exclusive powers are** law-making powers granted only to the Commonwealth Parliament. The state parliaments are not permitted to pass legislation on these matters. Relatively few of the Commonwealth's law-making powers are exclusive powers.

**Examples of the exclusive powers of the Commonwealth include law-making about:**

- Customs and excise duties; that is, the states cannot legislate to tax goods imported into/exported from Australia (see section 90).
- The control of the armed forces (see section 51(vi) and section 114).
- Currency (i.e. the coining of money in the Australian economy) (see section 51(xii) and section 115).

**USEFUL TIP** Avoid re-using the term 'exclusive' when defining exclusive powers – instead describe them as law-making powers that only the Commonwealth may exercise.

## Concurrent powers 4.1.2.2

**Concurrent powers are** law-making powers granted to Commonwealth Parliament that are shared with the state parliaments. That is, both the Commonwealth and the states may pass laws in areas of concurrent power. Most powers granted to the Commonwealth Parliament by Section 51 of the Australian Constitution are concurrent powers shared with the states.

**Examples of concurrent powers include law-making about:**

- marriage and divorce
- taxation
- banking
- railway construction
- insurance
- trade with other nations
- trade and commerce between the states of Australia.

**CASE STUDY**

As stated above, an example of concurrent law-making power is marriage. In practice, this means there is Commonwealth law about marriage, including the *Marriage Act 1961* (Cth) which defines 'marriage' as 'the union of two people to the exclusion of all others, voluntarily entered into for life' (see Section 5) and there are state laws about marriage also. For instance, section 31 of the *Births, Deaths and Marriages Registration Act 1996* (Vic) requires all marriages in Victoria to be placed on the register of marriages with Births, Deaths and Marriages (a Victorian government department).

**CASE STUDY**

A second example of concurrent law-making power in action is taxation. There are Commonwealth laws about taxation, such as the laws requiring all wage-earners to pay income tax and lodge a tax return with the Australian Tax Office. There are also state laws about taxation, such as Victorian legislation that imposes taxes upon the purchase of cars and houses (often called 'stamp duties').

**USEFUL TIP**

Throughout your studies you will see the Commonwealth Parliament also referred to as the 'federal parliament' or the 'national parliament' – these terms are all different ways of referring to the same law-making body.

## Residual Powers 4.1.2.3

**Residual powers are** all law-making powers not granted to the Commonwealth Parliament in the Australian Constitution, that are the responsibility of the state parliaments. These law-making powers are not explicitly stated or listed in the Australian Constitution (nor are they listed in the Constitutions of each state).

**Examples of the residual powers include law-making about:**

- health
- education
- agriculture
- police
- prisons
- criminal laws.

**CASE STUDY**

An example of a residual power is law-making with respect to education. For this reason, the education systems in each Australian state vary, as each state parliament has passed different legislation to govern its own school system. For example, some states have slightly different minimum age requirements for beginning primary school, and each state awards a different certificate upon the completion of secondary school (such as the VCE in Victoria, the HSC in New South Wales).

**USEFUL TIP**

The Study Design requires students to be able to 'compare the constitutional law-making powers of the state and Commonwealth parliaments, using examples.' To 'compare' means to analyse similarities and differences, not simply to define types of law-making powers.

For example:

- A similarity between exclusive powers and concurrent powers is that they are explicitly stated in the Australian Constitution.
- A difference between exclusive powers and residual powers is that exclusive powers are stated in the Constitution, whereas residual powers are not.

## The significance of section 109 4.1.3.1

The federal system of government – in particular, the concurrent law-making powers of the Commonwealth Parliament and the state parliaments – creates the risk of conflict between state laws and national laws. That is, there is a possibility that two laws on the same topic will be inconsistent. The Australian Constitution resolves this issue in section 109.

**Section 109 states:**

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

**Key points regarding the operation of s.109 include:**

- If an inconsistency arises between state and Commonwealth legislation, the timing of each law's creation is irrelevant. It does not matter whether the Commonwealth law was passed first, or the state law – if they are in conflict with one another, the Commonwealth law will prevail to the extent of the inconsistency.
- The words 'to the extent of the inconsistency' are important here. Only those sections of state law that are inconsistent with Commonwealth law will be declared invalid; the remaining sections of the state law that are not in conflict with Commonwealth law continue to operate.
- A state law will only be declared invalid by the High Court of Australia under section 109 when the validity of that law has been challenged (often by the Commonwealth). Section 109 will not cause an inconsistent state law to be invalid automatically.
- Section 109 does not impact on the law-making powers of the states and the Commonwealth. The effect of section 109 is to render invalid any section of state law that is inconsistent with a Commonwealth law, but the state retains the ability to make laws on that particular topic.

**USEFUL TIP**

A common misconception in response to past exam questions about section 109 has been for students to write that an entire state law is declared invalid if there is an inconsistency with Commonwealth law. Many students made this mistake when tackling Question 3c from the 2009 VCAA Legal Studies Exam:

> The *Marital Status Act 2009* has just been passed by the Victorian parliament. How could Section 109 of the Commonwealth Constitution affect this law if it were challenged in the courts? (2 MARKS)

Only the **parts** of state law that are inconsistent with Commonwealth law will be declared invalid.

**Section 109 is significant in that:**

- It provides a way to resolve inconsistencies between state and Commonwealth laws, with the Commonwealth law prevailing.
- It creates a restriction on the law-making powers of the states in the areas of concurrent law-making power. While states can pass laws on these matters, their ability to do so is limited because any part of a state law made under the concurrent powers that is inconsistent with a federal law will be declared invalid when challenged in the High Court.

**USEFUL TIP**

The Study Design requires students to not only know what is stated in section 109, but why it is **significant**. If asked for the significance of section 109, be sure to not merely restate what the Constitution says!

**CASE STUDY**

***R v LICENSING COURT OF BRISBANE; EX PARTE DANIELL* [1920] HCA 24**

The *Liquor Act 1912* (Qld) provided for local communities to vote on proposed changes to liquor licensing, and set the date of the 1917 Commonwealth Senate elections as a date when such polls were to be conducted. Voters in Toowong (a suburb in Brisbane) were asked to vote on a proposal to reduce the number of liquor licences in the area on 5 May 1917 – the same date a Senate election was conducted. However, section 14 of the *Commonwealth Electoral* (*War-time*) *Act* 1917 explicitly prohibited any state conducting polls/elections of any kind on the same day as an election for the Commonwealth Parliament.

The High Court concluded the Queensland and Commonwealth legislation were inconsistent, and the sections of the Queensland law that set up the vote on liquor licenses were declared invalid under section 109 of the Constitution. Therefore, the vote conducted on the 5th of May in Toowong was declared to be unlawful and as such its results could not form the basis of any attempt to remove liquor licenses from hotels in the area.

**CASE STUDY** ***COLVIN v BRADLEY BROTHERS PTY LTD* [1943] HCA 41**

The *Commonwealth Conciliation and Arbitration Act 1904* (Cth) permitted employers to employ females to work on certain machines. However, section 41 of the *Factories and Shops Act 1912* (NSW) prohibited the employment of women on milling machines. This case can be distinguished from *R v Licensing Court of Brisbane* [1920] (above), because it was possible to follow both laws simultaneously – nothing in the Commonwealth law required females to be employed in factories, so employers could simply choose to employ only males in factories and be following both laws.

However, the Commonwealth law gave women a right to work in particular workplaces, and the NSW law took away this legal right. The High Court held that by removing such a right granted by Commonwealth law, section 14 of NSW legislation was inconsistent with the Commonwealth law and was therefore invalid due to the operation of section 109 of the Constitution.

**USEFUL TIP**

Be sure you can apply your knowledge of s. 109 to a fact scenario. In Section B of the 2018 VCAA exam students were presented with an extract from Victorian legislation banning tanning beds, then asked:

> If the Commonwealth Parliament were to pass legislation allowing the commercial use of tanning units, how might section 109 of the Australian Constitution be relevant? (4 marks)

Simply restating what s. 109 says was not appropriate – students had to link their explanation back to this fact scenario. The examiner's report included these remarks:

> To achieve full marks, students needed to explain what the conflict or issue was in this particular case – that is, that one law (the Commonwealth law) would allow the commercial use of tanning units and that the other law (the state law) would ban it, which would mean there would be a conflict. If somebody operates a business allowing people to use tanning units, one law says that they are committing an offence and the other law allows it. If this explanation was not in the response, then the student could not achieve full marks.

After discussing the specifics of the laws in question, students needed to conclude that the Commonwealth law would prevail due to the operation of s. 109.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.2: Division of constitutional law-making powers**

## Keen to learn more?

**Parliamentary Education Office – Closer Look: Governing Australia,** www.peo.gov.au/learning/closer-look/governing-australia.html

**The Australian Constitution,** www.ausconstitution.peo.gov.au/index.html

**Victoria Law Foundation: The People & The Australian Constitution,** www.victorialawfoundation.org.au/sites/default/files/resources/the_people_and_the_australian_constitution.pdf

**Rule of Law Institute of Australia: Division of Powers Poster,** www.ruleoflaw.org.au/wp-content/uploads/2016/07/2016-07-18_Rule_of_Law_Institute_Division_of_Powers_Poster.pdf

QUESTIONS

# 4.1.2 Division of Constitutional law-making powers

LEVEL 1:
Define and understand

**1.** Which of the following statements about the exclusive powers is correct?

**A.** Exclusive powers ensure the interests of the states are protected as the laws are made by the specific Parliament of each state.

**B.** Exclusive powers allow for the Commonwealth Parliament to make uniform laws for all of Australia.

**C.** Exclusive powers allow for the Commonwealth Parliament to make laws with the state parliaments, ensuring the law are in the best interests of both parliaments.

**D.** Exclusive powers allow for the Commonwealth Parliament to make laws quickly without having to consider the individual interests of the states or territories.

**2.** The Commonwealth recently passed separate legislation regarding marriage, the navy and taxation. The Victorian parliament also has passed legislation regarding marriage. The New South Wales parliament also has passed legislation regarding the navy. The Western Australian parliament also has passed legislation regarding taxation. Which state or states' legislation will be invalid due to it not being in the jurisdiction of that Parliament?

**A.** The legislation passed by the Victorian parliament will be invalid due to marriage not being a concurrent power.

**B.** The legislation passed by the NSW parliament will be invalid due to the navy not being a concurrent power.

**C.** The legislation passed by the WA parliament will be invalid due to taxation not being a concurrent power.

**D.** Neither the legislation passed by NSW or WA will be valid.

**3.** Residual powers are contained in which section of the Constitution?

**A.** s.109

**B.** s.128

**C.** s.90

**D.** None of the above

**4.** Which of the following statements regarding the ability of section 109 of the Constitution is most accurate?

**A.** s.109 restricts the power of the state parliaments to a full extent. This is because if legislation has a section that conflicts with the Commonwealth law, the legislation will be declared invalid.

**B.** s.109 does not restrict the power of the state parliaments to any extent. s.109 provides that in the case of a conflict between Commonwealth and state law, the Commonwealth law will be declared invalid.

**C.** s.109 restricts the power of the state parliaments to some extent. Although state law that conflicts with Commonwealth law will be declared invalid, states can still make laws in areas of residual powers.

**D.** s.109 restricts the power of the state parliaments to some extent. s.109 provides that only the sections of the state law that conflict with Commonwealth law will be declared invalid, and not the whole legislation. Additionally, the state law has to be challenged in the High Court before it can be deemed invalid.

LEVEL 2:
Describe and explain

**5.** Sammy is a member of the Legislative Assembly of the Victorian Parliament. She is about to introduce a bill into parliament to introduce a Victorian currency. Will this bill be valid? Justify your answer. (3 MARKS)

**6.** Using an example, explain concurrent powers. (3 MARKS)

**7.** A legal critic once said 'residual powers are those specifically listed in the Constitution. Both state parliaments and the Commonwealth Parliament can make laws in areas of residual power'. Is this statement correct? Explain your answer. (3 MARKS)

**8.** The Commonwealth Parliament had passed a law that prohibited those under the age of 18 to marry. A month after this, the Victorian Parliament passed a law that allowed anyone over the age of 16 to marry. Would the Victorian law be valid? Justify your answer. (3 MARKS)

LEVEL 3:
Apply and compare

**9.** Assume the state of Victoria passes legislation to spend $1.5 billion to raise an army. Explain why a Commonwealth challenge to this legislation in the High Court of Australia will likely succeed. (3 MARKS)

**10.** Assume the Commonwealth challenges the validity of Victorian legislation, and the High Court of Australia declares some sections of this Victorian law invalid.

Based on your knowledge of the division of powers, identify and explain two possible reasons why the High Court may declare sections of Victorian law invalid in this instance. (4 MARKS)

**11.** Section 456 of the *Crimes Act 1958* (Vic) states that a police officer is legally entitled to ask for a person's name and address if they have reason to believe the person has committed an offence (or is about to commit an offence). Any police officer requesting a person's name and address must advise the person what offence they think he or she has committed. In 2018 the Commonwealth government proposed a new law allowing the police to ask anyone at an airport to provide their name and address (and identification) at any time, regardless of whether or not they are suspected of committing an offence.

Assume this proposed law passes the Commonwealth Parliament in 2018. Shortly after, Mark is stopped by a police officer at Melbourne Airport and asked to provide his name and address. He asks why and the police give no reason. He refuses to provide his name and address and is charged with an offence.

In defending himself, Mark's legal representative challenges the validity of the charges brought against him, arguing the Victorian Crimes Act only enables police to request his name and address if they suspect he has committed a crime. Because the police didn't indicate what crime he was suspected of committing, Mark thinks he was free to refuse the request.

Explain to Mark why his challenge will likely fail. (3 MARKS)

**12.** The Victorian Parliament can pass legislation on topics within both the residual powers and the concurrent powers. Using examples, distinguish between the residual and concurrent powers. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**13.** 'Section 109 of the Constitution does not prevent the state parliaments from tackling social issues.'

Do you agree? Give reasons for your answer. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 1 (online), covering these lessons:

- **Lesson 4.1.1 Roles of the Crown and the Houses of Parliament in law-making**
- **Lesson 4.1.2 Division of Constitutional law-making powers**

Check with your teacher when it's time to complete this progress check.

# 4.1.3 The Australian Constitution as a check on parliamentary law-making

**The Australian Constitution creates the Commonwealth Parliament and gives it the power to make laws on a wide range of topics (the exclusive and concurrent powers). The Constitution also ensures state parliaments have the power to make laws on various matters (within the concurrent and residual powers).**

However, the Constitution also places limits on what the Commonwealth and state parliaments can do. In this lesson you will learn what those limitations are (the means by which the Constitution acts as a check on the power of the state and Commonwealth parliaments) and 'how much' of a restriction each of these constitutional structures places upon the parliaments' law-making powers.

This lesson covers VCAA Key Knowledge point: **'The means by which the Australian Constitution acts as a check on parliament in law-making, including: the bicameral structure of the Commonwealth parliament – the separation of the legislative, executive and judicial powers – the express protection of rights – the role of the High Court in interpreting the Australian Constitution – the requirement for a double majority in a referendum',** which we have broken down into the following concepts:



## Bicameral structure of the Commonwealth parliament 4.1.3.1

### Defining this check on parliamentary law-making power

**The Australian Constitution ensures the Commonwealth Parliament is a bicameral parliament** that is, a parliament with two houses of elected law-makers: the Senate and the House of Representatives.

Section 1 of the Australian Constitution states:

> The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

**The government introduces almost all legislation** into the Parliament, and almost all legislation is initiated in the House of Representatives (see Lesson 4.1.1). As the government controls the majority of the seats in the House, legislation can be rushed through the House with limited debate and/or amendment.

Therefore, the provision of a second house to review and pass legislation is an important way to ensure legislation is reviewed and scrutinised before being passed, and radical changes to the law and/or unjust new laws are not rushed into operation.

### The extent of this limitation on parliamentary law-making power

Ways the bicameral structure of Parliament **limits parliamentary law-making power**

- The inclusion of a second house of Parliament (the Senate) ensures all bills are reviewed and debated, to ensure the government of the day does not alter the law dramatically without debate and scrutiny.
- If the Parliament consisted of only one house, the government (in control of that house) could pass legislation that benefits the majority of voters and mistreats unpopular minorities in society. The inclusion of a second house should prevent this from happening, by ensuring all bills need to be approved by a second group of law-makers.

*cont'd*

*However:*

- It is possible that one political party may control the majority of seats in both the Senate and the House. In such a case legislation may be rushed through without review and debate, meaning the bicameral structure does not act as a limit on parliamentary law-making power. This is only a small weakness; this situation is very uncommon, as the Senate is rarely controlled by the same party controlling the House.

**USEFUL TIP** This section of the Legal Studies course requires you to discuss **how the bicameral structure acts as a check on the law-making powers of the Parliament**. How the roles and composition of the House and the Senate influence law-making more generally is explored in Unit 4 Area of Study 2 (see Lesson 4.2.1).

## Separation of the legislative, executive and judicial powers 4.1.3.2

**Defining this check on parliamentary law-making power**

**The separation of powers is** a principle established by the Constitution to ensure there is no abuse of power by those bodies involved in the creation of laws and the administration of justice.

Under the Australian Constitution:

- **Legislative power** is the ability to make laws; this power is granted to the parliament. Section 1 of the Australian Constitution outlines that the legislative power shall be vested in the Commonwealth Parliament.
- **Executive power** is the ability to administer laws and 'to conduct the business of government' (such as the collection of taxes, running the police force, granting visas to those who wish to migrate to Australia, etc); this power is technically given to the Crown, but in practice is exercised by ministers who are in charge of government departments. Section 61 of the Australian Constitution states:

  > The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

- **Judicial power** is the ability to resolve criminal and civil disputes, sometimes imposing sanctions and awarding damages (by applying the law to the facts of a case); this power is exercised by the courts. Section 71 of the Constitution states that the judicial power shall be vested in the courts.

In theory, all three powers are kept separate.

**In practice the legislative and executive powers overlap** because ministers (who exercise executive power in running government departments) are also members of Parliament (and therefore also exercise legislative power.

**The judicial power is kept entirely separate and independent.** Judges cannot exercise legislative or executive power. Ministers and members of Parliament must not exercise judicial power.

**CASE STUDY** The following hypothetical scenarios demonstrate how the separation of powers limits parliamentary law-making power:

**Scenario 1**

Assume the Commonwealth passes legislation that targets members of a new political party (called 'The ScoMo Party'). The ScoMo Party are a small political party, unpopular in some parts of the community, blamed for rising crime by the tabloid media and instability in the Australian government. The Commonwealth passes a law taking possession of all property owned by the ScoMo Party, providing no compensation of any kind. Introducing and passing this new law has made members of the Commonwealth Parliament more popular with voters.

Heidi is a signed-up member of the ScoMo party and challenges the validity of this law. The High Court declares it invalid as it breaches section 51(xxxi) of the Constitution by taking the property of ScoMo party members without providing just terms (see below in 4.1.4.3).

Under the separation of powers principle, the High Court is entirely independent of the Parliament and ministers. Therefore, the Court does not care whether the law was popular or not – the Court is not concerned with whether new legislation is a 'good law', they are concerned only with whether legislation is valid under the Constitution. The Court will independently strike down the law because it breaches the Constitution, protecting The ScoMo Party's right to just terms if the Commonwealth compulsorily takes their property.

This separation of judicial power guarantees the High Court can uphold the system of government set up by the Constitution in an objective and unbiased way, to declare invalid Commonwealth laws that are beyond its powers.

**Scenario 2**

Assume members of the House of Representatives face pressure from voters in their electorates to get tough on crime, and the Commonwealth Parliament responds by passing legislation allowing the House of Representatives to conduct criminal trials.

Les is charged with defrauding Centrelink and awaits a hearing before the House of Representatives.

If Les challenged this legislation in the High Court it would be declared invalid, and he would not have to face trial in the House of Representatives. The separation of powers ensures the Parliament cannot pass legislation giving itself the ability to conduct criminal cases and sanction offenders (only courts may exercise this judicial power).

**USEFUL TIP** In Unit 4 students are required to apply legal principles to **actual** scenarios; these hypothetical scenarios are provided for illustrative purposes only and should not be referred to within your SAC or exam responses.

**USEFUL TIP** Scenario 2 (above) is similar to Question 3 in the 2017 Legal Studies examination:

> Following criticisms of judicial decisions, a law has been passed that will allow members of Parliament to hear and determine court disputes.' Would this law be valid? Justify your answer. (4 MARKS)

It is important you can apply your knowledge to scenarios such as this.

**Judges are independent** in reviewing whether the parliament has (or has not) passed laws in accordance with the Constitution. This independence is promoted in the following ways:

- Judges are appointed until the age of 70; judges cannot be removed by ministers unless misconduct is proven and both houses of parliament vote to remove a judge.
- Judges' salaries cannot be reduced by ministers.
- Ministers or members of parliament who unfairly criticise judges' decisions may be found in contempt of court (a serious criminal offence).

**CASE STUDY** ***AUSTRALIAN COMMUNIST PARTY v COMMONWEALTH* [1951] 83 CLR 1**

In October 1950, the Commonwealth Parliament passed the *Communist Party Dissolution Act 1950* (Cth), banning the Communist Party of Australia and taking possession of all its property. The legislation included passages outlining why communism presented a threat to Australia and ought to be banned. It also sought to prevent members of the Communist Party from being employed in any Commonwealth government department.

The government of the day had been elected promising to introduce and pass this legislation. It was very popular with a majority of voters.

The Communist Party (and various other individuals and trade unions affected by the law) challenged the validity of this legislation in the High Court, arguing that the Commonwealth did not have the authority to pass laws banning a political party.

The High Court upheld this challenge, ruling the legislation invalid. The Court stated it's role was not to decide whether this was a good law or a bad law (that's the role of the elected members of Parliament); instead, the Court had to decide whether the Commonwealth had the power to make the law. The Court decided neither the exclusive nor the concurrent powers enabled the Commonwealth Parliament to pass this law.

This case exemplifies the importance of independent courts under the separation of powers principle; despite the political popularity of this law at the time, the independent court ruled it unconstitutional, providing a check on the law-making power of the Parliament.

**The extent of this limitation on parliamentary law-making power**

Ways the separation of legislative, executive and judicial powers **limits parliamentary law-making power:**

- Judges will determine whether legislation breaches the Constitution in a way that is independent and based on the law – not based on politics.
- Judges' independence in deciding whether the parliament has passed laws outside its powers is protected in a range of ways (see above).
- The separation of powers is enshrined in the Australian Constitution, and therefore cannot be changed or abolished without a referendum, in accordance with s. 128 (see lesson 4.1.5).

*However*

- The Australian Constitution guarantees the separation of powers at Commonwealth level (acting as a check on the law-making of the Commonwealth Parliament), but does not establish the separation of powers at state level.

## Express protection of rights 4.1.3.3

**Defining this check on parliamentary law-making power**

**Express rights are** human rights (or legal entitlements) explicitly stated in the Australian Constitution. They protect human rights by limiting the law-making powers of the Commonwealth Parliament.

**Section 51(xxxi): Right to 'just terms' when Commonwealth acquires property**

s. 51(xxxi) allows the Commonwealth to make laws with respect to *'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'*

**Check on law-making by Parliament**

- The Commonwealth cannot simply pass legislation taking a person's (or a business's) land, possessions, a business itself, etc. If it does so, just terms must be provided. The 'just terms' requirement means any Commonwealth law taking possession of property must provide compensation that is fair.
- The Commonwealth can only pass legislation to compulsorily acquire property for some other Commonwealth purpose (eg. defence, immigration, etc.); the Commonwealth is not empowered to pass laws to acquire property for any reason it sees fit.

*However*

- s. 51(xxxi) does not prevent the Commonwealth from acquiring property. In fact it gives the Commonwealth the power to pass laws taking possession of property in a compulsory way (ie: not as a result of a buying/selling agreement), but ensures just terms are provided when it does so.
- This section does not apply to the states; it does not require the states to provide just terms if a state Parliament passes a law acquiring property from a person or business.

### Section 80: Right to jury trial for Commonwealth indictable offences

s. 80 includes '*The trial on indictment of any offence against any law of the Commonwealth shall be by jury.*'

**Check on law-making by Parliament**

- Guarantees individuals a jury trial if charged with an indictable offence under Commonwealth law.
- Commonwealth cannot legislate to have indictable offences tried by judge alone.

*However*

- Most criminal offences are created by state legislation, not Commonwealth law; s. 80 does not prevent states from passing laws to have serious offences tried by judges alone.
- s. 80 provides jury trials for indictable offences; if the Commonwealth passes legislation creating a criminal offence, the Commonwealth Parliament decides whether that offence is an indictable offence or summary offence. That is, it can pass laws creating serious criminal offences and declaring such offences are to be tried summarily by judge alone, limiting the effect of s. 80.

### Section 92: Free interstate trade

s. 92 declares that '*trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*'

**Check on law-making by Parliament**

- Commonwealth and state parliaments may not pass laws that restrict the free movement of goods between states, as a way of protecting businesses in one state from competing businesses in another state. For example, a Victorian law imposing a tax on furniture made in NSW to protect Victorian furniture-makers from competition would be invalid under s. 92.
- Commonwealth and state parliaments may not pass laws designed to restrict individuals' movement from one state to another.

*However*

- The High Court has stated that although a law designed to prevent interstate movement of people would be invalid, a law that has some other valid purpose but has the side-effect of restricting movement between states might be valid.
- For example, assume a state law prevents individuals on bail from leaving Victoria. Such a law has a valid purpose (protecting the community, ensuring those charged with crimes attend court), but a side-effect is that interstate movement is limited. The Court may find such a law to not breach s. 92.

### Section 116: Freedom of religion

s. 116 states the '*Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*'

**Check on law-making by Parliament**

- The Commonwealth cannot pass laws that are designed to restrict the free practice of religion nor impose a religion on any individuals.

*However*

- s. 116 limits the Commonwealth's law-making powers, but does not apply to the state parliaments.
- s. 116 does not prevent the Commonwealth passing laws 'about' religion. For example, legislation granting money to religious schools does not breach s. 116; laws that prevent discrimination based on religious belief do not breach s. 116.
- A law which has the effect of forcing a person to do something their religion prohibits does not necessarily breach s. 116. For example, a law conscripting individuals to fight in a war may be contrary to some individuals' religious beliefs about protecting life, but that in itself does not mean such a law would be invalid under s. 116.

**Section 117: No discrimination based on state of residence**

s. 117 requires that an Australian citizen *'resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were ... resident in such other State.'*

**Check on law-making by Parliament**

- State laws cannot be passed that impose a burden on a person because they live in a different state. For example, assume Victoria passes a law that says doctors need a university degree to be admitted to work as doctors in Victorian hospitals, but the same law says doctors who live in NSW need a university degree and 3 years' experience to be permitted to work as doctors in Victorian hospitals. Such a law would be invalid under s. 117.

*However*

- Some laws that discriminate between residents of different states may be acceptable. For example, a Victorian law that prevents residents of NSW voting in Victorian elections would not breach s. 117.
- Relatively few High Court cases have involved the interpretation of s. 117 and as a result, it remains unclear which laws will or will not violate s. 117.

**The extent of this limitation on parliamentary law-making power**

Ways the express protection of rights **limits parliamentary law-making power**

- Laws breaching these express rights will be declared invalid when challenged in the High Court of Australia.
- These express rights cannot be amended or removed by the Commonwealth Parliament; they may only be removed at a referendum (which is difficult to do – see Lesson 4.1.5).

*However*

- The are few express rights in the Australian Constitution limiting the law-making powers of Parliament (especially in comparison to similar countries such as the US and Canadian constitutions, which have many more express rights acting as a check on the power of law-makers).
- The 5 express rights are relatively narrow in their operation; for example:
  - Section 80 applies only to Commonwealth indictable offences, yet most criminal laws are made by the states.
  - Section 116 does not prevent the states from passing laws to restrict the free practice of religion.
  - There are many exceptions to s. 117, but which laws discriminating on the basis of state residence are acceptable or unacceptable is unclear.
- A law breaching an express right operates until it is challenged in the High Court. This will require a party with standing to take legal action, which is both costly and time-consuming. The time and expense may prevent those with standing challenging a law that breaches an express right, meaning the law continues to operate (and the parliament's law-making power is not 'checked').

## Role of the High Court in interpreting the Australian Constitution 4.1.3.4

**Defining this check on parliamentary law-making power**

**The High Court is the guardian of the Constitution;** it is established in Chapter III of the Australian Constitution.

**The Court's role is to interpret and give meaning to the words in the Constitution.** In doing so, the High Court upholds and protects the system of government established by the Constitution itself.

**The Court will only decide whether legislation passed by the Commonwealth or state parliaments is (or is not) valid** under the Constitution when the validity of that legislation is challenged by a person, organisation or state with standing (that is, a party affected by the legislation).

**In other words, the Court is not proactive** in acting as a check on state and Commonwealth parliaments' law-making powers.

Legislation that breaches the Constitution is declared 'ultra vires' ('beyond power'). As shown above, the Constitution places a range of limits on the law-making powers of the state and Commonwealth Parliaments. Ultimately, the role of the High Court is to ensure these other constitutional checks on law-making power are upheld, as shown below.

**CASE STUDY**

Consider the following hypothetical scenarios that demonstrate the role of the High Court in limiting parliamentary law-making power.

**Scenario 1**

The Commonwealth passes legislation, yet a state believes it has made a law that enters into the residual powers. The state decides to challenge the validity of that legislation, and it is for the High Court to determine whether the law is (or is not) valid under the constitutional division of powers. Assume the law in question is found to be a law that does not fit within the exclusive or concurrent powers; the High Court would declare the law invalid.

In doing so, the High Court ensures the state and Commonwealth Parliaments pass laws within the boundaries of the constitutional division of powers. The High Court is acting to keep the Commonwealth within its law-making boundaries.

**Scenario 2**

The Commonwealth Parliament passes legislation creating a new religion. A person who believes this violates the express right to freedom of religion may challenge the validity of this legislation in the High Court; the Court will determine whether this law breaches section 116 of the Constitution.

In such a case the High Court is acting to ensure the Commonwealth does not pass laws breaching the express rights stated in the Constitution.

**Scenario 3**

The Commonwealth Parliament – keen to be 'tough on crime' – passes legislation granting itself the power to conduct criminal trials and sentence offenders. A person found guilty in such a manner may challenge this guilty verdict in the High Court. The High Court determines that the law is invalid as it gives members of Parliament the ability to exercise judicial power.

In this instance, the Court is ensuring the Commonwealth Parliament does not violate the separation of powers principle laid out on the Australian Constitution.

**USEFUL TIP**

In Unit 4 students are required to apply legal principles to **actual** scenarios; these hypothetical scenarios are provided for illustrative purposes only and should not be referred to within your SAC or exam responses.

**The extent of this limitation on parliamentary law-making power**

Ways the role of the High Court in interpreting the Constitution **limits parliamentary law-making power**

- The High Court will declare legislation invalid if is outside the Parliament's law-making jurisdiction as defined by the constitutional division of powers. Therefore, the Court will:
  - Limit Commonwealth power by ensuring it legislates only on matters within the exclusive and concurrent powers; and
  - Be a check on state parliaments' powers by ensuring they make laws within the residual powers and the concurrent powers.
- The High Court will declare invalid any legislation that breaches an express right, again ensuring the Commonwealth passes laws within the boundaries created by the Constitution.
- The Court will declare invalid any legislation that breaches an implied right. The Court can interpret the words in the Constitution in a way that recognises human rights that are not explicitly stated, but were intended by those who wrote the Constitution. In Lesson 4.1.4 students will read about the *Australian Capital Television* case, in which the High Court declared invalid a Commonwealth law that breached the implied right to freedom of political communication.

*cont'd*

- The Court will declare invalid any Commonwealth legislation that gives members of Parliament or ministers the ability to exercise judicial power (such as resolving civil disputes, awarding damages, sentencing criminals and so on), as this would breach the separation of powers.

*However*

- The Court cannot be proactive in limiting Commonwealth and state parliaments' powers. It can only declare legislation breaching the Constitution invalid after the legislation has been challenged.
- To challenge the validity of legislation is time-consuming and costly for parties seeking to do so.
- The High Court cannot award damages to those who endure suffering as a result of a Parliament breaching the Constitution. For example:
  - A Commonwealth law breaching an express right will be declared invalid but the High Court cannot award damages to a person who suffered injury as a result of such legislation.
  - A law giving members of the Commonwealth Parliament judicial power will be declared invalid when challenged in the High Court, but a person who suffered injury as a result of that law cannot be awarded damages by the Court.

## Requirement for a double majority in a referendum 4.1.3.5

### Defining this check on parliamentary law-making power

Section 128 of the Constitution describes the process for amending the words in the Australian Constitution (see Lesson 4.1.5 for more information about this process). A change to the Constitution must first pass through the Commonwealth Parliament, and is then put to the voters in a compulsory yes/no vote (called a 'referendum'). To succeed, the proposed change must receive:

- A 'yes' vote from the majority of voters Australia-wide; **and**
- A 'yes' vote from the majority of voters in the majority of states.

44 proposed changes to the Constitution have been put to the voters since 1901; only 8 such proposals have met this double majority requirement.

### The extent of this limitation on parliamentary law-making power

Ways the requirement for a double majority in a referendum **limits parliamentary law-making power**

- It prevents the Commonwealth Parliament from changing the division of powers, express rights and all other aspects of our system of government laid out in the Constitution, unless such change also has the consent of the voters in a compulsory yes/no vote. This enables Australian voters to veto any constitutional change the Commonwealth Parliament approves of.
- The limitation is more significant because the double majority provision is so difficult to achieve – particularly the need to have support from the majority of voters in the majority of states. For example, 5 of 36 failed referendums have achieved a 'yes' vote from the majority of voters Australia-wide, but not achieved a 'yes' vote from the majority of voters in the majority of states.

*However:*

- In many respects the double-majority requirement does not limit parliamentary power, because it applies only to constitutional change. The Commonwealth Parliament is free to legislate on all other matters within its jurisdiction without needing to put a proposal to the voters and gain the required double majority.
- Although the double majority limits the ability of the Commonwealth Parliament to change the words of the Australian Constitution, the day-to-day operation of the Constitution (especially the division of law-making powers) has been changed significantly through High Court interpretation of those words. This is explored further in Lesson 4.1.6

**USEFUL TIP**

For each of these 5 checks on parliamentary power, be sure you can:

- Describe the constitutional limitation placed on law-making powers of state and Commonwealth Parliaments; and
- Weigh up 'how much' of a check each constitutional structure places upon the law-making powers of Parliament; that is, ways it **does** limit law-making powers and ways it **does not** necessarily limit law-making powers of state and Commonwealth Parliaments. This would be required in a 'discuss' question.

**USEFUL TIP**

The 2018 VCAA exam included this question:

> Evaluate two ways in which the Australian Constitution enables the Australian people to act as a check on parliament in law-making. (8 MARKS)

That's 10% of the marks on offer in the exam! It is critical to know what 'evaluate' requires you to do and to link your response to the role of the people in the constitutional processes discussed. Simply restating what an express right is or how the double majority operates would not be appropriate. The examiner's report stated:

> To receive full marks for this question, students needed to evaluate two ways by discussing strengths and weaknesses and provide an overall conclusion. The question was challenging for many students, and very few achieved full marks. The key differentiating factor in this question was the link between the check on parliament in law-making, and how that check enabled the people's participation.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.3: The Australian Constitution as a check on parliamentary law-making**

## Keen to learn more?

**Parliamentary Education Office: Separation of Powers Fact Sheet,** www.peo.gov.au/learning/fact-sheets/separation-of-powers.html

**Rule of Law Institute: Separation of Powers Poster,** www.ruleoflaw.org.au/wp-content/uploads/2016/07/2016-07-18_Rule_of_Law_Institute_Separation_of_Powers_Poster.pdf

**Rule of Law Institute: Communist Party Case,** www.ruleoflaw.org.au/65th-communist-party-case/

QUESTIONS

# 4.1.3 The Australian Constitution as a check on parliamentary law-making

LEVEL 1:
Define and understand

**1.** The Queensland parliament has a unicameral (one house) structure of parliament. Which of the following statements best provide advantages of having a bicameral structure of parliament rather than Queensland's unicameral structure?

**I.** The bicameral structure allows for a means of eliminating errors in laws, as the laws are reviewed by different people.

**II.** The bicameral structure allows for a more comprehensive gauge of public opinion, as it allows for parliamentary debate by two groups of elected law-makers.

**III.** The bicameral structure allows for the different houses of parliament to be totally independent from one another.

**IV.** The bicameral structure allows for laws to be passed more efficiently as there is less debate.

**A.** I and II only

**C.** III and IV only

**B.** II and III only

**D.** I, II and IV only

**2.** Justice Truepenny has been a justice of the Supreme Court for the past 15 years. Recently, he has decided that he would also like to hold a seat in the House of Representatives. With reference to the separation of powers, why would Justice Truepenny not be able to be a member of parliament whilst being a justice?

**A.** As Justice Truepenny is a justice, he is currently part of the judiciary. This means he has the power to enforce the law and settle disputes. A member of parliament, on the other hand, is part of the legislature. Therefore, members of parliament have the power to administer laws. However, the separation of powers provides that the powers should be kept independent and separate to ensure that no one body has absolute power over the functions of the legal system. By Justice Truepenny being elected as a member of parliament, he could only adjudicate on matters regarding the parliament.

**B.** As Justice Truepenny is a justice, he is currently part of the executive. This means he has the power to administer the law and run government departments. A member of parliament, on the other hand, is part of the legislature. Therefore, members of parliament have the power to make laws. However, the separation of powers provides that the powers should be kept independent and separate to ensure that no one body has absolute power over the functions of the legal system. Justice Truepenny could not be elected as a member of parliament as this principle would not be upheld due to his executive decisions potentially being influenced by political bias.

**C.** As Justice Truepenny is a justice, he is currently part of the judiciary. This means he has the power to administer laws. A member of parliament, on the other hand, is part of the legislature. Therefore, members of parliament have the power to make laws. However, the separation of powers provides that the powers should be kept independent and separate to ensure that no one body has absolute power over the functions of the legal system. Justice Truepenny could not be elected as a member of parliament as this principle would not be upheld due to his ability to administer laws potentially being influenced by political bias.

**D.** As Justice Truepenny is a justice, he is currently part of the judiciary. This means he has the power to enforce the law and settle disputes. A member of parliament, on the other hand, is part of the legislature. Therefore, members of parliament have the power to make laws. However, the separation of powers provides that the powers should be kept independent and separate to ensure that no one body has absolute power over the functions of the legal system. Justice Truepenny could not be elected as a member of parliament as this principle would not be upheld due to his judicial decisions potentially being influenced by political bias.

**3.** Assume the Commonwealth Parliament is about to initiate legislation that criminalises Christianity. Which of the following options most accurately explains how this legislation would be deemed invalid.

**A.** As this legislation is contravening the express right of freedom of religion, the parliament could not initiate that law.

**B.** As this legislation is contravening the express right of freedom of religion, a referendum would be required in order to gauge public opinion on the new legislation.

**C.** As this legislation is contravening the express right of freedom of religion, the High Court can immediately declare the legislation ultra vires and therefore invalid.

**D.** As this legislation is contravening the express right of freedom of religion, the High Court can declare the legislation ultra vires and therefore invalid, but only if the matter is brought to the High Court.

**4.** On what terms is the High Court allowed to declare legislation (or aspects of it) invalid?

**I.** If the legislation contravenes any rights protected by the Constitution

**II.** If the legislation was made by a state Parliament (in an area of concurrent power) and it conflicted with a Commonwealth legislation

**III.** If the bill was disputed by members of Parliament before it became part of law

**IV.** If the Crown granted royal assent

**A.** II only

**B.** I and II only

**C.** I and IV only

**D.** I, II, III and IV

**5.** Which of the following referendums fulfilled the requirement for a double majority?

**I.** 60% of Australian voters supported the proposed change. Also in favour of the proposed referendum was a majority of voters in VIC, NSW, TAS and WA.

**II.** 52% of Australian voters voted supported the proposed change and so did a majority of voters in all states except for Tasmania and NSW.

**III.** A majority of voters in Australia and a majority of voters in NT, WA, ACT, VIC and NSW voted in favour of the proposed change to the Constitution.

**A.** I only

**B.** I and II

**C.** I and III

**D.** All of the above

LEVEL 2:
Describe and explain

**6.** How does the bicameral structure of the Commonwealth parliament act as a check on parliamentary law-making? (3 MARKS)

**7.** Describe the principle of the separation of powers. (4 MARKS)

**8.** Describe how express rights are protected by the Constitution. Include an example of an express right. (3 MARKS)

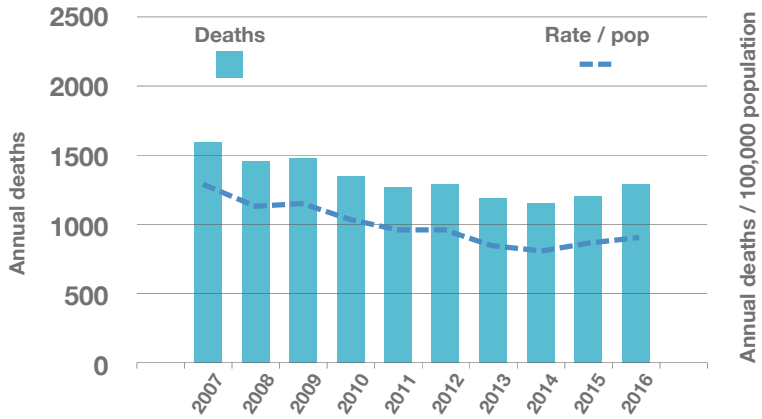
**9.** Explain how the High Court's ability to interpret the Constitution acts as a check on parliamentary law-making. (3 MARKS)

**10.** To date, only 8 of 44 proposed referendums have been successful. Explain one way in which the double majority provision acts as a check on parliamentary law-making. (3 MARKS)

LEVEL 3:
Apply and compare

**11.** Assume the Commonwealth Parliament – concerned about the rising road toll in Australia – proposes legislation granting itself the ability to make laws about road rules by inserting new law-making power into section 51 of the Constitution. Could it do so? Justify. (3 MARKS)

**Annual fatalities and rate per 100,000 population, 2007–2016**




*Source:* bitre.gov.au/publications/ongoing/road_deaths_australia_annual_summaries.aspx

**12.** The Commonwealth Constitution determines how much time passes between Federal elections. Elections for members of the House of Representatives are held approximately every 3 years, and Senators from each state need to be re-elected every 6 years. In 1984 the Commonwealth Parliament passed legislation to ensure elections for Senators and members of the House of Representatives were held at the same time. As this required constitutional change it was put to the voters in a referendum, and supported by 50.6% of voters Australia-wide. It also received a majority of 'yes' votes in Victoria, NSW, the NT and the ACT.

Did this constitutional reform succeed? Justify your response. (4 MARKS)

**13.** Section 44 of the Constitution states:

> Any person who
>
> > (i.) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Across 2017 and 2018, 15 members of the Commonwealth Parliament were removed from office because their election violated Section 44. They had been elected by the voters, but were then found to be citizens of other nations and declared ineligible to sit in Parliament by the High Court.

Frustrated by the significant cost of conducting multiple by-elections to choose new Senators and members of the House of Representatives, assume the Commonwealth Parliament proposes legislation to abolish section 44. Can the Parliament do so? Justify. (4 MARKS)

**14.** Assume the Commonwealth Parliament passes the Religious Reforms Act, including the following provisions. A group of religious leaders from multiple faiths challenge the law, as they believe the legislation breaches section 116.

- Part 1 creates a new religion called Turnbullism.
- Part 2 gives $100,000 to an Islamic community group in Sydney to build a new mosque and another $100,000 to the Jewish Museum of Australia for renovations.
- Part 3 allows a court to fine those who abuse other people on the basis of their religion.
- Part 4 ensures that only Catholics shall be appointed to the position of Governor-General.

Comment on the role of the High Court in limiting the Parliament's power and advise the group of religious leaders of the validity of this legislation. (6 MARKS)

**15.** The following scenario contains errors.

'In response to growing concern about lenient sentences, the federal government introduced legislation allowing members of parliament to hear criminal cases and sentence offenders. A group of independents and minor parties that hold the balance of power in the Senate were opposed to the legislation, so the governor presented it to the Crown for royal assent after it passed just the House of Representatives. The first person charged under the legislation challenged its validity in the High Court, who determined that it cannot resolve these types of matters.'

Correct the errors in this passage. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**16.** Throughout 2017 and 2018 the federal government unsuccessfully attempted to pass legislation to reduce the tax paid by Australian businesses.

Evaluate the bicameral structure of parliament as a check on parliamentary law-making. (5 MARKS)

**17.** 'The express rights in the Constitution are a limited check on the parliament's law-making abilities.' Do you agree? Justify. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 2 (online), covering these lessons:

- **Lesson 4.1.3 The Australian Constitution acts as a check on parliamentary law-making**

Check with your teacher when it's time to complete this progress check.

# 4.1.4 High Court interpretations of the Australian Constitution

**As the guardian of the Constitution the High Court of Australia gives meaning to the words in the Constitution and, if necessary, declares invalid any law that infringes upon the democratic principles and system of government the Australian Constitution establishes.**

Two critical sections of the Australian Constitution are sections 7 and 24.

Section 7 includes the following comments about 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 says 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.

The words **'directly chosen by the people'** are important in establishing the democratic system of government we enjoy in Australia.

This lesson covers VCAA key knowledge point: **'The significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution'**, which we have broken down into the following concepts:



## The significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution 4.1.5.1

The High Court has been required to interpret sections 7 and 24 of the Constitution on many occasions. Two important consequences of this interpretation include:

- the recognition of an implied right to freedom of political communication; and
- defining when the ability to vote in Commonwealth elections can and cannot be removed.

**USEFUL TIP**

While there are many examples of the High Court interpreting sections 7 & 24, the Study Design requires students to know about **only one** such High Court case. Discussion of either of the cases below is appropriate.

**CASE STUDY**

***AUSTRALIAN CAPITAL TELEVISION PTY LTD AND NSW v COMMONWEALTH* [1992] 177 CLR 106**

In 1991 the Commonwealth passed legislation to restrict television advertising during an election campaign. The validity of this law was challenged in the High Court.

Justice McHugh stated that: 'Sections 7 and 24... confer rights on the people of Australia to choose "directly" the members of both Houses of Parliament by means of votes taken at periodic elections'.

While sections 7 and 24 don't mention voting, other sections of the Constitution make clear that 'directly chosen' means voting at elections.

The Court found that sections 7 and 24 therefore establish the principle of 'representative government.' Because it gives the people 'control over the composition of Parliament, the Constitution gives effect to a system of representative democracy.' (Justice McHugh.) This requires voters to be able to hear from political parties and to be free to discuss political issues, so they can make informed choices in electing law-makers.

Chief Justice Mason described the link between representative government and free discussion of political issues in this way:

> Freedom of communication as an indispensable element in representative government.
>
> Indispensable... is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.

Because sections 7 and 24 require voters to be free to communicate on political matters, a right to free political communication was implied by the words 'directly chosen by the people'. The law was declared invalid as it breached this implied right.

Why is the decision in *Australian Capital Television* significant? Because it recognised that sections 7 and 24 give rise to the implied right to freedom of political communication and it defined what sort of communication is protected by this implied right. The Court's decision creates a restriction on the powers of the Commonwealth Parliament, as it cannot pass laws that unreasonably prevent free discussion of political issues.

**USEFUL TIP**

A common mistake in the exam is to accurately describe a case that is not actually the focus of the question. Students lose easy marks way too often by simply describing the wrong case! Be sure to read the question carefully: if asked about the interpretation of sections 7 & 24 make sure you don't discuss a High Court case about the division of law-making powers!

**CASE STUDY**

***ROACH v ELECTORAL COMMISSIONER* [2007] 233 CLR 162**

Roach was serving a 6 year prison term. In 2006 the Commonwealth passed legislation banning all prisoners from voting in Commonwealth elections. Before this new law was passed, the law prevented those serving a prison term over three years from voting.

Roach challenged the validity of the 2006 law, arguing the Australian Constitution guaranteed her the right to vote.

The High Court rejected part of Roach's argument, deciding the Constitution does not protect a right to vote for all adults.

However, the Court also stated that sections 7 and 24 of the Constitution set up the principle of representative government (as the Parliament is 'directly chosen by the people'), and this requires government to be chosen by the substantial majority of the population. The right to vote could only be removed for a significant reason.

Serving a long prison term was a significant reason and therefore an appropriate basis to remove the right to vote, and so was unsoundness of mind. However, the Court stated that removing the right to vote from all prisoners (even those on remand), was excessive. A law removing the power to vote needed to distinguish between those who really seriously violate the law (and serve long prison terms) and the majority of prisoners, who have committed less serious offences (or are on remand) and in prison for only a short time.

The Court also said that a person who goes to prison is still a member of the community and still takes an interest in how their society is governed – so removing the ability to vote can only be done in serious cases.

The Court concluded the 2006 change to the law was invalid, because it was excessive to remove the vote from all prisoners; the previous law banning voting by those in prison for over three years was held to be acceptable.

Roach therefore did not regain the right to vote, but prisoners serving short prison terms (and those on remand awaiting trial/awaiting sentencing) had the ability to vote reinstated.

The Commonwealth retained the ability to pass laws about who may vote. However, this decision is significant as the interpretation of sections 7 and 24 created restrictions on what laws the Commonwealth can and cannot pass regarding who may vote.

**USEFUL TIP** When describing a case, be sure to name it accurately! For example 'In the *Australian Capital Television Case*, the facts were that ...' You can't get full marks in the exam if you don't name the case correctly.

**USEFUL TIP** The key word in the Study Design here is 'significance'. To describe the significance of the relevant High Court case requires students to do more than just describe the facts and the decision. Instead, the 'significance' of the case requires a focus on what meaning the decision gave to the Constitution – what the decision represents in terms of recognising an implied right (in *Australian Capital Television*) or ensuring the vote is only removed for substantial reasons (in *Roach*). Signpost your discussion of these cases with something like 'The decision in *Roach* was significant because...'

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.4: High Court interpretations of the Australian Constitution**

## Keen to learn more?

**The High Court's judgement summaries [2007],** hcourt.gov.au/publications/judgment-summaries/2007-judgment-summaries

**Lynch, P, 'Vickie Roach v The Commonwealth: Human Rights and Representative Democracy' (2014),** www.monash.edu/law/research/centres/castancentre/conference-2014/2007/conf-07-lynch-paper

**Williams, G, 'The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia' (1997),** www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp10

QUESTIONS

# 4.1.4 High Court interpretations of the Australian Constitution

LEVEL 1:
Define and understand

**1.**

***ROACH v ELECTORAL COMMISSIONER* [2007]**

In 2006, the Commonwealth amended the Electoral Act disqualifying all prisoners from voting. This included those held in remand who had not yet been convicted of a crime. Vicki Roach, a Victorian Aboriginal woman serving a prison term of 6 years, challenged the constitutional validity of this law in the High Court.

The High Court found that the amendment was invalid, as it was inconsistent with the principle of representative government.

The High Court found that sections 7 and 24 of the Constitution, which refer to Parliament being 'directly chosen by the people', protected the notion of representative government, and thus the right to vote could not be violated by the Commonwealth without significant reason.

Fill in the blank spaces:

In this case, the High Court was required to _____ the _____, in order to keep it current and up-to-date. The High Court deemed the new law to be unconstitutional because the right to vote was deemed to be protected by the Constitution, and therefore the Commonwealth was legislating _____. This case demonstrates the power of the High Court to _____.

**A.** modify the wording of; Constitution; ultra vires; preserve the Constitution

**B.** give meaning to the words of; relevant statute; obiter dictum; preserve the Constitution

**C.** modify the wording of; relevant statute; stare decisis; adapt the Constitution

**D.** give meaning to the words of; Constitution; ultra vires; adapt the application of the Constitution

LEVEL 2:
Describe and explain

**2.** Outline one advantage of High Court interpretation as a means of maintaining the Constitution. Use a case example involving the interpretation of sections 7 & 24 of the Constitution to support your answer. (3 MARKS)

LEVEL 3:
Apply and compare

**3.** Review the decision in *Roach v Electoral Commissioner* [2007]. Assume the Commonwealth, concerned that the insta-generation can't concentrate on political matters, proposes to raise the voting age to 25. Comment on the validity of this legislation. (4 MARKS)

**4.** Review the High Court's decision in *Australian Capital Television and NSW v Commonwealth* [1992]. Explain how the decision in *Australian Capital Television* is an example of the High Court acting as the guardian of the constitution. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** 'The High Court's interpretation of sections 7 and 24 of the Constitution provides a big limitation on the powers of the Commonwealth Parliament.'

Discuss this statement, with reference to one relevant High Court decision. (5 MARKS)

# 4.1.5 Constitutional Referendums

**Section 128 states the process of changing the words in the Australian Constitution:**

- **Legislation outlining the proposed change in the wording of the Constitution must pass both houses of the Commonwealth Parliament (known as a 'constitutional alteration bill').**
- **The proposed change must be put to the voters in a compulsory yes/no vote, called a 'referendum'. The referendum must be conducted within 2 to 6 months of the bill's passage through the Parliament.**
- **To succeed, the proposal must achieve a double majority:**
  - **The majority of voters Australia-wide must vote 'yes' (including voters in the territories) and**
  - **The majority of voters in the majority of states must vote 'yes'.**
- **If the proposal achieves the double majority, the legislation receives royal assent from the Governor-General and the words in the Constitution are amended.**

Since 1901, 44 proposed changes to the Constitution have been put to the voters in a referendum. Of these, only 8 have achieved the double majority and resulted in a change to the wording of the Constitution. The most recent referendum was in 1999; the most recent successful referendum was in 1977.

This lesson covers VCAA Key Knowledge point: **'The significance of one referendum in which the Australian people have protected or changed the Australian Constitution'**, which we have broken down into the following concepts:

| | |
|---|---|
| The significance of one referendum in which the Australian people have protected or changed the Australian Constitution | 4.1.6.1 |

## The significance of one referendum in which the Australian people have protected or changed the Australian Constitution 4.1.6.1

**The voters are directly involved** in Australia's process of constitutional amendment (as described above). This democratic involvement of the people in changing our system of government makes Australia different to many other nations around the world. For example, in the USA and Canada the Constitution is changed by elected law-makers, not by the voters.

**The s. 128 process gives voters in Australia the power to veto changes to the Constitution**, after such changes have been approved by the Commonwealth Parliament. That is, the section 128 process empowers voters to approve or reject changes to the Constitution that our politicians put before us.

**USEFUL TIP**

While there are many examples of referendums to explore, the Study Design requires students to know about **only** one referendum that changed the Constitution **or** one referendum that did not result in change. Discussion of either of the referendums below is appropriate, but discussion of both is unnecessary.

**CASE STUDY**

### THE VOTERS *CHANGING* THE AUSTRALIAN CONSTITUTION: SOCIAL SERVICES IN 1946

The 1946 referendum 'sought to give the Commonwealth Parliament power over a wide range of social services by inserting a new subsection into section 51.'

*Source: 45th Parliamentary Handbook of the Commonwealth of Australia;* Parliamentary Library, Dept of Parliamentary Services

In the early 1940s the Commonwealth took over the collection of all income taxes and passed laws creating a range of welfare payments (such as payments to widows and the unemployed). A 1945 High Court decision had called into question whether the Australian Constitution actually entitled the Commonwealth Parliament to make such legislation.

This referendum was designed to ensure the Commonwealth had the power to continue making laws to provide various welfare payments.

The Yes/No question put to voters was:

> 'Do you approve of the proposed law for the alteration of the Constitution entitled 'Constitution Alteration (Social Services) 1946?'

Result:

- 54% of voters Australia-wide supported this change to the Constitution
- In all 6 states a majority of voters voted 'yes' to this change.

By voting 'yes' Australians approved adding section 51(xxiiiA) to the Constitution, giving the Commonwealth law-making power about 'the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.'

**CASE STUDY**

### THE VOTERS *PROTECTING* THE AUSTRALIAN CONSTITUTION: 4-YEAR ELECTION CYCLES IN 1988

The 1988 referendum 'sought to increase House of Representatives terms from a maximum of three years to a maximum of four years, and to reduce Senate terms from a six-year fixed term to a four-year fixed term. It also sought to introduce simultaneous elections for the Houses.'

*Source: 45th Parliamentary Handbook of the Commonwealth of Australia;* Parliamentary Library, Dept of Parliamentary Service.

Why propose such a change? In theory, if elections are held less often this reduces the total financial costs associated with conducting elections (over time). It also means law-makers can spend more time focused on 'governing' and less time focused on campaigning to win elections. In addition, while elections for the Senate and the House of Representatives are usually conducted on the same date, this is not always the case – the proposed change would ensure such elections were always held at the same time.

In May 1988 Senator Bob MacMullan described the purpose of this proposal in the following way:

> 'It is hard for people to realise that we are now only 10 months past the most recent election, yet speculation about the date for the next election has already started. We have had too many elections at all levels of government. That is expensive, wasteful and annoying. '
>
> *Source:* Cth. Parliamentary Debates. Senate. 24 May 1988 Vol 35 p. 2793

The Yes/No question put to voters was:

> A Proposed Law: To alter the Constitution to provide for 4 year maximum terms for members of both Houses of the Commonwealth Parliament. Do you approve this proposed alteration?

Result:

> 33% of voters Australia-wide supported this change; 67% of voters rejected it, protecting the system of government and ensuring federal elections are conducted every 3 years (and Senators sit for 6 year terms).
>
> No state had a majority of voters in favour of this change.

This proposed change to the Constitution had been approved by the Commonwealth Parliament, but the voters protected the existing system set up by the Constitution; in other words, the Australian people vetoed a change to the Constitution that had been endorsed by the politicians in the Commonwealth Parliament.

**USEFUL TIP** Along with an example of a referendum put to the voters, the VCAA Study Design requires students to *'examine the relationship between the Australian people and the Australian Constitution'* and to *'analyse the ability of the Australian people to protect or change the Australian Constitution.'*

**The relationship between the Australian people and constitutional change**

**The role the voters play:**

- Elected law-makers are not able to amend the Constitution alone.
- The voters can choose to approve or veto any proposed change in the Constitution.
- If the proposed change affects a particular state, the voters of that state must vote 'yes' for the Constitution to be amended (as well as the double majority being achieved).
- All voters must participate in a referendum.
- The double majority requirement ensures voter support must be high and geographically spread around Australia.
- The direct participation of voters to approve or reject constitutional change is not common. As stated above, in many similar nations (such as Canada and the USA) constitutional change does not involve the voters directly.
- The voters cannot initiate change in the words of the Constitution. Instead, proposed changes must first be passed through the Commonwealth Parliament.

**The voters can pressure law-makers to initiate constitutional change through:**

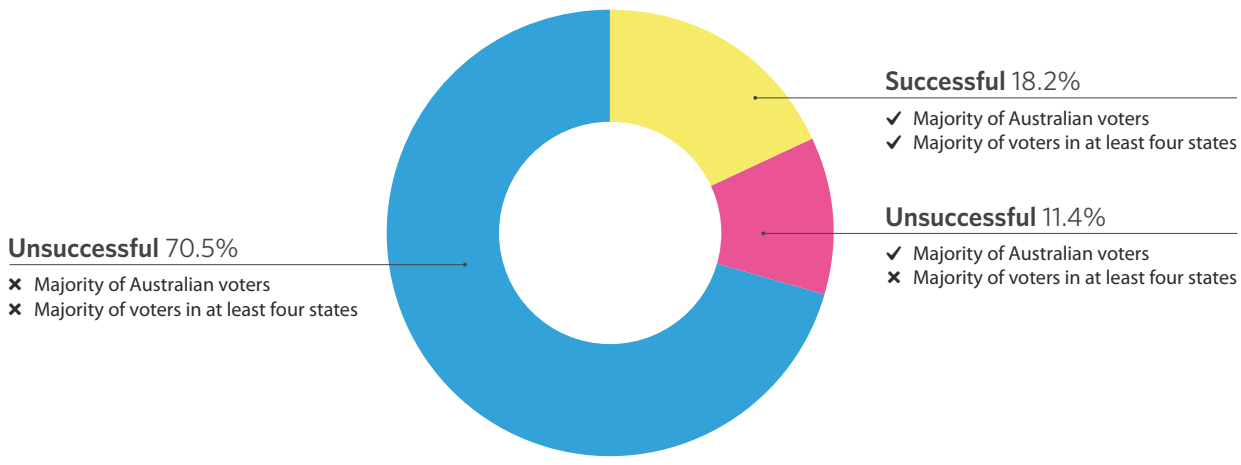
- Electing individuals to the House of Representatives and Senate who promise to initiate change in the Constitution (if that's a relevant issue at the time of an election).
- Creating public pressure for change through the media or demonstrations.
- Lobbying their local member of parliament to initiate constitutional change.
- Submitting petitions to the parliament suggesting constitutional amendments signed by those who support such change.

**Given how rarely referendums are conducted (the most recent referendum was in 1999) we can conclude:**

- Few Australians choose to employ these methods to generate Constitutional change; and/or
- These methods to encourage the Commonwealth Parliament to initiate constitutional change are not effective.

**Trends in how the Australian people have responded to proposed constitutional change:**

- 44 separate proposals to change the Australian Constitution have been put to the voters;
- 8 proposed changes have been successful in achieving the double majority, resulting in constitutional change
- Of the 36 failed referendums, 5 achieved support from the majority of voters Australia-wide but did not achieve the support of the majority of voters in the majority of states.



- The voters have often been asked to consider multiple proposed changes at one time. The 44 referendum questions since Federation have been put to voters on 19 separate occasions. Voters have been asked just 1 question at a referendum on only 5 occasions.
- Over half the 44 proposed changes have been intended to increase the Commonwealth's law-making power. In almost all such referendums the voters have rejected efforts to increase Commonwealth power.
- Over time, referendums have generally received less and less voter support. Proposals put to voters prior to WWII received relatively more support than proposals since WWII. This suggests the Australian people are increasingly happy with our system of government, less inclined to change and choose to protect it.

**How do the Australian people respond to proposed constitutional change?**

The low success rate of referendums suggests Australian voters:

- Want to maintain the system of government as it operates now and protect the Constitution from proposed changes;
- Are reluctant to increase Commonwealth power, usually choosing to protect the Constitution's existing division of law-making powers

**Do the Australian people understand constitutional change?**

If we are to analyse the relationship between the Australian people and the Constitution (including the voters' response to referendums), we should consider how informed the voters' decisions about constitutional change actually are. There are conflicting views on this among legal experts.

**What the experts say**

Experts who believe the voters **DO** understand constitutional change might argue:

> Most criticism has directed at the role of the voter in ratifying constitutional referendums. Indeed, the image of the Australian as an 'unthinking No voter' or 'simple partisan' are the ones most frequently presented in the literature. However, there is little evidence to support either image. Analysis of constitutional referendum voting indicates that, historically, there has been high turnout, low informal voting and a demonstrated ability to distinguish between proposals when two or more are put to the vote.
>
> *Source:* Miles, R 'Matters of the heart and the heart of the matter: the constitutional referendum in Australian politics' (2000) Alternative Law Journal
>
> In many cases, voters have been given two or more questions at a referendum, with different results for each question. (For example, at the 1946 referendum in which voters agreed to increase Commonwealth power over social services, the voters rejected other referendum proposals.) This suggests the Australian voters understand and think carefully about each proposal.
>
> *Source:* Bennett, S, 'The Politics of Constitutional Amendment' (2003) Commonwealth Parliamentary Library Research Paper No. 11

Section 128 requires at least 2 months to elapse between a constitutional alteration bill passing the Commonwealth Parliament and the referendum being held. This should ensure the Australian people have time to consider and debate the proposal, allowing for a more informed decision about changing or protecting the Constitution.

Experts who believe the voters **DO NOT** understand constitutional change might argue:

> Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. This is often a reflection of the fact that disengaged citizens tend to have less knowledge about their system of government and any reform being proposed.
>
> Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote No.
>
> *Source:* Williams, G, 'Recognising indigenous peoples in the Australian Constitution: What the constitution should say and how the referendum can be won'(2011) *Land, Rights, Laws: Issues of Native Title*, Vol. 5, No. 1 UNSW Law Research Paper No. 2012-25

In 2006 Amnesty International Australia commissioned a survey of 1001 Australian voters. Asked whether human rights are protected by a bill of rights (a passage in a Constitution dedicated to human rights protection, such as in the US Constitution), 61% of respondents incorrectly stated 'yes', with another 26% saying they did not know. Such a response indicates a very significant lack of understanding of the Australian Constitution.

**USEFUL TIP**

Participating in a referendum is not the only connection between the Australian people and the Constitution. For example, any person with standing may challenge the constitutional validity of legislation passed by state and/or Commonwealth parliaments, with the outcome of such a challenge changing the day-to-day operation of the Constitution.

Roach's High Court challenge (described in Lesson 4.1.4) is an example of this additional connection between the people and the Constitution.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.5: Constitutional Referendums**

## Keen to learn more?

**Australian Electoral Commission: Referendum results,** www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm

**Bennett, S, 'The Politics of Constitutional Amendment' (2003) Commonwealth Parliamentary Library Research Paper No. 11**

**Kildea, P & Smith, R, 'The Challenge of Informed Voting at Constitutional Referendums' (2016) *UNSW Law Journal***

**Miles, R, 'Matters of the heart and the heart of the matter: the constitutional referendum in Australian politics' (2000) *Alternative Law Journal***

**Williams, G, 'Recognising indigenous peoples in the Australian Constitution: What the constitution should say and how the referendum can be won'(2011) *Land, Rights, Laws: Issues of Native Title*, Vol. 5, No. 1 UNSW Law Research Paper No. 2012-25)**

QUESTIONS

# 4.1.5 Constitutional Referendums

LEVEL 1:
Define and understand

**1.** On May 27th 1967 a referendum was held in order to remove entrenched discrimination against Aboriginal Australians from the Constitution.

The referendum proposed:

- The removal of section 127 which barred Aborigines from being included in population statistics
- The removal of the phrase 'other than the aboriginal race in any state' from section 51 (xxvi), thus allowing the Commonwealth to make laws regarding indigenous Ausralians.

The referendum was successful, with 90.77% of Australian voters voting 'yes'. This historical example demonstrates the way in which referendums are able to:

**A.** protect the Constitution from trivial or unnecessary modifications.

**B.** change the Constitution in order to ensure it aligns with the views and values of society.

**C.** protect the Constitution from unpopular changes that do not reflect the majority of voters.

**D.** All of the above

LEVEL 2:
Describe and explain

**2.** Referendums provide for changes to be made to the Constitution and also for its protection against unnecessary modifications. What is a referendum? Describe how one referendum has either protected or changed the Constitution. (2 MARKS)

LEVEL 3:
Apply and compare

**3.** The following is an excerpt from 'Shorten and Turnbull to talk on four-year terms' year-terms'.

### Shorten and Turnbull to talk on four-year terms

**Michelle Grattan**
July 23, 2017 5.52pm AEST

Opposition Leader Bill Shorten has called for a pre-election agreement between government and opposition that whichever side wins will hold a referendum for fixed four-year terms.

Soon after Shorten, interviewed on the ABC's Insiders, put up his proposal on Sunday morning, Malcolm Turnbull rang him on various matters.

The prime minister's office said that Turnbull had said he was interested in talking with Shorten about four-year terms, while noting there were a lot of complications.

But it denied suggestions Turnbull had given bipartisan support to Shorten's proposal. Labor insists it did not suggest that Turnbull had given bipartisan support.

'The present Federal term is three years, with the prime minister having discretion on when to call the election.' Shorten said the Federal political system seemed 'out of whack in that everything is so short term', with the average term being two-and-a-half years rather than three.

'We need both Labor and Liberal to co-operate on four-year terms,' Shorten said.

'Governments can be more daring and more determined if they're not constantly thinking about the next election,' he said. 'What this country needs is long-term policymaking.'

*Source:* Grattan, M., Shorten and Turnbull to talk on four-year terms (2017) https://theconversation.com/shorten-and-turnbull-to-talk-on-four-year-terms-81454

Identify the role of the Australian people in making such a change, and describe two factors that would make this proposal more likely to succeed. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**4.** It is only the Australian people who can change the Commonwealth Parliament's powers under the Constitution.

Explain one argument in favour of this statement, and one argument against this statement. Use examples where appropriate. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 3 (online), covering these lessons:

- **Lesson 4.1.4 High Court interpretations of the Australian Constitution**
- **Lesson 4.1.5 Constitutional Referendums**

Check with your teacher when it's time to complete this progress check.

# 4.1.6 The High Court and the division of constitutional law-making powers

**The Australian Constitution sets up a federal system of government, with the Commonwealth and the state parliaments each responsible for making law on certain topics (as established by the constitutional division of law-making powers).**

Since 1901 there have been many occasions when the validity of Commonwealth and state legislation has been challenged, on the basis that a law has possibly been made outside that parliament's powers. Consider the following hypothetical scenarios:

- A person charged with a criminal offence under Commonwealth law may claim that criminal law is a residual power, and the exclusive and concurrent powers of the Commonwealth don't allow the Commonwealth Parliament to make laws about crime. This individual may argue the law under which they were charged is invalid under the Constitution, so the charges should be dropped.
- Assume the Victorian Parliament passes legislation to build a toll road, but the Commonwealth Parliament passes legislation banning toll roads in Victoria. Victoria may argue law-making about road construction is a residual power, not an exclusive or concurrent power of the Commonwealth and that, therefore, the Commonwealth law is invalid.
- NSW decides to place a 5% tax on the price of all imported cars as a way of raising revenue. The Commonwealth may feel this legislation enters the exclusive powers (as the Constitution only allows the Commonwealth to pass laws that tax imported and exported goods).

As the guardian of the Constitution, it is for the High Court of Australia to resolve such disputes.

This lesson covers VCAA Key Knowledge point: **'The division of constitutional law-making powers of the state and Commonwealth Parliaments, including exclusive, concurrent and residual powers' and 'Significance of section 109 of the Australian Constitution',** which we have broken down into the following concept:

| | |
|---|---|
| The significance of one High Court case which has had an impact on the division of constitutional law-making powers | 4.1.7.1 |

## The significance of one High Court case which has had an impact on the division of constitutional law-making powers 4.1.7.1

**As the guardian of the Constitution** the High Court of Australia gives meaning to the words in the Constitution to determine whether Commonwealth (or state) legislation is or is not within the law-making powers of the Commonwealth (or state).

**USEFUL TIP** While there are many examples of the High Court interpreting the Constitution and such interpretations changing the division of powers, the Study Design requires students to know about **only one** such High Court case. Discussion of either of the cases below is appropriate.

**CASE STUDY** ***VICTORIA v COMMONWEALTH* [1926] 38 CLR 399**

The Commonwealth passed legislation making financial grants to the states, setting terms that related to building and maintaining roads (the *Federal Aid Roads Act 1926* (Cth)).

Section 96 of the Australian Constitution states:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Victoria, New South Wales and South Australia sought a declaration from the High Court that this Commonwealth law was invalid. These states argued:

A. The Commonwealth law was a law about road-making, and

B. The Commonwealth is not empowered to make such laws under the constitutional division of powers, stating that under section 96 "the Parliament cannot attach as conditions to its grant any conditions which amount in substance to the exercise of any legislative power which is not within sec. 51 of the Constitution."

The Court therefore had to decide whether the Commonwealth was able to pass laws granting money to states including conditions dealing with a topic that is usually the responsibility of a state under the residual powers (in this case, road construction and maintenance).

The Court decided the legislation making the grant was valid, stating that section 96 allows the Commonwealth to make a grant of money to a state including any conditions the Commonwealth sees fit.

This decision is significant because this interpretation of section 96 allows the Commonwealth to make grants to a state that direct the state to use the funds in a particular way (called a 'tied grant'), even if such instructions enter into the residual powers.

In theory, states can reject such a grant. However, in practice state governments are financially dependent on the Commonwealth: the Commonwealth collects about 80% of all tax revenue in Australia (through the GST, company tax, personal income tax, etc), yet the states need significant funds to run hospitals, public transport, a police force and other government services that are their responsibility.

As a result of this financial dependence, the states often have to take such tied grants. This interpretation of section 96 therefore enables the Commonwealth to frequently legislate on topics within the residual powers of the states through making tied grants.

**CASE STUDY**

***COMMONWEALTH v TASMANIA* [1983] 158 CLR 1**

The Tasmanian government intended to dam the Franklin River, however the Commonwealth intervened to prevent this. Having signed an international treaty (the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage) committing Australia to protecting sites of environmental significance, the Commonwealth Parliament passed legislation (the *World Heritage Properties Conservation Act 1983* (Cth)) protecting the Franklin River and surrounding areas from any development. Sections 6 and 9 of this Act empowered the Commonwealth to prevent construction at the site of the proposed dam.

The Commonwealth asked the High Court to rule that Tasmania's plan to build a dam on the Franklin River was unlawful, as the construction breached the *World Heritage Properties Conservation Act*. In response, Tasmania sought a High Court declaration that sections 6 and 9 of the Commonwealth law were invalid, because it was not within the Commonwealth's exclusive or concurrent law-making powers under the Constitution to make laws about environmental protection.

The High Court held that the Commonwealth law was valid. The 'external affairs' power in section 51 (xxix) gives the Commonwealth the ability to pass laws that give effect to Australia's international obligations, including upholding commitments made in international treaties the Commonwealth has signed.

This decision is significant because it increased the Commonwealth's law-making abilities under the external affairs power (see Lesson 4.1.7 for further discussion of the external affairs power). The Court's interpretation of the external affairs power enables the Commonwealth to pass laws on any matter within a treaty it has signed, even if that law is about a topic that enters into the states' residual powers.

**USEFUL TIP**

As mentioned in Lesson 4.1.4, a common mistake in the exam is to accurately describe a case that is not actually the focus of the question. Students lose easy marks way too often by simply describing the wrong case! Be sure to read the question carefully – if asked about High Court interpretations changing the division of powers, don't discuss *Roach* or *Australian Capital Television*!

**Analysing the impact of High Court interpretation** on the division of law-making powers:

- The Court cannot initiate a change in the division of powers; rather it must wait for the validity of legislation to be challenged then it will determine whether such a law is valid under the constitutional division of powers.
- The validity of legislation can only be challenged by a party with standing (that is, a person, government, organisation, etc that is affected by the law in question).
- The High Court cannot alter the words in the Constitution, but its interpretation of the text can (and does) change the powers of the state and Commonwealth Parliaments.
- Over time the High Court has tended to interpret the Commonwealth's powers under the Constitution broadly, gradually expanding the range of matters the Commonwealth Parliament can make laws on and thereby changing the division of powers between the state and Commonwealth Parliaments.

### Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.6: The High Court and the division of constitutional law-making powers**

### Keen to learn more?

**Victoria Law Foundation: The People & The Australian Constitution,** www.victorialawfoundation.org.au/sites/default/files/resources/the_people_and_the_australian_constitution.pdf

**Bennet, S & Webb, R (2008) Research Paper no. 17: Specific purpose payments and the Australian federal system. Research Papers 2007-08. Australian Parliamentary Library,** www.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp17.pdf

QUESTIONS

# 4.1.6 The High Court and the division of constitutional law-making powers

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

Historically, High Court decisions relating to the division of law-making power have tended to favour the _____ of _____ law-making power at the _____ of the _____.

**A.** extension; state; expense; Commonwealth
**B.** limitation; Commonwealth; expense; states
**C.** extension; Commonwealth; expense; states
**D.** extension; Commonwealth; whim; court

LEVEL 2:
Describe and explain

**2.** Describe the impact of one High Court decision you have studied on the division of law-making power. (4 MARKS)

LEVEL 3:
Apply and compare

**3.** Consider the judgement in *Victoria v Commonwealth* [1926]. Assume the Commonwealth Parliament passes legislation granting $250 million to the state of Victoria that must be spent on the redevelopment of 3 hospitals. The Victorian government, believing health care is a residual power, plans to challenge the validity of this grant.

Must the Victorian government accept such a grant, and would a challenge be likely to succeed? Give reasons for your response. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**4.** Analyse the ability of the High Court to change the constitutional division of powers. (5 MARKS)

# 4.1.7 External affairs power

**Australia regularly enters into agreements with other nations about a range of topics. For example, Australia has made commitments to other nations to:**

- **minimise climate change;**
- **prevent slavery;**
- **protect the natural environment;**
- **ensure air travel is conducted safely; and**
- **limit the spread of nuclear weapons.**

Such agreements are often contained within a treaty. In simple terms, a 'treaty' is a written agreement between two or more nations to do (or not do) certain things.

However, such agreements do not automatically form part of the Australian law. For example:

> Assume the Australian government signs a treaty with other nations making a commitment to prevent slavery. This treaty has no impact on the law within Australia (that is, the treaty on its own would not automatically make slavery unlawful in Australia).

Since the early 20th century the Australian government has entered many treaties with other nations on a very wide range of topics. Having made these commitments to other nations, the Australian government must then pass laws to give effect to the promises it has made.
Continuing the above example:

> If the Australian government signs a treaty with other nations committing Australia to preventing slavery, the government must then introduce (and pass) legislation through the Commonwealth Parliament that prevents slavery. In short, it must pass a law that 'keeps the promise' Australia has made to other nations to prevent slavery.

This need to pass legislation to give effect to a treaty creates an issue: what if the proposed law is on a topic within the residual powers? To finish the example above:

> What happens if law-making about slavery doesn't fall within the exclusive or concurrent powers of the Commonwealth Parliament? Can the Commonwealth validly pass legislation to give effect to the treaty the Australian government has signed?

This issue has been raised many times in the High Court of Australia.

This lesson covers VCAA Key Knowledge point: **'The impact of international declarations and treaties on the interpretation of the external affairs power',** which we have broken down into the following concept:

The impact of international declarations and treaties on the interpretation of the external affairs power 4.1.8.1

## The impact of international declarations and treaties on the interpretation of the external affairs power 4.1.8.1

**A treaty is** an agreement between two or more nations to do/not do certain things. Such agreements are binding in international law (that is, each nation that is a party to a treaty is legally required to adhere to the contents of that treaty). An international treaty may also be referred to as a 'covenant' or 'convention' (these terms are used interchangeably).

**Examples of international treaties** Australia has signed include:

- International Covenant on Civil and Political Rights (1980)
- Convention on the Elimination of all forms of Racial Discrimination (1975)
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993)
- United Nations Convention Against the Illicit Traffic in Narcotic Drugs & Psychotropic Substances (1993).

**An international declaration** is a statement of principles that is not legally binding. That is, a nation may sign an international declaration but is not bound to follow the content of this document.

**An example of an international declaration is** the Universal Declaration of Human Rights (1948).

International treaties (and declarations) do not automatically become part of Australian law. As stated by the High Court in *Kioa v West* [1985] 159 CLR 550 'treaties do not have the force of law unless they are given that effect by statute.'

That is, any commitments made to other nations by the Australian government through a treaty do not take effect in Australia until the parliament passes legislation to give effect to whatever commitments are made within a treaty.

**CASE STUDY**

Assume the Australian government signs a treaty with New Zealand in which both nations commit to lowering the voting age to 16. Such a document has no impact on the voting age in Australia. In this hypothetical example, the commitment made in the treaty only takes effect in Australia if the Commonwealth Parliament passes legislation lowering the voting age to 16.

**The Commonwealth's external affairs power is** stated within section 51(xxix) of the Australian Constitution; it says:

> Section 51:
>
> 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: (xxix) external affairs.

Since Federation the Australian Government has frequently entered into international treaties with other nations. It has then sought to give effect to these treaties by passing legislation through the Commonwealth Parliament.

Laws passed to give effect to an international treaty often touch on a subject matter that is usually the states' responsibility. As a result:

- The validity of such legislation has been challenged in the High Court of Australia many times.
- The Commonwealth has long-argued the external affairs power (above) allows the Commonwealth Parliament to pass laws to give effect to the international commitments it has made (even if that legislation covers a topic not normally within the exclusive or concurrent powers).
- The High Court has therefore been required to interpret the words 'external affairs' and the scope of this law-making power of the Commonwealth.

**USEFUL TIP**

There are many examples of international treaties informing the High Court's interpretation of the external affairs power; the case studies below have been selected to provide an overview of the Court's interpretation of this power.

**CASE STUDY**

***R v BURGESS; EX PARTE HENRY* [1936] 55 CLR 608**

The Commonwealth Parliament regulated the aviation industry with air navigation rules made under the *Air Navigation Act 1920* (Cth). This legislation was created following the Commonwealth signing the international *Convention Relating to the Regulation of Aerial Navigation* (a 1919 treaty signed by numerous countries to regulate air travel). The Convention included rules about international air travel and safe flight around take-off/landing areas.

Henry – a pilot – had his licence suspended for breaching aviation rules made under the Commonwealth's *Air Navigation Act*. The *Convention* included rules preventing flight below a minimum height in landing areas; the Commonwealth's aviation rules prevented flight below a certain minimum height for the entire airport. Henry challenged the constitutional validity of the Commonwealth legislation (and the suspension of his pilot's licence) in the High Court.

The High Court reached two important conclusions:

- The external affairs power did allow the Commonwealth to pass legislation to give effect to the aviation rules laid out in the *Convention*.
- The Commonwealth needs to ensure that the legislation it passes faithfully reflects what is in the international treaty. In this case, the rules Henry broke were not actually within the *Convention* (recap: the *Convention* included rules about flying near landing areas, but the Commonwealth law set rules about flying all around an airport).

- Therefore, while the Court concluded the Commonwealth could pass laws to give effect to the *Convention*, Henry's challenge to the charges brought against him was successful.

To summarise, the Court held the Commonwealth is not able to claim 'We've signed a treaty about aviation, this is a law about aviation, therefore it's valid under the external affairs power.' Rather, the external affairs power enables the Commonwealth to pass laws that reflect what is actually within the treaty.

**CASE STUDY** ***KOOWARTA v BJELKE-PETERSON* [1982] 153 CLR 168**

In 1966 Australia signed the *International Convention on the Elimination of All Forms of Racism*. In 1975, the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth). When introducing the legislation into Parliament, then Attorney–General Kep Enderby stated in the House of Representatives:

> The purpose of this Bill is to make racial discrimination unlawful in Australia and to provide an effective means of combating racial prejudice in our country.
>
> The Bill introduces into Australian law for the first time the obligations contained in the International Convention on the Elimination of All Forms of Racial Discrimination. It is asserted in this Convention that all human beings are born free and equal in dignity and rights and that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and without any justification.

The facts in this particular case involved Koowarta (an indigenous man) and other indigenous people attempting to purchase the right to farm a large property in Queensland. The Queensland government blocked this sale, as it did not want indigenous Australians owning large parcels of land.

Koowarta challenged this government action on the basis that it breached the *Racial Discrimination Act*. In response, the Queensland government sought a High Court declaration the Commonwealth did not have the ability to make the *Racial Discrimination Act* and it was therefore invalid.

A majority of judges in the High Court decided that:

- The external affairs power in the Constitution enabled the Commonwealth to pass laws about matters that are an 'international concern'; and
- If the Australian government has signed a treaty on a particular topic (such as racial discrimination), that topic must therefore be a matter of 'international concern'; thus
- The external affairs power allows the Commonwealth to pass laws giving effect to a treaty it has signed.

The Court held the external affairs power enabled the Commonwealth to pass the *Racial Discrimination Act*, as it was implementing the *International Convention on the Elimination of All Forms of Racial Discrimination*. Koowarta was successful in challenging the Queensland government's attempt to block indigenous land ownership.

**CASE STUDY** ***COMMONWEALTH v TASMANIA* [1983] 158 CLR 1**

The facts of *Tasmanian Dams* case were discussed in Lesson 4.1.6. Recall that Tasmania sought a High Court declaration the Commonwealth's *World Heritage Properties Conservation Act 1983* (Cth) was invalid, arguing that law-making about environmental protection was outside the Commonwealth's exclusive and concurrent law-making powers under the Constitution.

The High Court found the Commonwealth law to be valid, deciding the 'external affairs' power gives the Commonwealth the ability to enter international treaties and pass laws that give effect to those treaties. That is, the Court reached the same conclusion as it had reached in *Koowarta*.

This interpretation of the external affairs power widened the Commonwealth's law-making abilities. The external affairs power allows the Commonwealth to pass laws on any matter within a treaty it has signed, even if that law is about a topic that enters into the states' residual powers.

**Summarising the Court's interpretation of the external affairs power:**

- The external affairs power allows the Commonwealth to pass laws to give effect to the treaties it has signed with other nations (as the Court stated in *Koowarta*).
- If the resulting legislation enters a topic that is normally within the residual powers of the states, that is acceptable (as held in *Tasmanian Dams*).
- The Commonwealth Parliament must ensure the legislation accurately reflects the contents of the treaty (as stated above in *Burgess*).

As a result of these decisions about the external affairs power, the Commonwealth Parliament regularly passes legislation to implement international treaties on a very wide range of topics (including many matters that are otherwise not within the exclusive and concurrent powers of the Commonwealth).

**USEFUL TIP**

Be sure you can explain how international treaties and the external affairs power are connected (it's not enough to simply know how to define both). And if describing a case, tie it back to the specifics of the question!

Consider Q3 from the 2018 VCAA exam:

> Describe the relationship between international treaties and the external affairs power. (3 MARKS)

Unfortunately 36% of students scored 0/3. The examiners' report said:

> Although many students were able to explain what an international treaty is and what the external affairs power is, few were able to describe the relationship between the two. That relationship is ultimately founded upon the decisions by the High Court that have established that the 'external affairs power' includes the power to pass laws to give effect to international treaty obligations.
>
> It was not necessary to use a case to gain full marks. While many students did describe a case, such as the Tasmanian Dam case, very few were able to explain how this case demonstrated the relationship between international treaties and the external affairs power. If examples of cases are used in responses, they should be used in a way that enhances the rest of the response

## Need extra assistance with this topic?

Remember to check out Edrolo's video lesson:

**Lesson 4.1.7: External affairs power**

## Keen to learn more?

**Treaty Making Process: Dept. of Foreign Affairs & Trade,** www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx

**Clark M (2013)** ***Remembering the Tasmanian Dam Case,*** blogs.unimelb.edu.au/opinionsonhigh/2013/07/24/clark-tasmanian-dam/

***Wilderness case that changed course of federal power*** RN Law Report, http://www.abc.net.au/radionational/programs/lawreport/tasmanian-dams-30-years/4793690

QUESTIONS

# 4.1.7 External affairs power

LEVEL 1:
Define and understand

**1.** Which of the following statements about the 'external affairs' power in Australian is not correct?

**A.** Law-making about 'external affairs' includes the power to legislate with respect to Australia's relationship with other countries.

**B.** Law-making about 'external affairs' is unnecessary given that the contents of international treaties signed by Australian governments automatically becomes part of Australian law.

**C.** Laws made under the 'external affairs' power can enter into the residual powers.

**D.** Law-making about 'external affairs' includes the power to legislate about matters outside Australia.

LEVEL 2:
Describe and explain

**2.** Describe the impact of the High Court's interpretation of the external affairs power upon the division of powers, using an example. (3 MARKS)

LEVEL 3:
Apply and compare

**3.** Environmental protection is a residual power, yet there exist national laws about pollution and environmental protection. Define 'residual powers' and explain the circumstances under which the external affairs power would enable the Commonwealth to make laws about matters within the residual powers. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**4.** Discuss the impact of international treaties on the division of law-making powers in Australia. (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 3 (online), covering these lessons:

- **Lesson 4.1.6 The High Court and the division of constitutional law-making powers**
- **Lesson 4.1.7 External affairs power**

Check with your teacher when it's time to complete this progress check.

AOS QUESTIONS

# The people and the Australian Constitution

LEVEL 5
Bringing it all together

**1.** 'The *Australian Constitution* works to limit the powers of the Commonwealth, but not the states.'

Do you agree with this statement? Justify your answer. (8 MARKS)

**2.** Describe how law-making powers are divided between state and Commonwealth parliaments. Analyse the role of the people in changing the constitutional division of powers. (8 MARKS)

**3.** A former leader of a Victorian political party gave a speech to a group of students, saying 'the difference between the role of the House of Representatives and the Legislative Assembly is that only the latter is responsible for the formation of government'. He then went on to say 'when the Commonwealth and Victoria pass conflicting legislation the law made by us Victorians will be followed'.

When asked by a student about the referendum process, he said 'at least that double-majority thing restricts their power'.

Comment on these statements. (7 MARKS)

**4.** One way in which the Australian Constitution acts as a check on the law-making power of parliament is through the role of the High Court. Evaluate two other ways in which the Australian Constitution acts as a check on the law-making power of parliament. (8 MARKS)

**Time for some exam practice!**

You've finished the Area of Study. Now would be a great time to visit Edrolo online and check out:

- **Our skills masterclass**
- **Unit 4 AOS 1: Topic Test**

Just get the 'OK' from your teacher first.

# UNIT 4 AOS 2: THE PEOPLE, THE PARLIAMENT AND THE COURTS

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

Image: © AAP

## KEY KNOWLEDGE

*Parliament and courts*

- factors that affect the ability of parliament to make law, including:
  - the roles of the houses of parliament
  - the representative nature of parliament
  - political pressures
  - restrictions on the law-making powers of parliament
- the roles of the Victorian courts and the High Court in law-making
- the reasons for, and effects of, statutory interpretation
- factors that affect the ability of courts to make law, including:
  - the doctrine of precedent
  - judicial conservatism
  - judicial activism
  - costs and time in bringing a case to court
  - the requirement for standing
- features of the relationship between courts and parliament in law-making, including:
  - the supremacy of parliament
  - the ability of courts to influence parliament
  - the interpretation of statutes by courts
  - the codification of common law
  - the abrogation of common law

*Law reform*

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

## KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the factors that affect the ability of parliament and courts to make laws
- analyse the features of the relationship between parliament and courts
- explain the reasons for law reform, using examples
- analyse the influence of the media, including social media, in law reform, using examples
- discuss the means by which individuals can influence law reform, using examples
- evaluate the ability of law reform bodies to influence a change in the law, using recent examples
- evaluate the ability of parliament and the courts to respond to the need for law reform
- synthesise and apply legal principles to actual scenarios.

Legal Studies Area of Study key knowledge points and key skills derived from VCE Legal Studies Study Design 2018-2022 p.22;

# 4.2.1 Parliamentary law-making

**Parliament is the supreme law-making power of the Commonwealth and States. This means Parliament-made laws (that is, legislation) cannot be overruled by the courts, only interpreted (unless the legislation breaches the Australian Constitution). Parliament is composed of elected representatives whose main role is to make laws that reflect the will of the people. They make laws *in futuro*, meaning the laws apply to future events. This aims to protect society through developing a code of conduct within the community to promote social cohesion.**

There are a number of factors that limit the Parliament's ability to make laws. The role of the houses acts to ensure checks and balances are placed on the law-making powers of the Parliament – to ensure legislation is developed in the best interest of the people.

Our political system was founded as a representative democracy whereby members of Parliament are elected to represent and serve the interests of the people within their electorate. The representative nature of the Commonwealth Parliament is established through sections 7 & 24 of the Australian Constitution, which state both houses shall be directly elected by the people.

Political pressures from international, local and internal political party sources can also cause Parliament to act or refrain from acting in developing law reform. Finally, the ability of Parliament to develop the law is restricted within their jurisdiction (as outlined in the Constitution) and parliamentary processes.

This lesson covers VCAA Key Knowledge point: **'Parliamentary law-making, including: the roles of the houses of Parliament, the representative nature of Parliament, political pressures and restrictions on the law-making powers of Parliament'** which we have broken down into the following concepts:



## The role of the houses of Parliament 4.2.1.1

**The composition of each house of Parliament** (following an election) has a significant impact on the Parliament's ability to make laws. This is outlined below.

**USEFUL TIP** See Lesson 4.1.1 for a recap of the roles of the houses of parliament. The discussion below describes how the composition of each house impacts on law making.

| Roles of the houses (based on their composition) | Impact on law-making |
|---|---|
| Role of the LOWER house: Formation of majority government | The party with the most number of seats in the lower house forms government and is referred to as a majority government. Most of the bills introduced will be government bills and the legislation can be quickly passed through the lower house as the government has the majority of seats and members vote along party lines in support of government policies.<br>These laws should reflect the will of the majority of voters, who chose to put this political party in government. |

*cont'd*

| Roles of the houses (based on their composition) | Impact on law-making |
|---|---|
| Role of the LOWER house: Formation of minority government | In a hung Parliament none of the major political parties gain the majority of seats and coalitions must be formed with minor parties or independents. This requires considerable negotiation which can in turn hinder the development of legislation as the process is time consuming. However, it can be argued that this may lead to law-making that better represents the views of the people through the negotiation process. From 2010, Julia Gillard managed a minority government passing 432 bills. |
| Role of the UPPER house: Upper house as a rubber stamp | When the government holds the majority of the seats in the upper house it is referred to as a rubber stamp. The house will merely act as a 'rubber stamp' in passing legislation as they will support government policy. This is beneficial for the government as they are able to enact the law-reform they promised at an election without amendments or time delays. However, it will hinder the opposition's ability to pass laws it proposes and limit the Parliament's ability to adequately critique, amend and improve legislation. An example of when the government held the majority in the upper house was the Liberal/National government between 2004–2007. |
| Role of the UPPER house: Hostile upper house | When the opposition holds the majority of seats in the upper house and refuses to pass legislation or only does so with considerable amendments the house is referred to as 'hostile'. This can limit the ability of Parliament to pass legislation as the opposition may only agree to pass legislation if large amendments are made and after considerable delay – this may make the Parliament less effective as a law-maker. If the hostile Senate blocks money bills required to provide government services (called 'supply bills') Parliament may be dissolved and new members elected, which is costly and time-consuming. |
| Role of the UPPER house: Balance of power held by independents/minor parties | In order to pass legislation there needs to be a majority of votes and this can sometimes require seeking support from members of minority parties or independents. This can mean a small number of people in the house hold a considerable amount of power, that is, they can determine whether a law is passed or not.<br>It may mean the views of the minority hold considerable power and may limit the ability of laws to reflect the will of the majority.<br>In addition, given the composition of the Senate after the 2019 election, negotiating with minor-party and independent Senators to gain their support for bills introduced by government is slow. |

**CASE STUDY**

- In 2018 the Federal government introduced large income tax cuts. It was finally passed in the Senate despite considerable debate, backflips and negotiation with crossbenchers (ie: members of minor parties and independents).
- Introduced into the Senate in May 2018, the legislation was opposed by Labor and the Greens, requiring the Liberal/National government to gain the support of 9 of the remaining crossbenchers.
- The Senate was composed of a number of independents and minor parties who are able to reflect the views of a small group in society and wield significant power as they hold the balance of power (that is, their votes are needed to pass legislation rejected by the Labor opposition).

- The crossbenchers made conflicting demands from the government in return for their vote.
- The legislation passed the Senate with 37 votes to 33.
- Support was eventually gained from One Nation and Centre Alliance Senators despite them voicing their concerns about the bill days earlier.

**USEFUL TIP** Be careful with your Legal Studies terminology here: be sure to read the question carefully and don't confuse the houses of the Victorian Parliament and Commonwealth Parliament.

## The representative nature of Parliament 4.2.1.2

The democratic practices of the Commonwealth and Victorian parliaments have a significant impact on law-making.

| Representative nature of parliament | Impact on the ability of parliament to make laws |
|---|---|
| Representative democracy | The Australian Constitution provides for representative democracy through an entitlement to vote. Sections 7 & 24 of the Australian Constitution outline that both houses will be directly elected by the people.<br><br>In Victoria the *Constitution Act 1975* (Vic) states the members of the Legislative Assembly and Legislative Council will be elected by the people from their respective districts.<br><br>This means Parliament is accountable for their actions as the people control the composition of both houses.<br><br>**Impact on law-making:**<br>The party in government introduces most legislation; they are in government as the voters have elected them based on their promise to enact certain changes in the law and as they reflect the views of the majority of voters. In this way, the legislation they introduce will be representative of the majority of voters. |
| Regular elections | Regular elections ensure the government is mindful to act in the best interests of the people or risk being voted out of office at the next election.<br><br>The Victorian Constitution outlines that elections are held during the last Saturday of November every four years. At a Commonwealth level elections are required to occur after three years but can be called earlier.<br><br>**Impact on law-making:**<br>While regular elections can ensure the government acts in the best interest of the people, it can however, also impact on law-making as the government may become very short-term focused. With a goal to become elected again, they may also stand on a platform seeking to gain votes from the majority of people rather than legislating in the best interests of the entire community and/or avoid passing laws to resolve complex social issues. |

*cont'd*

| Representative nature of parliament | Impact on the ability of parliament to make laws |
|---|---|
| Voters' participation in law-making | As described in later parts of this Area of Study, voters can influence law-making in a range of ways, such as:<br>• submitting petitions<br>• writing to their local member of parliament<br>• using social media to persuade other voters to hold particular opinions about law reform/vote based on proposed new laws<br>• making submissions to the VLRC and parliamentary committees reviewing legislation.<br>**Impact on law-making:**<br>These are ways voters can inform law-making, ensuring parliament makes laws that match the values and expectations of society – that is, ensuring parliament is representative. |

**CASE STUDY**

- For many years the Australian political landscape has been dominated by two major parties: Labor and Liberal/National Coalition. More recently however we have seen the emergence of minor political parties.
- A recent study by the Grattan Institute has indicated support for minor parties is at its highest since WWII.
- Since 2004 there has been an increase in votes for minor political parties, in particular in regional and outer metropolitan areas.
- It is suggested that the shift in voting has occurred due to rising job insecurity and cultural anxiety from global events.
- Examples of minor parties in the Commonwealth Parliament include the Nationals, the Australian Greens, Katter's Australian Party, Pauline Hanson's One Nation, Derryn Hinch's Justice Party and Family First.
- The development of these parties is indicative of the representative nature of the Parliament.

*Source:* www.theguardian.com/australia-news/2018/mar/12/minor-party-support-surge-driven-more-by-cultural-anxiety-than-economics

**USEFUL TIP**

When explaining the representative nature of Parliament be sure to include sections 7 & 24 of the Australian Constitution as evidence of this requirement. Explain how representative government is achieved rather than simply stating it exists.

When defining a term or phrase be sure to use a different word than that listed in the definition. For example when defining 'representative government' don't define it as 'members are elected to represent the views of the people' rather 'members are elected to '**reflect, serve, speak for**' the views of the people'.

## Political pressures 4.2.1.3

**Political pressures are** the actions of political parties, Australian organisations (such as business groups, trade unions or religious bodies) and international bodies (like the United Nations) that seek to influence how laws are changed in Australia.

| Political pressures | Impact on the ability of Parliament to make laws |
|---|---|
| Political parties' policy and tensions | Pressures can come from within the political party. Rather than voting for what is in the best interest of their electorate, members of parliament can have their own alliances with colleagues and parties can have their own political agenda.<br>**Impact on law-making:**<br>Members of parliament influenced by these internal party pressures may encourage certain legislation to be introduced/discourage other members of parliament from introducing certain bills.<br>Disagreements within a political party about law reform can slow down (or prevent) new legislation being presented to the parliament on controversial topics (see case study below). |
| Political pressure from organisations in Australia | Pressure for law-reform can also come from outside the governing party such as the opposition, feedback from the community (both individuals and organisations) and lobbying from groups in society.<br>Where organisations make political donations the government may make laws to appease those organisations (such as trade unions, business groups, etc).<br>**Impact on law-making:**<br>Organisations such as business groups and trade unions can pay to televise persuasive advertising that creates community dislike for particular legislation/proposed legislation, putting pressure on law-makers to change the law (or withdraw particular proposed changes in the law).<br>For example:<br>• The 2018 Banking Royal Commission came after a long period of pressure from the Labor opposition, the Greens, consumer groups like CHOICE and those who had worked in the industry and reported concerns about how banks are run; this resulted in recommendations for law reform (see Lesson 4.2.10 for more information about Royal Commissions).<br>• In 2010–2012 the Minerals Council of Australia (representing mining companies) spent significant funds paying for advertising that criticised laws that taxed carbon pollution. This law became increasingly unpopular, the Liberal/National Coalition promised to remove the law if elected, and the law was abolished in 2014.<br>• There is a high level of support among Australian voters for new legislation creating a tax on sugar-sweetened drinks to tackle obesity and related health problems and such a law is supported by medical experts. However, businesses in the beverage industry have (so far) persuaded members of the Commonwealth Parliament not to introduce such a law. |
| Avoidance of controversial issues | Regarding issues of a controversial nature, the government may be reluctant to act for fear of backlash from sections of society.<br>**Impact on law-making:**<br>While expected to be representative of all the voters, Australia is a very diverse community. Sometimes a desire to secure votes at the next election can take political priority. This can lead to law-reform on controversial topics being avoided. |

*cont'd*

| Political pressures | Impact on the ability of Parliament to make laws |
|---|---|
| | For example:<br>• The federal government did not introduce legislation to legalise same-sex marriage until 2017 due to fear of backlash from a minority of the community;<br>• The Commonwealth Parliament has passed and later abolished various laws designed to reduce carbon emissions (popular with many voters, but equally unpopular with others). |
| International events, bodies and agreements informing Australian law | Living in a global community means a number of international pressures can impact on the legislative direction of our parliaments.<br>**Impact on law-making:**<br>International disputes, crimes, biosecurity concerns, natural disaster and international trade relations can dictate the types of legislation that is or isn't introduced.<br>For example:<br>• Acts of terrorism in other nations have in recent years caused the Commonwealth Parliament to pass various laws designed to allow police more power to investigate terrorism-related activities.<br>• Trade agreements with other nations (designed to increase the buying and selling of goods and services between nations) result in new Australian laws that make such trade easier (and cheaper for consumers).<br>Australia's obligations to international organisations such as the United Nations can also impact law-making. International agreements also lead to law-reform in Australia (see Lesson 4.1.7 for the discussion of international treaties and Australian law). |

**CASE STUDY**

- In 2014 the Australian Human Rights Commission (through a National Inquiry into Children in Immigration Centres) uncovered the detrimental effect such changes were having on children and made a number of recommendations including releasing children and families into community detention.
- In 2015 the United Nation condemned Australia's treatment of asylum seekers – in particular, mandatory detention and offshore processing. During international summits a number of other countries shared concern about the policies and questioned whether they violated international human rights.
- In 2016 Peter Dutton, Minister for Immigration and Border Protection, indicated all children had been released from mainland detention centres.

**CASE STUDY**

- In 2004 the Howard government amended the *Marriage Act 1961* (Cth) to define a marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.
- Since then 23 bills regarding marriage equality or recognition of overseas same-sex marriages were introduced into the Commonwealth Parliament without success.
- A groundswell of community support for and against marriage equality also continued during this time. Lobby groups, protests, advertising and the use of social media indicated community divide on the issue.
- The issue attracted religious, social and moral issues which made for a controversial area of the law, resulting in law-makers hesitant to create legislative change for fear of voter backlash and the divide within their own parties.
- In September, 2017 a national plebiscite postal vote was held to determine the nation's views of marriage equality.
- In October, 2017 the vote was returned with 61% in support of marriage equality and in response a month later the government passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

**CASE STUDY**

Throughout 2018 the Liberal/National Coalition was developing new legislation to regulate electricity generation and carbon emissions from electricity generation (a legislative set of rules called 'the National Energy Guarantee'). This is an important social issue to resolve – electricity generation in Australia produces significant amounts of carbon pollution and the price of electricity has risen in recent years.

Internal disputes within the Liberal Party members of the Commonwealth Parliament and challenges to the leadership of the Prime Minister at the time Malcolm Turnbull meant this draft legislation was initially amended in August 2018 then ultimately not presented to the Parliament for debate or passage.

This is an example of political pressures limiting the ability of the Parliament to change the law and tackle social issues.

**USEFUL TIP**

When describing political pressures it is important not to simply define such pressures but to make a connection to political pressures' impact on law-making. That is, describe how the pressure limits law-making and how the pressure assists in law-making.

## Restrictions on the law-making power of Parliament 4.2.1.4

Constitutional limitations and the operation of the Victorian and Commonwealth parliaments can impact on their ability to respond to the need for law reform.

| Restriction | Impact on the ability of Parliament to make law | Application |
|---|---|---|
| Jurisdiction | Both the state and Commonwealth Parliaments are only able to make laws according to their law-making powers provided to them in their Constitutions.<br>The Commonwealth Parliament can only make laws in the areas of exclusive and concurrent law-making powers while the states can only make laws in the areas of residual and concurrent law-making powers.<br>If it is believed Parliament has passed a law outside of their law-making power a challenge can be made through the High Court as in the case of the *Malaysia Solution* (see case study). | For example, the Commonwealth Parliament develops a national *Crimes Act* regarding murder and mandatory sentencing, despite crime being a residual power.<br>This could be challenged in the High Court as the area of criminal law is a residual law-making power retained by the states at the time of Federation.<br>The states could challenge this through the courts and the law may be found ultra vires if it is outside of the law-making power of the Commonwealth Parliament. |
| s.109 as a restriction on the state parliaments | s.109 states that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.<br>While the restriction only impacts on concurrent law-making powers, and to be declared invalid the matter must be taken to the High Court. As such states may be reluctant to legislate in these areas of law-making powers.<br>See Lesson 4.1.2 for further information. | If the Victorian government sought to amend the *Marriage Act 1958* (Vic) to prevent same-sex marriage the Commonwealth Parliament could pursue the matter through the High Court as the law will be in conflict with the *Marriage Act 1961* (Cth) and therefore they could assert that s.109 should be enforced. |

| Restriction | Impact on the ability of Parliament to make law | Application |
|---|---|---|
| Restriction entrenched in the Commonwealth Constitution | A number of restrictions exist in the Commonwealth Constitution that limit the law-making power of Commonwealth Parliament. These include:<br>• s.116 outlines that the Commonwealth cannot establish a religion, impose religious observance, restrict free exercise or impose a religious test for public office.<br>• s.92 requires there to be free trade between the states.<br>• s.128 limits the ability of the Commonwealth Parliament to change the Constitution.<br>See Lesson 4.1.3 for further information. | For example, if Victoria passed a law imposing taxes on products made from other states this could be seen as a breach of section 92. Section 92 requires there to be free trade between all the states and consequently the law would likely be challenged by the other states. |
| Parliamentary process | The law-making process itself can be a restriction. Parliament is not always sitting which limits the time available to pass laws. In 2018 Parliament only sat for 19 weeks.<br>Furthermore, the legislative process can be time-consuming due to the extensive debates and parliamentary committees established to investigate legislation. As such law reform may be slow to react to new issues arising in society. | The debates regarding the *Native Title Amendment Act 1997* (Cth) took over 100 hours.<br>This can restrict the ability of Parliament to make more laws or laws within a reasonable time frame. |

**CASE STUDY**

***PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP; PLAINTIFF M106 OF 2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP* [2011] HCA 32**

In 2010 the Gillard government signed a deal with Malaysia, known as the Malaysia Solution. The agreement was to send 800 asylum seekers to Malaysia in return for 4,000 refugees for resettlement. The matter was taken to the High Court where the law was held to be invalid, 'ultra vires'.

The High Court held that the Commonwealth Parliament has acted outside of its law-making power because it contravened s.198a of the *Migration Act 1958* (Cth) which required that the asylum seekers would be protected against persecution; a requirement that could not be satisfied if the asylum seekers were sent to Malaysia.

**USEFUL TIP**

In a SAC or exam be sure to read the question carefully and determine if the restriction to discuss is on the law-making power of Commonwealth Parliament or a state parliament. Remember the Commonwealth Constitution imposes restrictions on both!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.1: Parliamentary law-making.**

## Keen to learn more?

**Parliamentary Education Office**, www.peo.gov.au/

**Parliament of Australia The Role of the Senate,** www.aph.gov.au/Senate/briefs/brief10

**Parliament of Australia About the House of Representatives,** www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_of_Representatives

**Parliament of Victoria Legislative Assembly,** www.parliament.vic.gov.au/assembly

**Parliament of Victoria Legislative Council,** www.parliament.vic.gov.au/council

**Parliament of Australia Representative roles and Responsibilities,** www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/APF/monographs/What_lies_beneath/RepresentativeRoles

**Parliamentary Education Office Making Laws,** www.peo.gov.au/learning/closer-look/governing-australia/making-laws.html

**The Australian Constitution,** www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/coaca430/

***Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32,** www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2011/32.html

***Marriage Amendment (Definition and Religious Freedoms) Act* 2017 (Cth),** classic.austlii.edu.au/au/legis/cth/num_act/maarfa2017459/

**Wood D & Griffiths K (2018) Who's in the Room? Access and influence in Australian politics,** grattan.edu.au/report/whos-in-the-room/

QUESTIONS

# 4.2.1 Parliamentary law-making

LEVEL 1:
Define and understand

**1.** A bill proposed by the Federal government to ban the distribution of plastic straws is successfully passed by the House of Representatives. If the majority of seats in the Senate is controlled by the opposition, what effect will this have on the proposed bill?

**A.** The bill will lapse as the government does not hold the majority in the Senate.

**B.** The bill will lapse as it is necessary for the opposition to serve as a check and balance on the government.

**C.** The bill is likely to be more thoroughly scrutinised as the opposition holds the majority.

**D.** The bill will pass because the government is by definition the most preferred party.

**2.** As the supreme law-making body it is important that Parliament is representative of the voting population so that:

**A.** the laws passed by Parliament are consistent with the views, values and interests of the majority of people who must abide by them.

**B.** the laws passed by Parliament reflect community standards that are current and up to date.

**C.** citizens of Australia are encouraged to actively participate in the political system that creates the laws by which they must live.

**D.** All of the above

**3.** Fill in the blank spaces:

Within the Higgins electorate, a small but vocal group of activists carry out a series of demonstrations in support of legalising euthanasia. They are however, met with a largely negative response from the rest of the community. When a bill proposing to legalise euthanasia is presented before the lower house of Parliament and members of Parliament are given a free choice on how to vote, the Higgins representative is likely to vote _____ acting on the political pressure from _____.

**A.** in favour of the bill; the activists

**B.** against the bill; the majority of the community

**C.** against the bill; other party members

**D.** in favour of the bill; the stress of having a career as a politician

**4.** In the wake of a series of dubious missile threats from North Korea, the Victorian state government initiates a bill in the Legislative Assembly to establish a Victorian army. A hung Parliament exists, and the Government has the same number of members as the opposition in the lower house. The cost to raise a state army is calculated to be approximately $25 billion (far exceeding the state's budget). A public vote was conducted to evaluate community support and it was found that 13% of Victorian voters were in favour of the bill, 72% were opposed to the bill, and 15% were impartial.

What is the **most significant** restriction that prevents this bill from becoming law?

**A.** lack of economic viability to carry out the proposed changes

**B.** constitutional restriction

**C.** political pressures from the public

**D.** hung Parliament

LEVEL 2:
Describe and explain

**5.** Distinguish between the effect of a hostile Senate and a rubber-stamp Senate on Parliament's ability to make law. (4 MARKS)

**6.** 'Democracy' comes from the Greek 'demos kratos', which translates to 'people power'. Why is this principle so important in the parliamentary law making process? (2 MARKS)

**7.** Explain what political pressures are and outline one way in which they aid in the process of parliamentary law-making and one way in which they inhibit it. (3 MARKS)

**8.** A bill is presented to the House of Representatives proposing to enforce that all Australian high school students study maths and science. Education is omitted from the Commonwealth Constitution and therefore falls within the scope of residual power. Is this bill valid? Justify your answer. (2 MARKS)

LEVEL 3:
Apply and compare

**9.** 'In a controversial move, assume the Commonwealth Parliament has recently passed the *Uniform Religion Act* (Cth) to establish a national religion of Pastafarian on all residents in Australia. The government bill was introduced by an Independent Member of Parliament, Jasper Crombie, who indicated the purpose of the bill was to unite the country in faith. The bill passed both houses of Parliament and received royal assent by the Governor-General.

The bill not only established a national religion but also required all primary and secondary schools to ensure the curriculum includes Pastafarian teachings for all students within the country. Jasper confirmed this would ensure there was uniformity between the states. Concerned this would infringe on her rights, Sally Bronson, President of the Civil Libertarian Movement, has announced she is challenging the validity of the legislation. She is taking the matter to the Victorian Supreme Court for them to determine if the law is ultra vires.

Identify four errors in the above extract and provide the correct process or procedure. (4 MARKS)

**10.** Political pressures impact on Parliament and influence the types of legislation that is introduced.

### UN official says Australia responsible for 'inhuman' treatment of asylum seekers

**Michelle Grattan**
July 23, 2017 5.52pm AEST

The UN's special rapporteur on the human rights of migrants, François Crépeau, has reported on his visit to Australia last November, saying Australia's strong human rights record was tarnished by an abusive offshore detention system that 'cannot be salvaged'.

Crépeau said the regime of offshore detention – on Papua New Guinea's Manus Island and the Pacific state of Nauru – was unjustifiably punitive and unlawful 'cruel, inhuman and degrading treatment'. He said Australia knew the dangerous and helpless situations on Manus and Nauru were damaging those held there.

*Source:* www.theguardian.com/australia-news/2017/jun/12/un-official-says-australia-responsible-for-inhuman-treatment-of-asylum-seekers

Explain the differences between domestic and international political pressures on the ability of Parliament to make laws. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**11.** 'Over time the Senate has ceased being a house of review and become a house of rejection,' Mr Abbott said. 'The result is gridlock, not government, and it has to change. In the end, the government of the day has to be allowed to govern – and not with one hand tied behind its back because its legislation can't pass.'

*Source:* www.theaustralian.com.au/national-affairs/tony-abbott-calls-for-senate-referendum-warns-we-are-turning-into-italy/news-story/ac0f64770d311e5b4ec8d759bc392b83

Evaluate the effectiveness of the Senate in the law-making process. (6 MARKS)

**12.** In 2010 Julia Gillard formed a minority government. Labor won 72 seats in the House of Representatives and in order to form government Gillard sought an alliance with two regional independents from New South Wales (Rob Oakeshott and Tony Windsor), a Greens member from Melbourne (Adam Bandt) and an independent from Hobart (Andrew Wilkie).

*Source:* www.abc.net.au/news/2010-09-08/labors-minority-government-explained/2253236

Discuss the extent to which a minority government can effectively govern. (5 MARKS)

# 4.2.2 Roles of the Victorian Courts and the High Court in law-making

**The Australian court system is a common law system, adopted from England. Statutes are interpreted by judges and applied to the cases before them in order to resolve disputes. The rule of law underpins the process, whereby the law is required to be clear and accessible, and applied equally by an independent judiciary to cases before them to ensure a fair trial. In addition, the common law system is based upon the doctrine of precedent whereby courts lower in the court hierarchy follow the decisions of the courts higher in the hierarchy to provide consistency, predictability and in turn, justice.**

The Victorian Courts derive their jurisdiction through legislation such as *Magistrates' Court Act 1989* (Vic) and *County Court Act 1958* (Vic). While section 75 and 75A of the *Constitution Act 1975* (Vic) establish the Supreme Court of Victoria which is divided into the Court of Appeal and the Trial Division.

The High Court of Australia is the highest court in Australia and, as it hears appeals from the Court of Appeal, it is the highest court in the Victorian court hierarchy. It was established by the Australian Constitution and its jurisdiction, outlined in sections 75 and 76 which include the power to resolve constitutional matters, disputes between states, disputes between states and the Commonwealth and appeals from state courts.

While the courts' primary role is to resolve disputes by applying the law to the case before them, they have a secondary role as law-makers. Through interpretation of statute law and precedents judges can develop the law (known as common law, case law or judge-made law). The doctrine of precedent is the process by which judges follow the reasons for earlier decisions (given by higher courts in the same hierarchy) when deciding on cases before them with similar facts.

This lesson covers VCAA Key Knowledge point: **'The role of the Victorian courts and the High Court in law-making',** which we have broken down into the following concepts:



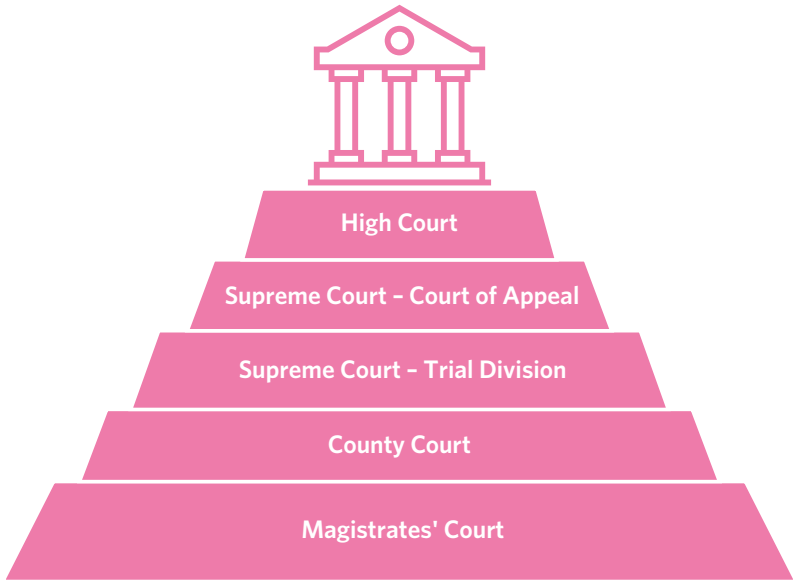
## Role of the Victorian Courts 4.2.2.1

**The main role of courts is to** uphold the rule of law by determining disputes between parties. Judges will do this by interpreting statute and common law and applying the legal principles to the facts of the case before them. Through this interpretation of statutes and application of precedents courts can develop the law.

### The Victorian Court hierarchy

The Victorian court hierarchy enables the doctrine of precedent to operate as the courts are ranked according to their jurisdiction (the trials and appeals they each hear). The Victorian Court hierarchy from the lowest to highest court is shown on the following page.

## Victorian court hierarchy




**CASE STUDY**

Consider the following hypothetical situation:

Let's assume that Michael rocks on his chair at work. Lauren worries about his safety and accuses Michael of breaking a rule; she asks the workplace supervisor (Victoria) to do something about it. There are no firm workplace rules about rocking on chairs so Victoria needs to make up a rule to resolve the matter. Victoria decides that Michael shouldn't be allowed to rock on his chair.

Three days later, Lauren complains to Victoria that another coworker – Scarlett – is rocking on her chair. Victoria advises Scarlett she is not permitted to do so.

In all future cases of workers rocking on chairs, Victoria should apply the same rule. Why?

Because not to do so would be unfair on Michael and Scarlett. All workers in the office should be treated equally by the rules; all workers should know and understand the rule that they are not able to rock on the chairs.

Just like in this office, laws within society should be equally applied to all citizens and the laws should provide certainty and predictability to ensure a society in which there is equality and fairness.

In this hypothetical case Victoria has set a precedent: a principle of 'law' that will be applied in future cases of people sitting and rocking on chairs.

**The doctrine of precedent**

- The doctrine of precedent is based upon the principle of 'stare decisis' which means 'to stand by what has been decided'.
- To ensure consistency and fairness lower courts must follow the decisions of the higher courts in the same hierarchy, when resolving disputes with facts that are similar to cases resolved higher in the hierarchy.
- Precedents are developed by superior courts of record, courts which record their decisions in written judgements. This is usually the High Court, the Supreme Court – Trial Division and the Supreme Court – Court of Appeal.
- If a case arises in which there is no law or the law is unclear, during a trial or appeal, legal representatives will search for persuasive precedents (see below) to support their case and present these to the judge who will refer to them when deciding the case.

**Judges' written reasons for their decisions are divided into two parts**

- **Ratio decidendi** – reason for the decision. This is the legal reason for the decision and forms the binding part of the judgement; that is, the ratio is the principle of law that must be followed by courts lower in that same hierarchy.

- **Obiter dictum** – comments made by the way. These are comments made by the judge to provide context to the judgement or legal suggestions. This is the persuasive part of the judgement, that is, it doesn't have to be followed but can provide guiding principles for judges in future cases.

**A binding precedent is** a precedent that must be followed by all lower courts in the same hierarchy when the facts of the case before them are similar to the facts of the case where the precedent was established.

**Persuasive precedent** can act as a guide for judges though they are not obliged to follow such precedents. For example, in deciding on a case in Victoria judges may look at precedent from other jurisdictions such as other states or countries to help guide their decision. If there is no law applicable to a particular case, the parties will present precedents from another hierarchy (or obiter dictum comments from other cases) to the judge in an attempt to persuade them to make a judgement in their favour according to the persuasive precedent.

- A persuasive precedent is not required to be followed – it is presented by barristers to judges in an attempt to **persuade** the court as to what the law **should be**. Persuasive precedents can be:
  - Comments that are obiter dictum in written judgements in earlier cases.
  - Decisions made by the same court or courts at a lower level in the hierarchy.
  - Decisions made by a court in a different hierarchy (such as in other Australian jurisdictions or internationally).

**CASE STUDY**

### PRECEDENTS DEVELOPING LAWS REGARDING MURDER

In homicide offences such as manslaughter and murder, the definition of the crime includes **causing the death** of another person. Usually it is very clear whether an accused person has caused the victim's death, with the prosecution presenting evidence the accused did some violent act (such as a stabbing or shooting) and the victim died. But in some cases new fact scenarios have arisen, and whether the accused 'caused' the victim's death was challenged. New law had to be developed by the UK and Victorian courts to resolve these disputes.

#### *R v SMITH* [1959] (A CASE FROM THE UK)

Smith (a member of the armed forces) stabbed a fellow soldier during an argument at the barracks. The victim was taken for medical assistance. He was dropped twice during the journey, the doctors failed to diagnose his punctured lung and he died.

Smith was charged and found guilty of murder. Smith appealed the decision. Smith's legal representatives argued the stabbing didn't cause the death; rather, the very poor medical treatment caused the death of the victim (and with proper medical attention, he would not have died).

The court rejected Smith's argument. The Court held the stab wound was a significant cause of the death and it didn't matter that it was not the only cause. The court held the stabbing was a 'substantial and operating cause of death'.

This decision created a new principle of law – the 'substantial and operating cause test' for deciding whether an accused person's actions caused the death of a victim, in circumstances where some other factor has also contributed to the death. This was the ratio decidendi in Smith's case.

Smith's case is an example of the courts creating a new law to resolve a dispute in which there is no law (that is, when a new fact scenario has arisen for which there is no applicable legislation or precedent to be applied).

#### *R v EVANS AND GARDINER (NO 2)* [1976] VR 523

Evans and Gardiner stabbed the victim in the stomach during a fight in prison. The victim was treated and survived. 11 months later, the victim fell ill. The victim sought medical treatment, but ultimately he died due to the buildup of scar tissue (in his bowel, which had been damaged when he was stabbed). The scar tissue was not diagnosed by the doctor, and was discovered after his death. Evans and Gardiner were found guilty of manslaughter.

Evans and Gardiner appealed to the Full Court of the Supreme Court (now referred to as the Supreme Court – Court of Appeal). On appeal they argued the poor treatment of the victim (and the failure to discover the scar tissue) during his illness had caused the death, rather than their actions in stabbing the victim (almost a year earlier).

This was a new fact scenario in the Victorian courts; the prosecution presented the persuasive precedent from *R v Smith* [1959] and argued the law in Victoria should be the 'substantial and operating cause test'

The court adopted the principle of law in this persuasive precedent; the court held that the stabbing was a substantial and operating cause of the victim's death (notwithstanding that there was another cause of death also – here, the failure of the treating doctors to diagnose the scar tissue).

This is an example of judges in the Victorian hierarchy creating a new principle of law, based on the persuasive precedents presented by a party to the dispute (here – a persuasive precedent from another court hierarchy).

The 'substantial and operating cause test' to determine whether an accused person has caused the death of a victim is now the law in Victoria, to be applied in all similar cases in lower courts in the Victorian hierarchy

***DPP V ROBB [2016] VSCA 125***

Two co-accused (Robb and Rachele) bashed the victim (Mitchell) in his home. Mitchell called 000 40 minutes later and was found deceased by police. An autopsy found that he had died of a heart attack. Mitchell's heart was diseased (due to prior health issues); the pain from his injuries and blood loss caused such stress on his heart that – due to the preexisting heart disease – he went into cardiac arrest.

Robb was convicted of manslaughter by a jury in the Supreme Court. She appealed to the Court of Appeal, arguing the pre-existing heart condition caused Mitchell to die, not the assault, it was simply a coincidence.

The Court of Appeal rejected this argument, applying the principle established in R v Evans and Gardiner: the assault was a substantial cause of the death and therefore she was criminally liable for the death, even though another cause of death was also operating at the same time (here, Mitchell's existing ill health).

Robb's case (including both the trial and the decision of the Court of Appeal which confirmed that Robb caused the death of Mitchell) are an example of the Victorian courts now applying the law created in Evans and Gardiner.

**USEFUL TIP**

Consider the following hypothetical situation:

Jasper and Bronson were enjoying a few drinks together at the pub. As the night progressed they had a disagreement and were asked to leave the premises. Outside their altercation turned physical and Jasper shoved Bronson causing him to fall awkwardly and break numerous bones in his arm. Bronson required emergency surgery and during his recovery Bronson contracted septicemia and died.

Jasper is charged with manslaughter and presents a defence that there was a break in causation – his barrister argues the septicemia caused the death, not Jasper's shove. The prosecution argues the shove was a 'substantial and operating cause of death' as established in *R v Evans and Gardiner.*

In this hypothetical case the County Court would be bound to follow the precedent established in *R v Evans and Gardiner* – the precedent was established in the Supreme Court – Court of Appeal (called the 'Full Court' at the time) and as the County Court is lower in the same court hierarchy and the facts in Jasper's case are similar, the precedent is binding and the County Court must follow it.

**Methods available to avoid applying precedent.**

There are a number of methods available to judges that allow them to avoid applying a precedent if they feel it is inappropriate or doesn't apply to the case before them. The extent to which these methods can be used is dependent on the court's position in the hierarchy. For example, lower courts may still have to follow the decision of a court higher in the hierarchy.

**Available methods to avoid applying precedent**

| | |
|---|---|
| **Disapproving** | Judges can show their disapproval for a decision through their written judgment however, if they are in a court lower in the hierarchy than the court in which the precedent was established they still must follow the precedent. |
| **Distinguishing** | Judges are able to avoid applying a precedent, in any court within the hierarchy, if they can show the case before them has different material facts to the case in which the precedent was established. |
| **Reversing** | Judges in superior courts are able to change a decision of a court lower in the hierarchy when the case is brought to them on appeal. This occurs when a party appeals a decision to a higher court and the court reverses the decision of the lower court, creating a new principle of law. |
| **Overruling** | Judges in superior courts can change a decision of lower court from an earlier, different case. When a party appeals a decision to a higher court the court can choose to overrule a decision from a previous case. This involves two different cases (see case study below).<br>Courts on the same level can overrule their own decisions however, this can mean two different precedents are established which can only be clarified once the matter is taken to a higher court. |

**USEFUL TIP** The difference between reversing and overruling is that reversing refers to a decision that is changed on appeal in the same case **whereas** overruling is when a different case is brought before the courts and they change the precedent that was established in an earlier case, lower in the hierarchy.

**USEFUL TIP** Disapproving a precedent doesn't change it; it merely shows that the judge doesn't agree but if they are in a court lower in the hierarchy they are still required to follow it.

**USEFUL TIP** Be super careful with your use of terminology here, especially the word 'binding'. In particular:

- If something is 'binding' then by definition it cannot be avoided; and
- For a precedent to be binding, the main facts in the previous case and the current case must be similar. If the judge can distinguish between the current case and the earlier case, then the facts must not be the same – so the precedent set in the earlier case isn't binding in the first place!

To summarise – don't say a judge can 'avoid a binding precedent'!

**CASE STUDY**

**OVERRULING IN *IMBREE v MCNEILLY* [2008] HCA 40**

In 1986 the High Court ruled in the case of *Cook v Cook* [1986] that an inexperienced learner driver owed a lower standard of care to their instructor than an experienced driver.

In 2002 Imbree allowed McNeilly (a 16 year old learner driver) to drive his car while he was sitting in the front seat as the supervisor. There was an accident and Imbree suffered spinal injuries. Imbree sued McNeilly and the court hearing the original trial and the court hearing the appeal held *Cook v Cook* [1986] was good law and reduced the amount of compensation awarded to Imbree as McNeilly owed a reduced standard of care.

On further appeal, the High Court overruled the decision in *Cook v Cook* [1986]. They held the standard of care owed by a learner driver was the same as that owed by all other road users. This created a new principle of law.

**CASE STUDY**

**REVERSING IN *TRKULJA v GOOGLE LLC* [2018] HCA 25**

In 2004 Trkulja was shot during the underworld killings by an unknown gunman. Trkulja's former solicitor had represented underworld figure Mick Gatto which had led to a one-time chance meeting between Gatto and Trkulja. Apart from this, he had no connection to the criminal underworld. In 2012 Trkulja sued Google for defamation because searches of his name brought up images of other gangland figures and associated him with the criminal underworld. Trkulka won the case and was awarded $200,000.

In 2013, Trkulja again sued Google in the Supreme Court as his images continued to appear in response to such searches.

Google appealed to the Court of Appeal where the judges ordered the proceedings be set aside. The Court of Appeal held that a search engine could not be held liable for defamation based on the results of the search. The Court found that simply showing the results of a search did not amount to publishing information, so Google could not be sued for publishing material that damaged Trkulja's reputation.

In 2018, Trkulja appealed to the High Court which unanimously agreed the Court of Appeal was incorrect; on hearing the appeal, the High Court reversed the decision of the Court of Appeal and stated the results of a search in a search engine (such as Google) does amount to publication of information and could therefore be the basis of a defamation action.

**USEFUL TIP**

It's really important to correctly know the Victorian court hierarchy as some questions may provide you with a case study and require you to indicate whether the precedent will be persuasive or binding.

A common area of confusion is the Victorian Supreme Court. The Victorian Supreme Court is split into two parts: the Supreme Court (Trial Division) and the Court of Appeal. The Court of Appeal sits above the Trial Division!

**Courts can only make law when:**

- a case comes before them;
- where no law, either statute or common law exists or it isn't clear how the law may be applied;
- the court is a superior court of record, usually the High Court or Supreme Court; and
- the mode of trial is a judge sitting alone/an appeal and doesn't include a jury.

**USEFUL TIP**

It is important to be able to apply your knowledge to fact situations. For example, you may be provided with a case study and then asked if the precedent here will be persuasive or binding. This means you need to correctly know the Victorian court hierarchy. Here are a few examples:

> In a recent decision the Victorian Supreme Court (Trial Division) established a new precedent. To what extent are judges bound to follow the new precedent in future cases with similar fact situations? Justify your answer. (5 MARKS)
>
> *Source:* 2011 VCAA Legal Studies Exam Q8b
>
> In this answer you are required to explain the doctrine of precedent, that is, courts must stand by what is decided and follow decisions from courts higher in the hierarchy. To link back to the question you would need to include that judges from the Magistrates' Court and County Court will be obliged to follow the precedent while judges from the Supreme Court (Trial Division), Supreme Court – Court of Appeal and the High Court are not obliged.

This demonstrates an understanding of both the doctrine of precedent and the Victorian court hierarchy. In addition, in this answer you could also include that judges can avoid applying this precedent through distinguishing the facts of this case; furthermore, judges in different hierarchies may be persuaded by this Supreme Court (Trial Division) decision, but not bound to follow it.

'The Victorian court hierarchy is an important part of our legal system. It allows the doctrine of precedent to operate and it establishes the jurisdiction of courts.'

Explain one reason why a precedent established in the Victorian Supreme Court (Court of Appeal) may not have to be followed in the Victorian Supreme Court (Trial Division). (2 MARKS)

*Source:* 2012 VCAA Legal Studies Exam Q3a

This question confused many students who thought the Supreme Court – Court of Appeal was on the same level or below the Supreme Court (Trial Division). As the Supreme Court (Trial Division) is below the Supreme Court – Court of Appeal, the judges in the Trial Division are obliged to follow the precedent unless they can distinguish the case before them, suggesting the material facts in the case before them are distinguishable from the case where the precedent was established.

## Role of the High Court 4.2.2.2

**The establishment and jurisdiction of the High Court**

The High Court was established by Chapter III of the Australian Constitution. Section 75 of the Australian Constitution outlines the original jurisdiction of the High Court. It can hear all matters:

- **i)** arising under any treaty;
- **ii)** affecting consuls or other representatives of other countries;
- **iii)** in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- **iv)** between States, or between residents of different States, or between a State and a resident of another State;
- **v)** in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

Furthermore, the High Court has additional jurisdiction to hear matters:

- **i)** arising under this Constitution, or involving it's interpretation;
- **ii)** arising under any laws made by Parliament;
- **iii)** of Admiralty and maritime jurisdiction;
- **iv)** relating to the same subject-matter claimed under the laws of different States

**The High Court can hear matters on appeal** however special leave (permission to appeal) must be sought for the High Court to hear the matter. In deciding whether it will hear the case the High Court considers whether the matter is a question of law in the interest of the public, whether there are differences in opinion regarding the law between courts (or within courts, with different decisions at the same level in the hierarchy) and whether hearing such an appeal is in the interests of administrative justice.

**The High Court is the highest court in the court hierarchy** and therefore it is not bound by its own decisions and can overrule them at any point. While the High Court can interpret any state and Commonwealth legislation it is also able to interpret the Australian Constitution, by which precedent can be established.

**USEFUL TIP** The Court of Appeal is **not** the highest court in the Victorian court hierarchy, the High Court of Australia is. If a party is dissatisfied with a decision from the Court of Appeal they can seek special leave to have the matter heard in the High Court.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.2: Roles of the Victorian Courts and the High Court in law-making**

## Keen to learn more?

**Parliamentary Education Office,** www.peo.gov.au

**Magistrates' Court of Victoria,** www.magistratescourt.vic.gov.au

**County Court of Victoria,** www.countycourt.vic.gov.au

**Supreme Court of Victoria,** www.supremecourt.vic.gov.au

**High Court of Australia,** www.hcourt.gov.au

***Imbree v McNeilly*; *McNeilly v Imbree* [2008] HCA 40,**
www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2008/40.html

***Trkulja v Google LLC* [2018] HCA 25**
www.hcourt.gov.au/assets/publications/judgment-summaries/2018/hca-25-2018-06-13.pdf

QUESTIONS

# 4.2.2 Roles of the Victorian Courts and the High Court in law-making

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

'The doctrine of precedent is based on the principle of _____. The ratio decidendi forms the _____ part of a precedent on all _____ courts in the _____ hierarchy. Comments made _____, however, are only ever _____.'

**A.** stare decisis; binding; superior; same; obiter dicta; persuasive

**B.** stare decisis; binding; inferior; different; obiter dicta; persuasive

**C.** stare decisis; persuasive; inferior; same; obiter dicta; persuasive

**D.** stare decisis; binding; inferior; same; obiter dicta; persuasive

**2.** A precedent is established in the High Court of Australia. A Victorian Supreme Court judge, Justice Kevin Harcourt, is presiding over a similar case to the one in which this precedent was established. Should the Supreme Court judge wish to avoid applying this precedent they may:

**A.** attempt to distinguish their case from the one in which the precedent was established.

**B.** reverse the precedent.

**C.** overrule the precedent.

**D.** disapprove of the precedent.

LEVEL 2:
Describe and explain

**3.** A precedent was recently established in the NSW Supreme Court. In Melbourne, a County Court judge is presiding over a similar case but wishes to avoid applying this Supreme Court precedent because:

- He considers the facts of the two cases to be 'materially different'.
- He disapproves of the precedent.
- He thinks the decision was made ultra vires.

Is it likely that the County Court judge will be able to avoid applying this precedent? Provide one reason for your answer. (2 MARKS)

**4.** A legal critic once wrote that 'we can learn far more about how precedents may be avoided based on the facts of the case from studying the Victorian courts than we can from the High Court'. Do you agree or disagree with this statement? Provide one reason for your answer. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** Lily is convicted of murder in the Victorian Supreme Court and she appeals the decision to the Supreme Court – Court of Appeal on a point of law. The decision is overruled on appeal. The DPP is dissatisfied with the decision and appeals to the High Court. The High Court explains they are bound to follow a decision from the House of Lords in England and they find that the trial judge has failed to direct the jury on an important issue of law before the jury deliberated. Furthermore, the justices indicated what their findings would have been if the facts had been slightly different and made other similar comments by the way.

A case with similar facts comes before the Supreme Court three years later. The Supreme Court follows every part of the High Court judgement as it is binding precedent. They are bound to all parts of the judgement made by the High Court.

Identify three errors in the above extract and provide the correct process or procedure. (3 MARKS)

**6.** The doctrine of precedent has been referred to as 'the hallmark of the common law'. It has been called 'the cornerstone of a common law judicial system' that is 'woven into the essential fabric of each common law country's constitutional ethos'.

*Source:* www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf

The doctrine of precedent is composed of both binding and persuasive precedent. Distinguish between binding and persuasive precedent. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** Advocates of a strict view of precedent claim that the consistency, continuity and predictability resulting from adherence to precedent is essential to the maintenance of public confidence in the rule of law and the work of the judiciary. On the other hand, one Australian judge, Justice Lionel Murphy, who served on the High Court of Australia, the nation's highest court, between 1975-1986, saw a risk of serious injustice in a rigid adherence to precedent. He even went so far as to suggest that it was an approach 'eminently suitable for a nation overwhelmingly populated by sheep'.

*Source:* www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf

Discuss the ability of the courts to provide consistency as law-makers. (5 MARKS)

# 4.2.3 Statutory interpretation

**Parliament makes laws *in futuro*, meaning they make laws that will apply to future events. As a result Parliament may not always foresee all the possible ways laws may need to be applied. In this situation it is up to the judges to apply the law to the particular case presented before the courts. In addition, while statutes usually include definitions of the words contained in the statute some words may be ambiguous, not clearly defined and the meanings of words can change over time. In these situations it is up to the courts to clarify the meanings in order to resolve disputes and provide justice. Common law is created *ex post facto* – it is applied after the fact.**

There are a number of outcomes that result from judges making these determinations. One outcome can be the development of a particular area of the law. Courts can continue to interpret and develop interpretations of words in legislation over time to mould and modify an area of the law. The court's definition of a term in legislation forms a precedent, a principle of law to be applied in similar future cases where the legislation is applied.

Parliament may act to correct this injustice through the creation of legislation to ultimately overturn or abrogate the common law precedent (that is, the interpretation of the terms in legislation).

This lesson covers VCAA Key Knowledge point: **'Statutory interpretation',** which we have broken down into the following concepts:



## Reasons for statutory interpretation 4.2.3.1

**Judges interpret statute law in order to apply the legislation to resolve the case before them.** While Parliament use professional draftspeople skilled in writing legislation, there are situations that arise in which:

- Sections of a statute may be drafted in **very broad, general terms** yet need to be applied to a specific fact scenario;
- The **meanings of words may change over time;**
- As Parliament makes laws *in futuro*, they may be **unable to foresee a particular situation** and the courts must step in to clarify the law to the case before them.

| Reasons | Example with a cases study |
|---|---|
| Broad words applied to a specific set of facts | *Deing v Tarola* [1993] The Studded Belt Case<br>• Deing was wearing a belt with raised metal studs; he was arrested and charged and found guilty in the Magistrates' Court for possessing a regulated 'weapon'.<br>• The *Control of Weapons Act 1990* (Vic) stated it is illegal to possess, carry or use any regulated weapon without lawful excuse.<br>• Deing appealed the conviction to the Supreme Court.<br>• The term 'weapon' is a broad term covering a wide range of items; it had to be interpreted to determine whether it applied to the very specific facts of this case (a belt with raised metal studs).<br>• Justice Beach determined that a 'weapon' should be defined as anything that is 'not commonly used for any other purpose than as a weapon'.<br>• Deing's belt was found not to fit that definition of a weapon and his conviction was overturned. |

*cont'd*

| Reasons | Example with a cases study |
|---|---|
| Changing nature of words | *The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission* [2003] FamCA 94<br>• Kevin was born biologically female but identified as a male and as an adult underwent gender reassignment surgery.<br>• Kevin married Jennifer in 1999 and applied for a declaration of validity of their marriage. This was challenged by the Attorney-General who argued Kevin was not a man for the purpose of the definition of a marriage.<br>• The Family Court was asked to decide whether Kevin was 'a man' at the time of the marriage. That is, what criteria should be applied in determining whether a person is a 'man' or a 'woman' for the purpose of the law of marriage.<br>• At the time the ***Marriage Act*** was written, 'marriage' was defined as the 'union of a man and a woman', but parliament did not include a definition of 'man'.<br>• The Family Court held the marriage was valid as Kevin was considered a man in the everyday sense. The Court decided the word 'man' should be given a contemporary, normal and everyday meaning (which in the 21st century was held to include those who had changed their gender to male during their lives). |
| Unforeseen circumstances | *R v Brislan* [1935] 54 CLR 262<br>• The defendant was charged under the *Wireless Telegraphy Act 1905* (Cth) for being in possession of a wireless without a valid licence. She was charged and fined.<br>• The defendant challenged the validity of the Commonwealth legislation arguing the Commonwealth didn't have the power to make the *Wireless Telegraphy Act 1905* (Cth) laws about wirlesses as section 51(v) does not specifically include wireless sets.<br>• Section 51(v) of the Constitution gives the Commonwealth power to make laws about 'postal, telegraphic, telephonic and other like services'.<br>• The High Court interpreted the term 'other like services' in Section 51(v) to include broadcasting to wireless sets. This ultimately expanded the law-making power of the Commonwealth Parliament.<br>• This decision was further expanded in 1965 in *Jones v Commonwealth* where the High Court held 'other like services' could also include televisions – a technology unforeseen when the Constitution was drafted in the late 19th century. |

**USEFUL TIP** When providing reasons for statutory interpretation you need to provide a full response. It is not enough to merely mention that 'words may be very broad' – an explanation is needed. A brief example is a good way to strengthen your answer.

**USEFUL TIP** When considering reasons why courts interpret statutes be mindful of a few common misconceptions. Just because a law is not easily understood is not a reason for a judge to interpret the statute. Also, a judge will not interpret statute just because society's values change.

## Effect of statutory interpretation 4.2.3.2

**Through statutory interpretation judges give meaning to the words in legislation and are able to resolve disputes in the cases before them.** The interpretation of legislation in a particular case can also have broader implications including:

- The development of an area of the law through the creation of precedent.
- Broadening the operation of a statute.
- Narrowing the operation of a statute
- Legislation being passed which abrogates a courts' interpretations of a statute.

| Effects of statutory interpretation | Case studies |
|---|---|
| Create precedent | *Deing v Tarola* [1993] The Studded Belt Case<br>• Deing was wearing a belt with raised metal studs; he was arrested and charged and found guilty in the Magistrates' Court for possessing a regulated 'weapon'.<br>• The *Control of Weapons Act 1990* (Vic) stated it is illegal to possess, carry or use any regulated weapon without lawful excuse.<br>• Deing appealed the conviction in the Supreme Court.<br>• The term 'weapon' is a broad term covering a wide range of items; it had to be interpreted to determine whether it applied to the very specific facts of this case (a belt with raised metal studs).<br>• Justice Beach determined that a 'weapon' should be defined as anything that is 'not commonly used for any other purpose than as a weapon'.<br>• Deing's belt was found not to fit that definition of a weapon and his conviction was overturned.<br>Through statutory interpretation Justice Beach created a precedent – a definition of 'weapon' which will provide greater clarity of what a 'weapon' is in future cases.<br>In later cases in the Magistrates' Court and County Court the legislation and this precedent defining 'weapon' will be read together to determine whether those charged with carrying a regulated weapon have an item that breaches the law. |
| Broadening of the law's application | *Carr v Western Australia* [2007] 232 CLR 138<br>• Carr was suspected of armed robbery and questioned by police. During the interview he made no admissions of guilt. In the police cells he did admit his participation in the armed robbery. This was captured on the police station's video surveillance.<br>• This recorded admission was used as evidence in Carr's trial and he was found guilty. He appealed unsuccessfully to the WA Court of Appeal, then appealed again to the High Court of Australia.<br>• WA's Criminal Code Section 570D(2) requires that when a person is tried for a serious offence, evidence of any admission of guilt can only be admissible evidence if the admission is videotaped; in s 570D(1) 'videotape' is defined as 'any videotape on which an interview is recorded'. The word 'interview' is critical here.<br>• Carr argued an 'interview' requires a degree of formality and a question-answer approach; he stated the conversation in his cell was not an 'interview' as it lacked this formality. Therefore, Carr argued the recording of his participation in armed robberies in the cell was not a 'videotape' of an admission as required in the Criminal Code, and should not be used as evidence in his trial.<br>*cont'd* |

| Effects of statutory interpretation | Case studies |
|---|---|
| | The majority of judges in the High Court rejected Carr's argument. The Court defined 'interview' as any conversation between police and a suspect, therefore the video recording of the conversation in the cell was admissible evidence in a trial and his conviction was upheld.<br><br>This broad interpretation of 'interview' in this example of High Court statutory interpretation means in future cases any video recording of a conversation between police and a suspect will be admissible evidence. |
| Narrowing the application of a law | *Carr v Western Australia* [2007] 232 CLR 138<br><br>• Justice Kirby was in the minority in Carr's case – he interpreted 'interview' more narrowly as a formal question-answer interaction between the police and a suspect.<br><br>Had the majority of the Court given 'interview' the same narrower interpretation as Justice Kirby, the video of Carr's admission would not have been permitted as evidence in his trial.<br><br>Although Justice Kirby's reasoning did not form a precedent to be applied in future cases (as he was not in the majority) this is an example of how judges may narrow the operation of legislation when engaged in statutory interpretation. |
| Parliament may amend legislation in response to statutory interpretation, abrogating interpretations of legislation | *The meaning of 'persecution' in Australian refugee law*<br><br>Australian law provides that a person is entitled to refugee status and protection in Australia if they can prove a well-founded fear of persecution due to their race, religion, sexuality, etc. (*Migration Act 1958* (Cth)).<br><br>To be 'persecuted' means to be subjected to harassment or harm, because of one's religion, race, nationality, being part of a particular social group or political opinion. Throughout the 1990s, the courts gave a broad interpretation and meaning to the term 'persecution' – deciding this included acts such as being denied employment, education, limiting free speech and the freedom to practice one's religion.<br><br>The impact of these cases was to significantly increase the number of people who fit within the definition of being 'persecuted' and therefore entitled to protection in Australia.<br><br>In 2001 the Commonwealth Parliament – concerned that too many individuals qualified for protection in Australia due to the courts' decisions about who was 'persecuted'– responded by amending the *Migration Act* to narrow who would qualify as being persecuted (now in s.5J of the Act):<br><br>• It wasn't enough to show that a person would have greater opportunities in Australia, compared to their home country.<br>• Persecution means 'serious harm', and this includes torture, threats to one's life, significant physical harm, denial of basic services so severe it threatens a person's ability to survive.<br><br>The impact of this new legislation was to make it significantly harder for a person to prove they were being persecuted, reducing the number of people who qualify for protection in Australia under the *Migration Act.*<br><br>This is an example of parliament passing legislation in response to the court's interpretation of a statute over time – parliament abrogated the courts' earlier interpretations of 'persecuted'. |

**USEFUL TIP**

It is common for exam questions to incorporate knowledge from a number of different key knowledge dot points in the Study Design. For example, below is a question about statutory interpretation **and** persuasive precedent.

'Describe the circumstances in which a court's interpretation of a statute will become a persuasive precedent. (4 marks) [2017]'

In this question it was important to outline when the interpretation of a statute is persuasive such as if the decision was made in a court lower or a court from a different hierarchy. The matter may be persuasive if the matter can be distinguished, the facts are materially different from the case before them or the comments were obiter dicta and therefore not binding.

Be mindful that the question is in reference to statutory interpretation. Many students referred to *Donoghue v Stevenson* and *Grant v Australian Knitting Mills* as examples of persuasive precedent; however, these cases did not involve statutory interpretation.

**USEFUL TIP**

Be sure to read the question carefully! It's important not to confuse the '**reasons** for statutory interpretation' with the '**effects** of statutory interpretation'. Think about 'reasons for statutory interpretation' meaning the 'why' and 'effects of statutory interpretation' as the 'consequence'.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.3: Statutory interpretation**

## Keen to learn more?

***The Attorney-General for the Commonwealth & 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003),** www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2003/94.html

***R v Brislan* [1935] HCA 78; (1935) 54 CLR 262,** www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1935/78.html?context=1;query=Brislan;mask_path=

***Carr v Western Australia* [2007] 232 CLR 138,** www.hcourt.gov.au/assets/publications/judgment-summaries/2007/hca47-2007-10-23.pdf

**Kirby, M 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) Melbourne University Law Review 113,** www.austlii.edu.au/au/journals/MelbULawRw/2011/3.html

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QUESTIONS

# 4.2.3 Statutory interpretation

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

'There are a number of reasons why the court may need to interpret _____ that _____ makes. It may be due to _____ about what a particular word or phrase in the Act means and therefore it needs to be _____. Another reason could be difficulties in foreseeing how the Act will be applied in the _____, for example, due to rapid changes in _____.'

**A.** legislation; Parliament; confusion; defined; future; technology

**B.** law; Commonwealth Parliament; confusion; changed; future; the values of society

**C.** cases; the court; confusion; defined; past; the environment

**D.** statutes; Parliament; confusion; applied; present; the law

**2.** In the *Carr v Western Australia* case Carr's admission to police that he was involved in armed robberies – an admission made while in his cell – was deemed to be a videotape of an interview and could therefore be used as evidence in his trial. What effect of statutory interpretation best describes what this case illustrates?

**A.** The word 'interview' was given meaning.

**B.** It decreased the scope of circumstances that the legislation applied to, by narrowing the definition of an 'interview'.

**C.** The Parliament rejected the court's interpretation of 'interview' and changed the legislation in response.

**D.** It increased the scope of circumstances that the legislation applied to, by broadening the definition of an 'interview'.

LEVEL 2:
Describe and explain

**3.** In the case of *Deing v Tarola*, a man was arrested by police for wearing a leather belt with silver studs on it, and was charged under section 6 of the *Control of Weapons Act 1990* (Vic) which states that 'a person must not possess, carry or use any regulated weapon without lawful excuse'. It came into question whether a studded belt was a regulated weapon, and it was found that if it is only intended to be used as clothing and not as a weapon, then the man cannot be charged for the possession of a weapon.

Identify and describe which reason for statutory interpretation this case is highlighting, and describe one other reason for statutory interpretation. (3 MARKS)

**4.** Describe two effects of statutory interpretation and explain one of these effects with reference to an example. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** In *R v Brislan* [1935], Brislan challenged the validity of the Commonwealth's power to pass laws relating to wireless sets. The High Court was required to interpret s.51(v) of the Commonwealth Constitution.

> s.51 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: (v) postal, telegraphic, telephonic, and other like services;

Explain why, in this situation, it was necessary to interpret the statute. (4 MARKS)

**6.** Section 6 of the *Control of Weapons Act 1990* (Vic): A person must not possess, carry or use any regulated weapon without lawful excuse.

In the *Deing v Tarola* [1993] 2 VR 163 decision, the Supreme Court decided a weapon is 'anything that is not in common use for any purpose but that as a weapon.'

As a solicitor at Victoria Legal Aid you're approached by two individuals charged with breaching the *Control of Weapons Act*. Considering the statute and the precedent set in *Deing v Tarola,* advise each of these individuals as to whether they have breached the Act and describe one way this interpretation might be changed.

- Dion is arrested by police for carrying a machete in the backseat of his car.
- Michael is in the car with Dion, and police find a small kitchen knife in his bag.

Justify your answer. (6 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** In 2003 *Attorney-General for the Commonwealth v 'Kevin and Jennifer' and Human Rights and Equal Opportunity Commission* [2003] FamCA 94 required the Family Court to determine the validity of a marriage for a transgender man. The Kevin and Jennifer case is an example of the need for statutory interpretation.

Discuss the extent to which you believe statutory interpretation is an effective way to make law. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 1 (online), covering these lessons:

- **Lesson 4.2.1 Parliamentary law-making**
- **Lesson 4.2.2 Roles of the Victorian Courts and the High Court in law-making**
- **Lesson 4.2.3 Statutory interpretation**

Check with your teacher when it's time to complete this progress check.

# 4.2.4 Factors that affect the ability of courts to make law

**Through the process of interpreting statutes and developing common law principles applying and changing precedents, judges within the courts are able to make and develop the law.**

There are a number of factors that can help and hinder the courts' ability to make law. Some of the factors that impact on the ability of the courts to make laws include:

- **The doctrine of precedent** is the process by which judges follow the reasons for their decisions (given by courts higher in the same court hierarchy) when deciding on cases before them with similar facts.
- **Judicial conservatism** is an approach to judicial law-making where a judge is reluctant to develop new law as they feel this is the role of Parliament and, instead, tend to interpret the statute narrowly.
- **Judicial activism** is an approach to judicial law-making where a judge considers a number of factors in their decision making, interpret the law broadly and in turn, create new legal principles.
- **Costs and time** in bringing a case to court can be considerably onerous.
- **The requirement of standing** means one needs to show they are directly impacted by the outcome of the case and have the right to appear before and be heard by the court.

This lesson covers VCAA Key Knowledge point: **'Factors that affect the ability of courts to make law'**, which we have broken down into the following concepts:



## The doctrine of precedent 4.2.4.1

**The court's primary role is to resolve disputes between parties.** They do this by interpreting legislation or case law and applying the legal principles to the cases before them. Throughout this process the courts will follow the doctrine of precedent.

**The doctrine of precedent is based upon the principle of 'stare decisis',** to stand by what has been decided. This means that cases with similar facts will be decided in a similar manner to ensure consistency, predictability and justice. In order to uphold this principle the courts are arranged in a hierarchy according to their jurisdiction. Courts lower in the hierarchy must follow the decisions of superior courts in the hierarchy.

**Courts will only make law when** the law is unclear or there is no law applicable to the dispute they are resolving.

**USEFUL TIP**

A quick recap of **how** courts make law using the doctrine of precedent:

- In a superior Victorian court (often when hearing an appeal), the court finds there is no clear legislation or common law principle to resolve the dispute – a new fact scenario has arisen, for which there is no law.
- Legal representatives for each party will present persuasive precedents to the court – principles of law from courts in other hierarchies and/or lower in the hierarchy, or comments made in other cases that are obiter dictum.
- Legal representatives for each party may also ask the superior court to reject precedents set in earlier cases lower in the hierarchy (that is, to overrule such decisions) and make new law.

- The court will resolve the dispute by accepting the persuasive precedents presented by one party, and adopting the principle of law to resolve the dispute before the court.
- In delivering this judgement, the court gives written reasons for its decision; the ratio forms a new principle of law that is binding in all future cases with similar facts, lower in the Victorian hierarchy.

**Judges have some flexibility** and are able to avoid applying precedent by using one of the following techniques:

- **Reversing –** A judge presiding over a superior court of record is able to hear a case on appeal from a lower court and change the decision made in the same case in the lower court.
- **Overruling –** A judge presiding over a superior court of record can change a decision made by a lower court or a court at their own level from a previous case with similar facts.
- **Disapproving –** A judge can show they denounce the decision however if they are presiding over a court lower in the hierarchy they still must follow the decision.
- **Distinguishing –** A judge is able to avoid applying precedent if they are able to demonstrate that the case before them has different material facts to the case which established the precedent. In such a case the court is free to develop a new common law principle.

**The doctrine of precedent can help develop law because:**

- If no statute or common law exists or it isn't clear how the law should be applied to the case before them judges are able to develop the law. As such, if a new social issue arises for which there is no law, courts can create law.
- Judges from superior courts of record or on the same level can overrule or reverse a decision from courts lower in the hierarchy, thereby developing law.
- Judges have the ability to distinguish the case before them; that is, when a party's legal representative suggests the material facts are different from previous cases and the court is not obligated to follow a precedent, the court can accept this and can therefore develop new law.
- They can also disapprove a precedent; these obiter comments may persuade superior courts in future cases to create new law.

**The doctrine of precedent can hinder the development of the law because:**

- Judges cannot develop law just because they want to. They must wait for a case to come before them and requires a party with standing.
- They can only develop new law where there is no preexisting statute of common law, or it isn't clear how the law should be applied.
- To develop law they must be a superior court of record and lower courts are unable to develop law.
- Judges may be conservative and feel it is not their role to develop law.
- The process of finding and presenting persuasive precedents is an inefficient way to solve new social problems; it provides no opportunity to research expert or public opinions on what the new law should be. This may lead to laws that are ineffective and/or not accepted by the community.

**USEFUL TIP** It is important to provide explanations in your answers. It is not simply enough to mention RODD (reversing, overruling, disapproving and distinguishing). You need to explain how it can impact on law-making and create flexibility in judges' decision-making.

**USEFUL TIP** Be careful as the topic of precedent tends to be the most rote-learned topic and students generally tend to use pre-prepared answers. This strategy will **not** help you to get full marks! It's important to be able to apply your knowledge to the particular question rather than simply remembering!

## Judicial conservatism 4.2.4.2

**Judicial conservatism is** an approach to law-making where a judge is reluctant to develop new law as they feel that is the role of parliament, as elected representatives, to develop law. As a result they tend to interpret the law narrowly, focusing only on the case before them. Conservative judges don't want to make controversial changes and avoid establishing precedent. They develop case-specific judgements rather than developing areas of the law through the development of precedent. Furthermore, judicial conservatism can cause judges in superior courts to apply outdated precedents – even in circumstances when the court is not bound to follow the precedent.

**Judicial conservatism can help develop law because:**

- It leads to small, incremental changes in the law as the judges strongly believe it is the role of parliament to create law so they tend to narrowly interpret the law to apply it strictly to the case before them.

**Judicial conservatism can hinder the development of law because:**

- The common law can remain unchanged irrespective of changed community values.
- The development of the common law can be restricted despite opportunities through the presentation of test cases before the higher courts.

**CASE STUDY** ***STATE GOVERNMENT INSURANCE COMMISSION v TRIGWELL* [1979] HCA 40**

The Trigwells were injured in a car accident caused by a roaming sheep. They sued the owners of the sheep.

The High Court decided to follow an old common law principle where a landowner didn't owe a duty of care for roaming livestock – they were not responsible for damage caused by their livestock. This was reminiscent of a time when horses and carriages were used and could easily manoeuvre around grazing livestock.

As the highest court in the hierarchy, the High Court was certainly able to overrule the old precedent and create new law, but chose not to. Justice Mason suggested in his judgement that if a change to this law is required, it should come from Parliament:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise.
>
> 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. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law.
>
> In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.

This is an example of courts adopting a conservative approach in developing the law.

The Victorian parliament later passed the *Wrongs Act (Animals Straying on Highways) Act 1984*, abrogating the outdated common law principle.

## Judicial activism 4.2.4.3

**Judicial activism is** an approach to law-making where judges will consider a number of factors in their decision making and consider that while they have a primary role to resolve disputes before them, they feel a responsibility, where necessary, to undertake a secondary role in developing the common law. They are progressive in their approach and take into account social, ethical and political factors to interpret the law broadly and in turn, create new legal principles.

**Judicial activism can help develop law because:**

- Judges feel their role extends beyond merely applying legal principles to the case before them and they take a holistic approach to their decisions.
- They feel a responsibility to consider their secondary role as law-makers and develop areas of the common law that reflect community values.
- They can develop law by putting pressure on Parliament to make legislative changes.
- As the High Court is not bound by any previous decisions, judges in this court are able to engage in such activism and radically change the law.

**Judicial activism can hinder the development of law because:**

- Progressive judges may constantly seek to modify and develop the law which can cause inconsistency and confusion.
- Such activism is not common; judicial conservatism is more common as an approach to law-making.
- Courts must still wait for a relevant case to come before them before actively changing the law.

**CASE STUDY** ***MABO v QUEENSLAND (NO 2)* [1992] HCA 23**

Since European settlement, Australian law had assumed the continent was 'terra nullius' – legally the 'land of no-one' and therefore the Crown automatically took ownership of the entire continent at the time of European settlement. Eddie Mabo (and others) claimed ownership rights of the land in the Murray Islands (in the Torres Strait). Mabo began legal proceedings in 1982 and ten years later the High Court ruled.

Mabo argued the legal assumption Australia was terra nullius was incorrect, and therefore the Crown did not automatically own all land at the time of European settlement. Instead, Mabo asked the court to accept that indigenous people owned the land at the time of settlement (ownership known as 'native title') and that this land ownership continued after European settlement.

In 1992 the High Court held 'terra nullius' was a legal fiction and found that native title could exist if it could be proved:

- That there is a strong connection between the people and the land
- The indigenous connection to the land had not been extinguished by some transaction since European settlement (such as the land being bought and sold)

This is a good example of judicial activism as the judges took the opportunity to develop law once the test case came before them. The judgement declaring 'terra nullius' as a legal fiction was progressive and regarded by many as controversial. The precedent had a significant impact on Australian property law.

Justice Brennan stated the courts 'cannot unquestionably adhere to earlier decisions if they lay down a rule that seriously offends the values of justice and human rights...which are aspirations of the contemporary Australian legal system'.

The Court decided the law's previous assumption Australia was a 'land of no-one' was racist and discriminatory. The facts presented in Mabo's case about indigenous peoples' connection to the land showed this assumption to be wrong, and to allow the law to continue to reflect this prejudiced view of Australian history would also be wrong.

Although courts should be slow to change laws made by judges in the past, the High Court also stated 'the common law shouldn't be frozen in an age of racial discrimination'.

**USEFUL TIP** Remember, even progressive judges can't simply change an area of law through the development of precedent when they want to. The court must be a superior court of record, they must wait for a case to come before them, there must be no other law they can apply, or it isn't clear how the law may be applied.

## Costs and time in bringing a case to court 4.2.4.4

**Cost and time in bringing a case to court can be** very onerous on parties.

**Some of the costs involved** in pursuing a matter through the courts can include legal representation, which can include both a solicitor and barrister, courts fees and depending on the outcome of the case-party fees (that is, the requirement to pay some/all of the opposing party's costs). Some barristers may cost as much as $3,000–$5000 a day, particularly those with the knowledge and skills required to present test cases in the Supreme Court of Appeal and the High Court. While Legal Aid may be available it is generally limited to criminal and family law matters and isn't an exhaustive resource.

**Going to court to pursue a change in the law can be very time-consuming.** There is a significant backlog of cases in the justice system which means sometimes waiting months (or years) to have a matter heard before the courts. In addition pre-trial procedures, while reducing the trial time, can be burdensome and time-consuming in themselves. Pre-trial procedures prepare parties for court by requiring parties to exchange documents to clarify issues and generally reduce the legal issues to be considered at trial. Parties may also use delaying tactics to avoid proceeding to trial which can further contribute to time delays.

Most critically however, changing the common law requires a case to be pursued to the highest courts on appeal (as lower courts do not make or change the law). This need to appeal to superior courts of record adds to the time taken to amend the common law.

**Cost and time can help develop law because:**

- The high cost and time delays can prevent some parties from taking a matter through the courts however, recent process changes to reduce time delays (especially changes in the appeals processes in the Court of Appeal).

**Cost and time can hinder the development of law because:**

- Judges in superior courts need to wait for a case to come before them before they can develop law; the time taken to appeal to the higher courts slows the development of the law.
- The reluctance of parties to pursue a matter through the courts due to the costs and delays means there is less opportunity for judges to develop the common law – appropriate test cases may not come before the courts because those with standing are discouraged from pursuing their case to the higher courts.

**CASE STUDY** ***MABO v QUEENSLAND (NO 2)*** **[1992] HCA 23**

**Time**

- The Mabo case took ten years to pass through the courts.
- **1982** Mabo and five other plaintiffs made a legal claim over the land in the Murray Island, against the Queensland government.
- **1985** The Queensland government sought to extinguish the property rights through the enactment of the *Queensland Coastal Islands Declaratory Act 1985* (Qld).
- **1985** Mabo issued a legal challenge to the Queensland Act claiming it was discriminatory and breached the *Racial Discrimination Act 1975*.
- **1988** The High Court held the *Queensland Coastal Islands Declaratory Act 1985* was invalid as it breached the *Racial Discrimination Act 1975*. Mabo's claim then proceeds to the High Court.
- **1992** The High Court finds in favour of Mabo's native title claim.

**Costs**

- In the High Court special leave applications for civil matters are $3,320 while businesses can pay as much as $15,053.
- The first day of a High Court hearing before the Full Court can range from between $1,855–$5,580. Businesses can pay as much as $20,400 for the first day of a hearing.

  *Source:* www.hcourt.gov.au/registry/filing-documents/high-court-of-australia-fees
- The Australian Government Attorney-General's Department has recently estimated the average cost of going to the Federal Court is $111,130.

  *Source:* www.collaw.edu.au/news/2017/05/08/the-cost-of-law-how-litigation-funding-works-with-lawyers-in-australia
- Barristers presenting a test case in the High Court of Australia are highly skilled and experienced, and can therefore charge thousands of dollars per day to prepare and present a case.

**USEFUL TIP** Try to always provide evidence to support your statements. Simply stating that the court process is time-coming or costly is not enough. Provide evidence of this and explain why it is costly or time-consuming. Try re-reading your answers and if you can ask 'why' or 'how' you need to add more!

## The requirement for standing 4.2.4.5

**'Standing' refers to** the ability of a party to appear before and be heard by a court. It is based upon *locus standi*, meaning 'place to stand'. A party must show the courts that they are an aggrieved party, that their private rights have been directly affected by a legal issue or the action of another party and the infringement would continue unless the court provided relief. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides a statutory test for deciding who has standing – that is, who can be considered an 'aggrieved person'.

Alternatively, a party may have standing if they can demonstrate 'special interest' in a legal matter. A 'special interest' can include:

- A public interest group challenging a government decision that could be public concern.
- A trade union challenging a government decision that may impact their members.
- A business challenging a government decision that may be favourable to a commercial rival.
- A member of the public that challenges a government decision that affects them.

The special interest test was developed by the High Court. In the case of *Australian Conservation Foundation v Commonwealth* [1980] HCA 53, Justice Gibbs established that the special interest test doesn't have to involve legal or financial rights, but must be more than a 'mere intellectual or emotional concern'. The 'special interest' test requires a party to show that their interests are adversely affected by the action or decision of another party (or legislation) beyond that of any other member of the public.

**CASE STUDY** Consider the following hypothetical situation:

The Commonwealth Parliament passed new legislation regarding the retention of electronic data. This has meant that customers' metadata from phone calls, text messages, emails and internet activity will be stored indefinitely and be able to be accessed by the government. While exemptions have been made for some social media platforms, the data of Facebook users will be retained.

Facebook feels this is unfair to their users and has challenged the validity of this legislation claiming they have a special interest in the outcome of the case. Facebook would assert that they are a commercial entity challenging a government decision that may be favourable to a commercial rival. Furthermore, they feel their interest in this matter is beyond that of any other member of the community.

In this hypothetical case Facebook has asserted a special interest: they have demonstrated they have a 'special interest' in the case beyond that of any other member of the community. A court would therefore likely allow Facebook to challenge the validity of the legislation in court.

**The requirement for standing can help develop law because:**

- Only people with standing can pursue a matter through the courts. Only parties who have been genuinely affected, an aggrieved party, can pursue the matter thereby reducing the amount of claims going to court, and in turn, the costs and delays in the court system. This therefore allows more opportunity for genuine cases to be pursued through the courts.

**The requirement for standing can hinder the development of law because:**

- The requirement of standing limits the ability of simply anyone who wants to change the law from pursuing the matter through the courts. Sometimes aggrieved parties don't have the time or money to pursue the matter through the courts and limiting other groups/individuals from pursuing the matter according to their political agenda may slow the development of the common law.

**USEFUL TIP**

Compare this with law-making by Parliament: **any individual** in society can write to their local member of Parliament and lobby for a change in the law; **any individual or group** can organise a protest or petition to pressure Parliament to change the law.

**CASE STUDY**

***RE MCBAIN* [2002] HCA 16**

McBain (a doctor providing IVF services) brought a case before the Federal Court in 2000 claiming an inconsistency between:

- s. 8 of the *Infertility Treatment Act 1995* (Vic) which provided that in order to receive treatment, a woman must be married or in a de facto relationship with another person, and
- s. 22 of the *Sex Discrimination Act 1984* (Cth) which states it is unlawful to refuse to provide a person with a service based upon that person's marital status.

McBain argued he was unable to provide IVF to Leesa Meldrum (a single woman seeking IVF treatment) if he abided by the Victorian law; the Federal Court held that the Commonwealth law should prevail, enabling single women to access IVF.

A group of Catholic Bishops wanted to challenge this decision, on the basis of their religious beliefs. They didn't want single women to access IVF. The High Court had to decide if the Bishops had standing.

It was held the Bishops did not have standing as they had no legal, economic or special interest in the case. Chief Justice Gleeson stated 'People who were not parties to litigation do not have a claim of right to have judicial decisions quashed because they are erroneous'. The Catholic Bishops' religious beliefs did not give rise to a 'special interest'.

**USEFUL TIP**

Try to always use examples in your answers. This will help demonstrate you understand the key knowledge and help you get those extra marks!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.4: Factors that affect the ability of courts to make law**

## Keen to learn more?

***State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617 (19 September 1979),** www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/40.html?context=1;query=Trigwell;mask_path=au/cases/cth/HCA

***Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992),** www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html?context=1;query=Mabo;mask_path=

***Re McBain* [2002] HCA 16; 209 CLR 372; 188 ALR 1; 76 ALJR 694 (18 April 2002),** www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2002/16.html?context=1;query=McBain;mask_path=

QUESTIONS

# 4.2.4 Factors that affect the ability of courts to make law

LEVEL 1:
Define and understand

**1.** There are several methods by which judges are able to avoid and develop precedent. Which of those methods has been used in the case of *Trkulja v Google LLC* [2018] HCA 25?

- Trkulja's former solicitor had represented underworld figure Mick Gatto which had led to a one-time chance meeting between Gatto and Trkulja. Apart from this, he had no connection to the criminal underworld.
- In 2012 Trkulja sued Google for defamation because searches of his name brought up images of other gangland figures and associated him with the criminal underworld. Trkulka won the case and was awarded $200,000.
- In 2013, Trkulja again sued Google in the Supreme Court as his images continued to appear in response to such searches.
- Google appealed to the Court of Appeal where the judges ordered the proceedings be set aside. The Court of Appeal held that a search engine could not be held liable for defamation based on the results of the search. The Court found that simply showing the results of a search did not amount to publishing information, so Google could not be sued for publishing material that damaged Trkulja's reputation.
- In 2018, Trkulja appealed to the High Court which unanimously agreed the Court of Appeal was incorrect, changing the principle of law regarding the result of Google searches and publication of defamatory material.

**A.** disapproving
**B.** overruling
**C.** reversing
**D.** distinguishing

**2.** Which of the following is **not** a likely implication of judicial conservatism?

**A.** Precedent becomes outdated
**B.** The doctrine of precedent fails to provide consistency and predictability
**C.** Judicial decisions do not reflect current community standards
**D.** Judicial decisions may be considered unjust

**3.** Which of the following could **not** be considered an implication of judicial activism?

**A.** Common law becomes static
**B.** The doctrine of precedent provides flexibility
**C.** Current views and values of the community are reflected in common law
**D.** Common law remains up to date

**4.** Fill in the blank spaces: 'There are several restrictions upon courts when it comes to developing _____. This is primarily because courts make laws _____ and therefore must wait until a relevant _____ comes before the court. The willingness of parties to bring such disputes to court furthermore depends on them having _____ and _____. Ultimately this means there is limited opportunity for courts to develop law.'

**A.** common law; in futuro; test case; standing; being willing to spend the time and money
**B.** common law; ex post facto; test case; standing; being willing to spend the time and money
**C.** statute law; in futuro; appeal; time; money
**D.** common law; ex post facto; appeal; time; money

**5.** Thomas purchased a can of Betty's Beans from his local supermarket. Halfway through eating the beans he discovered a series of maggots. Ultimately, Thomas became very sick and his mother was forced to take several months off work to take care of him. Upon returning the beans to the supermarket, the store owner was highly concerned about the lack of quality control of a product sold to his customers. However he claimed no responsibility over the Betty's Beans product. Dissatisfied with this response, Thomas turned to Australian current affairs show 'A Current Affair' where his story reached a national audience.

In this case, which party would **not** be considered to have standing to take this dispute to court?

**A.** Thomas

**B.** The shop owner

**C.** Thomas' mother

**D.** A particularly outraged 'A Current Affair' viewer

LEVEL 2:
Describe and explain

**6.** Explain how distinguishing a precedent may contribute to the development of common law. (3 MARKS)

**7.** The Trigwells were injured when a vehicle struck their car after swerving to avoid colliding with some sheep that had strayed onto the highway. The couple sued both the vehicle driver and the owner of the sheep for damages but were unsuccessful. According to outdated common law, landowners did not owe any duty of care for their stock straying onto the highway. It was therefore decided by the High Court that despite changes in community views over time the precedent would be followed, as such law-making should be left to Parliament.

Explain in relation to the Trigwell case the effect of judicial conservatism on the common law (3 MARKS)

**8.** Outline one way in which the common law is developed by judicial activism. (2 MARKS)

**9.** Explain the impact of time and cost of bringing action to court upon the development of common law. (2 MARKS)

**10.** Describe the requirement for standing as a factor that can influence the development of the law. (3 MARKS)

LEVEL 3:
Apply and compare

**11.** Tania Isbester recently fought to save the life of her dog, Izzy, a Staffordshire bull terrier, who was on death row since 2013 after biting a woman. When the Knox City Council decided to euthanise the dog Isbester appealed, in 2014, to the Victorian Supreme Court, then to the Supreme Court – Court of Appeal, and finally to the High Court. Whilst one of the barristers worked pro bono on this case there were still significant costs associated. In 2015, the High Court found there may have been a perception of bias in the decision and Izzy was, consequently saved. The council was ordered to pay Isbester's legal costs of approximately $600,000.

*Source:* www.theage.com.au/national/victoria/death-row-dog-saved-after-panel-rules-its-release-20150918-gjq3zy.html

Referring to the above case study, explain two of the factors that may affect the ability of the courts to make law. (4 MARKS)

**12.** Kirby's neighbour has recently erected a new boundary fence over 2 metres high, which has caused Kirby to lose significant sunlight in that part of her garden where she grows her vegetables. While the neighbours indicate they have a building permit from the local council Kirby believes the council has failed to consider her interests in their decision.

Describe the standing requirement and advise Kirby as to whether she might be able to meet the standing requirement. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**13.** 'Australian constitutional law academic, Professor Craven, has offered three definitions which are really one, relating respectively to the common law, the statute law and to the Constitution. Judicial activism in his view involves the conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy. It exists in relation to statute law where a court consciously adopts an interpretation of statutory language which goes well beyond the ordinary import of the words because the court believes that an extended interpretation is necessary to give effect to the true legislative intention or because it wishes to frustrate an unpalatable legislative intention.'

*Source:* www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf

To what extent is law-making by the courts flexible and able to change as society changes? (5 MARKS)

**14.** 'The decision of the High Court of Australia in *Mabo & Ors v The State of Queensland (No 2)* [1992] has attracted unprecedented comment. Brennan J (with whom Mason CJ and McHugh J agreed) envisaged that his decision would afford a new, just and appropriate 'skeleton of the common law' in Australia concerning the title to land of its indigenous peoples.

The most telling criticism which has been targeted at Mabo concerns not how the High Court came to its decision, but whether, as a matter of judicial policy, it ought not to have left such a seemingly radical change of the law to the elected representatives of the Australian people in their democratic Parliaments'.

*Source:* www.austlii.edu.au/au/journals/JCULawRw/1994/3.pdf

Discuss the benefits of judicial activism. (5 MARKS)

# 4.2.5 Relationship between courts and Parliament in law-making

**Parliament is the supreme law-making body whose primary role is to create legislation which the courts then apply to cases before them. Parliamentary sovereignty means parliament has the power to develop and repeal laws at their discretion. Judges interpret statutes made by parliament in order to adjudicate disputes before them. Courts can apply statutes to the cases before them and interpret the meaning of the words and fill gaps in legislation. Through their reluctance to develop law, judicial conservatism, judges can bring legal issues to the attention of parliament and through judicial activism they can develop areas of the law.**

Through this process the courts can influence parliament to change the law and parliament can either confirm (codify) or change (abrogate) the law developed by the courts. The Commonwealth Parliament however, cannot override High Court interpretations of the Commonwealth Constitution. Parliaments make most of the laws governing society, while parliament depends on the courts to apply the law to cases and establish new law in situations that have arisen for the first time.

Parliament passes acts that create the court system and provide their jurisdiction. For example, the *Magistrates' Court Act 1989* (Vic) and *County Court Act 1958* (Vic) in Victoria established the Magistrates' and County Courts.

This lesson covers VCAA Key Knowledge point: **'Relationship between courts and parliament in law-making'** which we have broken down into the following concepts:



## Supremacy of parliament 4.2.5.1

**Parliamentary sovereignty is** the fact that parliament is the supreme law-making body. This means Parliament can make, repeal and change any laws they wish, within their jurisdiction, whenever they wish.

**Parliamentary supremacy also means the parliament is** empowered to override the laws of other law-making bodies such as the courts.

**Parliaments' primary role is to create legislation** that is in the best interests of the people, while the courts' primary role is to resolve disputes before them (and through this process they may develop laws).

As elected representatives, parliamentarians can initiate legislative change when required, in order to reflect the needs of the people. They are able to investigate and develop areas of the law broadly, consult with the community to ensure they are best representing the views of their constituents, seek to implement legislative change to protect the community and promote a cohesive society.

**Supremacy of parliament can help develop law because:**

- Parliament can make laws at any time they wish to in a broad range of areas.
- Parliament also has the ability to research whole areas of the law and ensure legislative change reflects the will of the people.

**Supremacy of parliament can hinder the development of law because:**

- Each Parliament is limited by their jurisdiction. They can only make laws in the area of law-making in which they have the power to do so.

**CASE STUDY** **VICTORIAN PARLIAMENT CHANGES IN LEGISLATION**

The Victorian Parliament recently passed the *Road Safety Amendment (Automated Vehicles) Act 2018*. Obtaining royal assent in February 2018, this legislation establishes a regime for the trialling of automated vehicles on highways.

Similar to the permit scheme upon which human learner drivers apply, in this system, the 'automated driver system' is learning to drive. The permit holder is taken to be 'driving' when the car is in autonomous mode and the permit holder is liable for any offences outlined under the *Road Safety Act 1986* that relate to being in charge of a motor vehicle.

This can be seen as an example of the supremacy of parliament whereby a new situation occurred and parliament was able to take action to develop new laws when the need arose.

## The ability of courts to influence parliament 4.2.5.2

**The courts can influence parliament by providing feedback to parliament** in relation to the application and relevance of legislation they interpret and apply to cases before them.

Parliament makes laws *in futuro,* which means it cannot foresee all possible situations, and consequently makes laws in very broad terms in order to capture more fact situations. It is up to the courts to apply the law accordingly to each particular case before them.

**Through the process of statutory interpretation** the judges can provide ratio decidendi (reason for their decision) and obiter dictum (comments made by the way), which can outline whether the current legislation is relevant, covers all circumstances and/or has a real-life application. Furthermore, some specialised courts such as the Coroners Court (as below) can be more explicit and even develop recommendations for new legislation.

**The courts can help develop law because:**

- Courts complement parliament in developing areas of law through their judgements and expressing suggestions for law reform by parliament.
- The Coroners Court can make recommendations to parliament regarding law reform which can prompt legislative change.

**The courts can hinder the development of law because:**

- The requirement for standing can limit the number of cases that come before the courts through which the judges can make decisions and in doing so comment on whether the law ought to be changed by parliament. Courts cannot initiate such cases and must wait for a relevant case to come before the court.
- Parliament doesn't have to respond to the recommendations or suggestions from the courts and this only occurs on rare occasions in superior courts.

**CASE STUDY** **CORONERS COURT**

The Coroners Court of Victoria is a specialist court that investigates certain types of deaths and fires to consider ways these deaths and fires can be prevented in future. According to section 67 of the *Coroners Act 2008* (Vic)*:*

**1.** A coroner investigating a death must find, if possible–

**a)** The identify of the deceased; and

**b)** The cause of death; and

**c)** The circumstances in which the death occurred.

The court's main role is to make recommendations to reduce similar deaths in the future. There are around 45,000 deaths in Victoria each year, and 6,500 are reported to the Coroners Court.

*Source:* www.everyday-law.org.au/blog/victorian-state-coroner-sara-hinchey-shining-light-on-the-coroners-court

**CASE STUDY** **SAFE INJECTING ROOMS**

In February 2017, an inquest was undertaken into the death of Ms A. Ms A was found to have died of a heroin overdose after a history of drug abuse. In investigating the death, Coroner Jacqui Hawkins identified commonalities with other heroin overdoses in the Richmond area.

Coroner Hawkins stated 'my primary purpose is to, if possible "to contribute to the reduction of the number of preventable deaths and the promotion of public health and safety".'

The inquest sought a vast range of submissions from groups such as Victoria Police, outreach groups working in the Richmond area, Department of Health and Human Services and examined expert witnesses. Coroner Hawkins made the following recommendation:

> On the evidence before me, I am convinced that a safe injecting facility in North Richmond is an essential intervention that could reduce the risk of future heroin overdose death occurring in circumstances similar to those of Ms A. In conclusion, I support the establishment of a pilot safe injecting facility in North Richmond and accordingly have made that recommendation.

In July 2017 the Victorian Parliament amended the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) to introduce a safe injecting room pilot program.

*Source:* www.coronerscourt.vic.gov.au/resources/d48c9cdc-8db0-45b5-83c2-5ea6918e3ccd/ms+a_+241816.pdf

**USEFUL TIP** There are a number of tribunals and specialist courts on the Victorian Court hierarchy. In addition to the Coroners Court of Victoria there is a Children's Court of Victoria which hears matters involving young people, Victorian Civil and Administrative Tribunal (VCAT) hears a wide range of civil disputes and Victims of Crime Assistance Tribunal (VOCAT), provides financial assistance to victims of violent crime. Furthermore, there are specialist courts within the jurisdiction of the Magistrates' Court including; Koori Court, Drug Court and the Sexual Offences List.

## The interpretation of statutes by courts 4.2.5.3

**Statutory interpretation is** the courts giving meaning to the words in legislation when resolving a dispute.

Parliament makes laws *in futuro* (that is, laws that apply in the future), which means they often develop law that is quite broad in an attempt to ensure it can cover a number of different scenarios.

**CASE STUDY** Section 16 of the *Crimes Act 1958* (Vic) states 'A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.'

Notice the parliament included the broad term 'serious injury' to cover a wide range of scenarios (such as broken bones, bruises, concussion, etc). In addition, the broad phrase 'intentionally cause' covers a wide range of situations (rather than listing punching, kicking, stabbing, shooting, etc).

This is an example of legislation drafted by parliament in broad terms, to cover a wide range of cases. Judges will look at the facts of each case before the court and give meaning to the terms 'serious injury' and 'intentionally caused' to decide whether the specific facts of that case should result in a guilty verdict.

As a result, it is up to the courts when resolving a dispute to interpret the statute in order to apply it to the case before them. Statutory interpretation also allows the courts to 'fill the gaps' left by parliament and provide a real life application of the law.

**The interpretation of statutes by courts can help develop law because:**

- The courts are able to broaden the application of the law to real life cases through statutory interpretation.
- Through interpretation the courts can fill gaps and provide definitions to words which develops new law (as such interpretations form a precedent).

**The interpretation of statutes by courts can hinder the development of law because:**

- The judges may interpret the statute narrowly and restrict the application of a law.
- Judges may be conservative in their approach which may limit the development of the law.
- Judges can only interpret legislation and give meaning to the words in legislation when a relevant case comes before the courts; they cannot proactively change the operation of a statute.

**CASE STUDY** ***DEING v TAROLA* [1993] 2 VR 163 (THE STUDDED BELT CASE)**

Deing was wearing a belt with raised metal studs; he was arrested, charged and found guilty in the Magistrates' Court for possessing a regulated 'weapon'. The *Control of Weapons Act 1990* (Vic) stated it is illegal to possess, carry or use any regulated weapon without lawful excuse.

Deing appealed the conviction in the Supreme Court and Justice Beach determined that a weapon should be defined as anything that is 'not commonly used for any other purpose than as a weapon'. Deing's belt was found not to fit that definition of a weapon and his conviction was overturned.

This exemplifies the relationship between the parliament making legislation and the courts giving meaning to the words in that legislation (and setting a precedent when they do so): in future cases involving individuals charged with possessing an item that is allegedly a weapon, the statute and interpretation are read together to determine whether they are guilty.

## The codification of common law 4.2.5.4

**The codification of common law is** the classifying, restating and incorporation of case law into legislation. This occurs when parliament agrees with a principle of common law established by judges from a particular case and passes legislation to enshrine the legal principle.

**The codification of common law can help develop law because:**

- It enshrines the legal principles established by the courts, meaning future court cases cannot remove the principle of law created in the precedent.
- Parliament may legislate beyond the legal principles in the relevant court case by developing whole areas of the law.

**The codification of common law can hinder the development of law because:**

- Parliament may develop an area of the law through statute which may limit the ability of judges to continue to expand the area of law through common law.

**CASE STUDY** ***MABO v QUEENSLAND (NO 2)* [1992] HCA 23 & *NATIVE TITLE ACT 1993* (CTH)**

At the time of European settlement, Australia was deemed to be 'terra nullius' – land of no-one and therefore automatically owned by the British Crown.

Mabo challenged this principle of law claimed ownership of land on Murray Island.

In 1992 the High Court held 'terra nullius' was a legal fiction and that indigenous ownership of land in Australia (called 'native title') could exist if it could be proved:

- That there is a strong connection between the indigenous people and the land; and
- The land had not been bought/sold in the time since European settlement (as this extinguished indigenous ownership rights).

The Commonwealth Parliament codified this decision by passing the *Native Title Act 1993* (Cth). Through this they acknowledged aboriginal land rights and expanded the principle of law the High Court established by also creating the Native Title Tribunal where claimants could pursue their land rights

**USEFUL TIP** Be sure to use subject specific language in your writing. For example 'codification' and 'abrogation' rather than simply referring to parliament passing laws to override or update laws.

## The abrogation of common law 4.2.5.5

**The abrogation of common law occurs** when parliament disagrees with a legal principle developed by a court and renders the law invalid by passing legislation. In this situation the common law is superseded by the legislation passed by parliament. Parliament, as the supreme law-making power, has the ability to abrogate common law.

**The abrogation of common law can help develop law because:**

- Parliament is able to abolish legal principles developed through the courts they disagree with or believe no longer reflects society's values.

**The abrogation of common law can hinder the development of law because:**

- It may be time-consuming or controversial for parliament to abrogate a law that may be considered outdated and this can prevent parliament from legislating with regards to other matters.

**CASE STUDY** ***STATE GOVERNMENT INSURANCE COMMISSION v TRIGWELL* [1979] HCA 40**

The Trigwells were injured in a car accident caused by a roaming sheep. They sued the owners of the sheep.

The High Court decided to follow an old common law principle where a landowner didn't owe a duty of care for roaming livestock. This was reminiscent of a time when horses and carriages were used and could easily manoeuvre around grazing livestock.

Justice Mason suggested in his judgement that if a change to this law is required, it should come from Parliament. The Victorian Parliament later passed the *Wrongs (Animals Straying on Highways) Act 1984*.

This is an example of the Victorian Parliament abrogating the common law principle upheld in the Trigwell decision to ensure future cases were not decided in a similar manner.

**CASE STUDY** ***DE SALES v INGRILLI (NO 2)* [2003] HCA 16**

De Sales' husband was killed in an accident on a farm owned by Ingrilli; De Sales sought compensation. The Court determined compensation should be awarded and then reduced it by 5% according to an old English common law principle (the widow's discount), where a reduced amount of damages could be awarded if there was a good chance of remarriage for the plaintiff.

Ingrilli appealed to the Full Court of the Supreme Court arguing the discount should be 20% given De Sales' age and appearance. The appeal was upheld.

De Sales appealed to the High Court who upheld the appeal yet restored the original 5% discount.

The Victorian Attorney-General at the time, Rob Hills, regarded the concept of the 'widow's discount' as sexist and discriminatory. Victoria enacted the *Wrongs (Remarriage Discount) Act 2004* to provide no discounts for damages on the basis of remarriage prospects.

This is an example of outdated common law principles being abrogated by Parliament.

**USEFUL TIP**

Always use a case to help illustrate your answer. Imagine an exam question asking you to 'describe the abrogation of common law as a feature of the relationship between courts and parliament' – a brief example following your description will make your answer far more impressive!

Remember you don't need to include all the facts of the case, just an explanation as to why it is significant and how that case demonstrates the concept you are describing. Such as, 'For example, abrogation occurred after the Trigwell decision where the Victorian parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* to abrogate the decision made by the courts that the owners are not responsible for roaming livestock.'

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.5: Relationship between courts and parliament in law-making**

### Keen to learn more?

***Road Safety Amendment (Automated Vehicles) Act 2018*,** www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/6EADABCAD6531AB7CA2582410010E08A/$FILE/18-008aa%20authorised.pdf

**Coroners Court 'Finding into Death Inquest of Ms A',** www.coronerscourt.vic.gov.au/resources/d48c9cdc-8db0-45b5-83c2-5ea6918e3ccd/ms+a_+241816.pdf

***Mabo v Queensland (No 2)* ('Mabo case') [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992),** www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html

***State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617 (19 September 1979),** www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/40.html

QUESTIONS

# 4.2.5 Relationship between courts and Parliament in law-making

LEVEL 1:
Define and understand

**1.** Identify which of the following options is inaccurate with respect to the supremacy of parliament.

- **A.** Parliament is a sovereign body that is not answerable to anyone.
- **B.** Parliament is a sovereign body that has the ability to override other lawmaking bodies.
- **C.** Parliament can change existing laws when the need arises.
- **D.** Whilst parliament is the supreme law-making body, they cannot overrule decisions made by the High Court regarding constitutional matters.

**2.** Which of the following options best explains how obiter dictum can influence parliament to change the law?

- **A.** Judges can influence parliament to change laws through their obiter dicta. This is because the obiter dictum is an explanation of why the judge made the decision and if the new decision needed to become a law, this can influence parliament to react accordingly.
- **B.** A judge may overrule a precedent in which the ratio decidendi was outdated and did not reflect the views and values of society. In their obiter dictum, they may include a note that the previous precedent was outdated thus prompting parliament to change the law to align with these statements.
- **C.** A judge may choose not to overrule a precedent and instead disapprove of it, obiter dicta, which can influence parliament to change the law.
- **D.** A judge may set a new precedent for a case that comes before them. The media may then ask the parties outside the court how they feel and if they disagree with the precedent this may prompt parliament to change the law to reflect the views of the people.

**3.** Which of the statements below is incorrect?

- **A.** All courts can interpret statutes.
- **B.** Parliament cannot pass legislation in response to the court's interpretation of the words in a statute.
- **C.** Courts can narrow the meaning of a statute by interpreting it.
- **D.** Courts can create a broader meaning of a statute by interpreting it.

**4.** Which of the following options does not demonstrate codification of the common law?

- **A.** Justice Judy has just established a new precedent and developed common law. Parliament has reviewed Justice Judy's precedent and concluded that whilst Justice Judy is right, she has failed to foresee a potential flaw in the law. Consequently, parliament update the law.
- **B.** A member of parliament has discovered that there is a gap in the common law that was established last week. Consequently, the member enacts a bill to address this gap to ensure that the common law does not have loopholes that can be taken advantage of.
- **C.** A member of parliament has decided that a piece of common law should become an act of parliament to show that parliament supports this view of the law. This member drafts a bill for parliament that reflects the principles of the common law.
- **D.** A judge has a case come before them that has never come before the courts, nor is it reflected in statutes. They develop a new common law principle for the case which is then put into a new statute.

**5.** Which of the following scenarios reflects the abrogation of the common law?

**A.** The Victorian Parliament passed legislation to abolish the 'widow's discount' principle in response to the decision in *De Sales v Ingrilli*.

**B.** The Victorian Parliament passed legislation to ensure the 'widow's discount' principle applied in the *De Sales v Ingrilli* decision was applied in all future cases when an award of damages was made.

**C.** The Victorian Parliament knew the application of the 'widow's discount' in civil cases was disliked by a large portion of the community, but was powerless to act as such matters can only be decided by the courts.

**D.** None of the above options reflects abrogation of the common law.

LEVEL 2:
Describe and explain

**6.** Explain what is meant by the phrase 'supremacy of parliament'. (2 MARKS)

**7.** Explain how comments made obiter dicta can influence parliament to change the law. (2 MARKS)

**8.** The court's decision in *Deing v Tarola* is an example of which aspect of the relationship between the courts and parliament? Justify your conclusion. (2 MARKS)

**9.** With reference to an example, outline what codification of common law means and one reason why parliament would codify the common law. (3 MARKS)

**10.** Using an example, explain the relationship between parliamentary supremacy and the abrogation of the common law. (2 MARKS)

LEVEL 3:
Apply and compare

**11.** The Mabo decision prompted the Commonwealth Parliament to codify the High Court decision, creating the *Native Title Act 1993* (Cth).

Using examples, explain the difference between codification and abrogation. (4 MARKS)

**12.** Describe one example of a court case influencing law-making by parliament. Explain one reason why parliament cannot influence the decision-making of the courts. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**13.** Describe 'parliamentary sovereignty'. To what extent can the courts change the laws made by parliament? (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 2 (online), covering these lessons:

- **Lesson 4.2.4 Factors that affect the ability of the courts to make law**
- **Lesson 4.2.5 Relationship between courts and parliament in law-making**

Check with your teacher when it's time to complete this progress check.

# 4.2.6 Reasons for law reform

**Law reform (that is, making changes to the law), occurs for a number of reasons. Parliament, as the supreme law-making power monitors the need for law reform and implements modifications accordingly. Laws need to be relevant in the particular social, political and economic climate of the day.**

Parliamentarians, as elected representatives, seek to develop laws that are in the best interests of the people. Through consultation with the community they are able to determine the needs of the people. Furthermore, political parties monitor opinion polls, observe the actions of individuals and groups seeking legislative change and are mindful of significant events that highlight gaps or inconsistencies in the law.

In developing legislation parliament will consider the need to protect the community, reflect changes in social values and the obligation to promote a cohesive community.

Laws also need to change in order to improve the legal system to ensure the continued and enhanced achievement of justice, and to keep up with advances in technology. Significant events within the community can also highlight deficiencies in the current laws and prompt legislation change. Finally, constant evaluation of legislation ensures our laws are established to protect and uphold human rights.

This lesson covers VCAA Key Knowledge point: **'Reasons for law reform',** which we have broken down into the following concepts:



## Reasons for law reform 4.2.6.1

**There are a broad range of reasons for law reform.** It is parliament's role to monitor the needs of the community to ensure laws are reflective of their values, respond to contemporary social issues and ensure greater access to justice in all areas of the law.

| Reason for change in the law | Explanation of why laws changes |
|---|---|
| Community value shifts | Effective laws need to reflect community values as members of society are more inclined to follow laws they accept. Over time society's values and beliefs change and the law needs to adapt to ensure they reflect these changes. A law that is not consistent with the values of the majority of society will not be accepted.<br>For example, the development of the law in regards to same sex relationships:<br>• In 2015, Victoria made changes to the *Sentencing Act 1991* to recognise that homosexual sex between consenting adults should never have been a crime and developed a new scheme to expunge historical convictions.<br>• Most recently the Commonwealth Parliament legislated to enable same-sex marriage: *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). |
| Advances in technology | Technology develops at a rapid pace. Parliament makes laws *in futuro* (which means they apply to future situations). Legislators are not able to foresee all future technological advances and issues that may arise when technology changes.<br>Consequently, we tend to see advances in technology lead to new social issues arising; the possible legal implications of new technology are only known once there is an issue, at which point Parliament must respond. |

*cont'd*

| Reason for change in the law | Explanation of why laws changes |
|---|---|
| | For example, recent advances have included biomedical advances such as IVF, gene technology, and surrogacy. Recent changes were made to the *Gene Technology Amendment Act 2016* to ensure Victoria's legislation is in line with the Commonwealth and other state and territory legislation as part of the national gene technology scheme. |
| Protection of society | Parliament has obligations to develop legislation to protect society. Laws are established to develop a code of conduct surrounding violence against individuals, damage or theft of property and the way members of the community interact. In particular, parliament must change the law when it is clear that existing laws do not adequately protect those who cannot protect themselves.<br>For example, in 2015 changes to the *Crimes Act 1958* (Vic) were made, making it an offence for an adult to fail to report and protect a child from sexual abuse. |
| Significant events | Sometimes a significant event can occur which may prompt the need for legislative reform. There can be an outcry from the community which can place pressure on the parliament to act.<br>For example, the 2012 rape and murder of Jill Meagher by Adrian Bayley (who was at the time on bail and parole), highlighted the need for stricter parole laws. The Victorian Parliament reacted by passing the *Corrections Amendment (Parole Reform) Act 2013* which amends the *Corrections Act 1986* to include section 73A which makes the safety and protection of the community paramount to parole decisions. The new law also reformed membership of the Adult Parole Board and provided for the notification of registered victims before the release of a prisoner on parole. |
| Improving the legal system | To uphold the principles of justice (that is – access, equality and fairness) also requires legislative reform.<br>For example, in order to provide greater access to and fairness within the legal system for Aboriginal people, the Koori Court was developed and more recently the expansion of the Koori Court into the County Court, *County Court Amendment (Koori Court) Act 2008*.<br>For example, there have been recent changes to the jury empanelment process with a reduction in the number of peremptory challenges in criminal cases as outlined in *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic). The new changes seek to provide greater access to the legal system by reducing the time involved in jury empanelment and improve fairness with respect to the composition of juries so they more accurately reflect a cross-section of the community. |

**CASE STUDY** **CHANGING COMMUNITY VALUES – SAME SEX MARRIAGE**

- Over a number of years there has been a significant change in community values regarding same sex marriage.
- Up until 1949 male homosexual sex was punishable by the death penalty in Victoria.
- In 1980 Victoria decriminalised homosexuality by passing the *Crimes (Sexual Offences) Act 1980* (Vic).
- The *Relationship Act 2008* (Vic) enabled de facto and same-sex couples to register their domestic relationship to take into account property rights and financial interests.
- In 2015, Victoria made changes to the *Sentencing Act 1991* (Vic) to recognise that homosexual sex between consenting adults should never have been a crime and developed a new scheme to expunge historical convictions.

- Most recently the Commonwealth parliament legislated to enable same-sex marriage. *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

This illustrates how parliament can respond to changes in community values over time. As social values change parliament is able to respond accordingly to ensure our laws reflect social attitudes.

**CASE STUDY** **ADVANCES IN TECHNOLOGY**

- Technological advancements have seen the creation of driverless cars. Until recently Victorian road rules assumed a person is always in charge of a vehicle and therefore responsible for ensuring the car is driven in a safe way.
- The Victorian Parliament recently passed the *Road Safety Amendment (Automated Vehicles) Act 2018*.
- Obtaining royal assent in February 2018, this legislation establishes a regime for trialling automated vehicles on highways.
- Similar to the permit scheme upon which human learner drivers apply, in this system the 'automated driver system' is learning to drive.
- The permit holder is taken to be 'driving' when the car is in autonomous mode and the permit holder is liable for any offences outlined under the *Road Safety Act 1986* that relate to being in charge of a motor vehicle.

This is an example of advances in technology creating new social problems, and law-makers responding by passing legislation to address the new social issue (not the technology itself).

**CASE STUDY** **PROTECT SOCIETY – REFORM TO BAIL VICTORIAN BAIL LAWS**

- On Friday 21st January 2017, James Gargasoulas allegedly drove his car through the Bourke Street Mall which resulted in a number of serious injuries and deaths.
- Gargasoulas was charged with six counts of murder, 28 counts of attempted murder and conduct endangering life.
- Investigations showed that Gargasoulas was released on bail by a bail justice, a trained volunteer, days ahead of the attack.
- The Victorian government acknowledged the need for stricter bail laws and asked former Supreme Court Judge, the Hon. Paul Coghlan QC, to review Victoria's bail system.
- In response to this review, parliament passed the *Bail Amendment (Stage One) Act 2017* to ensure greater protection for the community.
- The Act amended the *Bail Act 1977* so that decision makers, including magistrates and judges, are required to give higher priority to community safety when making decisions.
- The Act also outlined that bail will be refused for a range of new offences. Unless the accused can show compelling reasons otherwise, bail will be refused for more offences such as:
  - Rape
  - Kidnapping
  - Armed robbery
  - Culpable driving causing death
  - Persistent contravention of a family violence intervention order
- In addition, in February 2018, *Bail Amendment (Stage Two) Act 2018* was passed which adopted further recommendations from Justice Coghlan's report including, amongst other changes, s.5AAA which ensures there is a greater consideration by a bail decision maker on family violence risks.

This is an example of new Victorian legislation designed to protect the community from dangerous individuals.

**USEFUL TIP**

Here's an example of an exam question about this topic:

2016 VCAA exam (Question 9a): 'Describe one reason why a law may need to change.'

The examiner's report said:

> Two marks were awarded for a full description of a reason why a law may need to be changed. Identification of a reason only was awarded one mark. An example was a good way to provide a more comprehensive description. Only the first reason given was assessed.

How to ensure you get full marks:

- Don't just name the reasons for law reform but explain why the law has to change as a response.
- Including a brief example of a recent change in the law will certainly add to your description of a reason for legislative change!
- If you're asked for one reason, only give one! Don't write two or three reasons, stick to the question.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.6: Reasons for law reform**

## Keen to learn more?

***Corrections Amendment (Parole Reform) Act 2013,*** www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/num_act/cara201362o2013405/

***Road Safety Amendment (Automated Vehicles) Act 2018,*** classic.austlii.edu.au/au/legis/vic/num_act/rsava20188o2018417/

**Wheelahan, F., Catania, P. & Westbrook, G. (2018) Steering the future: Victoria to welcome driverless cars,** www.corrs.com.au/thinking/insights/steering-the-future-victoria-to-welcome-driverless-cars/

QUESTIONS

# 4.2.6 Reasons for law reform

LEVEL 1:
Define and understand

**1.** The *Tobacco Amendment (Protection of Children) Act 2009* (Vic) was introduced which made it illegal to smoke in cars with children under the age of 18 years. This was done in an attempt to ensure that children are not exposed to secondhand smoke. Which option best describes the reason why this law changed?

**A.** Changing attitudes of the community; society now valued smoking as less important, therefore the law must change to limit where people can smoke.

**B.** Changing expectations of the legal system; it was expected that the law should ensure that children are not exposed to cigarettes or smoke.

**C.** Changing technology; due to the introduction of cars, the law must change to adapt to this change in technology.

**D.** Protection of the community; to protect children from being exposed to smoke at a young age.

LEVEL 2:
Describe and explain

**2.** A reason why laws may need to change is due to changing expectations of the legal system. Using examples, outline two other reasons for law reform. (3 MARKS)

LEVEL 3:
Apply and compare

**3.** 'Victoria has become the first state in the country to legalise assisted dying for the terminally ill, with MPs voting to give patients the right to request a lethal drug to end their lives from mid-2019.

After more than 100 hours of debate across both houses of parliament and two demanding all-night sittings, Lower House MPs ratified the Andrews Government's amended bill. The bill will now go to the Governor for royal assent.

Premier Daniel Andrews, who came to support euthanasia after the death of his father last year, said it was an historic day. 'This is a day of reform, a day of compassion, a day of giving control to those who are terminally ill,' he said.'

*Source:* www.abc.net.au/news/2017-11-29/euthanasia-passes-parliament-in-victoria/9205472

The above extract provides an example of a law reforming to reflect changes in society's beliefs, values and attitudes.

Explain two other reasons why laws may need to change. (4 MARKS)

**4.** 'In early 2016 Victoria led the way and became the first state in Australia to legalise access to medicinal cannabis. At the time there was no Commonwealth regulatory framework, and so the *Victorian Access to Medicinal Cannabis Act 2016* envisaged a stand-alone Victorian scheme that regulated both manufacture and patient access.

Following Victoria's leadership, legislative change at the Commonwealth level has brought the regulation of medicinal cannabis within the existing Commonwealth Narcotic Drugs and Therapeutic Goods regulatory frameworks. The Commonwealth has introduced a comprehensive regulatory scheme for cultivation and manufacture and changed the scheduling of cannabis products to clarify their status under existing Therapeutic Goods regulation.'

*Source:* www2.health.vic.gov.au/public-health/drugs-and-poisons/medicinal-cannabis/changes-to-framework

Laws need to change for a range of reasons. With this in mind, justify the Victorian and Commonwealth Parliament's decision to legalise access to medicinal marijuana. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** 'Every society has a range of values – in other words, principles and ideas about the way people should live, conduct themselves and be treated by others.'

*Source:* www.lawgovpol.com/values-and-the-law

Effective laws are stable and consistent and parliament must balance this consistency against the need to respond to society's values.

Discuss the extent to which parliament should respond to changes in society's attitudes through legislation. Justify your answer. (5 MARKS)

# 4.2.7 Role of individuals in law reform

**Historically individuals and organisations can be quite powerful in pressuring parliament for legislative change. Individuals and groups of people can publicly signify their desire for legislative change through a number of methods including petitions, demonstrations and the use of the courts. While individuals can independently request legislative change the request is considered far more powerful when there is a significant number of people advocating for the change. The 'power of the people' can be effective as their collective capacity can be more influential in establishing law reform.**

In addition, through the representative nature of parliament, members are expected to make laws for the benefit of the people and to reflect their will. Through regular elections the people have the power to elect law-makers who promise to pass laws that reflect their opinions and values. It also provides an opportunity to vote out a party who have not developed law that the people demand.

This lesson covers VCAA key knowledge point: **'the ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts',** which we have broken down into the following concepts:



## Petitions 4.2.7.1

**A petition is a** formal written request to parliament seeking legislative change and includes a collection of signatures. The petition will contain a request for parliamentary action and will make direct contact with the relevant minister and be tabled in parliament.

The Petitions Committee of the Commonwealth Parliament present the details of the petition to parliament, and also publish the issue and ministers response on the Petitions Committee's website. Both the Victorian and Commonwealth parliaments have strict rules regarding the format and content of a petition.

Recently the Commonwealth and state parliaments have accepted the use of e-petitions, if made through their parliamentary websites (which has made it less complicated to gather a large number of signatures). Some recent examples of petitions include those against live export (with over 200,000 signatures) and petitions requesting a ban on single-use plastic bags.

**Petitions can influence law-making by:**

- Bringing the particular issue to the attention of parliament and, in particular, the relevant minister.
- While a large number of signatures can demonstrate a high degree of support it is unlikely to influence law-making if it is not on the political agenda.

## Strengths and weaknesses of petitions 4.2.7.4, 4.2.7.5

| Strengths | Weaknesses |
|---|---|
| Individuals and groups in society can use petitions to make direct contact with parliament and the relevant minister. | The minister tabling the petition may have little influence over government policy and therefore be unable to initiate legislation in response to a petition. |

*cont'd*

| Strengths of petitions | Weaknesses of petitions |
|---|---|
| Petitions with a larger number of signatures can demonstrate significant support for the issue. | It can sometimes be hard to obtain a large number of signatures. Petitions with few signatures may minimise the issue or petitions from opposing views can highlight conflict of opinions. |
| As petitions are tabled in parliament it can raise public awareness of an issue. Even if there isn't legislative change it can bring attention to a possible need to change the law to the minister and the general public. | Petitions are not as visual as other methods of pursuing legislative change such as demonstrations and the use of social media. |
| E-petitions have made it much easier to gather a lot of support for an issue. | E-petitions can only be accepted through parliament's website and not other pressure groups' sites. |

**USEFUL TIP**

There are many petitions on a wide range of issues submitted to the Victorian and Commonwealth Parliaments each year; for example, 124 petitions were submitted to the Victorian Legislative Assembly in 2017. This could be considered a large number of petitions to consider, in addition to other work undertaken by the Assembly, limiting the impact petitions may have on law-makers.

There was a total of 97,000 signatures across these 124 petitions – from a population of 6.4 million Victorians it could be argued that this is a very low number of signatures and therefore the requests for law-reform within these petitions may have little impact on law-makers in Victoria.

*Source:* Assembly Statistics 54 (Legislative Assembly) parliament.vic.gov.au/images/stories/downloads/Statistics/Assembly_statistics_54_-_12-14_December_2017.pdf

**USEFUL TIP**

Be sure to mention that petitions are tabled in parliament! Also, while lots of signatures can demonstrate a high degree of support, for petitions to actually influence law reform the issue must be on the political agenda.

## Demonstrations 4.2.7.2

**A demonstration is** a rally or protest that is undertaken by a large group of people to bring an issue to the attention of parliament in an attempt to prompt legislative change.

To be successful they generally require a significant number of people and media attention. Demonstrations are usually held in a city CBD, seeking to literally stop traffic in the hope to gain the attention of the public. Participants may march through the city streets, chanting and holding placards, usually ending on the steps of Parliament House where there will be an assembly of people and speeches.

Some examples of recent demonstrations include Invasion Day demonstrations on Australia Day in protest to the treatment of Aboriginal People and demonstrations in support of marriage equality.

**Demonstrations can influence law making by:**

- bringing the issue to the attention of the community to garner further support and persuade more members of the community of the need for law reform
- bringing the issue to the attention of legislators and demanding law reform; a demonstration with many participants may indicate a larger proportion of the community wants the law to change.

## Strengths and weaknesses of demonstrations 4.2.7.4, 4.2.7.5

| Strength | Weaknesses |
|---|---|
| With a significant number of supporters a demonstration can be effective at bringing the issue to the attention of the public and persuading others of the need for law reform. | Without a large number of supporters demonstrations may be ineffective (suggesting that few members of the community want the law to change) and this requires a great deal of organisation and time. |
| With the support of the media the issue can be brought to the attention of the nation. | Unless there is media attention, protests are likely to be limited in their effectiveness at raising attention to the issue. |
| Demonstrations can arouse public awareness of the issue, in particular to the relevant minister. | Demonstrations can attract groups from opposing sides which can highlight conflicting opinions; if violence arises this may undermine the demands for law-reform and cause members of the community to be opposed to the views expressed in the protest (the opposite of what those organising a demonstration wish to achieve). |

## Use of the courts 4.2.7.3

**Individuals can prompt a change in the law by initiating litigation**, pursuing a matter through the court system.

**Individuals and groups may use the courts to influence law-making** as a party to a civil or criminal dispute who believes the law (either a common law principle or statutory interpretation) is inappropriate; such parties may appeal to a superior court seeking earlier precedent to be overruled and the law to be changed.

**It is important to recall** from Lesson 4.2.4 that:

- A party seeking to influence law reform by initiating legal action through the courts must have standing.
- The courts in the hierarchy that can change the law are the superior courts (such as the Court of Appeal and the High Court). In some cases the Supreme Court Trial Division and the Court of Appeal may be bound by precedent, and the law can only change if a party is granted permission to appeal to the High Court.

**The use of the courts can influence law-making in the following ways:**

- Superior courts may develop new principles of law when adjudicating a case. The court may find in favour of the individual, publicly asserting their rights and changing the common law.
  - For example, in *Imbree v McNeilly* [2008] the High Court overruled their previous decision in *Cook v Cook* [1986] in which they had found the standard of care owed by an inexperienced driver was reduced. In *Imbree v McNeilly* [2008] the High Court found the standard of care owed by an inexperienced learner driver was the same as all other road users, changing the law.
- A successful appeal to a superior court may not only change the common law principle, parliament may then respond by passing legislation to codify the new common law principle.
  - For example, in *Mabo v Queensland (No 2)* [1992] Mabo appealed to the highest court, the High Court, to hear his case. The High Court found that 'terra nullius' was a legal fiction and changed the common law, recognising indigenous Australians' rights to land. In 1993 the Commonwealth Parliament passed the *Native Title Act 1993*, which codified the common law established by the High Court.

- Even if there is an unfavourable decision for a party, the matter may nonetheless bring the issue to the attention of legislators and the public which may prompt legislative changes at a later point in time. Following a court case, parliament may choose to pass legislation to abrogate a common law principle that was operative in that case.
  - For example, in *State Government Insurance Commission v Trigwell* [1979] an appeal to the High Court found against the Trigwells and held that a landowner didn't owe a duty of care for roaming livestock. The High Court could have changed the law but felt it was not their place to do so. In response the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* abrogating the common law principle.

## Strengths and weaknesses of use of the courts 4.2.7.4, 4.2.7.5

| Strengths | Weaknesses |
|---|---|
| Litigation can bring matters to the attention of the broader community who may lobby the government for a change in the law. | Pursuing a matter through the courts can be extremely costly with legal representation and court costs. Even if a party is successful in their case and have costs awarded in their favour, they are still likely to attract some costs. |
| While the litigator would prefer a decision in their favour even a finding against them can still bring the matter to the attention of parliament and they can act to abrogate the common law. | In order to take a matter through the courts one must demonstrate they have standing, that is, be an aggrieved party with a direct interest in the case. Members of the community merely interested in the legal or social issue cannot use the courts to initiate change in the law (unlike methods such as a petition or demonstration). |
| The public nature of the courts and the use of the media may highlight the issue to the relevant minister or parliament which can influence election policies and legislative changes. | Litigation is very time-consuming due to not only the backlog of cases within the justice system but the processes and procedures involved. It can take months to years to resolve a matter through the courts. |

**USEFUL TIP** Be sure to always include evidence or a recent example to support your statements in a question!

### Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 4.2.7: Role of individuals in law reform**

### Keen to learn more?

**Parliament of Victoria – Petitions,** www.parliament.vic.gov.au/assembly/petitions
**Parliament of Australia – Petitions,** www.aph.gov.au/Parliamentary_Business/Petitions
***Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992),**
www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html
***State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617 (19 September 1979),**
www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/40.html
***De Sales v Ingrilli (No 2)* [2003] HCA 16; (2003) 212 CLR 338; (2003) 196 ALR 500 (8 April 2003),**
www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2003/16.html
***Imbree v McNeilly; McNeilly v Imbree* [2008] HCA 40 (28 August 2008),**
www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2008/40.html

QUESTIONS

# 4.2.7 Role of individuals in law reform

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

Petitions are a/an _____ pressure to _____ the law. They are a/an _____ statement asking for _____ to take action on a particular issue, signed by people who support it. A petition can be _____ as it allows for both a _____ number of members of _____ to voice their opinion. On the other hand, petitions can also be _____ as parliament may choose to simply _____ the petition.

**A.** informal; change; written; parliament; ineffective; large or small; the public; effective; ignore

**B.** formal; create; written; the courts; effective; small; parliament; ineffective; ignore

**C.** informal; change; written; parliament: effective; large or small; the public; ineffective; ignore

**D.** informal; abolish; oral; the courts; ineffective; large; parliament; effective; ignore

**2.** Michael is part of an Aboriginal advocacy group located in Melbourne, where they all agree that the date of Australia Day should be changed from the 26th of January, as a mark of respect for Indigenous Australians, who believe their land was taken from them on this day at the time of British settlement. They therefore want to try to influence parliament to change the date, but do not know which method to use. They want the method to gain media attention and be able to get a large number of people involved. They do not mind how long it takes to organise, and are willing to spend some money to make it effective.

Which method would be best and most effective for Michael and his group to use?

**A.** Petitions

**B.** Demonstrations

**C.** Media

**D.** Talking directly with a member of Parliament about the issue

**3.** Which of the following statements best describes a strength of the courts in influencing law reform?

**I.** Courts are independent and able to develop the law on controversial issues, if a particular case requires the development of a new precedent and is being heard in a superior court.

**II.** The courts can immediately change the law as the need arises in society.

**III.** Because a civil or criminal case can be taken straight to the High Court if it is important, the High Court is able to change the law quickly.

**IV.** Due to the doctrine of precedent, the way in which the courts apply and interpret the law is consistent and fair, as cases with similar circumstances are dealt with in a similar way and the law being very slow to change, even as society changes.

**A.** II and IV

**B.** I only

**C.** III only

**D.** IV only

**4.** Sarah wishes to raise parliament's attention to the current immigration policy and wants to change the laws regarding the detention facilities in Australia. She doesn't yet know how many people will be in support of the issue, therefore needs a method of influencing law reform that will be effective with a large or small number of people supporting it. She would also like a method that will get parliament's attention as directly as possible, as she knows that this is an issue which needs parliament's support in order to change. Identify which method of influencing law reform will best cater for Sarah's needs and hence be the most effective for her.

**A.** Petitions

**B.** Use of the courts

**C.** Stand for election to Parliament

**D.** Demonstrations

**5.** Fill in the blank spaces:

The use of _____ and judges can be a means of influencing law reform. While they are effective in changing law, there can be weaknesses in this method, such as the fact it is a _____ process; courts can take a _____ time to come to a decision and it can take a _____ to appeal to superior courts that are able to change the common law. This is also a weakness of other methods, such as _____ and _____. This is because it can take a _____ amount of time to find and gain a large amount of _____ of people showing their support for the issue, and a _____ time to find and organise the gathering of a large group of people who also all support the same issue.

**A.** parliament; lengthy; long; long; demonstrations; petitions; lengthy; signatures; long

**B.** the courts; complex; long, long; petitions; lobbying; lengthy; signatures; long

**C.** the courts; time consuming; long; long; petitions; demonstrations; lengthy; signatures; long

**D.** the courts; lengthy; long; short; demonstrations; petitions; large; support; long

LEVEL 2:
Describe and explain

**6.** Outline how petitions provide a way for the public's opinion to directly come in contact with parliament, and identify one strength and weakness of petitions as a means of influencing law reform. (3 MARKS)

**7.** Jenny works at a local primary school, where she and her fellow colleagues agree that it is unjust how little they get paid for the time and effort they put in to their job. As a result, all the teachers at the school go on strike, in an attempt to attract parliament's attention about the low pay teachers receive with the hope of influencing law reform in this area.

Identify the method of influencing law reform in this case and outline one strength and one weakness of this method. (3 MARKS)

**8.** Identify the method used by Eddie Mabo to influence law reform about indigenous land rights, and describe one strength of this method. (3 MARKS)

**9.** Both petitions and demonstrations are effective as they can direct parliament's attention to a particular issue, either by being tabled in parliament, or by groups voicing their opinion publicly.

Identify and describe another method of influencing law reform, and explain why it is an effective method of attempting to change the law. (3 MARKS)

**10.** Amy is passionate about her support against animal cruelty, and wants to ban the export of live trade out of Australia.

Describe petitions as a method she could use to influence law reform and outline one limitation of petitions in affecting law reform. (3 MARKS)

LEVEL 3:
Apply and compare

**11.** Sally is a president of a local advocacy group seeking to improve rights for the LGTBIQ community. She doesn't have a lot of money and manages the organisation through donations. Sally is hoping to tap into the International Day Aagainst Homophobia, Biphobia and Transphobia (IDAHOBiT Day) to raise awareness of the needs to improve LGBTIQ rights, however it is only a few weeks away.

Advise Sally what kind of methods used to influence law reform would be most suitable for her in this situation. (4 MARKS)

**12.** Describe a demonstration and outline its purpose. (3 MARKS)

### Union rally for minimum wage increase disrupts Melbourne's CBD as tens of thousands march

**ABC News**
May 9, 2018 2.13pm AEST

Parts of Melbourne's CBD have been brought to a standstill as tens of thousands of people rally for an increase to Australia's minimum wage.

The huge crowd marched from Trades Hall on Victoria St to Federation Square, moving down Latrobe Street, Lonsdale Street and Swanston Street.

Trams were delayed and traffic disrupted as protesters made their way through the CBD.

Police also closed roads in some sections of the city. The march was part of the Australian Council of Trade Union's Change the Rules campaign which is calling for $50 per week increase to the minimum wage.

Australian Council of Trade Unions secretary Sally McManus said the campaign was also fighting to reverse cuts to penalty rates and improved working conditions.

*Source:* 9th May 2018, www.abc.net.au/news/2018-05-09/union-protest-minimum-wage-in-melbournes-cbd/9742280

LEVEL 4:
Discuss and evaluate

**13.** 'It's never been easier to start a petition online, and thanks to social media there are not thousands of individuals and groups online appealing for support for their cause. Currently there are petitions online calling on Mount Isa Council to grant a reprieve for a pet pig, two 12-year-old boys asking for a half pipe in their neighborhood, as well as a request to the House of Representatives to create a ladies-only beach in Perth. Thousands more sign the petitions and share them on social media but do any of them ever cut through and lead to real change?'

*Source:* www.abc.net.au/news/2016-12-15/are-online-petitions-ever-effective/8124388

Evaluate the ability of petitions to effect legislative change. (5 MARKS)

**14.** 'The judgments of the High Court in the Mabo case inserted the legal doctrine of native title into Australian law. In recognising the traditional rights of the Meriam people to their islands in the Torres Strait, the Court also held that native title existed for all Indigenous people in Australia prior to Cook's Instructions and the establishment of the British Colony of New South Wales in 1788. This decision altered the foundation of land law in Australia.'

*Source:* www.foundingdocs.gov.au/item-did-33.html

To what extent can the use of the courts to influence legislative change be effective? (5 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 3 (online), covering these lessons:

- **Lesson 4.2.6 Reasons for law reform**
- **Lesson 4.2.7 Role of individuals in law reform**

Check with your teacher when it's time to complete this progress check.

# 4.2.8 Role of the media in law reform

**The media has long been a mechanism through which information and ideas can be brought to the attention of the people. The media can quickly communicate information, raise awareness of a legal or social issue, present opinions and seek and present feedback from the community. The exchange of information can help individuals to form and develop opinions about issues and consequently pressure the parliament for law reform.**

While the sharing of information can inform and persuade the public, parliament can also draw important information from it. Law-makers monitor the media to determine the current concerns of the public and issues that may be 'trending' on social media. Furthermore, many members of parliament have social media accounts and will engage directly with the public through these forums. Through this process, government can gain an insight into areas of the law that require reform and respond accordingly.

The media can be divided into two classes; traditional and social. Traditional media includes television, newspaper and radio while more recently we have seen the emergence of social media which includes tools such as Facebook, Snapchat, Instagram and Twitter. Social media has made communication on legal and social issues far more accessible to individuals wanting to share their stories and opinions on legal issues.

This lesson covers VCAA key knowledge point: **'Role of the media, including social media, in law reform',** which we have broken down into the following concepts:



## The role of the media, including social media, in law reform 4.2.8.1

**The 'media' includes** traditional media sources such as newspapers, radio and television, including talkback radio in which members of the public express their opinions on social issues, and investigative journalism where complex issues are explored in detail.

**'Social media' includes** platforms such as Twitter, Facebook and Instagram.

**How traditional and social media can influence law-reform:**

- Exposing social issues and injustices, creating community awareness regarding how the existing law may be inadequate in a particular area (which can then lead to law-makers passing new laws in response to community opinion on the issue).
- Making law-makers informed of community opinion on social issues, who may then change the law to match community opinion.
- Groups using the media to persuade voters to hold a particular opinion on a social issue; law-makers may then change the law to retain the support of these voters.

| How media influences law-reform | Examples |
|---|---|
| **Media exposes social issues and injustices, creating community awareness regarding how the existing law may be inadequate** in a particular area (which may then lead to law-makers passing new laws in response to community opinion on the issue). | ABC Four Corners have broadcast many investigations which have brought issues to the attention of Australian community and caused such a vocal community backlash there have been parliamentary inquiries and law reform. Some issues include:<br>Live sheep export:<br>Created such concern for animal welfare in 2018 the Labor Party promise to pass laws stopping live sheep exports if elected at the next federal election (in 2019). |

*cont'd*

| How media influences law-reform | Examples |
|---|---|
| | Multinational companies avoiding paying tax:<br>Episodes about large international companies minimising the tax they pay in Australia generated public outcry, and in 2017 new laws were passed by the Commonwealth to reduce this practice. |
| **Media makes law-makers informed of community opinion on social issues;** members of parliament then change the law to match community opinion. | Marriage Equality<br>In 2017 #marriageequality was the most popular hashtag on Twitter in Australia; this further ensured law-makers understood the widespread public desire for this change in the law. |
| **Community groups/businesses use the media to persuade voters to hold a particular opinion** on a social issue. Law-makers then change the law to retain the support of these voters. | The GetUp! website and its use of Twitter and Facebook attempt to persuade voters to hold a particular opinion regarding a variety of their campaigns such as:<br>• Stop the Adani mine<br>• Save the Murray-Darling<br>• Stopping offshore detention on Manus Island and Nauru<br>This may lead individuals to change their opinion and support members of parliament who plan to change the law accordingly. |

**CASE STUDY**

**FOUR CORNERS – AUSTRALIA'S SHAME**

- In 2016, Four Corners broadcast 'Australia's Shame'.
- The investigation focused on the treatment of children in juvenile detention centres in the Northern Territory.
- In particular there was footage from the Don Dale Juvenile Detention Centre where minors were handcuffed to chairs, held in solitary confinement and tear gas was used to subdue the inmates.
- The episode prompted the Prime Minister to call for a Royal Commission into the Northern Territory's juvenile detention centres.
- In 2018, the Northern Territory announced it will fund 200 of the recommendations made by the Royal Commission in a $229 million package focused on preventing children and families from entering the child protection and justice systems.

*Source:* www.abc.net.au/4corners/australias-shame-promo/7649462

**USEFUL TIP**

Students need to **analyse the influence** of the media in law-reform; this requires students to comment on the media's impact and justify this position referring to strengths and weaknesses of the media's impact on law-reform.

**Analysing the role of the media in law-reform**

| Strengths | Weaknesses |
|---|---|
| The media, through its broad reach, can gain widespread support for a particular change in the law. | Through a variety of different forms the media can demonstrate conflicting views on an issue. This may make parliament reluctant to change legislation for fear of voter backlash. |
| Government can follow the media and determine where the community's interests lie and respond accordingly in enacting law reform. This ensures that they retain the support of the community so they are not voted out of office at the next election. | The government will normally only make legislative change if it is on their political agenda. |
| Social media has meant individuals (and community/ business groups) can quickly and easily garner support for an issue, rather than waiting for the mainstream media to capture the story. | The media is only effective at influencing law-reform if the broader community gets behind an issue and demonstrates their support and demands legislative change.<br>Some individuals use social media to promote offensive or extreme changes in the law, leading law-makers to perhaps disregard social media commentary on some issues altogether. |
| The general public has access to the media and a vast array of information from a number of different sources. This can enable them to gain information to form their own political judgements and pressure law-makers to change the law in other ways (such as indicating their voting preferences will change in response to a need to change the law). | The media can sometimes oversimplify issues. Furthermore, while the traditional media is regulated to some extent, social media is not which may mean the dissemination of unreliable ideas and facts. |

**USEFUL TIP**

It's important not to assume the assessors 'know what you know'. Always be clear what you mean and don't just write 'the media' but rather explain **which form of media** and **how it can influence changes in the law**. The explanation is really important, not just an example!

It's important to explain how the media can lead to a change in the law – it's not enough to merely provide an example without the explanation.

For example, during the same sex marriage debate the media was used extensively to promote the opinions of both sides of the debate. Television ads were created to try to promote the issue to the broader community and, in turn, lobby the parliament for change. In addition, social media was used to raise awareness with the use of rainbow filters to demonstrate support and television programs such as Q&A provided an opportunity for discussion and the community to ask politicians directly questions relating to these changes in the law.

This cumulative effect placed pressure on parliament to make legislative changes, in particular, the creation of the national postal vote and, consequently the enactment of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:
**Lesson 4.2.8: Roles of the media in law reform**

## Keen to learn more?

**Get Up!,** www.getup.org.au
**Change.org,** www.change.org
**Four Corners,** www.abc.net.au/4corners/
**The Age,** www.theage.com.au
**Q&A,** www.abc.net.au/tv/qanda/
**ABC News,** www.abc.net.au/news/
**Four Corners – Australia's Shame,** www.abc.net.au/4corners/australias-shame-promo/7649462
**What Australia talked about: Twitter reveals top trends of 2017,**
www.sbs.com.au/news/what-australia-talked-about-twitter-reveals-top-trends-of-2017

QUESTIONS

# 4.2.8 Role of the media in law reform

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

The use of media as a means to influence law reform has changed drastically over the past decade through the introduction of _____ media. The advantage of this new type of media is that information can be spread _____ and _____. Social media as a means for law reform can _____ coverage of parts of news stories. Moreover, because so many people can access social media, this can render the information it disseminates _____ reliable but _____ accessible.

**A.** social; more rapidly; reach a wider audience; oversimplify; less; more

**B.** social; more rapidly; more accurately; oversimplify; less; more

**C.** news; earlier; more accurately; increase detail; more; more

**D.** social; more rapidly; reach a wider audience; increase detail; more; more

LEVEL 2:
Describe and explain

**2.** Describe one limitation of using social media to influence law reform. (2 MARKS)

LEVEL 3:
Apply and compare

**3.** Compare the process of influencing a change in the law between the use of demonstrations and social media. (4 MARKS)

**4.** In 2016 Four Corners broadcast 'Australia's Shame', an investigation which showed the shocking treating of children behind bars. The episode prompted the Prime Minister to call for a Royal Commission into the Northern Territory's juvenile detention centres. In 2018 the Northern Territory announced it will fund 200 of the recommendations made by the Royal Commission in a $229 million package focused on preventing children and families from entering the child protection and justice systems.

Using examples, describe two ways the media can prompt legislative change. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** 'The media can also play a lead role in bringing about changes to the law. Perhaps the most obvious impact of the media is that it can shape and influence public opinion and values – and where the media exposes or reflects a clear shift in public opinion and values, this may bring about a change to the law. The media can generate public interest or even outrage about a particular issue or case, which may create pressure for governments and law reform bodies to act. The media can provide a platform for interest groups campaigning for law reform.'

*Source:* The Media and Law Reform, http://lawgovpol.com/media-law-reform/

Discuss the ability of the media to influence legislative change. (5 MARKS)

# 4.2.9 Role of the Victorian Law Reform Commission in law reform

**Formal law reform bodies are organisations that are used by state and Commonwealth governments to inform them of potential areas of law reform. In Victoria, the formal law reform body is the Victorian Law Reform Commission (VLRC).**

The commission is an independent body established by the *Victorian Law Reform Commission Act 2000* (Vic) in order to investigate law reform, suggests areas of law reform to research and undertake educational activities.

The VLRC will most commonly review particular laws and recommend changes to the law in response to a request from the Victorian Attorney-General. The Attorney-General provides terms of reference (indicating what laws to review and a timeframe in which to finalise recommendations for change) to the VLRC, who then consults a body of experts, investigates the issue, develops a research paper and seeks feedback from the community. The VLRC consults with the community through seeking submissions and holding discussion groups. They make recommendations in the form of a report which is tabled in the Victorian parliament. Parliament can choose to adopt all, none or some of the recommendations.

The VLRC have investigated a broad range of issues with many of the recommendations prompting legislative changes. Some of the completed projects include:

- Abortion law reform
- Bail laws
- Family violence laws
- Jury directions and jury empanelment

In addition to areas of law referred to them by the Attorney-General, the VLRC can also investigate smaller issues (community law reform projects), without a reference. These are only a small portion of the VLRC's work. Some examples of community law reform projects include:

- Birth Registration and Certificates
- Assistance Animals
- Supporting Young People in Police Interviews

This lesson covers VCAA key knowledge point: **'Role of the Victorian Law Reform Commission in law reform',** which we have broken down into the following concepts:



## The role of the Victorian Law Reform Commission 4.2.9.1

**The main role of the VLRC is**:

- To make law reform recommendations on matters referred to it by the Attorney-General.

**Other roles of the VLRC include to:**

- Make recommendations on minor legal issues of general community concern.
- Suggest to the Attorney-General that he or she refer a law reform issue to the Commission.
- Educate the community on areas of law relevant to the Commission's work.
- Monitor and coordinate law reform activity.

**USEFUL TIP** Be sure not to confuse the role of parliament and the role of the VLRC. The VLRC doesn't actually enact legislative reform, only parliament can pass laws! The VLRC only makes recommendations to changes in the law.

## The ability of the VLRC to influence law reform 4.2.9.2

| ***Ability* to influence law reform** | ***Limitations* of influencing law reform** |
|---|---|
| As the terms of reference comes from the Attorney-General the government is likely to change the law in response to the VLRC's report – as they have asked the VLRC to investigate the area of the law in the first place. | There is no obligation on the part of the government to enact any of the recommendations. |
| The VLRC does have some autonomy and can research minor legal issues without a reference from the Attorney-General. | The VLRC is limited by the terms of reference. That is, they can only conduct research and suggest new laws within the areas outlined by the Attorney-General.<br><br>Further, any reform projects initiated by the VLRC itself can only be on minor issues and are a small portion of the work the VLRC does. |
| The VLRC can consult broadly with the community and this is seen as strength as they can reflect public concern. New laws will more accurately reflect community values, and such new laws will be more likely to be accepted and followed. | Holding discussion groups with the community, reviewing submissions and speaking with those directly affected by the law can be very time-consuming. Projects tend to take approximately 18 months to complete; it then takes time for parliament to enact legislation to give effect to the VLRC's recommendations. Therefore, law can be slow to change in response to changes in society. |
| The VLRC is able to investigate an area of the law comprehensively and has access to experts in the area. New laws based on VLRC recommendations will be more likely to solve the social issue in question, if based on experts' knowledge. | Investigations can be very costly. The employment of experts in the field, in addition to staff from the Commission can increase costs. Given the VLRC's limited budget, not all law reform issues can be referred to the VLRC for these thorough investigations. |
| The VLRC is independent of political parties and is able to review laws on controversial matters objectively and deliver a set of recommendations for law reform to parliament based on expert opinion and the views of those in the public who make submissions. The review of Victoria's abortion laws in 2007/08 and the 2014/15 review of access to cannabis are examples of this independent review of the law about very controversial matters. | The VLRC cannot change the law, this remains the role of the elected parliament which is subjected to political pressures.<br><br>However, the public nature of the VLRC's recommendations based on expert opinion and the views of the wider community should counteract internal political pressures that can otherwise prevent law reform. |

**USEFUL TIP**

Students will often be asked questions linking together concepts in the course. For instance, you need to be able to describe the link between the work of the VLRC and the law-making by parliament.

In the 2017 VCAA exam students were asked:

> Explain the relationship between the Victorian Parliament and the Victorian Law Reform Commission (VLRC). (4 MARKS)

The big mistake students made in this question? Writing a prepared/memorised definition of the VLRC and what it does (an all-to-common problem in the Legal exam) – which didn't answer the actual question!

The examiner's report included the following commentary:

> The role of the VLRC was not the focus of the question, and so students who gave this explanation were not awarded full marks. Higher-scoring responses described various features of the relationship between the two bodies. For example, these responses mentioned that:
>
> - The VLRC is a creature of statute; that is, the Victorian Parliament created it and gave it its powers.
> - The Attorney-General, a member of parliament, can refer to the VLRC a matter relating to law reform.
> - The VLRC can make recommendations to the Attorney-General on any proposal or matter. Its report is tabled in parliament.
> - There are no obligations on the Victorian Parliament to adopt the recommendations made by the VLRC.

## One recent example of the Victorian Law Reform Commission recommending law reform 4.2.9.3

In October 2018 the Victorian Attorney-General requested the VLRC to conduct a review of the law regarding contempt of court (among other matters, including laws regarding the publication of material which identifies victims of sexual assaults). In February 2020 the VLRC submitted its recommendations for law-reform to the Attorney-General; its report was tabled in the parliament and published in August 2020.

A 'contempt of court' is any action which interferes with the fair and efficient operation of the justice system - a very broad range of conduct, including:

- Conduct inside a courtroom that interferes with a hearing, such as a witness yelling abuse at a barrister.
- A party to a case threatening violence against a judge.
  - For example, consider the conduct of the offender in *R v Slaveski* [2012] VSC 7 (for which he was imprisoned).
- Disobeying court/VCAT orders.
  - For example, in *Melbourne CC v 160 Leicester Pty Ltd (No 2)* [2020] VCAT 1435 the Tribunal imprisoned two men for failure to comply with an order made by VCAT in 2019. The two men had unlawfully demolished the historic Corkman Hotel; VCAT had ordered them to clear the site in preparation for creating a public park, which they did not do.
- Publishing information/making statements that undermine the public's confidence in the ability of the courts to administer justice in a way that is fair and competent.
  - For example, in 2017 the Supreme Court considered contempt proceedings against three federal government ministers before they apologised and retracted their comments about the courts' sentencing procedures. See *Statement of the Court of Appeal in DPP v MHK and DPP v Besim (23 June 2017)*.
- Publishing information regarding a court proceeding, in defiance of a suppression order and/or whilst a criminal matter is underway which may prevent a jury from remaining impartial (such as an accused person's prior convictions).
  - For example, *R v Nationwide News* [2018] VSC 572.

**Reasons for law reform**

The VLRC identified a range of issues with the existing law of contempt, including (but not limited to):

- The law of contempt is a common law offence, scattered throughout decades of written judgements (with some further conduct labelled as contempt in various statutes). As a result:
  - The law is difficult to access and follow - for instance, a person or news outlet considering making a statement about the courts (or a particular legal dispute) or planning to make particular comments in court cannot easily identify what conduct is and is not a contempt of court.

  - There is no unified set of principles defining what is and isn't contempt. Judges have a very wide discretion to determine whether particular conduct is a contempt of court. The common law includes examples of certain conduct being deemed a contempt of court, but no clear categories of what is and is not contempt.
- Given courts' discretion in this area, there is a risk that courts' decisions in contempt matters may limit the free expression of opinions regarding the justice system - that's an issue in a liberal, democratic society.
- There is no maximum penalty for a party convicted of contempt. A court may impose a fine, imprisonment - again, judges have wide discretion here.
- The language used to describe certain types of contempt (such as 'scandalising the court', 'contempt in the face of the court' and 'sub judice contempt') is outdated and unclear.
- The procedure for starting and conducting contempt proceedings is unclear. In some cases the OPP initiates contempt proceedings, sometimes it's a judge. An offender can be imprisoned, but has no access to a jury trial or committal proceeding.
- The common law regarding contempt was developed decades ago. Contempt proceedings against newspapers and local radio broadcasters who published material that might prejudice a jury and prevent an accused person receiving a fair trial made sense in the mid-20th century. Such laws aren't fit for purpose in a time of global, online news media in which overseas publishers can report on conduct within the Victorian courts (and Victorians can read such material online, even if a Victorian court has issued suppression orders restricting publication by local news outlets).

An effective law must be clear and allow members of society to know what conduct is acceptable. The consequences for breaching such a law must also be known and understood. The existing law of contempt fails to meet these criteria.

**Consultations & submissions**

In May 2019 the VLRC published a consultation paper describing issues with the existing law regarding contempt. The VLRC received 34 written submissions and conducted 27 consultation meetings with legal practitioners, academic experts, judges and court staff with respect to the existing law and options for law reform.

**Recommendations**

In 2020 the VLRC proposed the Parliament of Victoria resolve these issues through legislation - a Contempt of Court Act; such legislation would:

- Make the law regarding contempt more accessible - individuals, businesses and the courts would be more able to determine which conduct/publication is and is not acceptable (which would be useful to media outlets seeking to publish information and commentary about the courts' operation).
- Create clear maximum penalties for particular types of contempt - for example, non-compliance with a court/VCAT order would attract a maximum prison term of 5 years.
- Modernise the language used regarding contempt (replacing terms such as 'sub judice' and 'scandalising the court').
- Clearly define types of contempts (and the consequences for breaches). For instance, the VLRC proposes including:
  - **a)** Contempt by conduct that interferes with a court proceeding (intentionally disrupting a trial, abusing or assaulting persons within the court, etc);
  - **b)** Non-compliance with court orders;
  - **c)** Publication of material that prejudices a person's right to a fair trial; and
  - **d)** Publication of material undermining public confidence in the judiciary and the courts.
- Protect free speech. The proposed new contempt offences regarding publication (c and d, above) would be punishable only in serious cases. The VLRC's proposal aims to protect the free communication of opinions and information regarding the courts' proceedings and decisions. Only those comments which pose a serious risk to the courts' authority and the public's confidence in the courts would be actionable, not statements of opinion made in good faith.
- Ensure persons accused of a contempt offence receive a fair and independent hearing. Assume a judge witnesses a potential 'contempt by interfering with a court proceeding' when a witness repeatedly swears and yells at a barrister - the VLRC's proposal would prevent that same judge adjudicating any contempt hearing that follows.

**USEFUL TIP** One of the important aspects of the VLRC is that it consults extensively with the community through seeking submissions, discussion groups and publishing draft reports for public comment. Don't forget to use these examples in your answer.

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.9: Role of the Victorian Law Reform Commission in law reform**

## Keen to learn more?

***Victorian Law Reform Commission Act (2000),***
www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/vlrca2000344/

**Victorian Law Reform Commission,** www.lawreform.vic.gov.au

**Victorian Law Reform Commission - Contempt of Court, Judicial Proceedings Reports Act 1958 and Enforcement Processes,**
www.lawreform.vic.gov.au/all-projects/contempt

QUESTIONS

# 4.2.9 Role of the Victorian Law Reform Commission in law reform

LEVEL 1:
Define and understand

**1.** Fill in the blank spaces:

The Victorian _____ Reform Commission is a/n _____ and _____ body, funded by _____. Its role is to _____ the effectiveness of existing laws, _____ law reform and then _____ law reform to parliament.

**A.** law; informal; dependant; the taxpayer; review; research; change

**B.** legal; formal; independent; the Victorian government; review; research; change

**C.** law; formal; independent; the taxpayer; review; research; recommend

**D.** law; formal; independent; the Victorian government; review; research; recommend

LEVEL 2:
Describe and explain

**2.** The VLRC conducts detailed research of potential law reform, engaging with the public, professionals and other important individuals. They take careful time considering how the law should be changed.

Explain why this results in more effective laws but the VLRC cannot change legislation. (2 MARKS)

LEVEL 3:
Apply and compare

**3.** In 2018 the Chairperson of the VLRC decided independently to investigate the Victorian law regarding contempt of court. The Commission held extensive public consultations throughout Victoria. To ensure the VLRC's independence, written submissions were not accepted from affected parties such as judges, legal practitioners and the courts. The VLRC developed a report from their research and consultation with the community which made many recommendations to reform the law of contempt. In 2020, the VLRC passed the *Contempt of Court Act 2020* (Vic) clarifying which conduct is punishable as a contempt of court and setting maximum prison terms that may be imposed in such cases.

Identify three errors in the above extract and provide the correct process or procedure. (3 MARKS)

**4.** The following is an extract from a recent VLRC publication:

> The Victorian Law Reform Commission has been asked to make recommendations to improve the response of the justice system to sexual harm.
>
> We want to hear your views. You can help us understand what works well now, and what can be improved.
>
> We are interested in hearing from anyone who has professional or personal experience in this area, and anyone who has ideas for reform...
>
> We have been asked to focus on:
>
> - barriers to reporting sexual offences: what prevents people from reporting sexual harm
> - why reports of sexual harm may not proceed through the justice system
> - how to reduce the trauma of victim survivors in the justice system
> - how to improve data collection and reporting
> - the best ways of responding to sexual offences—including alternatives to the justice system
> - how to build on previous reforms.
>
> *Source: Improving the Response of the Justice System to Sexual Offences Issues Papers A-H Oct 2020, VLRC.*

The above extract relates to a Victorian Law Reform Commission project that is currently under investigation. Describe an example of one recently completed VLRC project and explain the purpose of the VLRC in developing law reform. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**5.** I am suggesting that our independence from the executive is expressed through this relationship to consultation, because there is a deep and sincere commitment to finding out what the community feels about the laws under review and gives them a voice in suggesting how the laws could be reformed. There are many law reforms that happen as a result of government will or ideology—as part of political platforms. But this should not drive independent law reform.'

'Law Reform Agencies and Government—Independence, survival and effective law reform?' Emeritus Professor Rosalind Croucher AM, President, Australian Law Reform Commission, Commonwealth Association of Law Reform Agencies, Melbourne, 25 March 2017.

*Source:* www.alrc.gov.au/news-media/speech-presentation-article/law-reform-agencies-and-government%E2%80%94independence-survival-and

Evaluate the extent to which the VLRC is able to influence law reform. (6 MARKS)

**Time for some exam practice!**

You're ready for Progress Check 4 (online), covering these lessons:

- **Lesson 4.2.8 Role of the media in law reform**
- **Lesson 4.2.9 Role of the Victorian Law Reform Commission in law reform**

Check with your teacher when it's time to complete this progress check.

# 4.2.10 Role of Royal Commissions in law reform

**Royal Commissions are independent bodies established by the Queen's representative, (the Victorian Governor or the Governor-General) on the recommendation of government to investigate a particular issue. These inquiries act independently to parliament, consult significantly with the community, are transparent in nature and have an inquisitorial focus on determining the truth. The government will define the scope of the investigation, appoint the commissioner (who is usually a retired judge), and outline the time frame within which the inquiry needs to be completed.**

This lesson covers VCAA key knowledge point: **'Role of Royal Commission in law reform'**, which we have broken down into the following concepts:



## The role of Royal Commission 4.2.10.1

**A Royal Commission is** the highest form of inquiry and they investigate a particular issue through consultation with experts and the community by seeking submissions and holding hearings. They develop a final report of recommendations of law reform which is tabled in parliament.

Royal Commissions can explore an area of policy, encompassing social, legal and political issues in their research. Alternatively, they can investigate a particular incident or allegation and be inquisitorial in their approach, seeking to determine the truth regarding the incident.

Royal Commissions, through their inquiry, gain a strong understanding surrounding the issues being investigated and are able to make recommendations to government about changes to the law.

**A particular feature of Royal Commissions is their coercive power of investigation**. Royal Commissions can:

- Summons a person to appear before the commission
- Require individuals to give evidence under oath
- Require individuals/businesses/organisations to produce evidence under oath
- Provide penalties of up to two years imprisonment for those who fail to attend or produce documentation as directed.

**This coercive power provides a Royal Commission with** a greater ability to determine the truth, gain an insight into the issue and review all the evidence. This provides for a greater understanding of the social or legal issue, so new laws can be enacted to most effectively resolve the issue.

**In addition, Royal Commissions are independent of politics** and may therefore be asked to investigate controversial matters which enables parliament to delay legislating in areas considered contentious and wait for the recommendations from the independent commission.

**Some recent examples of Royal Commissions include:**

**Commonwealth:**

- Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 2017–2019
- Royal Commission into Trade Union Governance and Corruption 2014
- Royal Commission into Institutional Responses to Child Sexual Abuse 2013.

**Victoria:**

- Victorian Bushfires Royal Commission 2009
- Royal Commission into Family Violence 2015.

**USEFUL TIP** Be sure to remember that Royal Commissions make recommendations, they don't change the law. Only parliament can make legislative changes!

## Ability of Royal Commissions to influence law reform 4.2.10.2

While Royal Commissions have a far-reaching scope with regards to connecting with the community and access to experts, their ability to influence law reform is ultimately dependent on parliament passing legislation. Furthermore the time and money involved in these investigations can be significant.

**Royal Commissions' ability to influence law-reform: strengths and weaknesses**

| ***Ability*** **of Royal Commissions to influence law reform** | ***Limitations*** **of Royal Commissions to influence law reform** |
|---|---|
| Royal Commissions can influence law reform as they comprehensively investigate a particular incident or legal/social issue. They have access to experts and consult intensely with the community which enables them to gain a far-reaching understanding of the social issue and proposed changes to the law that may resolve the issue in question. | Royal Commissions can be very expensive because of the considerable staff required and the use of experts. For example, the Royal Commission into Institutional Response to Child Sexual Abuse cost approximately $350 million. As a result the government isn't able to establish a Royal Commission to propose law reform for all social issues. |
| The report developed by the Royal Commission is tabled in parliament which brings the attention to members and, this generally becomes public to the wider community. In addition, hearings are often public and submissions can be made by the community which provides an indirect way for the public to influence law-reform. | The government doesn't have to follow the suggested recommendations which can mean the inquiry could be considered a waste of time and/or money.<br>However this is a relatively small weakness – the public nature of the commission and its recommendations mean it would be difficult for law-makers to ignore such recommendations without voters becoming dissatisfied. |
| Royal Commissions have the power to investigate a broad range of issues depending on the terms of reference provided by the government. | Royal Commissions can be time consuming due to the extensive use of experts, hearings, examination of witnesses and consulting with the community (and the time taken to finalise all evidence presented and make recommendations). As such, law reform can be slow to respond to issues in society.<br>For example, the Royal Commission into Institutional Responses to Child Sexual Abuse took four years to complete. |
| Royal Commissions have coercive powers of investigation. That is, they are able to summons a person to appear before the commission, give evidence under oath and produce documentation. This perpetuates the inquisitorial focus of the inquiry in finding the truth regarding a particular incident and expert opinion on how to resolve social issues, which enables the issue to be better understood and proposed changes are likely to be effective.<br>For example, the evidence which was obtained during the Victorian Bushfires Royal Commission has provided greater understanding of how to prevent bushfires and protect the community (reflected in new laws in Victoria). | There is a lack of power if there are breaches to the Royal Commission Act. The Australian Law Reform Commission has found there are difficulties in the lack of power to investigate breaches of the Act and the adequacy of penalties for a failure to comply with the Act. |

*cont'd*

| ***Ability* of Royal Commissions to influence law reform** | ***Limitations* of Royal Commissions to influence law reform** |
|---|---|
| Royal Commissions are independent which means the investigations are not influenced by political influences and the truth can emerge. | While Royal Commissions are independent, they are still dependent on the government to be willing to initially send the issue to Royal Commission for investigation.<br><br>For example, there was a reluctance of the Liberal/ National government to send the banking issue to a Royal Commission for a number of years (it commenced in late 2017 after being discussed by other members of the parliament for years). |

## One recent example of a recommendation for law reform by one Royal Commission 4.2.10.3

**CASE STUDY** **VICTORIAN ROYAL COMMISSION INTO FAMILY VIOLENCE**

- In 2014 the continued concern surrounding family violence reached its peak with the death of Luke Batty at the hands of his father. This event appears to have been a catalyst for the Victorian Government to investigate the issue further.
- In February 2015, the Victorian Government formally established the Royal Commission into Family Violence by presenting the letters patent to the Governor, Alex Chernov, which appointed former Court of Appeal judge, Marcia Neave as the Commissioner.
- The Victorian Government contributed $40 million towards the Commission.
- The Terms of Reference outlined the scope of the Commissioner's inquiry, which included a need to find the most effective ways to:
  - prevent family violence
  - improve early intervention
  - support victims
  - make perpetrators of family violence accountable.
- The Commission had 25 days of hearings and held community conversations with over 850 Victorians.
- The Commission received approximately 1000 written submissions from a broad range of individuals and organisations including:
  - Aboriginal Housing Victoria
  - MacKillop Family Services
  - Victorian Gay and Lesbian Rights Lobby
  - Domestic Violence Resource Centre Victoria
  - Brotherhood of St Lawrence
  - Law Institute of Victoria.
- The Commission also took into consideration the experiences of people from diverse backgrounds and investigated how family violence impacted on them. This included Aboriginal and Torres Strait Islander peoples, members of the LGBTIQ community, people with disabilities, male victims, women in prison, women who work in the sex industry and people from culturally diverse communities. In addition, the Commission's consultations covered rural, regional and remote areas.
- The Commission made 227 recommendations, some of which included:
  - an increase in funding to support services
  - an increase in the number and range of emergency accomodation
  - extensive education programs in schools surrounding respectful relationships

  - greater training for personnel who work in the family violence sector (such as police)
  - the development of an information sharing regime
  - the creation of a single case management data system which enable agencies to view information about family violence victims and offenders in real time.
- Of the 227 recommendations 63 have been implemented, such as:
  - developing a family violence information sharing scheme
  - providing additional funding for specialist family violence support services.
- Furthermore, the remaining 164 recommendations are in the process of being introduced.
- In May 2017, the *Family Violence Protection Amendment Act 2017* was established. The purpose of this legislation is to:
  - amend the *Family Violence Protection Act 2008* to require courts to make a family violence intervention order for a child if the court makes an order for an affected family member
  - amend the *Coroners Act 2008* to more effectively review family violence deaths
  - amend the *County Court Act 1958* and *Magistrates' Court Act 1989* to allow the Koori Court Division jurisdiction to deal with certain family violence matters
  - amend the *Criminal Procedure Act 2009* to enable the use of recorded evidence-in-chief by certain witnesses (instead of in-person questioning within a court).
- In June 2017, the *Family Violence Protection Amendment (Information Sharing) Act 2017* was passed, which amended the *Family Violence Protection Act 2008* to create an information-sharing scheme to allow organisations to share information in a timely and effective manner.
- The Victorian Parliament passed the *Prevention of Family Violence Act 2018* (Vic), creating the Family Violence Prevention Agency - now named Respect Victoria - an independent government agency with a number of functions aiming to reduce and prevent family violence.

**USEFUL TIP** The Study Design indicates you need to know one recent recommendation for law reform by one parliamentary committee OR one Royal Commission. This is your choice, so pick something you are interested in!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.10: Role of Royal Commissions in law reform**

## Keen to learn more?

**Parliament of Australia – Royal Commissions and Commissions of Inquiry,** www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions

**Australian Government – Royal Commissions,** www.australia.gov.au/about-government/government-and-parliament/royal-commissions

**Parliament of Victoria – Royal Commissions,** www.parliament.vic.gov.au/publications/research-papers/summary/36-research-papers/13735-2011-02rproyalcommissions

**Victorian Government – Royal Commissions,** www.vic.gov.au/law-justice/roles-tasks/royal-commissions.html

**Royal Commission into Family Violence,** www.rcfv.com.au/The-Commission

QUESTIONS

# 4.2.10 Role of Royal Commissions in law reform

LEVEL 1:
Define and understand

**1.** Jim and Flick had a disagreement about whether the public inquiry that was being spoken about on the news was a Royal Commission (RC) or not. The boys only heard small details about the matter from the news reporter, but had enough information to make an informed argument.

Which of the following arguments is most factually accurate?

**A.** Jim's argument that it is a RC because the courts determined the nature of the inquiry, and that it is a temporary inquiry established on an ad-hoc basis in response to the increasing offences committed whilst accused people are out on bail.

**B.** Flick's argument that it is a RC because the issue being investigated is funded by the Victorian government and was initiated in response to a petition tabled in parliament.

**C.** Jim's argument that it is a RC because they are acting in accordance with a term of reference and thus, are confined to investigating the specific sections of the Act in question.

**D.** Flick's argument that it is a RC because it is an ad-hoc inquiry set up to investigate an issue of public interest, and it has the power to force individuals to give evidence and produce documents.

**2.** A strength of Royal Commissions is that they are comprehensive and thorough in their investigations, and therefore allow government to make more informed decisions about changing the law. Which of the following is not an appropriate counter-argument to this assertion?

**A.** Despite being thorough with investigations, it is ultimately up to the parliament to choose whether to change the law in response to the findings of a Royal Commission. A Royal Commission cannot change the law.

**B.** Despite being thorough with investigations, ultimately limited resources will result in not all areas of potential law reform being investigated by a Royal Commission.

**C.** Despite being thorough with investigations, ultimately the temporary nature of Royal Commissions will always result in less comprehensive investigations and rushed for changes in the law.

**D.** A and B

LEVEL 2:
Describe and explain

**3.** What is a Royal Commission, and how does it influence law reform? Use a recent example in your response. (4 MARKS)

**4.** Describe one limitation of Royal Commissions in influencing a change in the law. (3 MARKS)

LEVEL 3:
Apply and compare

**5.** 'A Royal Commission is the highest form of public inquiry or investigation in Britain, Australia or other Commonwealth nations. Royal Commissions can serve as an avenue to law reform, as their findings or recommendations usually result in changes to legislation.'

*Source:* Royal Commisions, http://lawgovpol.com/royal-commissions/

Explain the extent to which Royal Commissions and the Victorian Law Reform Commission are similar. (5 MARKS)

**6.** Using an example, explain the role of one Royal Commission and comment on its success in creating law reform. (4 MARKS)

LEVEL 4:
Discuss and evaluate

**7.** 'Royal Commissions occupy a unique place in the Australian system of government, being the highest form of inquiry on matters of public importance. However, antiquated or inappropriate provisions of the *Royal Commissions Act 1902* (Cth) have caused difficulties in some inquiries. These difficulties include the power to compel the provision of information, a lack of power to investigate breaches of the Act, the adequacy of penalties for a failure to comply with the Act, and the ability of Royal Commissions to communicate information about unlawful behaviour to law enforcement bodies. Furthermore, Royal Commissions are also often expensive, running into the tens of millions of dollars.'

*Source:* Royal Commissions and official inquiries, www.alrc.gov.au/inquiries/royal-commissions-and-official-inquiries

Evaluate the effectiveness of Royal Commissions. (5 MARKS)

# 4.2.11 Role of parliamentary committee in law reform

**Parliamentary committees are established to undertake a specific task, usually something which the house of parliament itself is unable to complete. Committees are composed of members from one or both houses of parliament and include government and non-government members. Most members of parliament (with the exception of ministers) will serve on a committee and it forms a significant part of their work.**

In general, the purpose of a parliamentary committee is usually to review the law in a particular area and suggest amendments to the law as required. Parliament establishes committees and determines their terms of reference (which provides the scope of the social and legal issues they may investigate).

Parliamentary committees consult significantly with the community by seeking submissions, developing a dialogue with experts in the field and conducting hearings which are recorded in Hansard (report of committee proceedings) and made public. They are seen to bridge the gap between parliament and the people to ensure greater representation of society's views throughout legislative reform.

There are a number of different parliamentary committees, including (but not limited to):

- **Joint investigatory bodies (joint committees):** Members of the committee are from both houses of parliament and they report back to both houses of parliament. They can be permanent, serve a specific purpose and can be established through an Act of parliament.
- **Standing Committees:** The committee is created at the beginning of each parliament after an election and operate for the life of the parliament (until the next election).
- **Select committees:** The committee is established to investigate a particular issue, they have a limited life-span and are only established as required.

This lesson covers VCAA key knowledge point: **'Role of parliamentary committees in law reform',** which we have broken down into the following concepts:



## The role of parliamentary committee 4.2.11.1

**A parliamentary committee is** a group of government and non-government members who undertake work on behalf of the parliament to investigate policy and government administration. Parliamentary committees can contribute to more effective law-making through their research and consultation within the community.

**The role of parliamentary committees is to** provide another avenue through which:

- The community can express their opinions regarding issues considered by parliament, which may lead to legislative reform; and
- Expert opinion on complex social issues can inform proposed changes to the law.

Parliamentary committees perform particular roles, which are specific to the type of committees. They can be established to critique proposed bills or investigate a particular issue or incident. In their investigative role they are able to determine facts to understand an issue in society, hold hearings to cross-examine witnesses, review written submissions about what the law is (and should be), consult with the community and have access to the skills of experts in a particular field. This ensures they can research an area comprehensively and make recommendations to parliament for law-reform accordingly in an open and transparent process.

**Parliamentary committee have significant reach to ensure the whole truth emerges regarding complex social issues**, through their broad powers to compel witnesses to give evidence and parliamentary privilege:

- **Parliamentary committees have broad powers** to summons witnesses (including experts) to appear before a committee and provide documentation as evidence (similar to Royal Commissions).
- **Furthermore, parliamentary privilege is provided** within a parliamentary committee. This means immunities are afforded which prevent witnesses from being sued or prosecuted based upon any evidence they provide.

By using these powers to uncover the whole truth surrounding complex social issues, committees are better able to suggest changes to the law that are more likely to be effective in solving the social issue in question.

**Examples of recent Commonwealth committees include research into:**

- Electric Vehicles
- Stillbirth Research and Education
- Indigenous Affairs
- Human Rights
- Intelligence and Security.

**Recent Victorian parliamentary committees include:**

- NBN rollout in Regional Victoria
- Penalty Rates and Fair Pay
- Career Advice Activities in Victorian Schools.

## Ability of parliamentary committees to influence law reform 4.2.11.2

**Parliamentary committees' ability to influence law-reform: strengths and weaknesses**

| ***Ability*** **of parliamentary committees to influence law reform** | ***Limitations*** **of parliamentary committees' ability to influence law reform** |
|---|---|
| Parliamentary committees have coercive powers of investigation which means they are able to summon people to appear before a committee and produce documentation; furthermore, evidence is protected by parliamentary privilege which assists the committees in establishing the truth.<br>This enables the parliament to have a greater understanding of the issue and can therefore better develop law to resolve the issue. | Parliament doesn't have to act on the recommendations made by the committee.<br>They don't have to enact legislation which could mean the process itself has been a waste of time. |
| Parliamentary committees provide an opportunity to bridge the gap between parliament and the people. Committees are able to travel across the state (and the nation) and this can promote further public debate.<br>As a result, laws proposed by parliamentary committees are more likely to reflect community attitudes and consequently be more likely to be accepted. | Parliamentary committees' process of reviewing the law and recommending reform can be time consuming.<br>Furthermore, they can take members away from their other work in order to undertake the role required in the committee. |

*cont'd*

| ***Ability* of parliamentary committees to influence law reform** | ***Limitations* of parliamentary committees' ability to influence law reform** |
|---|---|
| Parliamentary committees can investigate a broad range of issues as they arise. For example, from investigating the use of electric cars (in the Commonwealth Parliament) to voluntary assisted dying (in Victoria). | Unlike Royal Commissions and the VLRC parliamentary committees may not be independent. The composition of the committee can impact on its ability to perform the role. In particular, there could be bias if the committee is composed predominantly by members of government or where members may split along party lines and may not provide a uniform set of recommendations.<br><br>For example, the recent Victorian parliamentary committee established to investigate the structure of the Melbourne Fire Brigade and Country Fire Authority was split in their recommendations according to party lines – the Shooters, Fishers and Farmers Party aligned with the Coalition in refusing to support a bill to make the CFA solely a voluntary organisation, while the Labor and Green members of the parliamentary committee supported the idea of the bill.<br><br>This political aspect of committees' structure means parliament may not receive uniform recommendations for law-reform and the way for the parliament to pass laws in response to such recommendations will be unclear. |
| Parliamentary committees can have access to expert opinions which means parliament may be more likely to adopt the recommendations for new laws (as they are based on expert opinion) and new laws are more likely to be effective. | Parliamentary committees can be very costly.<br><br>Parliamentary committees seek to use experts in their field however remuneration to these experts for their time can be costly. |

## One recent example of a recommendation for law reform by one parliamentary committee 4.2.11.3

**CASE STUDY** **VICTORIAN PARLIAMENTARY COMMITTEE INQUIRY INTO END OF LIFE CHOICES**

- In 2015, the Legislative Council established a Standing Committee on Legal and Social Issues to investigate and report on the laws in Victoria surrounding citizens making informed choices regarding their end of life choices.
- The terms of reference included researching the current practice within the medical field to support patients and their preferences in managing the end of their life, review the legislative framework that currently operates in Victoria and other jurisdictions and consider what legislative changes could be made.
- The committee advertised their work and sought submissions from the general community which were made public on the Committee's website. Submissions were received from individuals and organisations including; Australian Christian Lobby, Barwon Health, Dying with Dignity Victoria, La Trobe University, Rationalist Society of Australia and The Royal Australiasian College of Physicians.
- There was broad consultation with the community through 17 days of public hearings which took place in both metropolitan and regional areas. Oral evidence was provided at the hearings and transcripts were taken of the evidence and made public.

- Broad research was also undertaken and a report was tabled in parliament on 9 June 2016, which included 49 recommendations for law reform.
- The government's response was to make legislative reform. Of the 49 recommendations made by the Committee, parliament adopted 44 and enacted the *Voluntary Assisted Dying Act* (Vic) in 2017. Of the five recommendations not adopted two were not supported and parliament felt the other three required further investigation.
- The new legislation took effect in June 2019.

**USEFUL TIP** The Study Design indicates you need to know one recent recommendation for law reform by one parliamentary committee OR one Royal Commission. This is your choice, so pick something you are interested in!

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.11: Role of parliamentary committee in law reform**

## Keen to learn more?

**Parliament of Australia – Committees,** www.aph.gov.au/Parliamentary_Business/Committees

**Parliament of Australia – Committees Infosheet,** www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_4_-_Committees

**PEO – Parliamentary Committees,** www.peo.gov.au/uploads/peo/docs/fact-sheets/parliament_committees.pdf

**Victorian Inquiry into End of Life Choices,** www.parliament.vic.gov.au/lsic/inquiries/article/2608

QUESTIONS

# 4.2.11 Role of parliamentary committee in law reform

LEVEL 1:
Define and understand

**1.** Which of the following options best describes parliamentary committees?

**A.** A group of government and non government members who investigate specific issues in detail. Committees consist of members from only the upper house at the Federal level, and may be ongoing committees or a temporary committee tasked with investigating one specific issue.

**B.** A group of government and non government members who investigate specific issues in detail. Committees can consist of members from both houses of parliament, and may be an ongoing committee or a temporary committee tasked with specifically investigating civil legal matters.

**C.** A group of government and non government members who investigate specific issues in detail. Committees can consist of members from both houses of federal parliament, and may be ongoing committees or a temporary committee tasked with investigating one specific issue.

**D.** A group of government and non government members who investigate specific issues in detail. Committees can consist of members from both houses of parliament, or just one, and may be ongoing committees or a temporary committee tasked with investigating one specific issue.

**2.** You have been nominated by your legal studies class to represent your school at the VCE Legal Studies Annual Debate. You have been informed that your topic of discussion will be parliamentary committees, and you will only get a brief amount of time to talk about them. Your discussion should include an outline of what parliamentary committees are as well as a brief discussion of their effectiveness to influence law reform. You are confident in a definition of parliamentary committees, but struggling to think of an appropriate discussion. You are provided with the following options, which is most appropriate for a discussion of parliamentary committees?

**A.** Parliamentary committees are effective because they can investigate a wide range of issues and provide a way for members of the community to give their input and to have their views considered in the parliamentary decision-making process.

**B.** Parliamentary committees are ineffective because members of the governing party may dominate the composition and investigations can be time-consuming and costly.

**C.** Parliamentary committees are effective because the final reports prepared enable parliament to be more informed, however, they are ineffective because there is no obligation on parliament to support or introduce law reforms suggested by a committee.

**D.** Parliamentary committees are ineffective because limited resources result in the investigation phase being subcontracted out a third party, however, they are effective because this allows for parliamentary ministers to focus more on specific areas of law reform.

**3.** In 2019 the *Voluntary Assisted Dying Act* (Vic) came into operation, an example of law reform in response to the work of a parliamentary committee. Which of the following statements about this case study is incorrect?

**A.** Members of the committee made recommendations based on expert medical opinion.

**B.** All recommendations of the committee were enacted in legislation.

**C.** The changes proposed by the committee reflected community opinion on the issue.

**D.** The committee included members of the Legislative Council.

LEVEL 2:
Describe and explain

**4.** An important feature of the Australian parliamentary system is that it includes a 'committee system'. What is the role of a parliamentary committee? Outline the process used by parliamentary committees to influence law reform. (3 MARKS)

**5.** A parliamentary committee is effective at recommending changes to the law because it can uncover the whole truth of an issue it investigates, including community opinions. Proposed changes to the law are more likely to be effective at solving complex social issues if based on a full understanding of that issue.

How can a parliamentary committee uncover the whole truth about an issue? (3 MARKS)

**6.** Recommendations to change the law that come from parliamentary committees demonstrate an appreciation of the community's values and expectations. Using one recent example, explain why this is correct. (3 MARKS)

LEVEL 3:
Apply and compare

**7.** 'The committee system in a parliamentary democracy provides a way of achieving greater public input into issues being considered by parliament. The Parliament of Victoria has an extensive system of committees which hold inquiries into particular issues and call for input from the wider community, including experts, individuals, business and government organisations, to express their views.'

*Source:* www.parliament.vic.gov.au/committees

Describe parliamentary committees. Using an example, outline the purpose of a parliamentary committee. (4 MARKS)

**8.** Distinguish between parliamentary committees and Royal Commissions. (3 MARKS)

LEVEL 4:
Discuss and evaluate

**9.** 'In this chapter the Committee proposes a legislative framework for assisted dying in Victoria for capable adults in certain circumstances. The proposed framework is a result of the Committee's extensive research and consultation process during the inquiry.'

*Source:* Committee's final report into end of life choices, www.parliament.vic.gov.au/images/stories/committees/SCLSI/EOL_Report/LSIC_58-05_Text_WEB.pdf

Discuss the ability of parliamentary committees to change the law. (5 MARKS)

# 4.2.12 Ability of parliament and the courts to respond to the need for law reform

**Parliament develops legislation which is interpreted by the courts to apply to the cases before them in order to resolve disputes. Collectively, parliament and the courts work together to respond to the need for law reform however, the extent to which each body can do so is limited.**

Parliament is the supreme law-making power and their primary role is to develop legislation to apply to future fact situations, protect the community and continually respond to the need of law reform to enhance the legal system, cohesion of society and uphold human rights. Members of parliament strive to make laws that reflect the will of the people however, they are limited in that they are susceptible to political pressures and the fear of voter backlash can make them reluctant to legislate with respect to controversial matters.

The primary role of the courts is to adjudicate matters before them; through statutory interpretation and the operation of the doctrine of precedent they perform a secondary role in developing laws. The courts support parliament by filling in the gaps in the law and interpreting the law to apply to the situations before them. When there is no law to apply or it is unclear how to apply the law, judges can develop new law. Judges are not elected, but rather appointed, and therefore are free from political pressures.

This lesson covers VCAA key knowledge point: **'Ability of parliament and the courts to respond to the need for law reform',** which we have broken down into the following concepts:



## The ability of parliament and the courts to respond to the need for law reform 4.2.12.1

**Parliament, as the supreme law making body, can make laws whenever the need arises.**

Parliament makes laws *in futuro* (laws that apply to future circumstances). Parliament should therefore be able to pass laws to prevent social issues arising, however, parliament is unable to foresee all possible circumstances and problems that may arise in the community.

**The ability of parliament to respond to the need for law-reform: strengths and weaknesses**

| ***Ability*** **of parliament to respond to the need for law reform** | ***Limitations*** **of parliament to respond to law reform** |
|---|---|
| Law-making is parliament's primary role and therefore, when required, they are able to act quickly to initiate changes to the law.<br>For example, the Commonwealth passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) in response to the national plebiscite. | The legislative process is very time consuming including a number of reading stages through both houses of parliament and parliamentary committees. In addition, parliament is not always sitting which further restricts their ability to pass legislation. For example, parliament may only sit 20 weeks of the year. This means parliament may be slow to respond to new issues in society (although parliament can be recalled from a break in response to very urgent social, security or economic issues). |

*cont'd*

| ***Ability*** **of parliament to respond to the need for law reform** | ***Limitations*** **of parliament to respond to law reform** |
|---|---|
| Representative government means that the members are elected by the people to best represent their views. In the Commonwealth Parliament this is established through sections 7 & 24 of the Constitution. This principle should ensure members introduce and pass laws that reflect the will of the people (and in response to changing social attitudes), or risk being voted out at the next election. | On some issues there may be conflicting views within the community. This may hinder law-making and parliament may be concerned about voter backlash and hesitate in developing new law. This can occur on controversial matters such as marriage equality (a change in the law that many in the community felt was long overdue, with many voters supporting change for a long time before parliament legislated for marriage equality in 2017).<br><br>For example, the conflicting opinions in society and within political parties about how to best limit the effects of climate change and regulate electricity-generation have meant Commonwealth law on this topic has changed frequently since 2007 and remains a contentious topic in 2018.<br><br>As members of parliament often vote as directed by their party's leaders (along party lines) may mean in some cases MP's vote for/against new legislation do not reflect the will of the voters in their own electorate/ community. |
| Parliament is able to investigate entire areas of the law. They are well resourced to do so through parliamentary committees, royal commission and law reform bodies such as the VLRC to research extensively using experts and consulting with the community.<br><br>The access to such bodies and the process they follow means new laws will be more closely aligned to community values and more likely to be effective as they are based on expert opinions.<br><br>For example, law-reform regarding medicinal cannabis based on expert medical opinion following the VLRC's review. | Research into law reform can be very expensive. Given the co-ordination of panels of experts, staff to research, extensive consultation with the community, this process can be very costly.<br><br>Indeed, this expense means only some topics can be referred to bodies such as the VLRC and a royal commission to inform law-making. |
| Parliament is the supreme law-making body and can therefore make laws whenever the need arises, creating new law, amending existing legislation.<br><br>For example, the abolition of the 'widow's discount' by the Victorian Parliament – see Lesson 4.2.5. | The Victorian and Commonwealth Parliament are limited in their law-making power by their jurisdiction as outlined in the Australian Constitution which establishes both the parliament and the jurisdiction.<br><br>For example, the Commonwealth Parliament is unable to make laws in the area of residual powers such as education and health. See Lesson 4.2.1 for other restrictions on parliaments' ability to respond to the need for law reform. |

**USEFUL TIP**

It's not enough to know the strengths and weaknesses of parliament in its ability to respond to the need for law reform – the exam will need more than this! Instead, be sure you can adapt this knowledge to a fact scenario. Whether parliament is able to respond well to the need for law reform will depend on:

- Has a bill been introduced into the parliament? By whom?
- Does any one party control both houses?
- Has a proposed change in the law been referred to the VLRC, a committee or is it subject to a royal commission? If so, what's good (and not so good) about that?

The 2018 exam (Section B, Question 3b) required students to discuss the ability of parliament to respond to a specific proposed change in the law – but not enough students linked back to the stimulus material! As the examiner's report stated:

> A number of students provided rote-learnt responses about the general ability of the federal government to change the law. Some students focused on the possibility of there being a rubber stamp (which was not the case in this scenario), others talked about sitting days in parliament (while this is an important consideration, it was not the most important point to make in this answer), and others did not reference the stimulus material at all.

**Courts are fundamentally more limited in their ability to respond to law reform.** In performing their primary role of adjudicators, the courts may, if there is no law or it is unclear how to apply the law, develop common law. Employing the flexibility provided through reversing, overruling and distinguishing judges can develop the common law. Furthermore, the courts can, through the decisions in ratio decidendi and obiter dicta, put pressure on parliament to make legislative changes. However, the courts are limited as they must wait for a case to come before them which requires standing.

**The ability of courts to respond to the need for law-reform: strengths and weaknesses**

| ***Ability*** **of the courts to respond to the need for law reform** | ***Limitations*** **of the ability of the courts to respond to law reform** |
|---|---|
| When the need arises to change the law, courts can change the law relatively quickly compared to parliament. Once a case comes before them they must adjudicate the matter and, if necessary, interpret the law and therefore developing precedent. This allows the courts to fill the gaps in the law when a new social issue arises and there is no relevant legislation/common law.<br>For example, the definition of the term 'man' in the Kevin and Jennifer case filled the gaps in that law. | Once a matter is before the courts they can act quickly. However the courts must wait for a case to come before them before the law can change. This can be slow as the courts must wait for a test case to reach the higher courts in the hierarchy, which requires standing, time and money. The development of an area of law can therefore take a long time (because these cost and time factors may prevent those with standing from pursuing such a case to a higher court).<br>Courts cannot initiate a change in the law, their law-making is reactionary. |
| Judges are appointed by the Crown (on the advice of ministers) and remain in this position until the age of 70, at which point judges must retire – they are not required to re-apply for their role. This ensures the independence of their decisions as their focus can solely be the application of the law and not concerned with passing decisions to appease people in order to be reappointed.<br>This allows the courts to develop the law on controversial topics without fear of voter backlash.<br>For example, the creation of native title in Mabo's case was new law on a controversial matter which the High Court was able to adjudicate free from political pressures. | The courts are not an elected body and therefore do not represent the views of the people, so it may therefore not be considered appropriate for courts to develop laws.<br>Also, this creates the risk of inappropriate laws being created or maintained.<br>For example, the High Court's acceptance of a common law principle providing a widow's discount in *De Sales v Ingrilli* [2002] – a law that was clearly out-of-touch given the Victorian Parliament's legislative response abrogating the precedent. |

| ***Ability*** **of the courts to respond to the need for law reform** | ***Limitations*** **of the ability of the courts to respond to law reform** |
|---|---|
| | *cont'd* |
| The courts are able to influence parliament through their decision making. Decisions made and through obiter dictum, comments made by the way, can influence to make legislative changes.<br>For example, the work of the Coroners Court influences legislative change in Victoria to enhance community safety and protection. | The courts apply the law *ex post facto*, meaning the law applies retrospectively to the case. The courts are unable to pre-empt changes in society that will need laws to ensure community cohesion.<br>The law-making process used by courts (with legal representatives finding and presenting persuasive precedents and a judge delivering written reasons for a decision) is ineffecient. In developing common law there is no process in the courts whereby society's best interests can be debated, no ability to seek expert opinion or community attitudes on how to solve social problems. |
| Judicial activism means judges may consider a broad range of factors in their judgements; the High Court can develop and adapt the law as the High Court is not bound by its earlier decisions. This enables the High Court to radically alter the law in response to changes in society.<br>For example, the High Court's creation of native title in Mabo was a radical change in the law, based on changes to social values. | Judicial activism such as that seen in Mabo is not common. Instead, judicial conservatism can limit the court's ability to influence law-making. Judges may be reluctant to change the law, believing it is their role to narrowly interpret the through the adjudication of the case before them and it is the role of parliament to develop law.<br>For example, in the Trigwell case Justice Mason indicated the right to make laws should be confined to parliament. He stated that changing the principle of law in this dispute 'is a matter which should be left to parliament.' and 'it seems to me that in the division between the legislative and the judicial functions it is appropriately the responsibility of parliament to decide whether the rule should be replaced and, if so, by what it should be replaced.' |

**USEFUL TIP** Some points to remember when considering evaluation questions:

- An **evaluation** requires you to consider the strengths and weaknesses and draw a conclusion about something's 'value', that is, is the strength really a big strength or is there a corresponding weakness?
- Always try to match up strength against the corresponding weakness.
- Use paragraphs for each strength and weaknesses.

**USEFUL TIP** Remember that 'making law' will also cause 'changes' in the law.

## PARLIAMENT

### Strengths

- Parliament makes laws *in futuro* to apply circumstances in the future. The enables parliament to prevent social issues arising.
- Elected representatives who can engage the public in law-reform ensuring laws match society's values.
- Parliament can pass legislation whenever the need arises. This ensures they can be flexible according to the needs of the community.

### Weaknesses

- Cannot predict future events and therefore legislation may not cover all possible circumstances.
- Reluctant to make laws on controversial matters for fear of voter backlash.
- Parliament is not always sitting. In fact, they only sit approximately 20 weeks of the year.

## COURTS

### Strengths

- Courts can fill the gaps in the law that parliament may not have been able to foresee.
- Judges are not elected and therefore are not influenced by politics when making decisions; can change the law on contentious issues free of political pressure.
- Courts are available to resolve disputes at any time throughout the year, as soon as a dispute arises.

### Weaknesses

- Courts make laws *ex post facto* (after the fact). This means the act or omission has already occurred, a social problem has arisen and a dispute has arisen.
- As they are not elected, judges may make laws that may not reflect the views of a contemporary society.
- Courts, however, must wait for a case to come before them which requires a party with standing and the time and money to pursue the matter.

**USEFUL TIP** The figure above is a brief summary of the strengths and weaknesses of parliaments and the courts as law-makers; any comparative discussion would need to be in greater depth – check out the detailed explanations and examples in the previous tables in this lesson.

**USEFUL TIP** Don't memorise answers to past questions! Here's one way this topic has been asked about before; **don't pre-prepare an answer to this question** – instead, learn from the assessors' comments about how to structure a response and the task words in the question.

> 'Discuss the extent to which courts are able to overcome the limitations of parliament in making laws. (10 MARKS)'

Key take-aways from the VCAA Examination Report:

- 'Students were required to demonstrate their understanding of the limitations (or weaknesses) of parliament in making laws, and the extent to which courts could overcome those limitations.'
- 'High-scoring responses provided a comprehensive and detailed discussion that addressed the "extent to which" in the question.'
- 'Using proper paragraphs and structure was also advisable when responding to this question. Higher-scoring responses started with a limitation of parliament, discussed how courts could overcome that limitation and then discussed whether there was any limitation on courts when overcoming it.'

*Source:* 2015 VCAA Legal Studies Exam Q15,& 2015 VCAA Legal Studies Examination Report

## Need extra assistance with this topic?

Remember to check out Edrolo's video lessons:

**Lesson 4.2.12: Ability of parliament and the courts to respond to the need for law reform**

## Keen to learn more?

**Supreme Court of Victoria,** www.supremecourt.vic.gov.au/

**The Sentencing Advisory Council,** www.parliament.vic.gov.au/

**Commonwealth Parliament,** www.aph.gov.au/

**Barker, M (2017) Do Judges Make Law? The University of Notre Dame Australia Law Review,** https://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1019&context=undalr

QUESTIONS

# 4.2.12 Ability of parliament and the courts to respond to the need for law reform

LEVEL 1:
Define and understand

**1.** Which of the following statements is incorrect?

**A.** Judges are not democratically elected, and therefore are not as hesitant as members of parliament may be to make law on a matter that may be controversial (and can therefore do so without fear of electoral backlash).

**B.** In a ruling they make, courts are able to highlight a particular area of law that needs to be changed, even in their obiter dictum (statements that do not directly apply to the reasons for the decision in that case).

**C.** While courts are not able to make legislation, they are able to interpret statutes when a case comes before them and as a result, change the wording of the statute.

**D.** Judges are not elected by the community, and therefore the reasons for the decisions they make in court may not be reflective of the majority of the community's values.

LEVEL 2:
Describe and explain

**2.** Stewart has been campaigning against acts of family violence in Victoria through demonstrations and petitions throughout the past year. Members of parliament as a result have supported his position and are attempting to introduce laws to combat this issue.

Identify and describe one strength and one weakness of parliament in their ability to respond to this need for law reform. (3 MARKS)

LEVEL 3:
Apply and compare

**3.** Using a case study, explain how the courts are unsuccessful in their ability to respond to the need for law reform. (3 MARKS)

**4.** Explain why parliament was effective at responding to the need for law reform in this instance. (3 MARKS)

### Marriage equality law passes Australia's parliament in landslide vote

**Paul Karp**
December 7, 2017 5.58pm AEDT

Jubilation and tears of joy as Australia becomes the 25th country to recognise same-sex marriage. Australia's parliament has legislated for marriage equality, passing a bill almost unanimously to allow two people, regardless of sex, to marry.

On Thursday the House of Representatives passed a cross-party bill after an unprecedented national postal survey gave unstoppable momentum to legislate the historic social reform.

Australia, which changed the law in 2004 to say that marriage is only between a man and a woman, now becomes the 25th country to recognise same-sex marriage.

*Source:* www.theguardian.com/australia-news/2017/dec/07/marriage-equality-law-passes-australias-parliament-in-landslide-vote

LEVEL 4:
Discuss and evaluate

**5.** 'In 2014 The Victorian Law Reform Commission was asked by the Attorney-General to report on the options available to people to be treated with medicinal cannabis in exceptional circumstances. The resulting report, published in 2015, made 42 recommendations. In April 2016, the Victorian Parliament passed the *Access to Medicinal Cannabis Act 2016* (Vic).'

Evaluate parliament's ability to respond to the need for law reform. (6 MARKS)

**6.** Evaluate the extent to which the courts are effective at responding to the need for law reform. (6 MARKS)

### Do judges make law?

**Michael Barker**
December 1, 2017

I fear there are some who believe judges do just make it up as they go along and simply try to deliver a judgment that supports the outcome they believe is just.

And I fear equally there are others who see the judicial job as involving a relatively simple task of declaring the law and applying it to the facts to produce the outcome – something that a computer could do better, and far more quickly and cheaply!

*Source:* https://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1019&context=undalr

**Time for some exam practice!**

You're ready for Progress Check 5 (online), covering these lessons:

- **Lesson 4.2.10 Role of Royal Commissions in law reform**
- **Lesson 4.2.11 Role of parliamentary committee in law reform**
- **Lesson 4.2.12 Ability of parliament and the courts to respond to the need for law reform**

Check with your teacher when it's time to complete this progress check.

AOS QUESTIONS

# The people, the parliament and the courts

LEVEL 5
Bringing it all together

**1.** Describe how judicial conservatism and judicial activism can affect law-making by courts. What is one way courts overcome the weaknesses of parliament in law-making? (8 MARKS)

**2.** 'The double-majority requirement and political pressures impact upon law-making by the Commonwealth.' Do you agree? Justify your response. (7 MARKS)

**3.** Assume the Commonwealth Parliament introduces new legislation, the *Interesting Examples for VCE Students and Miscellaneous Act 2019* (Cth). Identify and describe two ways in which the people may have influenced this change in the law. (6 MARKS)

**4.** Using an example, describe one reason for a change in the law. How can the role of VLRC assist Parliament to be a more effective law-maker? (6 MARKS)

**5.** 'The courts can influence law-making by parliament and act as a check on the law-making powers of parliament.' Do you agree? Justify your response. (6 MARKS)

**6.** Describe one check on the law-making powers of the Commonwealth Parliament and discuss the ability of the Commonwealth Parliament to respond to the need for law-reform. (10 MARKS)

**7.** On 4 July 2019, Australian Greens Senator Mehreen Faruqi introduced a Bill into the Senate. The Bill, The Live Animal Export (Slaughter) Prohibition Bill 2019, aims to amend the *Export Control Act 1982* to prohibit the export of live-stock for slaughter.

As at 1 July 2019, the composition of the Senate was as follows:

| | |
|---|---|
| Liberal-National Coalition (government) | 35 |
| Australian Labour Party (opposition) | 26 |
| Australian Greens (including Senator Mehreen Faruqi) | 9 |
| Other (independents and minor parties) | 6 |
| **Total** | **76** |

*Source:* https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition

**a)** Other than the role of the houses of parliament, describe one factor that affects the ability of parliament to make law. (3 MARKS)

**b)** Explain one way in which individuals may have influenced parliament to propose this change in the law and evaluate the effectiveness of this method. (6 MARKS)

**c)** Discuss the ability of the Commonwealth Parliament to change the law to prohibit the export of live-stock for slaughter. (6 MARKS)

**8.** 'One way for individuals to influence law-makers to reform the criminal justice system is to appeal cases.'

Describe this method, and one other method for individuals to influence law reform. Discuss the ability of one recommended reform to achieve justice in the criminal justice system. (10 MARKS)

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# 3.1.1 Principles of justice (AOS 1)

LEVEL 1

**1.** C **2.** D **3.** B

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined fairness as requiring unbiased legal processes to be in place, and all parties receive an impartial hearing (or similar).[1] |
| ✓ ✗ | I have identified one way fairness is promoted.[2] |
| ✓ ✗ | I have identified a second way fairness is promoted.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'fairness', 'hearing', 'charges', etc. |

*Exemplar response*

[The principle of fairness requires unbiased legal processes are in place, and all parties receive an impartial hearing.[1]][One way the criminal justice system achieves fairness is through having independent decision-makers, who are unbiased and not connected to the accused, victims or witnesses.[2]][A second way the criminal justice system achieves fairness is by accused persons having the ability to test the evidence presented against them, and to present evidence in their own defence.[3]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have defined equality as all people treated the same before the law, with a like opportunity to present their case (or similar).[1] |
| ✓ ✗ | I have identified one way equality is promoted.[2] |
| ✓ ✗ | I have identified a second way equality is promoted.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'fairness', 'equality', etc. |

*Exemplar response*

[The principle of equality requires that all people are treated the same before the law, with a like opportunity to present their case, irrespective of their personal characteristics such as wealth, race and so on.[1]][One way equality is promoted is that all victims and accused persons in criminal cases are treated in the same manner by judges, magistrates and juries regardless of their age, gender, religion, disability, etc.[2]][A second way equality is promoted is the rules that govern how trials are conducted are applied equally, in the same way across all criminal cases.[3]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined access as accused persons, victims of crime and witnesses giving evidence in a trial having an understanding of legal rights and an ability to pursue their case (or similar).[1] |
| ✓ ✗ | I have identified one way access is promoted.[2] |
| ✓ ✗ | I have identified a second way access is promoted.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'access', 'criminal justice system', etc. |

*Exemplar response*

[Access refers to accused persons, victims of crime and witnesses giving evidence in a trial having an understanding of legal rights and an ability to pursue their case.[1]][One way access is promoted is through accused persons having legal representation to advise them about the criminal laws they may have broken, court procedures and how to prepare their defence.[2]][Another way access is promoted is by victims of crime being informed about their role in the criminal trial process.[3]]

# 3.1.2 Key concepts in the criminal justice system

## LEVEL 1

**1.** C **2.** B **3.** C **4.** C **5.** C

## LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated that summary offences are minor offences.[1] |
| ✓ ✗ | I have stated that summary offences are determined before a magistrate (not a jury).[2] |
| ✓ ✗ | I have stated that they are heard in the Magistrates' Court.[3] |
| ✓ ✗ | I have provided an appropriate example.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offence', 'summary', etc. |

*Exemplar response*

[Summary offences are minor offences[1]][that are determined before a magistrate[2]][in the Magistrates' Court.[3]][One example of a summary offence includes driving without a licence.[4]]

*Possible points to include:*

Other examples of summary offences include but are not limited to:

- disorderly conduct
- using obscene language in a public place
- common assault
- drink spiking.

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated indictable offences are serious crimes.[1] |
| ✓ ✗ | I have stated indictable offences are heard by a judge.[2] |
| ✓ ✗ | I have stated indictable offences are heard by a jury if the accused pleads not guilty.[3] |
| ✓ ✗ | I have defined indictable offences by stating that they are heard in the County Court and Supreme Court.[4] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', 'on the other hand'.[5] |
| ✓ ✗ | I have stated indictable offences triable summarily are serious offences that may be tried like a summary offence.[6] |
| ✓ ✗ | I have stated indictable offences triable summarily are heard in the Magistrates' Court.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'indictable', 'accused', 'summary', etc. |

*Exemplar response*

[Indictable offences are serious crimes[1]][heard by a judge[2]][(and a jury if the accused pleads not guilty)[3]][in the County Court and the Supreme Court.[4]]

[On the other hand,[5]][indictable offences triable summarily, are a subset of serious offences that may be tried as if they were a summary offence[6]][in the Magistrates' Court.[7]]

**8.**

- ✓ ✗ I have defined the burden of proof.[1]
- ✓ ✗ I have linked the burden of proof to the presumption of innocence, stating the accused does not need to prove their innocence and cannot be required to give evidence that is self-incriminating.[2]
- ✓ ✗ I have avoided repeating the words 'burden' and 'proof' when defining these concepts.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'prosecution', 'accused', etc.

*Exemplar response*

[The burden of proof is the responsibility faced by the party bringing the case to court (the prosecution) to present their evidence and arguments to prove the accused committed the offence.[1]] [This is linked to the presumption of innocence, as it reflects the fact the accused does not need to prove their innocence, and does not need to give evidence that is incriminating.[2]]

**9.**

- ✓ ✗ I have defined the standard of proof.[1]
- ✓ ✗ I have explained what 'beyond reasonable doubt' means.[2]
- ✓ ✗ I have explained how the standard of proof upholds the principle of fairness, as the severe consequence of criminal sanctions should only be imposed when this high standard of proof is met.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'prosecutor', 'accused', etc.

*Exemplar response*

[The standard of proof refers to the weight of evidence required from the prosecutor in a criminal cases to prove the accused guilty beyond reasonable doubt.[1]] [This is a high standard, and means the court must be so confident that the accused is guilty that it would be unreasonable to return a verdict of 'not guilty'. This does not mean, however, that someone should only be convicted if no doubt exists, only if no reasonable doubt exists.[2]]

[The standard of proof upholds the principle of fairness as it ensures that the accused is not wrongly convicted of a charge where there is limited evidence against them or a reasonable, alternative explanation for who committed the offence. This ensures fairness as individuals should only face criminal sanctions if this high standard of proof has been met.[3]]

**10.**

- ✓ ✗ I have described the presumption of innocence as the guarantee that all accused will be treated as innocent by the court, until evidence proves guilt beyond reasonable doubt (or similar).[1]
- ✓ ✗ I have identified the impact this has on accused persons not being required to self-incriminate.[2]
- ✓ ✗ I have identified the impact this has on accused persons not being punished until guilt is proven.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'prosecution', 'convict', etc.

*Exemplar response*

[The guarantee made to all accused persons, regardless of who they are and the circumstances of the case in which they are implicated, that they are innocent until it is proven, beyond reasonable doubt, that they are guilty.[1]] [The consequences of this presumption are that an accused cannot be required to give evidence that is incriminating,[2]] [and sanctions cannot be imposed without guilt being proven by compelling evidence.[3]]

LEVEL 3

**11.**

| | |
|---|---|
| ✓ ✗ | I have described why the first statement is incorrect: that Steve's case may not be tried in the County or Supreme Court if the offence he has been charged with is triable summarily.[1] |
| ✓ ✗ | I have corrected this error by saying that as some indictable offences are triable summarily, his case may be heard in the Magistrates' Court.[2] |
| ✓ ✗ | I have described why the second statement is incorrect: Steve need not pressure his lawyers to prove his innocence as he is innocent until proven guilty due to the presumption of innocence.[3] |
| ✓ ✗ | I have corrected this error by saying that the burden of proof rests with the prosecution, not the defence in criminal proceedings.[4] |
| ✓ ✗ | I have described why the third statement is incorrect: that a jury does not need to be positive an accused is innocent to acquit him.[5] |
| ✓ ✗ | I have corrected this error by saying that the jury must deliver a 'not guilty' verdict unless they are satisfied beyond reasonable doubt, they do not need to be persuaded he is innocent.[6] |
| ✓ ✗ | I have referred explicitly to the scenario in my response. |
| ✓ ✗ | I have signposted my response appropriately: 'Further', 'Lastly', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'triable summarily', 'innocent until proven guilty', 'prosecution', 'beyond reasonable doubt', etc. |

*Exemplar response*

[Steve is incorrect in thinking that his case must be heard in the County or Supreme Court. Although indictable offences are heard in these courts[1]] [some indictable offences are triable summarily and thus may be heard in the Magistrates' Court.[2]]

[Further, Steve need not pressure his lawyers to prove his innocence as accused persons are innocent until proven guilty pursuant to the presumption of innocence[3]] [with the burden of proof resting on the prosecution, not the defence (Steve's representatives) in criminal proceedings.[4]]

[Lastly, a jury need not be certain that an accused person is innocent in order to acquit them,[5]] [rather they must deliver a 'not guilty' verdict unless satisfied beyond reasonable doubt he is guilty. The accused does not need to prove they are innocent.[6]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have stated that Bob has been charged with an indictable offence.[1] |
| ✓ ✗ | I have supported my determination that Bob has been charged with an indictable offence by stating that his case is being heard in the Supreme Court.[2] |
| ✓ ✗ | I have supported my determination that Bob has been charged with an indictable offence by stating that as a jury is present Bob cannot have been charged with a summary offence.[3] |
| ✓ ✗ | I have stated that the burden of proof rests with the prosecution.[4] |
| ✓ ✗ | I have supported my determination that the burden of proof rests with the prosecution because they are the party bringing the case.[5] |
| ✓ ✗ | I have stated that Bob will likely be acquitted based on the jury's comments.[6] |
| ✓ ✗ | I have supported my determination that Bob will be acquitted based on the jury's comments as the statement that they are 'more sure than unsure' suggests they have not reached the standard of proof needed to deliver a guilty verdict.[7] |
| ✓ ✗ | I have stated that the standard of proof is not more strict in murder cases.[8] |
| ✓ ✗ | I have supported my determination that the standard of proof is not more strict in murder cases by stating that the standard of proof is 'beyond reasonable doubt' in all criminal cases.[9] |

| | |
|---|---|
| ✓ ✗ | I have referred to the scenario explicitly in my response i.e. 'Bob', 'more sure than unsure' etc. |
| ✓ ✗ | I have signposted my response appropriately: 'Further', 'Moreover', 'Lastly', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'indictable offence', 'acquitted', 'standard of proof', 'conviction', 'prosecution', 'beyond reasonable doubt', etc. |

*Exemplar response*

[Bob has been charged with an indictable offence.[1]][This can be deduced from the fact that his case is being heard in the Supreme Court which has an unlimited criminal jurisdiction but in practice only hears the most serious indictable offences.[2]][Further, the presence of a jury supports the determination that Bob has been charged with an indictable offence as one would not be present if he were charged with a summary offence.[3]]

[The burden of proof rests with the prosecution[4]][because they are bringing the case against Bob and are thus responsible for proving his guilt.[5]]

[Moreover, it is likely that Bob will be acquitted based on the jury's comments.[6]][In concluding that they are merely 'more sure than unsure' the jury has not reached the standard of proof required to support a conviction, beyond reasonable doubt, in criminal proceedings.[7]]

[Lastly, the standard of proof is not more strict in murder cases.[8]][In all criminal proceedings, regardless of the severity of the offence in question, the standard of proof is 'beyond reasonable doubt'.[9]]

# 3.1.3 Rights of the accused

LEVEL 1

**1.** C **2.** A **3.** C

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined the right to be tried without unreasonable delay.[1] |
| ✓ ✗ | I have identified that the cases will be treated the same and stated that the circumstances for both parties do not make a difference.[2] |
| ✓ ✗ | I have explained why these persons should be treated the same.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'criminal history', etc. |

*Exemplar response*

[The right to be tried without unreasonable delay refers to the right where accused persons should expect to have their case heard within a just time period.[1]][Despite Bob's high profile role as Prime Minister and lack of criminal history, his case will not be given any preferential treatment in terms of how quickly it is managed compared to Scott. Similarly, Scott's criminal history will not mean that his case will be delayed.[2]][This is because both Bob and Scott have the right to be tried without unreasonable delay and no individual should be given preferential treatment.[3]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have defined the right to a fair hearing as it is stated in the Victorian Charter of Rights and Responsibilities.[1] |
| ✓ ✗ | I have identified one aspect of the right to a fair trial in practice.[2] |
| ✓ ✗ | I have identified a second aspect of the right to a fair trial in practice.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'third party', 'judge', etc. |

*Exemplar response*

[The right to a fair hearing is the right of an accused person to have their case heard fairly, publicly and presided over by a competent, unbiased and independent court.[1]]

[In practice, this means the decision-maker, the judge or jury will be free from bias,[2]][and it also means the accused can question prosecution witnesses to test the accuracy of evidence being used against them.[3]]

*Possible points to include:*

Other practical aspects of the right to a fair hearing are

- The ability to select legal representation, to have an expert cross-examine witnesses, address the jury and raise lawful defences, so the accused can present their case in its best light.
- Public hearings, to ensure those administering justice do so in a way that the public can see is fair (providing public scrutiny of the work of the courts, prosecutors and the police).
- The accused is given an opportunity to present evidence in their defence, to ensure equality of opportunity to present 'their side' of the case.
- Consistent rules of evidence and procedure to ensure guilty verdicts are based only on reliable, relevant evidence – not evidence that is prejudicial or cannot be verified.
- An accused person does not need to prove their innocence; they do not need to answer questions (in general) and exercising this right to silence may not be used by a court to infer the accused is guilty.

**6.**

| | |
|---|---|
| ✓ ✗ | I have identified the first error: that all cases in Victoria are tried by jury.[1] |
| ✓ ✗ | I have corrected this error by stating that the right to jury trial applies only for indictable offences.[2] |
| ✓ ✗ | I have identified a second error: that juries have six members.[3] |
| ✓ ✗ | I have corrected this error by stating that juries in criminal trials include 12 members in Victoria.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'accused', etc. |

*Exemplar response*

[It is incorrect to say all individuals can be tried by jury in Victoria.[1]][There is only the right to a jury trial in cases where an accused is charged with and pleads 'not guilty' to an indictable offence, to be tried in the County Court or Supreme Court. Juries are not used for summary offences.[2]]

[It is also not correct to say a jury in Victoria has six people randomly selected from society.[3]][A jury used in a criminal trial in Victoria has 12 members.[4]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated that both Steve and Jess have a right to be tried without unreasonable delay.[1] |
| ✓ ✗ | I have briefly described the right to be tried without unreasonable delay.[2] |
| ✓ ✗ | I have stated that both Steve and Jess have a right to a fair hearing.[3] |
| ✓ ✗ | I have briefly described the first aspect of the right to a fair hearing: 'presided over by a fair, impartial and capable third party'.[4] |
| ✓ ✗ | I have briefly described the second aspect of the right to a fair hearing: 'open to the public'.[5] |
| ✓ ✗ | I have used a contrasting linking word to transition into the other side of my comparison such as: 'however', 'whereas', 'on the other hand' etc.[6] |
| ✓ ✗ | I have stated that only Jess has the right to trial by jury.[7] |
| ✓ ✗ | I have stated that the right to trial by jury only extends to those charged with indictable offences.[8] |
| ✓ ✗ | I have stated that the right to trial by jury only extends to those who plead not guilty to an indictable offence.[9] |
| ✓ ✗ | I have concluded that therefore Jess is the only one afforded this right as only she has been charged with, and pleaded 'not guilty' to, an indictable offence.[10] |
| ✓ ✗ | I have referred explicitly to the scenario in my response: 'Steve', 'Jess', etc. |
| ✓ ✗ | I have signposted my response appropriately: 'Both', 'Further', 'However' etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'charges', 'fair hearing', 'trial by jury', 'indictable', etc. |

*Exemplar response*

[Both Steve and Jess have a right to be tried without unreasonable delay.[1]][This right applies without prejudice to all accused persons and is designed to ensure that criminal charges be heard in a timely manner and recognises that while delays may occur, they should not be excessive and unreasonable.[2]]

[Further, Steve and Jess have the right to a fair hearing.[3]][All accused persons have the right to have their case presided over by a fair, impartial and capable third party[4]][that is open to the public.[5]]

[However,[6]][while both Steve and Jess maintain a right to be tried without unreasonable delay and to a fair hearing only Jess has the right to trial by jury.[7]][This is because the right to trial by jury only extends to accused persons who have been charged with and indictable offence,[8]][they have pleaded 'not guilty' to.[9]][Therefore, only Jess and not Steve would be afforded this right as only she has been charged with and pleaded 'not guilty' to, an indictable offence.[10]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have identified one right of an accused person in Matthew's case.[1] |
| ✓ ✗ | I have briefly described this first right.[2] |
| ✓ ✗ | I have identified a second right of an accused person in Matthew's case.[3] |
| ✓ ✗ | I have briefly described this second right.[4] |
| ✓ ✗ | I have signposted my response appropriately by using terms such as: 'Another right', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'right', etc. |

*Exemplar response*

[One right that Matthew has as an accused person is the right to a fair hearing.[1]][All accused persons have the right to have their case presided over by a fair, impartial and capable third-party that is open to the public. This will happen in the Supreme Court.[2]]

[Another right that Matthew has as an accused person is the right to trial by jury, as he has been accused of an indictable offence.[3]] [This right entitles him to have the verdict in his case determined by a jury of his peers, representing a cross-section of the community, without bias or discrimination towards him.[4]]

*Possible points to include:*

Another right that could be described is the right to be tried without unreasonable delay.

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have briefly defined the right to be tried without unreasonable delay.[1] |
| ✓ ✗ | I have linked how this right upholds the principle of fairness.[2] |
| ✓ ✗ | I have linked how this right upholds the principle of access.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'trial', etc. |

*Exemplar response*

[The right to be tried without unreasonable delay confers upon an accused person a right to have their trial heard and determined in a timely manner and ensures that any delays which may occur are not excessive and unreasonable.[1]]

[This right upholds the principle of fairness by ensuring that disputes are resolved in a timely manner and that costs, stress and delays are minimised as much as possible. Thus, accused persons are spared the anxiety of waiting for their fate to be determined over a very long time and the process is not drawn out for any victims.[2]]

[This right also upholds access as a principle of justice as cases must move through the courts in a timely manner so this right is not infringed upon. The Charter creates the need to conduct cases without unreasonable delay, which means case backlogs don't build up, enabling greater access to the courts as a place to present a legal defence when charged.[3]]

# 3.1.4 Victims' rights

LEVEL 1

**1.** D **2.** B **3.** D

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated one consideration available to a vulnerable witness.[1] |
| ✓ ✗ | I have stated a second consideration available to a vulnerable witness.[2] |
| ✓ ✗ | I have outlined the process that takes place in order to have special provisions granted.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'vulnerable', 'witness', etc. |

*Exemplar response*

[One concession that may be granted to a vulnerable witness includes having a support person in court while giving evidence.[1]][A second concession that may be granted is having a closed court while giving evidence.[2]]

[The witness has to ask the prosecution to apply to the court to give evidence under these special provisions. It is then up to the judge or magistrate to decide whether to grant permission.[3]]

*Possible points to include:*

Other considerations available to a vulnerable witness may include, but are not limited to the following:

- Having a screen in court to separate the witness from the defendant
- Providing evidence via closed-circuit television

**5.**

| | |
|---|---|
| ✓ ✗ | I have used the wording found in the statement – 'left in the dark' – in my answer.[1] |
| ✓ ✗ | I have addressed the overarching reason why this statement is not true: victims have the right to be informed about proceedings by the police and prosecution.[2] |
| ✓ ✗ | I have included an example of information victims are entitled to.[3] |
| ✓ ✗ | I have included a second example of information victims are entitled to.[4] |
| ✓ ✗ | I have included a third example of information victims are entitled to.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'right to be informed', 'victims', etc. |

*Exemplar response*

[The statement that victims are 'left in the dark'[1]][can be largely refuted because victims have the right to be informed about proceedings by the police and the prosecution.[2]]

[For example, victims have the right to be informed about the outcome of bail proceedings,[3]][details of any charges that are changed or withdrawn,[4]][and the result of any appeal proceedings.[5]]

*Possible points to include:*

- The date and time a trial is set down for.
- Outcomes of a trial, including the verdict and any sanction imposed by the court.

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated that victims on the Victims Register can receive information about an offender's release date.[1] |
| ✓ ✗ | I have stated which victims can be on the Victims Register.[2] |
| ✓ ✗ | I have included one example of 'release date' information a victim may receive.[3] |

| | |
|---|---|
| ✓ ✗ | I have included a second example of 'release date' information a victim may receive.[4] |
| ✓ ✗ | I have included a third example of 'release date' information a victim may receive.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'victims', 'accused', etc. |

*Exemplar response*

[Only victims of crime, or their family members, that are on the Victims Register can receive information about an offender's release date.[1]][The Victims Register is for victims (and their families) of serious offences such as murder, family violence and threats to kill.[2]]

[Such victims can be informed about the length of the offender's sentence and any changes to the length of the sentence,[3]][the earliest possible release date[4]][and whether the offender applies for and is released on parole.[5]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated that Lisa would be considered a vulnerable witness.[1] |
| ✓ ✗ | I have justified this conclusion by stating that as Lisa is the victim of a sexual offence she is considered vulnerable.[2] |
| ✓ ✗ | I have provided one example of an arrangement the court could make to accommodate Lisa.[3] |
| ✓ ✗ | I have stated that Brianna would be considered a vulnerable witness.[4] |
| ✓ ✗ | I have justified this conclusion by stating that as Brianna is a child/due to her young age she would be considered vulnerable.[5] |
| ✓ ✗ | I have provided one example of an arrangement the court could make to accommodate Brianna.[6] |
| ✓ ✗ | I have stated that Tom would not be considered as a vulnerable witness.[7] |
| ✓ ✗ | I have justified this conclusion by stating that Tom would not be considered vulnerable purely because he is related to the accused.[8] |
| ✓ ✗ | I have substantiated this further by defining what is meant by the term 'vulnerable witness'.[9] |
| ✓ ✗ | I have signposted my response appropriately by using terms such as: 'Firstly', 'would also be considered', 'on the other hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offence', 'accused', 'vulnerable', 'victim', etc. |

*Exemplar response*

[Firstly, Lisa would be considered a vulnerable witness[1]][because she is the victim of a sexual offence and is therefore considered vulnerable due to the sensitive nature of the case.[2]][One accommodation that may be made for Lisa is allowing her to give evidence via closed-circuit television.[3]]

[Brianna would also be considered a vulnerable witness as,[4]][given that she is a child, she would be considered vulnerable by default.[5]][The court may accommodate her by allowing a support person to be present while she delivers evidence.[6]]

[Tom, on the other hand, would not be considered a vulnerable witness[7]][simply because he is related to the accused[8]][as in order to be considered vulnerable the court must consider the witness to be particularly impressionable or at risk – this usually includes children, victims of sexual offences and family violence, rather than relatives of an accused person.[9]]

*Possible points to include:*

Other accommodations that may be made by a court for vulnerable witnesses include but are not limited to:

- Providing screens to shield witnesses from the accused
- Creating a more casual courtroom setting by reducing the level of formality
- Barring certain individuals from being present in the courtroom
- Having the court closed to the public during the trial

**8.**

| | |
|---|---|
| ✓ ✗ | I have identified the right of a victim being referred to in the scenario: 'right to be informed of the likely release date of the accused'.[1] |
| ✓ ✗ | I have provided further detail describing this right.[2] |
| ✓ ✗ | I have identified one right that Nick would have had as an accused person.[3] |
| ✓ ✗ | I have provided further detail describing this right.[4] |
| ✓ ✗ | I have referred explicitly to the scenario in my response i.e 'Leina', 'Nick', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'victim', 'right', etc. |

*Exemplar response*

[Leina, as a victim of serious crime, has a right to be informed of the likely release date of the accused.[1]] [This right entitles her to know when Nick is due to be released and on what conditions, if she has been placed on the victims' register.[2]]

[One right Nick had prior to being convicted was the right to trial by jury.[3]] [As Nick has been convicted of an indictable offence he would have had the right to be tried by a jury of his peers to determine the verdict in his case.[4]]

*Possible points to include:*

Other rights that Nick would have had include:

- Right to be tried without unreasonable delay
- Right to a fair hearing

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have defined a victim's right to be informed about proceedings.[1] |
| ✓ ✗ | I have linked the right to be informed about proceedings to the principle of fairness.[2] |
| ✓ ✗ | I have linked the right to be informed about proceedings to the principle of access.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'access', 'victims', 'accused', etc. |

*Exemplar response*

[The right of victims to be informed about proceedings means that they are entitled to know information about a case that pertains to them including details of any investigations, bail applications, charges laid and sentences imposed on the accused. This right is established by the Victims' Charter.[1]]

[This right upholds fairness as it means that all victims, irrespective of the case in which they are involved, are guaranteed to be informed about proceedings without exception. Being informed of these matters enables victims to know when to attend court, when to prepare a victim impact statement, ensuring their chance to participate in proceedings – which is fair.[2]]

[Further, this right upholds access as it allows victims of crime to interact with, and be involved in, the criminal justice system. Through being informed about proceedings victims are able to decide what they are or are not willing to attend and communicate with the police and the prosecution. The principle of 'access', which includes all parties knowing and understanding their legal rights, is therefore upheld by this entitlement.[3]]

# 3.1.5 Victoria Legal Aid and community legal centres

## LEVEL 1

**1.** C **2.** B

## LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have identified one way VLA assist an accused person.[1] |
| ✓ ✗ | I have provided further detail about this support VLA provides.[2] |
| ✓ ✗ | I have identified a second way VLA assist an accused person.[3] |
| ✓ ✗ | I have provided further detail about this support VLA provides.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Victoria Legal Aid', 'criminal justice system', etc. |

*Exemplar response*

[One way VLA can assist an accused person is by providing a grant of legal assistance.[1]] [This means a person who is charged with a serious offence, but can't afford a lawyer and satisfies VLA's income test, will be either provided with a lawyer or funds to engage a private lawyer.[2]] [A second way VLA can help an accused person is by the information it publishes on its website.[3]] [VLA publishes free information about the courts' processes and common criminal offences, to enable self-represented accused people to better present their defence and understand the court system.[4]]

*Possible points to include:*

- Duty lawyers to assist some accused at the Magistrates' Court.
- Initial legal advice (in person or over the phone).

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined what community legal centres (CLCs) do.[1] |
| ✓ ✗ | I have explained how the function of CLCs is linked to access.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'community', 'access', etc. |

*Exemplar response*

[CLCs are community-based organisations that provide free legal services, usually just about minor criminal disputes, to disadvantaged people in the community.[1]] [They focus on helping disadvantaged accused people who may not qualify for a grant of assistance from VLA, and therefore contribute to the principle of access as they help these accused people to better understand the court system and how to defend their claim.[2]]

## LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified a similarity of the support provided by VLA and CLCs.[1] |
| ✓ ✗ | I have described this similarity of VLA and CLCs in detail.[2] |
| ✓ ✗ | I have used a linking word to demonstrate a transition from similarities to differences or vice versa such as: 'In contrast', 'however', 'whereas', 'on the other hand', etc.[3] |
| ✓ ✗ | I have identified a difference between VLA and CLCs.[4] |

| | |
|---|---|
| ✓ ✗ | I have described this difference between VLA and CLCs in detail.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Victoria Legal Aid', 'community legal centres', etc. |

*Exemplar response*

[Both Victoria Legal Aid (VLA) and community legal centres (CLCs) provide information about the law to the general public, which may be useful to accused persons facing criminal proceedings.[1]][These institutions publish information both online and in-person to improve the community's knowledge of the criminal justice system.[2]]

[However,[3]][a difference is that while both VLA and CLCs provide information, CLCs do not usually provide legal representation to accused persons during a committal hearing and trial[4]][instead usually just providing initial advice and sometimes legal representation for very minor matters that are resolved very quickly. On the other hand, VLA will often provide legal representation to accused persons charged with serious offences, if they meet VLA's eligibility criteria.[5]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated that Victoria is more likely than Marshall to receive legal representation from Victoria Legal Aid.[1] |
| ✓ ✗ | I have justified this statement by referencing the fact that she is homeless, and linked this to VLA's eligibility criteria.[2] |
| ✓ ✗ | I have justified this statement by referencing the fact that she is unemployed, and linked this to VLA's eligibility criteria.[3] |
| ✓ ✗ | I have referred to the fact that despite that Marshall has been charged with a serious indictable offence it is not likely that he would receive representation over Victoria.[4] |
| ✓ ✗ | I have justified this conclusion by referencing Marshall's has means to pay for his own lawyers due to his assets and income.[5] |
| ✓ ✗ | I have referred explicitly to the facts of the scenario. |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'firstly', 'despite that', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Victoria Legal Aid', 'legal representation', etc. |

*Exemplar response*

[Victoria is more likely to receive legal representation from Victoria Legal Aid than Marshall.[1]][Firstly, as Victoria is homeless she is likely to have no assets, which means she is more likely to be eligible for legal representation from VLA.[2]][Coupled with the fact that she is unemployed, and therefore would have little to no income with which to pay for a lawyer herself. She appears far more likely to receive legal representation through VLA, as VLA supports poorer accused persons who meet certain income and assets tests.[3]]

[Marshall has been charged with a serious indictable offence and therefore would be prioritised by VLA in deciding who to provide legal help to. Due to the nature of the offence with which he has been charged, it is not likely that he would be appointed legal representation from VLA over Victoria,[4]][given that he has 'numerous assets' and a large annual income, that would enable him to pay for his own lawyers. He would not satisfy VLA's eligibility criteria due to his assets and income.[5]]

LEVEL 4

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated to what extent Victoria Legal Aid promotes access to legal representation i.e. 'to a limited extent', 'to some extent', 'to a large extent', etc.[1] |
| ✓ ✗ | I have identified a way Victoria Legal Aid promotes access.[2] |
| ✓ ✗ | I have described in detail this way Victoria Legal Aid promotes access.[3] |
| ✓ ✗ | I have identified a way Victoria Legal Aid may not always promote access.[4] |
| ✓ ✗ | I have described in detail this way Victoria Legal Aid may not always promote access.[5] |

| | |
|---|---|
| ✓ ✗ | I have stated that a 20% increase in Victoria Legal Aid funding would positively impact on fairness.[6] |
| ✓ ✗ | I have explained how a 20% increase in Victoria Legal Aid funding would improve fairness.[7] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'however', 'on one hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Victoria Legal Aid', 'legal representation', 'fairness', etc. |

*Exemplar response*

[Victoria Legal Aid does, to some extent, promote access to the criminal justice system.[1]]

[On the one hand, Victoria Legal Aid enables some of the most disadvantaged people in society to access legal representation they otherwise would not be able to afford.[2]][By considering one's assets and income and by prioritising those charged with serious criminal offences and family matters where the welfare of a child is concerned, Victoria Legal Aid is able to provide legal advice and representation to those who are in greatest need of their assistance.[3]]

[However, due to funding shortages, the eligibility criteria to receive legal representation from VLA are extremely strict, helping only those who have very low incomes and are charged with very serious offences.[4]][Because Victoria Legal Aid can only afford to assist those who meet these eligibility tests it may discourage people from seeking legal representation from VLA. It also means some poorer people who fail VLA's income test and those charged with less serious offences cannot receive legal representation from VLA, limiting their ability to understand how to defend their claim and the court process, restricting access to justice.[5]]

[A 20% increase in Victoria Legal Aid funding would significantly improve the ability of the criminal justice system to achieve fairness.[6]][With greater funding, Victoria Legal Aid would be able to assist more people seeking legal representation and relax eligibility requirements, perhaps helping those charged with less serious crimes and those who are poor but may not meet the currently strict income test for support. This would improve fairness as more accused individuals would be able to receive free legal representation, ensuring their defence is better prepared and better presented.[7]]

*Possible points to include:*

VLA publishes information about criminal law and court procedures; this promotes access to justice (which includes accused persons understanding their legal rights and the operation of the legal system).

# 3.1.6 Purposes of committal proceedings

LEVEL 1

**1.** B

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have identified one other purpose of a committal: to determine whether the charge can be tried summarily in the Magistrates' Court.[1] |
| ✓ ✗ | I have identified a second purpose of a committal: to determine whether the accused will plead guilty or not guilty.[2] |
| ✓ ✗ | I have identified a third purpose of a committal: to assist the accused to receive a fair trial, if the matter goes to trial.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prima facie', 'evidence', etc. |

*Exemplar response*

[One other purpose of committals is to determine whether the charge for the indictable offence can be tried summarily in the Magistrates' Court.[1]][Another purpose is to determine whether the accused will plead guilty or not guilty,[2]][and finally committal proceedings assist the accused to receive a fair trial, if the matter goes to trial.[3]]

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated that Alfred will not attend a committal proceeding.[1] |
| ✓ ✗ | I have given a reason for this conclusion.[2] |
| ✓ ✗ | I have stated that Sylvia will attend a committal proceeding.[3] |
| ✓ ✗ | I have given a reason for this conclusion.[4] |
| ✓ ✗ | I have identified the Magistrates' Court as holding committal proceedings.[5] |
| ✓ ✗ | I have described one purpose of a committal.[6] |
| ✓ ✗ | I have described a second purpose of a committal.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'conviction', 'Magistrates' Court', etc. |

*Exemplar response*

[Alfred will not need to attend committal proceedings,[1]][as he has been charged with a summary offence and committal proceedings are only required prior to a trial for indictable offences.[2]]

[Sylvia will need to attend committal proceedings.[3]][This is because she has been charged with an indictable offence, and before a jury trial is conducted in a higher court,[4]][the Magistrates' Court will conduct a committal proceeding.[5]]

[One purpose of a committal proceeding is to determine whether the prosecution's evidence is of sufficient weight to support a conviction.[6]]

[A second purpose of a committal is to assist the accused to receive a fair trial by allowing him or her to see the prosecution's evidence and better prepare their own defence.[7]]

*Possible points to include:*

According to section 97 of the *Criminal Procedure Act 2009* (Vic) students can include the following:

The purposes of committal proceedings are:

**a.** to determine whether a charge for an offence is appropriate to be heard and determined summarily;

**b.** to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;

**c.** to determine how the accused proposes to plead to the charge;

**d.** to ensure a fair trial, if the matter proceeds to trial, by:

- **i.** ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;
- **ii.** enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
- **iii.** enabling the accused to put forward a case at an early stage if the accused wishes to do so;
- **iv.** enabling the accused to adequately prepare and present a case;
- **v.** enabling the issues in contention to be adequately defined

LEVEL 4

**4.**

- ✓ ✗ I have described a strength of committal proceedings.[1]
- ✓ ✗ I have linked this strength of committals to the principle of fairness.[2]
- ✓ ✗ I have described a second strength of committal proceedings.[3]
- ✓ ✗ I have linked this strength of committals to the principle of fairness.[4]
- ✓ ✗ I have described a third strength of committal proceedings.[5]
- ✓ ✗ I have linked this strength of committals to the principle of fairness.[6]
- ✓ ✗ I have rebutted the argument in the prompt that committals create delays.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'trial', 'evidence', etc.

*Exemplar response*

[A reason committal proceedings should be retained is because they prevent unnecessary trials,[1]][preventing an accused person from going through the trauma and expense of a jury trial when there is limited evidence against them, which promotes fairness in the criminal justice system.[2]]

[A second reason is that committals actually minimise delays in the County and Supreme Courts, by preventing jury trials in cases where there is little or no evidence.[3]][Delays can make worse the stress experienced by witnesses, accused persons and victims, which is unfair on these parties, so retaining committals as a way to reduce delays in higher courts promotes fairness.[4]]

[Lastly, committals should be retained as they allow the accused person to see the prosecution's evidence,[5]][which allows them to prepare their defence in its best light, including how they plan to test accuracy of prosecution evidence, promoting fairness also.[6]]

# 3.1.7 Plea negotiations and sentence indications

LEVEL 1

**1.** D **2.** C **3.** D **4.** D

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified the benefit for Jamie: that a plea deal would avoid a trial.[1] |
| ✓ ✗ | I have explained why avoiding a trial is beneficial for Jamie: that is spares her the trauma of testifying at a trial.[2] |
| ✓ ✗ | I have identified the benefit for Marcus: that in accepting a plea deal the severity of the charges may be reduced.[3] |
| ✓ ✗ | I have explained why avoiding a trial is beneficial for Marcus: that he may face a more lenient sentence as a result of reducing his charges.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'guilty plea', 'trial', 'charge', 'sentence', etc. |

*Exemplar response*

[One way in which a plea deal may be beneficial for Jamie is that if Marcus enters a guilty plea early, his case may be resolved without the need for the trial[1]][and therefore Jamie could avoid the traumatic experience of providing evidence in court.[2]][Secondly, it would be advantageous for Marcus to accept a plea deal as the severity of his charge may be reduced in exchange for his guilty plea[3]][and he may face a more lenient sentence as a result.[4]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have identified one case in which a plea negotiation is appropriate.[1] |
| ✓ ✗ | I have described in further detail why a plea negotiation is appropriate in this case.[2] |
| ✓ ✗ | I have identified one case in which a plea negotiation is not appropriate.[3] |
| ✓ ✗ | I have described in further detail why a plea negotiation is not appropriate in this case.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'defendant', 'victim', 'plea deals/agreement', etc. |

*Exemplar response*

[One situation where a plea negotiation is appropriate is if an important prosecution witness is reluctant to give evidence.[1]][In this case, a plea negotiation ensures there is a conviction and a sanction for criminal conduct, when getting a conviction at a trial is difficult due to the witness's reluctance.[2]][A situation where a plea negotiation is not appropriate is if the accused is not willing to plead guilty to any charges.[3]][The prosecution will not be able to negotiate an outcome if the accused is not prepared to plead guilty, even to lesser charges.[4]]

*Possible points to include:*

- Plea negotiation appropriate – victims/witnesses particularly traumatised, plea negotiation avoids need to give evidence (which would add to trauma)
- Plea negotiation appropriate – risk some evidence inadmissible, plea negotiation ensures a conviction.
- Plea negotiation inappropriate – offending so severe that less serious and/or fewer charges will not reflect criminality of behaviour

**7.**

| | |
|---|---|
| ✓ ✗ | I have identified the first error.[1] |
| ✓ ✗ | I have corrected the first error with some variation of 'Sentence indications are provided before the accused enters a guilty plea'.[2] |
| ✓ ✗ | I have identified the second error.[3] |
| ✓ ✗ | I have corrected the second error with some variation of 'only the accused can request a sentence indication'.[4] |

| | |
|---|---|
| ✓ ✗ | I have identified the third error.[5] |
| ✓ ✗ | I have corrected the third error by stating that the court has the discretion (power) to deny a sentence indication request OR the prosecution must consent to a sentence indication being provided.[6] |
| ✓ ✗ | I have signposted my answer appropriately using language such as: 'First error', 'Secondly', 'Lastly', 'Further', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'prosecution', etc. |

*Exemplar response*

[The first error contained in this statement is that sentence indications are provided 'after a guilty plea'.[1]][Sentence indications are provided before the accused enters a plea.[2]][Secondly, the assertion that sentence indications are provided at the request of the prosecution is incorrect.[3]][Only the accused can request a sentence indication, although in the higher courts the prosecution must consent to a sentence indication being given.[4]][Lastly, stating that a request for a sentence indication cannot be denied by a court is incorrect[5]][because the court has the discretion to deny a sentence indication request.[6]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have described the purpose of sentence indications as providing information to an accused about the outcome of an early guilty plea.[1] |
| ✓ ✗ | I have provided the further detail that this is intended to reduce the number of guilty pleas late in proceedings (or similar).[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sentence indications', 'guilty pleas', etc. |

*Exemplar response*

[The purposes of sentence indications is to put the accused in a better position to make the decision to plead guilty/not guilty at an early stage in proceedings, by providing extra information about the consequences of doing so.[1]][This should reduce the number of matters in which accused persons plead guilty late in proceedings.[2]]

LEVEL 3

**9.**

| | |
|---|---|
| ✓ ✗ | I have described one similarity/difference between the purposes of plea negotiations and sentence indications.[1] |
| ✓ ✗ | I have described a second similarity/difference between the purposes of plea negotiations and sentence indications.[2] |
| ✓ ✗ | In my answer when explaining differences, I have used linking words to distinguish such as 'unlike' or 'a difference is' or similar.[3] |
| ✓ ✗ | I have described a third similarity/difference between the purposes of plea negotiations and sentence indications.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sentence indication', 'plea', etc. |

*Exemplar response*

[A similarity of the purposes of both plea negotiations and sentence indications is they work to speed-up court proceedings by facilitating the resolution of criminal cases earlier than would otherwise occur, should they proceed to trial.[1]][Another common purpose of both plea negations and sentence indications is to avoid the costs involved in criminal trials for both parties and the courts.[2]]

[However, a difference in their purposes[3]][is that sentence indications specifically exist to reduce the number of criminal cases where the accused pleads guilty at a late stage of the trial process. In contrast, a key purpose of plea negotiations is a guilty plea that reflects the severity of the crime that was committed.[4]]

*Possible points to include:*

Similarities to describe include:

- To speed up (expedite) court proceedings and avoid the need for criminal trials.
- To avoid the costs involved in a criminal trial for both parties and the courts.
- To avoid the trauma/stress involved in a criminal trial for the accused, victims and their families.

Differences to describe include:

- Sentence indications exist to reduce the number of criminal cases where the accused pleads guilty at a late stage; in contrast, plea negotiations work to ensure a conviction for criminal activity that may be hard to achieve at trial.
- A purpose of plea negotiations is to resolve the matter, whereas a purpose of sentence indications is to provide information to an accused person but the matter is not resolved by this process alone.

**10.**

| | |
|---|---|
| ✓ ✗ | I have stated whether resolution by plea negotiation is appropriate in this case.[1] |
| ✓ ✗ | I have stated the first reason a plea negotiation is appropriate in this case – avoiding delay in final resolution given backlog in County Court.[2] |
| ✓ ✗ | I have stated the second reason a plea negotiation is appropriate in this case – avoiding stress for family, accused, witnesses.[3] |
| ✓ ✗ | I have stated the third reason a plea negotiation is appropriate in this case – ensures conviction where it may be difficult due to unwilling witness (Sarah's boyfriend).[4] |
| ✓ ✗ | I have stated the reason why a plea negotiation is not appropriate in this case – concerns of victim's family about leniency.[5] |
| ✓ ✗ | I have weighed arguments for and against resolution by plea negotiation in this case and reached a conclusion.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prosecution', 'accused', 'trial', etc. |

*Exemplar response*

[I believe a plea negotiation is appropriate in this case.[1]]

[Firstly, the delay in the County Court will amplify the stress and suffering of Liam's family, Sarah and her family; resolution by plea negotiation will avoid such stress.[2]] [In addition, the trauma of giving evidence will be avoided for the clearly-impacted Rosie. The avoidance of a trial reduces the workload of the County Court, meaning other matters are resolved more quickly.[3]]

[Further, Sarah's criminal behaviour will result in a sanction if she pleads guilty to this charge. If the matter instead goes to trial, given the unwillingness of her boyfriend to provide crucial evidence, she may be acquitted, which is not in society's best interests.[4]]

[However, while Liam's family will be consulted by the prosecution in considering the plea negotiation, the prosecution may make such a deal even if they oppose it. This may leave them feeling hurt that Sarah has got off too lightly, given they 'want to see justice done'.[5]]

[Given the significant benefits of accepting such a deal, overall I conclude such a plea negotiation is appropriate.[6]]

LEVEL 4

**11.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I feel plea negotiations are effective.[1] |
| ✓ ✗ | I have described one reason I made this statement.[2] |
| ✓ ✗ | I have described a second reason I made this statement.[3] |
| ✓ ✗ | I have described a counter-argument to my position.[4] |
| ✓ ✗ | I have described a second counter-argument to my position.[5] |
| ✓ ✗ | I have weighed arguments for/criticisms of plea negotiations and made a conclusion about their value.[6] |
| ✓ ✗ | I have structured and signposted my response appropriately: 'One reason is', 'However', etc. |
| ✓ ✗ | I have linked my discussion to the fact scenario in the question where it is relevant (eg: the family's unhappiness about the outcome). |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'trial', 'acquittal', etc. |

*Exemplar response*

[Despite limitations, plea negotiations are an effective way to resolve criminal matters.[1]]

[One reason for this is they secure a guilty verdict and a sanction for criminal activity without the need for a trial, saving the courts' already-stretched time and resources, reducing delays for matters that do go to trial. In avoiding a trial, they reduce the stress and trauma for victims and witnesses as they do not need to give (and listen to) evidence in court.[2]] [A second reason they are appropriate is they ensure a conviction for crimes in which evidence may be difficult to secure or perhaps inadmissible. For example, if a witness is reluctant to give evidence in a trial, securing a guilty plea to a lesser charge is preferable to a trial for a more serious offence where there's a high risk of an acquittal.[3]]

[However, in some cases victims' families (such as Kara's), the public feel such negotiations are inappropriate as an offender is treated too leniently for the crime they've committed.[4]] [Further, such negotiations are conducted privately (unlike trials and sentencing hearings being conducted in public), which may undermine public confidence that the criminal justice system is fair.[5]]

[As the public interest is well served by securing convictions for crimes in a timely manner, avoiding the trauma of a trial for victims and their families, I feel these weaknesses are outweighed by the benefits of such negotiations.[6]]

*Possible points to include:*

Arguments for plea negotiations:

- Reduce delays between charge/resolution.
- Reduces trial workload in higher courts, reducing delays for matters that do go to trial.
- Avoids distressing process of giving evidence/observing a trial for victims, victims' families, witnesses.
- Successful prosecution on a higher charge may be hard to achieve if there's a reluctant witness (such as a victim) or evidence that may be inadmissible – better for society to secure a guilty plea on a lesser charge for a serious incident.
- Police and victims are consulted by the prosecution during this process of negotiating a guilty plea.

Criticisms of plea negotiations:

- A reduced/discounted sentence (compared to that which might be imposed for the more serious charge) is the outcome of a process that is not public, unlike a trial and sentencing hearing – there is no public scrutiny of the process.
- Victims (or victims' families) may feel the lesser charge (and the sentence imposed) is insufficient given the severity of the crime.
- Though a victim is to be informed of the outcome of a plea negotiation, the Victims' Charter doesn't require that a victim agree to such plea negotiation resulting in a lesser charge.
- An unrepresented accused person may feel pressured to plead guilty to avoid a trial (that may see them acquitted) – though Victorian prosecutors' guidelines should prevent them approaching unrepresented accused persons to negotiate a plea.

**12.**

| | | |
|---|---|---|
| ✓ | ✗ | I have stated that based on the information Ella would not be granted a sentence indication.[1] |
| ✓ | ✗ | I have justified this conclusion by noting the prosecutor has not consented, which is required to grant a sentence indication.[2] |
| ✓ | ✗ | I have identified a feature of plea negotiations that lends itself to providing for fairness.[3] |
| ✓ | ✗ | I have linked this feature of plea negotiations to the principle of fairness.[4] |
| ✓ | ✗ | I have referred explicitly to the scenario in my response. |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'plea negotiations', 'sentence indications', etc. |

*Exemplar response*

[Based on the information provided a sentence indication would not be granted to Ella.[1]] [This is because the prosecution has not consented, which is required in order for a sentence indication to be granted.[2]]

[Plea negotiations save valuable court time and resources as the earlier guilty plea is entered, the greater the resources of the court that are spared.[3]] [In this way plea negotiations uphold the principle of fairness as more cases that do need to go to trial can move through the court system more quickly if court time is spared by some disputes concluding with a plea agreement. Delays compound the suffering of victims, witnesses and their families which is unfair on these parties; therefore reducing delays by the use of plea negotiations promotes fairness.[4]]

# 3.1.8 The Victorian court hierarchy and criminal cases

LEVEL 1

**1.** A **2.** C

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated the first statement is incorrect.[1] |
| ✓ ✗ | I have correctly defined 'appellate jurisdiction' as which cases a court can hear when a decision is being challenged.[2] |
| ✓ ✗ | I have stated the second statement is incorrect.[3] |
| ✓ ✗ | I have explained that the grounds for an appeal determines what court will hear a case on appeal.[4] |
| ✓ ✗ | I have stated the third statement is incorrect.[5] |
| ✓ ✗ | I have explained the defendant may need leave (permission) from the court in order to appeal.[6] |
| ✓ ✗ | I have signposted my answer appropriately: 'first error', 'secondly', 'thirdly, 'lastly', 'further', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appellate', 'jurisdiction', etc. |

*Exemplar response*

[The first statement is incorrect,[1]] [because a court's power to hear a case when a decision is being challenged is known as their 'appellate jurisdiction' not their 'power of judicial review'.[2]]

[Furthermore, appeal cases will not necessarily proceed up the court hierarchy without skipping a court.[3]] [The reason for an appeal will determine which court in the hierarchy hears an appeal from a lower court.[4]]

[Lastly, Mark's statement that an appeal must be granted if an offender requests one is false.[5]] [An offender will usually first need to be given leave (that is, permission) to appeal to a higher court.[6]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined what a court hierarchy is (in general).[1] |
| ✓ ✗ | I have described how the hierarchy leads to specialisation – a court hearing similar cases in its jurisdiction regularly developing skill and expertise (or similar).[2] |
| ✓ ✗ | I have used an example to illustrate specialisation.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parties', 'expertise', etc. |

*Exemplar response*

[A court hierarchy is the organising of courts into a ranking, from lower courts to higher courts. Each court is then assigned particular types of cases to hear.[1]]

[Specialisation is enabled by the court hierarchy because in establishing separate jurisdictions for each court, judges and magistrates are able to hone their expertise in dealing with certain types of cases over and over.[2]]

[For example, Supreme Court justices develop expertise in the law about murder and how to explain it to a jury, by hearing these cases frequently.[3]]

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated that the original decision would most likely have been made in the County Court.[1] |
| ✓ ✗ | I have justified this determination by stating that as Mr. Fernando was convicted of an indictable offence that was not one of the most serious (such as murder, which is tried in the Supreme Court) the decision would have been made in the County Court.[2] |
| ✓ ✗ | I have stated that the reason for a court hierarchy that this case highlights is the appeals process.[3] |
| ✓ ✗ | I have detailed how a court hierarchy facilitates the appeals process.[4] |
| ✓ ✗ | I have referred explicitly to the scenario in my response i.e. 'Mr. Fernando'. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'indictable', 'original criminal jurisdiction', etc. |

*Exemplar response*

[The court in which this case was most likely heard originally is the County Court.[1]][As Mr. Fernando was convicted of an indictable offence that was not one of the most serious indictable offences such as murder, the original decision would likely have been made in the County Court within its original criminal jurisdiction.[2]]

[The reason for a court hierarchy highlighted in this case is the provision of an appeals process.[3]][The court hierarchy enables the appeals process by facilitating a passage for review of judicial decisions by superior courts where legal grounds for an appeal exist, a process that would not be possible without courts organised into a hierarchy from lower to higher courts.[4]]

*Possible points to include:*

- As stated above it is most likely the trial was conducted in the County Court, however the Supreme Court (Trial Division) has unlimited criminal jurisdiction and therefore could have conducted this trial.
- The appeal being heard in the Court of Appeal confirms that the original sentence was imposed in the County Court or the Supreme Court (Trial Division); the Court of Appeal only hears appeals from these two courts, so this could also justify the conclusion the trial was conducted in either the County or Supreme Courts.

LEVEL 4

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I agree with the statement i.e. 'to a large/certain/limited' extent etc.[1] |
| ✓ ✗ | I have described one way the court hierarchy promotes access.[2] |
| ✓ ✗ | I have described one way the court hierarchy may not achieve access.[3] |
| ✓ ✗ | I have described one way the court hierarchy promotes fairness.[4] |
| ✓ ✗ | I have described one way the court hierarchy may not achieve fairness.[5] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'However', 'On the other hand' etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeals', 'specialisation', 'fairness', 'access', etc. |

*Exemplar response*

[I agree to a certain extent that the existence of a court hierarchy promotes fairness and access.[1]]

[The court hierarchy promotes access to justice by providing for the appeals process which facilitates the review of judicial decisions. The appeals process allows for mistakes to be corrected such as in the Weybury case; the ranking of courts from lower to higher provides access to such reviews of judges' decisions.[2]]

[However, grounds for appeal must exist such as the sentence being inadequate in this case, and be considered strong enough to warrant a review by a court which may render some cases ineligible for judicial review and meaning access to such appeals is limited.[3]]

[The existence of a court hierarchy also provides for fairness in the criminal justice system due to specialisation. As individual courts are able to hone their expertise in dealing with particular disputes and areas of law frequently, cases are presided over by skilled and knowledgeable judges who are more able to ensure a just outcome, which is fair.[4]]

[On the other hand, some offenders may not be able to appeal to the higher courts if they cannot afford the fees associated with appeals and the legal representation needed, limiting their ability to have mistakes corrected; in such cases the hierarchy does not deliver fairness for these offenders.[5]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated my opinion in response to the contention in the question.[1] |
| ✓ ✗ | I have described the first reason for my opinion, including discussion of the courts' organisation into a hierarchy.[2] |
| ✓ ✗ | I have linked this first reason for my opinion to a principle of justice.[3] |
| ✓ ✗ | I have described the second reason for my opinion, including discussion of the courts' organisation into a hierarchy.[4] |
| ✓ ✗ | I have linked this second reason for my opinion to a principle of justice.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'hierarchy', 'appeal', etc. |

*Exemplar response*

[I disagree with the above statement as the effective operation of the court system relies heavily on the organisation of the courts in terms of rank.[1]]

[Firstly, the court hierarchy facilitates the system of appeals – allowing decisions made by inferior courts to be reviewed by superior courts which could not exist if every court was on the same level.[2]] [This ensures errors are corrected, promoting fairness.[3]]

[Similarly, the court hierarchy enables different courts to specialise in different areas of law which, if every court was on the same level, could not be facilitated if every court had the same jurisdiction.[4]] [This specialisation allows judges to develop skills and knowledge pertaining to particular criminal matters, ensuring trials are conducted by those with expertise which is fair to all parties.[5]]

*Possible points to include:*

Arguments in favour of a single level of courts and not using a hierarchy:

- Simplification of the court system may reduce confusion about which courts resolve different matters, and the different processes they use – making the system more accessible for accused persons, victims' families and so on.
- A single court may still be able to divide into separate types of disputes, similar to how VCAT structures its lists in civil disputes; this may enable a simplified system that maintains the benefits of specialisation.

# 3.1.9 Key personnel in a criminal trial

LEVEL 1

**1.** C **2.** C **3.** B **4.** C

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated that this would have been permissible (allowed) because the accused was self-represented.[1] |
| ✓ ✗ | I have provided one point that the judge would have to be careful about.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'judge', etc. |

*Exemplar response*

[This would have been allowed because the accused was self-represented. In such cases, it is permissible for the judge to assist the accused to understand the court processes and consequences for their actions.[1]][The judge would need to be careful about not using language that supports the case of the accused.[2]]

*Possible points to include:*

Other considerations that a judge may consider:

- not using language that supports the case of the accused
- acting as an impartial umpire and making sure both parties are being treated equally
- using language that does not influence the jury.

**6.**

| | |
|---|---|
| ✓ ✗ | I have identified one responsibility of a juror.[1] |
| ✓ ✗ | I have provided further detail about this responsibility of a juror.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'accused', etc. |

*Exemplar response*

[One of the responsibilities of the jury is to remain impartial.[1]][This means the jury must decide if the accused is guilty or not guilty based on the facts of the case and not their personal biases or prejudices.[2]]

*Possible points to include:*

- To listen and remember the evidence presented in trial. It is important that jury members understand and remember all the evidence presented.
- To attend the whole trial. Jury members must attend the whole trial to ensure that they hear all the evidence and are in the best position to make a just verdict.
- Jurors must not talk about the case with anyone except the other jurors, to ensure jurors only discuss the facts of the case and are not influenced by opinions external to the court.

**7.**

| | |
|---|---|
| ✓ ✗ | I have described one role of the parties.[1] |
| ✓ ✗ | I have described a second role of the parties.[2] |
| ✓ ✗ | I have described a third role of the parties.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'prosecution', 'defence', etc. |

*Exemplar response*

[Firstly, the prosecution and accused are both responsible for deciding which witnesses to call and what other evidence to present to the court.[1]][Secondly, the accused has control over whether to engage legal representation and if so, to choose their legal representative.[2]][Lastly, the parties decide which legal principles to present to the court that relate to the offence and any defences that may apply.[3]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have stated the what extent I agree or disagree with the statement (limited/some/certain/large extent).[1] |
| ✓ ✗ | I have justified this conclusion by stating it is the role of the prosecution to present all relevant evidence, even if it could damage the prosecutor's case (or similar).[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prosecution', etc. |

*Exemplar response*

[I disagree to a large extent with the above statement.[1]] [This is because it is the role of the prosecution to present all relevant evidence, even if it could damage the prosecutor's case. That means the prosecution cannot pursue a conviction at all costs.[2]]

LEVEL 3

**9.**

| | |
|---|---|
| ✓ ✗ | I have described one similarity between the roles of the judge and jury in a criminal matter.[1] |
| ✓ ✗ | I have described a second similarity between the roles of the judge and jury in a criminal matter.[2] |
| ✓ ✗ | I have described one difference between the roles of the judge and jury in a criminal matter.[3] |
| ✓ ✗ | I have described a second difference between the roles of the judge and jury in a criminal matter.[4] |
| ✓ ✗ | In my answer when explaining differences, I have used linking words to distinguish such as: 'unlike', 'a difference is' (or similar). |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'verdict', etc. |

*Exemplar response*

[One similarity between the roles of the judge and the jury is their responsibility to fulfil their respective roles without prejudice. Both the judge and jury must operate as unbiased, third parties during a trial and must not have any connection to the accused, witnesses and so on.[1]]

[Another similarity is that both the judge and the jury are bound by confidentiality, in that neither may discuss the case in which they are involved with anyone outside of the courtroom.[2]]

[However, the roles of the judge and the jury differ significantly because the jury is responsible for determining the guilt of the accused, whereas the judge is solely responsible for sentencing the offender once they have been convicted.[3]]

[Furthermore, a jury does not need to give any reasons for the verdict they have reached, unlike judges who do need to provide reasons for the sentences they impose on those found guilty.[4]]

**10.**

| | |
|---|---|
| ✓ ✗ | I have defined one responsibility of legal practitioners in a criminal trial.[1] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', 'on the other hand', etc.[2] |
| ✓ ✗ | I have defined the matching responsibility of a judge in a criminal trial.[3] |
| ✓ ✗ | I have defined a second responsibility of legal practitioners in a criminal trial.[4] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', 'on the other hand', etc.[5] |
| ✓ ✗ | I have defined a second matching responsibility of a judge in a criminal trial.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'prosecution', 'accused', etc. |

*Exemplar response*

[The role of the legal practitioners is to represent their client to the best of their ability which, in criminal proceedings, involves the prosecuting barrister representing the interests of the State and the defence team representing the interests of the accused.[1]] [On the other hand,[2]] [the judge is not affiliated with either party and instead acts as an impartial umpire who ensures that all key personnel, as well as any other individuals present in the court, conform to courtroom rules and procedures.[3]]

[A further difference is that legal practitioners are responsible for questioning witnesses during a trial to draw out evidence[4]] [unlike[5]] [a judge who is not involved in this process other than ensuring witnesses comply with the rules of evidence and procedure and clarifying witnesses' answers if they are unclear.[6]]

*Possible points to include:*

Other responsibilities of legal practitioners in criminal proceedings include but are not limited to:

- must maintain strict lawyer–client confidentiality
- prepare legal arguments to present to the judge
- declare evidence to the other party's legal representatives
- summarising their party's case for the jury (at the start and end of the trial)
- making submissions to the judge regarding the sanction that should be imposed (if an offender pleads guilty or is convicted)

Other responsibilities of judges in criminal proceedings include but are not limited to:

- explaining the standard of proof to the jury
- directing the jury to the law that applies to the facts
- give rulings on points of law
- determine the sentence if the accused is convicted

LEVEL 4

**11.**

| | |
|---|---|
| ✓ ✗ | I have identified the judge as having the role of ensuring rules of evidence and procedure are followed.[1] |
| ✓ ✗ | I have described how the judge performing this role upholds one principle of justice.[2] |
| ✓ ✗ | I have identified the prosecution and the accused as being able to initiate plea negotiations.[3] |
| ✓ ✗ | I have described how the prosecution and accused performing this role upholds one principle of justice.[4] |
| ✓ ✗ | I have identified the legal practitioners as having the responsibility to conduct a case in a way that does not mislead the court.[5] |
| ✓ ✗ | I have described how the legal practitioners performing this role upholds one principle of justice.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prosecution', 'legal practitioner', etc. |

*Exemplar response*

[Firstly, the judge is responsible for acting as an impartial umpire in a criminal matter, ensuring that all personnel adhere to the rules of evidence and procedure.[1]] [This responsibility upholds the principle of fairness by ensuring the verdict is based solely on relevant and reliable evidence.[2]]

[Secondly, the prosecution and the accused have the option to enter into plea negotiations.[3]] [Because delays in criminal cases can be a source of unfairness to accused persons, victims and others, plea negotiations uphold the principle of fairness for all parties by facilitating early guilty pleas, ensuring matters are resolved more quickly.[4]]

[Lastly, the responsibility of preparing and conducting a case without misleading the courts is the responsibility of the legal practitioners.[5]] [This responsibility seeks to uphold the principle of fairness as it ensures that no misleading evidence or legal arguments will be presented in court that could lead to an unjust outcome.[6]]

*Possible points to include:*

The following alternative links to the principles of justice may also be described:

- The judge upholding rules of evidence and procedure could also be linked to the achievement of equality, as the rules are applied in the same manner in all cases, for all parties and all witnesses.

**12.**

| | |
|---|---|
| ✓ ✗ | I have given an opinion of the extent to which juries promote the achievement of fairness.[1] |
| ✓ ✗ | I have described the first reason for my opinion, linking juries to the principle of fairness.[2] |
| ✓ ✗ | I have described a matching counter-argument to that first reason.[3] |
| ✓ ✗ | I have described the second reason for my opinion, linking juries to the principle of fairness.[4] |
| ✓ ✗ | I have described a matching counter-argument to that second reason.[5] |
| ✓ ✗ | I have described a third reason for my opinion, linking juries to the principle of fairness.[6] |
| ✓ ✗ | I have weighed arguments for and against juries' contribution to the achievement of fairness and reached a conclusion.[7] |
| ✓ ✗ | I have linked my discussion to the scenario of juror misconduct in the question. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'accused', 'trial', etc. |

*Exemplar response*

[Across the whole justice system, juries contribute to the achievement of fairness in criminal trials to a limited extent.[1]] [Firstly, the risk of jury misconduct acts as a barrier to the achievement of fairness in criminal trials. This is evident in the scenario outlined above, as a juror was charged with juror misconduct, this would have resulted in a mistrial. Mistrials delay the delivery of justice to both parties, and witnesses and victims' families, which is unfair. Jurors seeking out extra information like this does also create the risk of verdicts based on irrelevant or unreliable information, which is unfair on victims and the accused.[2]] [However, judges do direct juries to make their decisions solely on the evidence presented in court, and the imposition of a fine like this should encourage jurors to follow such directions, limiting the risk of this unfairness.[3]]

[In addition, in order for juries to deliver a verdict, based on the facts of the case presented in trial, they must listen to, understand and recall all the evidence presented in trial, with no legal training. As juries may struggle to remember and understand all evidence, especially in long trials, criminal trials may not always be fair.[4]] [Having said that, it is the role of the judge to give directions to the jury to ensure a fair trial. Directions at the end of a trial given by the judge should ensure the jurors understand the evidence and the law presented, promoting the achievement of fairness.[5]]

[Most significantly though, juries are only used in trials for indictable offences in the County and Supreme Courts, and most criminal matters are summary offences resolved in the Magistrates' Court. Further, many of those charged with indictable offences plead guilty. Therefore, juries have no impact on the achievement of fairness in the vast majority of criminal cases.[6]] [Despite some of the limitations discussed, in trials in the higher courts juries can encourage the achievement of fairness. But in conclusion, in most criminal matters juries play no role in promoting fairness as a principle of justice.[7]]

*Possible points to include:*

These arguments for/against juries' contribution to fairness can be discussed in a different sequence, and to reach a different conclusion.

Ways juries promote fairness:

- A cross-section of the community is used as decision-maker, so the suspect in a criminal case should feel their guilt/innocence has been decided by their equals; this prevents suspects feeling they have been oppressed by the authorities, which helps achieve fair trials.
- Trial by peers also protects democracy, ensuring decisions are based on the facts and the law and are not politically-motivated (which is also fair).
- The presence of juries ensures plain English is used in court, less legal jargon is used (to ensure that the jury understand the court's procedures and the evidence they are being asked to make a decision upon); this ensures the accused understand the process being used against them, which is fair.
- Juries are independent of all parties to a dispute. They are randomly selected from the community and have no connection to the accused, victims, witnesses, etc. They can therefore be completely impartial which helps ensure the trial is fair.
- Jurors cannot seek additional information about the case beyond the courtroom. They are instructed to disregard any knowledge they may have of the dispute, are prevented by the Juries Act from seeking additional information about a case and judges can suppress media coverage of an offence to ensure jurors do not have preconceived ideas about an offender (or witnesses), which is fair.
- The decision-making responsibility is spread across more people (12 in criminal cases). If a group has come to the same decision (unanimous decisions often required; majority verdicts sometimes accepted but only if 1 person disagrees with majority), that decision is more likely to be correct – which ensures decisions are fair.

Limitations in juries promoting fairness:

- Many individuals in society are excused, ineligible and disqualified: individuals such as those under 18, recent migrants from non-English speaking background, refugees, etc. – don't participate in juries, and therefore, such people may not feel that they have been tried by their peers and therefore may not feel that they have been treated fairly (compared to others after a jury trial).
- Further, juries are used in a very small proportion of cases – most criminal matters are resolved in the Magistrates' Court – so relatively few individuals are tried by their peers.
- Jurors may be influenced by what they hear about a party to a case in the media – may make a decision based on preconceived ideas about the case, not just the evidence heard in court. This is not fair on the parties, victims, etc.
- Making decisions in legal cases is a complex task undertaken by people with no legal training – risk of an incorrect verdict for this reason. This could be unfair on accused and victims. Because juries do not need to provide reasons for their decisions there is no certainty they have actually applied the law to the facts correctly.

# 3.1.10 The purposes of sanctions

LEVEL 1

**1.** B **2.** D **3.** D **4.** C **5.** B

LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined rehabilitation as 'to address any underlying causes of offending, to reduce the likelihood of future offending' or similar.[1] |
| ✓ ✗ | I have stated that Ben's young age means he's more likely to be rehabilitated than Ash.[2] |
| ✓ ✗ | I have stated that Ben's CCO addresses the underlying cause of his crime, (drug use) to prevent future crime.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offending', 'rehabilitate', etc. |

*Exemplar response*

[To 'rehabilitate' is to address any underlying causes of offending, to reduce the likelihood of future offending.[1]][In this case, as Ben is only young compared to Ash, he's more likely to be rehabilitated[2]][and the requirement to attend counselling for his drug use is intended to prevent future drug-related offending; Ash's imprisonment is less likely to address any underlying reason for his drug-dealing.[3]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have included details about punishment, including 'revenge', 'suffering', 'retribution' or similar.[1] |
| ✓ ✗ | I have not used the words 'punish' or 'punishment' in my description. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offender', 'victims', etc. |

*Exemplar response*

[To punish is to exact revenge. Courts will often seek to impose suffering or loss of some kind upon an offender, as victims and society as a whole usually feel an offender should be 'made to pay' for their offending.[1]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have defined specific deterrence as 'when an offender themselves receives a sanction and is discouraged from committing same/similar behaviours that led to them receiving this sanction' (or similar).[1] |
| ✓ ✗ | I have used an appropriate example of an offender receiving a sanction and then being discouraged from engaging in similar/same behaviours again.[2] |
| ✓ ✗ | I have used a contrasting linking word such as: 'however', 'whereas', 'on the other hand', 'in contrast', etc.[3] |
| ✓ ✗ | I have defined general deterrence as 'when someone other than the offender is discouraged from committing same/similar behaviours that led the offender to receive a sanction' (or similar).[4] |
| ✓ ✗ | I have used an appropriate example of someone other than the offender – that is, society as a whole – being discouraged from engaging in similar/same behaviours as the offender.[5] |
| ✓ ✗ | I have not re-used any of the words I am defining. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offender', 'criminal behaviours', etc. |

*Exemplar response*

[Specific deterrence refers to when the offender themselves needs to be discouraged from committing the same or similar criminal behaviours,[1]][for instance, when someone receives a fine for speeding they are less likely to do so again.[2]]

[On the other hand,[3]][general deterrence refers to when individuals other than the offender are discouraged from engaging in similar behaviours to the offender.[4]][For example, all drivers know about fines being imposed for speeding so they are less likely to speed when driving.[5]]

**9.**

- I have stated how the judge's opinion will be reflected – it would support the imposition of a harsher sentence as opposed to a more lenient one.[1]
- I have identified denunciation as the sentencing purpose being reflected in the judge's comments.[2]
- I have justified this conclusion that denunciation is the sentencing purpose increasing the sentence – the statement indicates a desire to reflect the community's disapproval of the conduct.[3]
- I have used key legal studies terminology effectively such as: 'offender', 'denounce', 'court', etc.

*Exemplar response*

[In this case it is likely that the offender's sentence would be particularly severe.[1]][The judge's comments are clearly an example of the court seeking to denounce the actions of the offender,[2]][in that the sanction will reflect the court's (and the community's) condemnation of his actions.[3]]

**10.**

- I have defined 'protection' as providing safety to society and victims/their families from harm caused by offenders (or similar).[1]
- I have stated the rising prison population suggests courts are increasing their efforts to protect society by removing offenders from the community.[2]
- I have not re-used any of the words I'm defining.
- I have used key legal studies terminology effectively such as: 'sanction', 'community', 'offender', etc.

*Exemplar response*

[When a court seeks to achieve 'protection' as a purpose of criminal sanctions, it is intending to keep the community (and victims and their families) safe from the threat posed by the offender.[1]][The large increase in the prison population suggests courts in Victoria are increasingly using imprisonment to protect the community from harm, as individuals are removed from society.[2]]

LEVEL 3

**11.**

- I have described 'general deterrence' as the imposition of a more severe sanction, to discourage others in the community from similar offending (or similar).[1]
- I used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand', etc.[2]
- I have described 'denunciation' as the imposition of a more severe sanction to demonstrate the court's condemnation or disapproval of the offender's behaviour (or similar).[3]
- I have stated that the court's attempt to achieve general deterrence would result in Khoja's sentence being longer.[4]
- I have used key legal studies terminology effectively such as: 'deterrence', 'sanction', etc.

*Exemplar response*

[The sentencing purpose 'general deterrence' means the imposition of a more severe sanction, to discourage others in the community from similar offending.[1]][On the other hand,[2]][the purpose 'denunciation' refers to the court imposing a more severe sanction to demonstrate the court's condemnation/disapproval of the offender's behaviour.[3]]

[To achieve the 'general deterrence' purpose of criminal sanctions and discourage members of the wider community from offending as Khoja did, the sentencing court would have made his prison term longer than would otherwise be the case.[4]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have identified the purpose being referred to in the sentencing remarks as protection.[1] |
| ✓ ✗ | I have linked the sentencing remarks to how it reveals protection.[2] |
| ✓ ✗ | I have identified another purpose of sanctions.[3] |
| ✓ ✗ | I have defined this purpose of sanctions.[4] |
| ✓ ✗ | I have referred explicitly to the scenario in my answer. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sanction, 'offender', etc. |

*Exemplar response*

[The purpose being referred to in this sentencing remark is protection.[1]][As the judge has stated Mr. Anderson 'poses such a risk to society' that life in prison is the appropriate sanction, it is clear that protection is the purpose to be achieved as Mr. Anderson must be removed from society.[2]]

[Another purpose of sanctions is punishment.[3]][Punishment refers to the ability of a sanction to function as adequate retribution for a crime so that the offender 'pays' for the impact their crime has had on any victims and society at large. This should ensure victims and their families do not feel the need to exact revenge themselves.[4]]

*Possible points to include:*

- Rehabilitation – to sentence criminal offenders in a manner that aims to break the cycle of criminal behaviour (or 'recidivism') so that criminal offending may be prevented or stopped. Where relevant the courts may aim to address any underlying causes of criminal behaviour (such as drug addiction, mental illness, etc) to prevent future offending.
- Deterrence – to 'make an example' of the offender in an effort to sway the offender and/or would-be offenders away from committing similar crimes through the imposition of a criminal sanction. This includes general deterrence and specific deterrence.
- Denunciation – to publicly condemn (or criticise) the offender's criminal behaviour. Essentially, it is to highlight the extent to which the offender has transgressed against (or violated) the moral and ethical standards of society.

LEVEL 4

**13.**

| | |
|---|---|
| ✓ ✗ | I have stated one purpose of imprisonment.[1] |
| ✓ ✗ | I have described how imprisonment achieves the purpose I have identified.[2] |
| ✓ ✗ | I have stated a second purpose of imprisonment.[3] |
| ✓ ✗ | I have described how imprisonment achieves the second purpose I have identified.[4] |
| ✓ ✗ | I have stated that the recidivism rate in Victorian prisons suggests it is ineffective at achieving either rehabilitation or specific deterrence.[5] |
| ✓ ✗ | I have described how the recidivism rate suggests imprisonment is an ineffective means of achieving either rehabilitation or specific deterrence.[6] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'One purpose is', 'Moreover', 'Further', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'recidivism', 'offender', 'imprisonment', etc. |

*Exemplar response*

[One purpose that imprisonment seeks to achieve is protection.[1]][Imprisonment serves to protect society by depriving offenders who pose a risk to the public of their freedom and removing them from society.[2]][Another purpose of imprisonment is to punish.[3]] [Punishment refers to the ability of a sanction to function as adequate retribution for a crime so that the offender pays for the impact their crime has had on any victims and society at large, and the loss of liberty, employment and connection to family is how imprisonment exacts this revenge.[4]]

[The recidivism rate of Victorian prisoners, however, does not suggest that imprisonment is an effective means of rehabilitating offenders.[5]][As nearly half of all Victorian prisoners return to prison within two years, this data suggests imprisonment is not effective at helping offenders address the underlying causes of criminal activity such as mental health issues or drug addiction and stopping the cycle of criminality.[6]]

*Possible points to include:*

Purposes of imprisonment also include:

- Deterrence – to 'make an example' of the offender in an effort to sway the offender and/or would-be offenders away from committing similar crimes through the imposition of a criminal sanction. This includes general deterrence and specific deterrence.
- Denunciation – to publicly condemn (or criticise) the offender's criminal behaviour. Essentially, it is to highlight the extent to which the offender has transgressed against (or violated) the moral and ethical standards of society.

The recidivism rate also suggests imprisonment is not effective at providing specific deterrence; if almost half of all prisoners are committing serious offences again within such a short period, that suggests for many offenders imprisonment does not discourage them from criminal activity.

# 3.1.11 Types of sanctions

LEVEL 1

**1.** D **2.** A **3.** A

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined a fine as a monetary payment the court will order an offender to make, as a penalty for a criminal offence (or similar).[1] |
| ✓ ✗ | I have described one way a fine does achieve punishment.[2] |
| ✓ ✗ | I have described one way a fine does not achieve punishment.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sanction', 'fine', etc. |

*Exemplar response*

[A fine is a monetary payment the court will order an offender to make, as a penalty for a criminal offence.[1]][A fine does achieve punishment because the offender must forego the goods and services they would have purchased with the money paid to the state; their material standard of living suffers as a result of paying a fine.[2]][In some cases a fine will not achieve punishment because the maximum fine stated in the law for some offences may not be high enough to cause any suffering or achieve any retribution for some offenders who are very wealthy.[3]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified one condition that may be attached to a CCO.[1] |
| ✓ ✗ | I have identified a second condition that may be attached to a CCO.[2] |
| ✓ ✗ | I have identified a third condition that may be attached to a CCO.[3] |
| ✓ ✗ | I have described how a condition attached to a CCO can achieve rehabilitation, by addressing the underlying cause of a crime.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'specific deterrence', 'offender', etc. |

*Exemplar response*

[Conditions attached to a CCO can include the offender undertaking unpaid community work,[1]][attending drug or alcohol counselling[2]][and having a curfew that restricts their movements at certain times.[3]][One way a CCO can achieve rehabilitation is through court-monitored drug and alcohol counselling, which can fix underlying addiction problems that have caused criminal activity, such as violence or thefts.[4]]

*Possible points to include:*

- Staying away from particular locations.
- Not contacting certain individuals.
- Not consuming alcohol and/or not attending licenced venues such as bars or nightclubs.

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined imprisonment as an offender being held in custody.[1] |
| ✓ ✗ | I have stated imprisonment is the most severe sentencing option (the sanction of last-resort).[2] |
| ✓ ✗ | I have included details about a sentence usually including a minimum non-parole period.[3] |
| ✓ ✗ | I have avoided defining imprisonment in a repetitive way such as: 'being in prison'. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'imprisonment', 'sentencing', etc. |

*Exemplar response*

[Imprisonment is when an offender is held in custody for a given period of time,[1]][and it is the most severe penalty a court can impose.[2]][When a court imposes a prison term it will usually set a period of imprisonment (the 'head sentence') and also set a minimum period of imprisonment after which an offender can apply for parole (called 'the non-parole period').[3]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated I agree specific deterrence is achieved.[1] |
| ✓ ✗ | I have justified this opinion by stating how the fine discourages the offender from reoffending (or similar).[2] |
| ✓ ✗ | I have stated I disagree that general deterrence will not be achieved.[3] |
| ✓ ✗ | I have justified this opinion by stating how the use of fines discourages the wider community reoffending (or similar).[4] |
| ✓ ✗ | I have stated I disagree that denunciation will never be achieved.[5] |
| ✓ ✗ | I have justified this opinion by stating how a large fine can indicate condemnation of the offender's behaviour (or similar).[6] |
| ✓ ✗ | I have been careful NOT to simply reuse the words deterrence and denunciation when describing these purposes of sanctions. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sanction', 'fine', etc. |

*Exemplar response*

[I agree that a fine achieves specific deterrence,[1]][in that this punishment for driving without a licence will discourage the driver from reoffending.[2]][However, I disagree that a fine will not achieve general deterrence,[3]][as the awareness that such fines are imposed discourages most drivers from committing this offence in the first place.[4]]

[I also disagree that fines will not achieve denunciation.[5]][In circumstances where a court can impose a very large fine (for example, a large fine for a business due to a workplace death), this will communicate the court's condemnation of the crime.[6]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have stated this CCO would serve to rehabilitate.[1] |
| ✓ ✗ | I have described how rehabilitation is achieved through the provision of anger-management counselling.[2] |
| ✓ ✗ | I have stated that this CCO would serve to punish.[3] |
| ✓ ✗ | I have described how punishment is achieved by restricting the offender's freedom of movement and causing inconvenience (or similar).[4] |
| ✓ ✗ | I have stated that this CCO would serve to specifically deter.[5] |
| ✓ ✗ | I have described how specific deterrence is achieved by this punishment discouraging future crime (or similar).[6] |
| ✓ ✗ | I have signposted my answer appropriately such as: 'firstly', 'in 24601's case', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sanction', 'fine', etc. |

*Exemplar response*

[Firstly, the conditions of this community correction order (CCO) serve to rehabilitate 24601.[1]][In compelling the offender to attend anger-management counselling this order ensures he is getting the help he needs to resolve the issues that contributed to his criminality in the first place.[2]][Secondly, this particular CCO will punish 24601[3]][by ensuring that he surrenders his passport it restricts his freedom of movement; the unpaid community work also punishes the offender by causing him inconvenience and the loss of free time.[4]][Lastly, this punishment will also work to specifically deter 24601 from reoffending[5]][because the limitation on his free movement and inconvenience are a disincentive from future offending.[6]]

**9.**

| | |
|---|---|
| ✓ ✗ | I have identified a relevant purpose of sanctions (one of punishment, deterrence, denunciation or protection; not rehabilitation).[1] |
| ✓ ✗ | I have described how the purpose of sanctions is achieved in this instance, referring to Jeremy.[2] |
| ✓ ✗ | I have been careful NOT to simply reuse terms such as deterrence and punishment when describing these purposes of sanctions. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'imprisonment', 'punishment', etc. |

*Exemplar response*

[The purpose that a term of imprisonment would serve in Jeremy's case is to punish[1]][him for his wrongdoing by sentencing him to a term of imprisonment that proportionately reflects the severity of his actions. This would serve as retribution as he would suffer from his loss of freedom, independence and contact with family.[2]]

*Possible points to include:*

Alternative purposes to describe in this instance include:

- A term of imprisonment would serve to specifically **deter** Jeremy from committing more crimes as the punishment is a disincentive to offend, as well as generally deterring the wider community.
- A long term of imprisonment would serve to **denounce** Jeremy's crimes given their severity.
- A term of imprisonment would serve to **protect** the community from Jeremy's actions as he's removed from society.

LEVEL 4

**10.**

| | |
|---|---|
| ✓ ✗ | I have stated how much I agree that prison is effective at achieving specific deterrence.[1] |
| ✓ ✗ | I have given a reason why prison is effective at achieving specific deterrence.[2] |
| ✓ ✗ | I have referred to the quote in the question when discussing deterrence.[3] |
| ✓ ✗ | I have given a reason why prison is not always effective at achieving specific deterrence.[4] |
| ✓ ✗ | I have stated how much I agree that prison is effective at achieving protection.[5] |
| ✓ ✗ | I have given a reason why prison is effective at achieving protection.[6] |
| ✓ ✗ | I have referred to the quote in the question when discussing protection.[7] |
| ✓ ✗ | I have given a reason why prison is not always effective at achieving protection.[8] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'deterrence', 'protection','imprisonment', etc. |

*Exemplar response*

[The sanction of imprisonment is only somewhat effective at specifically deterring a significant proportion of offenders who cause significant harm to the community.[1]][The severity of the punishment does discourage many offenders from reoffending, therefore achieving specific deterrence.[2]][However, as the comment in this question suggests,[3]][approximately 30% to 40% of prisoners in Victoria return to prison within two years of being released, which suggests prison is not always effective at achieving specific deterrence in many cases.[4]]

[Prison is very effective at achieving protection during the course of their prison term,[5]][an offender is physically removed from society and their movement is restricted,[6]]['giving society as break' from their criminal acts.[7]][However, the extent to which imprisonment achieves long-term protection of the community from offending is limited if around 30–40% of offenders commit new crimes after being released and return to prison.[8]]

# 3.1.12 Factors considered in sentencing

LEVEL 1

**1.** B **2.** C **3.** B **4.** C

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have defined aggravating factors as 'any fact or circumstance that supports greater severity in sentencing' (or similar).[1] |
| ✓ ✗ | I have identified one aggravating factor in Bec's case: she was speeding.[2] |
| ✓ ✗ | I have identified a second aggravating factor in Bec's case: she has prior convictions for similar offences.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'culpability', 'aggravating', 'sentencing', etc. |

*Exemplar response*

[Aggravating factors are aspects of an offence or the offender that render the offending more serious, and result in a more severe sanction being imposed.[1]]

[One aggravating factor in Bec's case is that she was speeding,[2]][and another aggravating factor is that she has prior convictions for earlier driving offences.[3]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined mitigating factors as 'any fact or circumstances that supports leniency in sentencing' (or similar).[1] |
| ✓ ✗ | I have given one example of a mitigating factor.[2] |
| ✓ ✗ | I have given a second example of a mitigating factor.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'mitigating', 'aggravating', 'sentencing', etc. |

*Exemplar response*

[Mitigating factors are aspects of the offender or circumstances surrounding the crime that support leniency in sentencing.[1]][For example, genuine remorse[2]][and having no prior criminal history.[3]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated that the plea would NOT stand.[1] |
| ✓ ✗ | I have justified why the plea would not stand by stating that the prosecution does not enter pleas.[2] |
| ✓ ✗ | I have justified why the plea would not stand by stating that it is the accused person's responsibility to enter a plea.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prosecution', 'accused', etc. |

*Exemplar response*

[This plea would not stand[1]][because the prosecution does not enter a plea of guilty,[2]][only an accused person (such as Campbell) can decide whether to plead guilty to an offence.[3]]

**8.**

- ✓ ✗ I have identified the first error as to the timing of the VIS being presented.[1]
- ✓ ✗ I have correctly stated that the VIS is presented after the accused is found guilty/pleads guilty during sentencing.[2]
- ✓ ✗ I have identified the second error regarding the purpose of the VIS.[3]
- ✓ ✗ I have correctly stated the purpose of the VIS is to inform the judge as to the impact of the crime and that this informs sentencing.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'guilty', 'sentence', etc.

*Exemplar response*

[The first error is stating the victim impact statement (VIS) is presented during the trial.[1]] [In fact, such a statement is presented to the court after an accused person has pleaded guilty or been found guilty during sentencing.[2]]

[The second error is that the purpose of a VIS is to educate the prosecution about the impact of the offence.[3]] [The true purpose of a VIS is to educate the judge as to the physical, emotional and/or financial impact of the offence, to inform the sentence he/she then imposes.[4]]

LEVEL 3

**9.**

- ✓ ✗ I have defined aggravating factors as facts that increase the severity or culpability of a crime (or similar).[1]
- ✓ ✗ I have included one appropriate example of an aggravating factor.[2]
- ✓ ✗ I have used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand' or similar.[3]
- ✓ ✗ I have defined mitigating factors as any facts or circumstances that would support leniency in sentencing (or similar).[4]
- ✓ ✗ I have included an appropriate example of a mitigating factor.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'culpability', 'victim', 'mitigating', 'plea', etc.

*Exemplar response*

[Aggravating factors are any facts or circumstances (either acts or omissions) that increase the severity or culpability of criminal activity and would lead to a sanction being imposed that is more harsh,[1]] [such as using a weapon in committing the offence.[2]]

[On the other hand,[3]] ['mitigating factors' refer to any facts or circumstances that would support leniency in sentencing[4]] [such as the offender reacting to a great degree of provocation from the victim.[5]]

*Possible points to include:*

Examples of aggravating factors: recidivism, crime motivated by hatred of a particular group, the victim is vulnerable (the elderly, children, the disabled), abuse of a position of power and/or trust, significant injury to the victim, use of violence/weapon during the offence.

Examples of mitigating factors: significant provocation from the victim, cooperation with police, if the offending caused minimal harm, if the offender has taken steps towards rehabilitating, if the offender has suffered a history of abuse, a show of remorse, a lack of prior convictions, the offender was very young and didn't fully understand the consequences of their offending.

**10.**

- ✓ ✗ I have stated that Greg's plea would serve him favourably through a reduction in his sentence.[1]
- ✓ ✗ I have stated why guilty pleas are rewarded with a sentence discount, stating they avoid the cost, time and trauma associated with a trial (or similar).[2]
- ✓ ✗ I have described the first mitigating factor in Greg's case – his mental illness.[3]
- ✓ ✗ I have described the second mitigating factor in Greg's case – his lack of prior convictions.[4]

| | |
|---|---|
| ✓ ✗ | I have described the first aggravating factor in Greg's case – the use of violence in the offending.[5] |
| ✓ ✗ | I have described the second aggravating factor in Greg's case – the vulnerability of the victim.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'culpability', 'victim', 'mitigating', 'plea', etc. |

*Exemplar response*

[Greg's guilty plea is likely to serve him favourably during sentencing – his guilty plea would result in the court imposing a lower sentence than if he'd been convicted at a trial.[1]][His plea has this impact because the courts reward (with a reduced sentence) offenders such as Greg who save valuable court time and resources, and also avoid the need for the victim (Leah) to give evidence and the trauma associated with doing so.[2]]

[The mitigating factors in this case would include the fact that Greg suffers a mental illness. His mental age may have impeded his ability to determine that his actions were unlawful in the same way that a healthy adult could which is likely to diminish his culpability from the court's perspective.[3]][Further, that he has no criminal history is likely to reduce the severity of his sentence, as he has not demonstrated a pattern of criminality.[4]]

[Finally, the aggravating factors in this case would include the fact that the victim showed signs of physical assault. The use of violence would increase Greg's culpability.[5]][In addition, the fact that the victim is so young and therefore vulnerable is an aggravating factor and would serve to increase Greg's culpability.[6]]

LEVEL 4

**11.**

| | |
|---|---|
| ✓ ✗ | I have defined 'fairness' as a principle of justice.[1] |
| ✓ ✗ | I have identified one way in which considering guilty pleas can uphold fairness.[2] |
| ✓ ✗ | I have explained how judges can ensure fairness by how they treat a guilty plea.[3] |
| ✓ ✗ | I have identified one way in which considering victim impact statements can uphold fairness.[4] |
| ✓ ✗ | I have explained how judges can ensure fairness by how they factor victim impact statements into sentencing.[5] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'Secondly', 'In this way', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'convicted', 'sentence', 'trial', etc. |

*Exemplar response*

[The principle of 'fairness' requires that trials are conducted by independent, impartial courts and judges; it also requires that the outcomes of criminal matters are based on the unique facts of each individual case, and the circumstances of each offender and victim are taken into account.[1]]

[Judges can ensure fairness in sentencing by giving appropriate sentence discounts proportionate to how early a guilty plea has been submitted.[2]][In this way judges can uphold fairness by rewarding offenders in a way that is appropriate to the amount of time, money and stress that is saved in their particular case by not having to conduct a trial whilst also ensuring that they are still punished for the crime.[3]]

[Secondly, judges can uphold fairness by considering the impact a crime has had on the victim. In delivering a victim impact statement (VIS), victims of crime have the opportunity to explain how the offence has impacted them mentally, emotionally and physically.[4]][This allows a judge to gain insight into the impact of the crime and therefore be able to impose a sentence that is a reflection of the specific facts of the offence in question, which is fair to the accused and the victim.[5]]

# 3.1.13 Factors that affect principles of justice (AOS 1)

LEVEL 1

**1.** A **2.** A **3.** B

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated one legal cost.[1] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal representation', etc. |

*Exemplar response*

[One cost that may affect the ability of the criminal justice system to achieve the principles of justice is fees for legal representation.[1]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified one reason why delays are a negative for the criminal justice system.[1] |
| ✓ ✗ | I have identified a second reason why delays are a negative for the criminal justice system.[2] |
| ✓ ✗ | I have identified one cause of delay in criminal cases.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'evidence', 'trial', etc. |

*Exemplar response*

[One reason why delay in criminal cases is undesirable is because our courts rely on evidence being presented by witnesses in an oral question and answer format, as time passes memories fade and evidence can therefore be lost or unreliable. This can prevent just outcomes at trial.[1]] [Another reason why delays are a negative is because awaiting trial for a criminal offence is stressful for accused persons and their families, and delays add to this stress and anxiety.[2]] [One cause of delay is the large backlog of cases, with prosecutions rising faster than the courts' resources and ability to conduct cases.[3]]

*Possible points to include:*

Alternative causes of delay:

- Time taken to appeal judgements and sentences, creating a delay in the final resolution of a case.
- Trial procedures are slow, with legal practitioners' oral arguments and the question–answer process for evidence being presented both taking a lot of time.
- Judges giving directions to juries at the start and end of a trial for an indictable offence can be very time-consuming.
- A hung jury (in which no verdict is delivered) and mistrials (perhaps due to jury misbehaviour) mean re-trials need to be conducted, adding to delays in the resolution of criminal matters.
- Empanelling juries is time-consuming.
- The huge increase in matters about toll road fines being resolved by the Magistrates' Court, which create delays in the resolution of more urgent matters (such as assaults, family violence offences, etc).

**6.**

| | |
|---|---|
| ✓ ✗ | I have described how avoiding eye contact is seen as respectful in some indigenous communities but can be misunderstood as dishonesty in a court.[1] |
| ✓ ✗ | I have described how silence is important in conversation in indigenous culture but can be misunderstood as guilt in court.[2] |
| ✓ ✗ | I have described how respect for authority can result in indigenous witnesses giving answers they think are expected, rather than what actually occurred.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', etc. |

*Exemplar response*

[Some Indigenous Australians minimise eye contact as a sign of respect to those they are speaking with. In court this can be misunderstood as dishonesty and evasiveness.[1]][In some indigenous communities remaining silent during conversation is more common than, non-indigenous Australians. This can be misunderstood as uncertainty, confusion or guilt.[2]][Some indigenous Australians' cultural respect for authority can lead to a tendency to answer questions from police, lawyers and the courts in a way they feel is expected, rather than what has actually occurred.[3]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated that the appointment of Aboriginal Community Engagement officers would help to minimise the impact of cultural differences.[1] |
| ✓ ✗ | I have identified something these officers could offer Aboriginal clients that would provide for equality.[2] |
| ✓ ✗ | I have, using an example(s), described how these officers could minimise the impact of cultural differences on equality.[3] |
| ✓ ✗ | I have identified something these officers could offer Aboriginal clients that would provide for fairness.[4] |
| ✓ ✗ | I have, using an example(s), described how these officers could minimise the impact of cultural differences on fairness.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'equality', 'justice', 'fairness', etc. |

*Exemplar response*

[The appointment of the three Aboriginal Community Engagement officers would help to minimise the impact of cultural differences on the achievement of justice.[1]]

[These officers may help to bridge the gap between Aboriginal customs and traditions and the law,[2]][for example, taking extra time to explain the courts' rules of evidence and procedure, so that Aboriginal clients of VLA may be equipped with an equal chance to achieve an understanding of the legal system as any other client, providing for equality.[3]]

[These officers may also be able to provide for fairness by tailoring their services to suit the unique needs of their Aboriginal clients,[4]][such as in explaining the operation of Koori Courts, so that their Aboriginal clients receive legal advice and assistance that is based on appreciation of their circumstances.[5]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have identified one reason costs limit the achievement of fairness.[1] |
| ✓ ✗ | I have described in detail this reason costs limit the achievement of fairness.[2] |
| ✓ ✗ | I have identified one way the justice system promotes fairness despite costs issues.[3] |
| ✓ ✗ | I have described in detail this way the justice system promotes fairness despite costs issues.[4] |
| ✓ ✗ | I have identified a second way the justice system promotes fairness despite costs issues.[5] |
| ✓ ✗ | I have described in detail this way the justice system promotes fairness despite costs issues.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'accused', 'parties', etc. |

*Exemplar response*

[Costs associated with legal representation mean that some individuals charged with criminal offences will be unable to afford a lawyer and will represent themselves.[1]][This undermines the achievement of fairness as those without a lawyer will not understand the court procedures and any lawful defences to their charges, and will be less able to test the accuracy of the prosecution's evidence. They will be less able to present their defence in its best light, reducing fairness in the system.[2]]

[One way fairness is achieved in criminal matters despite the costs issues facing accused persons is through the use of jury trials for indictable offences.[3]][The state meets the costs of jury trials so they are provided for even the poorest accused persons in the County and Supreme Courts, promoting fairness by ensuring the decision-maker in these cases is independent of all parties, witnesses and the state.[4]]

[A second way fairness is achieved is through discounting sentences for accused persons who plead guilty, which occurs for all offenders regardless of their wealth and income.[5]] [This ensures the sanction imposed in such cases reflects the individual circumstances in the case (including their guilty plea), which is fair.[6]]

*Possible points to include:*

Costs' impact on fairness:

- Ability to appeal against conviction or sentence may be undermined if accused cannot afford legal representation to present appeal and/or cannot afford the filing fee to lodge an appeal in the superior court.

Fairness promoted despite costs issues by:

- Role of the judge as an independent umpire (and decision-maker in the Magistrates' Court) ensures rules of evidence and procedure adhered to.
- Trials conducted open to the public ensures accused persons treated fairly by the court system.
- Though self-represented accused persons may struggle with the rules of procedure they are still entitled to cross-examine prosecution witnesses and test the reliability of the evidence presented against them, which is fair.
- Sentencing hearings ensure sanctions are based on the individual circumstances of each case (considering mitigating factors, the impact on the victim in the specific case), which promotes fairness.
- VLA can provide representation to the poorest members of the community, especially those facing serious criminal charges, promoting a fair trial in these most serious cases.

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I agree with the statement i.e. 'to a large/certain/limited' extent etc.[1] |
| ✓ ✗ | I have identified one feature of the Koori Court system that promotes/limits the ability of it to provide for fairness.[2] |
| ✓ ✗ | I have described in detail how this feature of the Koori Court system promotes/limits the ability of it to provide for fairness.[3] |
| ✓ ✗ | I have identified a second feature of the Koori Court system that promotes/limits the ability of it to provide for fairness.[4] |
| ✓ ✗ | I have described in detail how this second feature of the Koori Court system promotes/limits the ability of it to provide for fairness.[5] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'In this way', 'Further', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Koori', 'offenders', etc. |

*Exemplar response*

[The Koori Court system as a way to sentence indigenous offenders upholds the principle of fairness to a large extent.[1]]

[Koori Courts seek to bridge the gap between Aboriginal customs and traditions and the traditional justice system, which promotes fairness for indigenous offenders, through having Aboriginal elders and respected persons present with offenders when discussing why they engage in crime.[2]] [In this way a more inclusive environment may be created in an effort to reduce the rate of recidivism by getting to the root causes of their criminal behaviour. Having to discuss one's crimes with respected community members also discourages reoffending.[3]]

[Further, Koori courts ensure that special arrangements are made in order to cater to the unique needs of Aboriginal offenders. For instance, offenders are permitted to discuss their conduct in the mode of storytelling as opposed to the strict question–answer format used in traditional courtrooms.[4]] [This helps to provide for fairness as the intimidating nature of a courtroom may be lessened, allowing offenders to feel empowered and supported by the system and more able to express their perspective on offending.[5]]

*Possible points to include:*

Students could have also included:

Koori Court sentencing process only applies to indigenous offenders who plead guilty (not to those found guilty by a magistrate or jury) to some offences (not sexual offences) and consent to the process. As such it does not necessarily promote fairness for all indigenous offenders.

**10.**

| | |
|---|---|
| ✓ ✗ | I have linked one of the disadvantages Neytiri faces to the principle of access or fairness.[1] |
| ✓ ✗ | I have described how this disadvantage impacts the ability of the criminal justice system to uphold access or fairness.[2] |
| ✓ ✗ | I have linked the second disadvantage Neytiri faces to the principle of access or fairness.[3] |
| ✓ ✗ | I have described how this second disadvantage impacts the ability of the criminal justice system to uphold access or fairness.[4] |
| ✓ ✗ | I have linked the third disadvantage Neytiri faces to the principle of access or fairness.[5] |
| ✓ ✗ | I have described how this third disadvantage impacts the ability of the criminal justice system to uphold access or fairness.[6] |
| ✓ ✗ | I have referred explicitly to the scenario in my response i.e. 'Neytiri', 'Pandora', etc. |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'secondly', 'lastly', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'fairness', 'access', 'trial', 'criminal justice system', etc. |

*Exemplar response*

[Neytiri's lack of English skills will affect the ability of the criminal justice system to provide for access[1]][because she may not understand her rights and obligations under the law and therefore may not be able to access the assistance she requires to stand trial, nor understand the trial process when it occurs.[2]]

[Secondly, the fact that Pandora has only a single court will impact on the ability of the criminal justice system to provide for fairness[3]][as Neytiri will have to wait a long time for her case to be heard and thus may unfairly compromise her right to be tried without unreasonable delay. The stigma attached to being suspected of a crime and the stress of awaiting trial for so long can be seen as unfair.[4]]

[Lastly, the fact that Neytiri has no money will impact the ability of the criminal justice system to provide for fairness[5]][as she may not be able to afford legal representation. Without a lawyer she will not understand the court procedures and any lawful defences to her charges, and will be less able to test the accuracy of the prosecution's evidence. Neytiri will be less able to present her defence in its best light, reducing fairness in the system.[6]]

*Possible points to include:*

- The existence of a single court means Neytiri cannot appeal the verdict or sentence if she is convicted; this absence of a right of appeal limits the achievement of fairness because any mistakes regarding her conviction or sentence will go uncorrected.

# 3.1.14 Criminal justice reform

LEVEL 1

**1.** B **2.** D

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have identified one appropriate recent or recommended reform.[1] |
| ✓ ✗ | I have described how the reform I've chosen is appropriate by linking to the stimulus material.[2] |
| ✓ ✗ | I have identified the positive impact on the principle of access.[3] |
| ✓ ✗ | I have explained how the recent/recommended reform promotes access.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'reform', 'access' etc. |

*Exemplar response*

[A recent reform that would assist Benji is the 2018/19 budget increase in funding for Victoria Legal Aid, which increased funding by $37 million over the next four years.[1]][As Benji does not have enough money for a private lawyer, VLA will be better able to assist more accused people such as Benji due to their increased funding, providing Benji with free legal advice and may be more able to provide him with a lawyer at no cost or at a low cost.[2]][This reform enhances the ability of the criminal justice system to achieve the principle of access[3]][as individuals with limited financial means are now more able to have a better understanding of the legal system and how to defend their claim.[4]]

*Possible point to include:*

- Law Council of Australia's recommendation to increase legal aid funding in Australia by $390 million per year.

**4.**

| | |
|---|---|
| ✓ ✗ | I have described the existing appeals process.[1] |
| ✓ ✗ | I have described the new appeals process, with reference to the giving of evidence.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'reform', 'hearing', etc. |

*Exemplar response*

[Appeals against a sentence or conviction from the Magistrates' Court require witnesses and victims giving evidence again.[1]]
[The appeals process under this reform will be conducted using the transcripts of evidence given in the hearing and arguments from legal practitioners, like appeals in the Supreme Court, without the need for evidence to be presented again.[2]]

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified a way this reform would improve the ability of the criminal justice system to provide for fairness.[1] |
| ✓ ✗ | I have described this way the reform would improve the ability of the criminal justice system to provide for fairness.[2] |
| ✓ ✗ | I have identified a way this reform would restrict the ability of the criminal justice system to provide for fairness.[3] |
| ✓ ✗ | I have described this way the reform would restrict the ability of the criminal justice system to provide for fairness.[4] |
| ✓ ✗ | I have identified a second way this reform would improve the ability of the criminal justice system to provide for fairness.[5] |
| ✓ ✗ | I have described this second way the reform would improve the ability of the criminal justice system to provide for fairness.[6] |

| | |
|---|---|
| ✓ ✗ | I have identified a second way this reform would restrict the ability of the criminal justice system to provide for fairness.[7] |
| ✓ ✗ | I have described this second way the reform would restrict the ability of the criminal justice system to provide for fairness.[8] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'On the one hand', 'Although', 'On the other hand', 'However', 'As such', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'judges', 'access', 'fairness', etc. |

*Exemplar response*

[One way replacing jury trials with a panel of judges would improve fairness is because it would probably lead to greater consistency in decision-making.[1]][This is because as judges have greater knowledge of the law they would have a greater awareness of how similar cases have been handled to the one before them and thus would be likely to make decisions accordingly.[2]][Although, despite that fact greater knowledge of the law may serve to uphold fairness it may also lend itself to an apprehended bias based on past experiences[3]][which may affect the ability of judges to appreciate the uniqueness of individual cases, thus potentially compromising their ability to treat the accused fairly and objectively.[4]]

[Another way a panel of judges replacing a jury could provide for greater fairness is through ensuring more 'correct' decisions for accused persons.[5]][Due to their extensive knowledge and expertise judges better understand key concepts underpinning the law, such as the standard of proof, and as such may consider evidence with a more critical eye than a layperson which could operate to ensure the correct outcome is reached.[6]][However, in introducing a panel of judges we would abolish an accused person's right to be tried by a jury of peers.[7]][Trial by peers ensures accused people feel judged by their equals, not oppressed by the state, and this benefit would be lost with such a reform.[8]]

*Possible points to include:*

- Trial by peers also protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair; this would be lost if juries were replaced by judges.

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I agree i.e. 'to a large/certain/limited' extent etc.[1] |
| ✓ ✗ | I have identified one consequence of increased Legal Aid funding that promotes/limits the ability of it to provide for equality.[2] |
| ✓ ✗ | I have described in detail how this consequence of increased Legal Aid funding promotes/limits its ability to provide for equality.[3] |
| ✓ ✗ | I have identified a second consequence of increased Legal Aid funding that promotes/limits the ability of it to provide for equality.[4] |
| ✓ ✗ | I have described in detail how this second consequence of increased Legal Aid funding promotes/limits its ability to provide for equality.[5] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'On the one hand', 'Therefore', 'However', 'As a result', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal representation', 'parties', etc. |

*Exemplar response*

[An increase in Legal Aid funding would better uphold equality to a large extent.[1]]

[On the one hand an increase in Legal Aid funding would better uphold equality as more people would be able to access legal representation[2]][and would therefore promote equality as an accused person's ability to present their defence in its best light shouldn't be determined by personal characteristics including their wealth or income.[3]]

[However, an increase in Legal Aid funding would not necessarily mean that the quality of legal representation would be consistent.[4]] [If the Law Council's proposal was adopted many more individuals would receive legal representation, but all accused persons may not receive the same quality of legal representation from lawyer to lawyer, thus advantaging those who are represented by more proficient lawyers, undermining the achievement of equality.[5]]

*Possible points to include:*

- Increased Legal Aid funding could improve their ability to disseminate information about the criminal law, lawful defences to various criminal charges and criminal trial procedures, to ensure all accused persons have an equal opportunity to be informed about their criminal case.

LEVEL 4

**7.**

- ✓ ✗ I have identified the first way this reform promotes fairness.[1]
- ✓ ✗ I have provided more detail linking the reform to the achievement of fairness.[2]
- ✓ ✗ I have identified the first limitation of this reform in promoting fairness.[3]
- ✓ ✗ I have provided more detail about this weakness of the reform to promote fairness.[4]
- ✓ ✗ I have identified the second way this reform promotes fairness.[5]
- ✓ ✗ I have provided more detail linking the reform to the achievement of fairness.[6]
- ✓ ✗ I have identified the second limitation of this reform in promoting fairness.[7]
- ✓ ✗ I have provided more detail about this weakness of the reform to promote fairness.[8]
- ✓ ✗ I have signposted my response appropriately using terms such as: 'However...', 'Another way fairness is promoted...', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'access', 'case', 'court', etc.

*Exemplar response*

[The first way this reform would promote fairness is by reducing delays in criminal trials.[1]][Delays add to the suffering of victims, witnesses and accused persons, which is unfair, so speeding up the process of empanelling juries would therefore promote fairness.[2]]

[However, this reduces delays only slightly, limiting the impact on fairness.[3]][This is because the law already limits how many challenges and stand asides can occur, plus jury trials are a small proportion of the total amount of criminal matters. As a result the impact on delays and promoting fairness across the system is small.[4]]

[Another way this reform promotes fairness is by removing the ability to skew how representative a jury is.[5]][A jury is intended to involve a cross-section of the community acting as a decision-maker, this reform ensures parties cannot influence the jury to make it younger, older or less diverse than the general population, which is fair.[6]]

[However, this does reduce fairness from an accused person's perspective by limiting their control over proceedings.[7]][Participation in jury selection helps an accused feel more confident in the trial process and the outcome, which is fair, and this reform removes that involvement.[8]]

**8.**

- ✓ ✗ I have identified one way a recent reform would improve the ability of the criminal justice system to achieve fairness.[1]
- ✓ ✗ I have described this way the reform would improve the ability of the criminal justice system to achieve fairness.[2]
- ✓ ✗ I have used 'however' or 'yet' or similar to show 'both sides' of the discussion.[3]
- ✓ ✗ I have identified a limitation of this reform in promoting fairness in the criminal justice system.[4]
- ✓ ✗ I have described this limitation of this reform in promoting fairness in the criminal justice system.[5]
- ✓ ✗ I have identified a second way this reform would improve the ability of the criminal justice system to provide for fairness.[6]
- ✓ ✗ I have described this second way the reform would improve the ability of the criminal justice system to provide for fairness.[7]

| | |
|---|---|
| ✓ ✗ | I have used 'however' or 'yet' or similar to show 'both sides' of the discussion.[8] |
| ✓ ✗ | I have identified a second limitation of this reform in promoting fairness in the criminal justice system.[9] |
| ✓ ✗ | I have described this second limitation of this reform in promoting fairness in the criminal justice system.[10] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'judges', 'fairness', etc. |

*Exemplar response*

[The recent reform of conducting judge-alone trials rather than jury trials in the County Court and Supreme Court during the pandemic promoted fairness by limiting some of the anxiety caused by delays.[1]] [Delays add to the trauma and stress felt by victims, witnesses and accused persons prior to a serious criminal matter being resolved at trial. This reform enabled some criminal matters to proceed during times of strict COVID-related restrictions - indeed, judges in the County Court identified avoiding delay as a reason for granting trials by judge-alone.[2]]

[However,[3]] [the impact on promoting fairness overall is quite limited as it has an impact on such a small number of matters with very few cases going to judge-only trials in the County Court and Supreme Court.[4]] [Since 2020 the courts experienced a significant backlog but this reform had an impact on a relatively small number of criminal trials. If an accused person does not consent to a trial by judge alone (or the court rejects an application for such a trial) the victim, witnesses and accused all face significant stress and anxiety due to delay and uncertainty regarding the resolution of the case.[5]]

[The shift to judge-alone trials promoted fairness in complex matters.[6]] [Complicated criminal matters involving technical evidence such fraud or OHS violations prosecuted by WorkSafe may be better suited to judge-alone trials in which the law and evidence are weighed by judges with legal experience and training, leading to fairer outcomes.[7]]

[Despite these benefits,[8]] [the reform's impact on fairness is limited by the fact it was temporary.[9]] [This legislation does not create the option for judge-alone trials in Victoria beyond the pandemic, it was a short-term emergency measure. The underlying causes of delay in criminal matters (such as the under-resourcing of the courts relative to rising case numbers, the time taken to obtain forensic reports, the time taken to examine and cross-examine witnesses during a trial) are not addressed by this reform.[10]]

*Possible points to include:*

The positive impacts (and limitations of) the following reforms upon the achievement of fairness could also be discussed:

- Removing de novo appeals from the Magistrates' Court to the County Court
- Expansion of the Koori Court
- Increased funding for VLA in 2018/19 Victorian budget

# AOS Questions: Unit 3 AOS 1

LEVEL 5

**1. a)**

| | |
|---|---|
| ✓ ✗ | I have stated that the offender has likely committed a serious indictable offence.[1] |
| ✓ ✗ | I have given an example of a serious indictable offence.[2] |
| ✓ ✗ | I have justified this conclusion by referring to the fact that the case was heard in the Supreme Court and its jurisdiction.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offender', 'indictable', etc. |

*Exemplar response*

[The offender has committed a very serious indictable offence,[1]][such as murder.[2]][This can be determined as the offender's case was heard in the Supreme Court which has an unlimited criminal jurisdiction, but in practice hears only the most serious indictable offences.[3]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have stated one way the accused having legal representation promotes fairness.[1] |
| ✓ ✗ | I have described in detail this first way in which legal representation promotes fairness.[2] |
| ✓ ✗ | I have stated a second way the accused having legal representation promotes fairness.[3] |
| ✓ ✗ | I have described in detail this second way in which legal representation promotes fairness.[4] |
| ✓ ✗ | I have referred to the facts in the statement throughout my response. |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'on the one hand', 'however', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'offender', 'evidence', 'fairness', etc. |

*Exemplar response*

[One way the use of legal representation promotes fairness is that he or she would have presented the accused person's defence in its best light.[1]][The accused's lawyer would know which lawful defences and evidence can be presented to the court on the accused person's behalf, helping ensure they could put their case at its best.[2]]

[A second way the use of legal representation promotes fairness is because such a lawyer can test the reliability of the prosecution's evidence.[3]][As an expert in questioning witnesses, the lawyer for the accused will be able to test the accuracy of evidence presented by prosecution witnesses, which ensures the final decision is based solely on reliable and relevant evidence, which is fair.[4]]

**c)**

| | |
|---|---|
| ✓ ✗ | I have stated that the sentence of imprisonment is likely to be lengthy.[1] |
| ✓ ✗ | I have justified this conclusion by referring to the fact that the aggravating factors outweigh the mitigating factors in this case.[2] |
| ✓ ✗ | I have referred to the facts in the statement throughout my response. |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'on the one hand', 'however', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'imprisonment', 'aggravating', etc. |

*Exemplar response*

[It is likely that the sentence of imprisonment will be long.[1]][This is because the aggravating factors at play overwhelm those supporting leniency (that is, mitigating factors) and as such will support the imposition of a lengthy term of imprisonment.[2]]

**2. a)**

| | |
|---|---|
| ✓ ✗ | I have described the change to appeals no longer requiring witnesses and victims to give evidence in the County Court's appeal (or similar).[1] |
| ✓ ✗ | I have identified one right of victims in Victorian criminal proceedings.[2] |
| ✓ ✗ | I have described this first right in detail.[3] |
| ✓ ✗ | I have identified a second right of victims in Victorian criminal proceedings.[4] |
| ✓ ✗ | I have described this second right in detail.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'vulnerable', 'witness', etc. |

*Exemplar response*

[The change to the process of conducting criminal appeals in the County Court will benefit victims of crime as they will no longer be required to give evidence again, as currently happens in de novo appeals, reducing the stress and trauma associated with being a victim of crime.[1]]

[One right of victims is that some may be able to give evidence as a vulnerable witness.[2]] [This includes children and victims of serious offences, who may be allowed to have a support person in court while giving evidence or having a closed court while giving evidence.[3]]

[Another right of victims is to be informed about criminal proceedings.[4]] [This includes being told about the outcome of bail applications, details of any charges that are changed or withdrawn and the result of any appeals.[5]]

*Possible points to include:*

One other right of a victim: to know the release date of an offender (if on the Victims' Register), including knowing if parole is applied for and granted.

**b)**

| | |
|---|---|
| ✓ ✗ | I have described one way the court hierarchy promotes fairness through appeals.[1] |
| ✓ ✗ | I have used 'however' or 'yet' or similar to show 'both sides' of the discussion.[2] |
| ✓ ✗ | I have described a limitation of the hierarchy in promoting fairness through appeal rights being restricted.[3] |
| ✓ ✗ | I have described a second way the court hierarchy promotes fairness, through specialisation.[4] |
| ✓ ✗ | I have used 'however' or 'yet' or similar to show 'both sides' of the discussion.[5] |
| ✓ ✗ | I have described a limitation of the hierarchy in promoting fairness, through costs associated with appeals limiting the ability to appeal.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'hierarchy', 'legal representation', etc. |

*Exemplar response*

[The court hierarchy promotes fairness by providing for the appeals process which facilitates the review of judicial decisions. The appeals process allows for mistakes to be corrected, and the ranking of courts from lower to higher provides this ability to have judges' decisions reviewed.[1]] [However,[2]] [grounds for an appeal must exist such as the sentence being excessive, and be considered strong enough to warrant a review by a court which may render some cases ineligible for judicial review and meaning access to such appeals is limited.[3]]

[The existence of a court hierarchy also provides for fairness in the criminal justice system due to specialisation. As individual courts are able to hone their expertise in dealing with particular disputes and areas of law frequently, cases are presided over by skilled and knowledgeable judges who are more able to ensure a just outcome, which is fair.[4]] [On the other hand,[5]] [some offenders may not be able to appeal to the higher courts if they cannot afford the fees associated with appeals and the legal representation needed, limiting their ability to have mistakes corrected; in such cases the hierarchy does not deliver fairness for these offenders.[6]]

**3.** **a)**

| | |
|---|---|
| ✓ ✗ | I have described 'general deterrence' as the purpose favoured by judges: the imposition of a sanction to discourage others in the community from similar offending.[1] |
| ✓ ✗ | I used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand' or similar.[2] |
| ✓ ✗ | I have described 'punishment' as the purpose favoured by jurors: the imposition of a sanction to achieve retribution for the harm caused by an offence.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'deterrence', 'sentence', etc. |

*Exemplar response*

[The sentencing purpose favoured by judges is 'general deterrence,' which means imposing a sanction to discourage others in the community from similar offending.[1]] [On the other hand,[2]] [the purpose that jurors favour is 'punishment' and it refers to the court imposing a sanction to function as retribution for a crime so that the offender 'pays' for the impact their crime has had on any victims and society at large. This should ensure victims and their families do not feel the need to exact revenge themselves.[3]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have stated that judges impose more severe sanctions to achieve general deterrence.[1] |
| ✓ ✗ | I have provided an example of a sanction imposed to achieve general deterrence.[2] |
| ✓ ✗ | I have justified this conclusion by stating a more severe penalty discourages others' offending (or similar).[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'imprisonment', 'offending', etc. |

*Exemplar response*

[To achieve the sentencing purpose of general deterrence, judges would be likely to impose a more severe sentence[1]] [such as a longer prison term,[2]] [because the imposition of such a tough penalty is a way the courts can discourage others from offending.[3]]

*Possible points to include:*

Other sanctions to achieve general deterrence include

- Imposing a large fine, relative to a smaller fine.
- Sentencing an offender to prison rather than imposing a fine.

**c)**

| | |
|---|---|
| ✓ ✗ | I have identified one factor that affects sentencing.[1] |
| ✓ ✗ | I have described this first factor affecting sentencing in detail, including an example if appropriate.[2] |
| ✓ ✗ | I have identified a second factor that affects sentencing.[3] |
| ✓ ✗ | I have described this second factor affecting sentencing in detail, including an example if appropriate.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sanction', 'sentence', 'aggravating', 'mitigating', etc. |

*Exemplar response*

[One factor that affects sentencing is the presence of any aggravating factors[1]] [which are aspects of an offence or the offender that render the offending more serious, and result in a more severe sanction being imposed, such as the offender having prior convictions for similar crimes.[2]]

[A second factor that affects sentencing is the presence of mitigating factors[3]] [which are aspects of the offender or circumstances surrounding the crime that support a more lenient sanction, such as the offender showing genuine remorse.[4]]

*Possible points to include:*

Other factors influencing sentencing are:

- Guilty pleas, which usually result in a less severe sanction being imposed
- Victim Impact Statements, which inform the court about the severity of the offence and the extent to which the offender needs to be punished, whether the victim needs to be protected, etc.

**4.** **a)**

| | |
|---|---|
| ✓ ✗ | I have identified the court that would most likely hear this case as the County Court.[1] |
| ✓ ✗ | I have provided one reason for my answer by explaining that James committed an indictable offence.[2] |
| ✓ ✗ | I have provided a second reason for my answer by explaining that the crime James committed was not one of the most serious indictable offences which are only heard in the Supreme Court.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'indictable offence', 'jurisdiction', etc. |

*Exemplar response*

[The court that would most likely hear this case is the County Court of Victoria.[1]][James committed an indictable offence and the County Court has jurisdiction to hear all indictable offences, except those reserved for the Supreme Court.[2]][The crime that James committed was not one of the most serious indictable offences which are only heard in the Supreme Court, such as murder or treason. Therefore, it will likely be heard by the County Court.[3]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have identified one reason for a court hierarchy in James' case.[1] |
| ✓ ✗ | I have explained this reason in detail.[2] |
| ✓ ✗ | I have made explicit references to James' case in my response.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'superior court', etc. |

*Exemplar response*

[One reason for a court hierarchy in James' case is to allow for the appeals process.[1]]

[An appeal is a request made to a superior court to review and (if successful) alter a previous decision made by a lower court in the same hierarchy. A court hierarchy is necessary for appeals to operate because without the courts being ranked from lower to higher courts, it would not be possible to have decisions reviewed (and mistakes corrected) by a superior court.[2]]

[For example, if James is unhappy with the outcome of his case, whether it be the verdict or the sanction, the court hierarchy will ensure that he is able to have this reviewed in a higher court, if he has grounds for an appeal.[3]]

*Possible points to include:*

Other possible reasons for a court hierarchy in this case:

- Specialisation refers to the courts' judges and staff developing expertise in particular criminal disputes and criminal procedures. This specialisation develops as a result of each court regularly conducting criminal trials (or appeals) of a particular kind. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction – a set of criminal matters each court hears regularly.
  - For example, James' case will most likely be heard in the County Court of Victoria, where the judge and court staff are familiar with cases involving indictable offences. Therefore, the judge that hears the case will have expert knowledge in determining and sentencing crimes of a similar nature, ensuring a fair outcome for James.

**c)**

| | |
|---|---|
| ✓ ✗ | I have described aggravating factors as 'any facts or circumstances that increase the severity or culpability of a crime (or similar).[1] |
| ✓ ✗ | I have provided an example of an aggravating factor in James' case.[2] |
| ✓ ✗ | I have used a linking word to distinguish, such as 'however', 'on the other hand', 'whereas', (or similar).[3] |
| ✓ ✗ | I have described mitigating factors as 'any facts or circumstances that would support leniency in sentencing' (or similar).[4] |
| ✓ ✗ | I have provided an example of a mitigating factor in James' case.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'aggravating', 'mitigating', 'culpability', 'bail', etc. |

*Exemplar response*

[Aggravating factors are any facts or circumstances (either acts or omissions) that increase the severity or culpability of criminal activity and would lead to a sanction being imposed that is more harsh.[1]] [For example, the fact that James was on bail when he committed the offence would act as an aggravating factor in this case, likely resulting in a harsher sentence for James.[2]]

[On the other hand,[3]] [mitigating factors refer to any facts or circumstances that decrease the severity or culpability of a crime and therefore support leniency in sentencing.[4]] [For example, the fact that James has cooperated with police throughout the investigation process would act as a mitigating factor in this case.[5]]

*Possible points to include:*

Other possible examples of aggravating factors in James' case:

- James' actions caused significant distress for witnesses and Eric's family.
- James has prior convictions of a similar nature.

Other possible examples of mitigating factors in James' case:

- James is still reasonably young in age.
- James claims that his assault on Eric was provoked.

**d)**

| | |
|---|---|
| ✓ ✗ | I have explained how imprisonment achieves rehabilitation in James' case.[1] |
| ✓ ✗ | I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[2] |
| ✓ ✗ | I have explained how imprisonment may not effectively achieve rehabilitation in James' case.[3] |
| ✓ ✗ | I have explained how imprisonment achieves protection in James' case.[4] |
| ✓ ✗ | I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[5] |
| ✓ ✗ | I have explained how imprisonment may not effectively achieve protection in James' case.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'imprisonment', 'offence', 'bail'. etc. |

*Exemplar response*

[A term of imprisonment may be able to rehabilitate James by providing access to rehabilitative programs. For example, while he is in prison James might undertake programs which aim to address his tendency towards violence or aggression.[1]]

[However,[2]] [imprisonment may not be able to successfully rehabilitate James due to the negative environment of the prison system. By isolating an offender from the support of friends and family and exposing them to other, more serious, offenders, prison can often have an adverse effect on rehabilitation. For example, James has spent time in prison for other offences, and went on to commit further crimes after his release. This suggests that he was not effectively rehabilitated by the term of imprisonment.[3]]

[Imprisonment will achieve protection in James' case by removing James from the community and preventing him from committing further crimes which injure other members of society.[4]]

[On the other hand,[5]] [a term of imprisonment may not be able to achieve protection indefinitely, as James will likely be released back into the community at some point in the future. Considering the negative impact that prison may have on James, and the fact that he committed this offence while on bail, it is quite possible that James will continue to pose a threat to society once released, thus limiting the ability of imprisonment to achieve protection.[6]]

**5. a)**

| | |
|---|---|
| ✓ ✗ | I have described the burden of proof as 'the responsibility of the prosecution to prove its case against an accused person' (or similar).[1] |
| ✓ ✗ | I have linked the burden of proof to the presumption of innocence.[2] |
| ✓ ✗ | I have avoided repeating the words 'burden' and 'proof' when defining these concepts. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'prosecution', 'accused', etc. |

*Exemplar response*

[The burden of proof is the responsibility faced by the party bringing a case to court (the prosecution in a criminal trial) to present their evidence and arguments to prove that the accused is guilty 'beyond reasonable doubt'.[1]]

[This is linked to the presumption of innocence, as it reflects the fact that the accused does not need to prove their innocence, and does not need to give evidence that is incriminating because they are presumed innocent until proven guilty by the prosecution.[2]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have identified one other purpose for committal proceedings.[1] |
| ✓ ✗ | I have explained the purpose in further detail.[2] |
| ✓ ✗ | I have linked this purpose for a committal proceeding to Oliver's case.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'committal proceeding', 'prosecution', 'cross-examination', etc. |

*Exemplar response*

[One other reason for a committal proceeding in this case is to ensure a fair trial.[1]]

[A committal proceeding allows an accused person to be fully informed of the prosecution's case against them, as they are provided with any documentary evidence that the prosecution has collected.[2]] [This would allow Oliver to better prepare his defence and would also allow his legal representative to prepare their cross-examination of prosecution witnesses and decide on the reliability of evidence. Thus, the committal proceeding is necessary to promote a fair trial for Oliver.[3]]

**c)**

| | |
|---|---|
| ✓ ✗ | I have identified one reason why a plea negotiation would be appropriate in Oliver's case.[1] |
| ✓ ✗ | I have explained the reason in further detail, with reference to the case.[2] |
| ✓ ✗ | I have used a linking word to distinguish, such as 'however', 'on the other hand', 'whereas', (or similar).[3] |
| ✓ ✗ | I have identified one reason why a plea negotiation would not be appropriate in Oliver's case.[4] |
| ✓ ✗ | I have explained the reason in further detail, with reference to the case.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'plea negotiation', 'accused', etc. |

*Exemplar response*

[One reason why a plea negotiation would be appropriate in Oliver's case is to prevent the victim's family from having to give evidence at trial.[1]]

[A successful plea negotiation would prevent the victim's family, who have suffered significantly as a result of the offence, from having to face the trauma of giving evidence at trial. The witnesses have expressed a reluctance to be involved in the trial and would therefore benefit from a plea negotiation where the accused pleads guilty, and is punished, without needing to go to trial.[2]]

[On the other hand,[3]] [a plea negotiation would not be appropriate in Oliver's case if he is not prepared to plead guilty to any charge.[4]] [A successful plea negotiation requires the accused to plead guilty to a charge, whether it be a lesser charge or fewer charges. Oliver has pleaded not guilty to the offence of culpable driving causing death and may not be willing to plead guilty to any offence. In which case the plea negotiation will not be appropriate.[5]]

*Possible points to include:*

Other possible reasons why a plea negotiation is appropriate:

- A plea negotiation could minimise delays, preventing the need to go to trial and benefiting the victim's family by achieving a resolution earlier in the process.

Other possible reasons why a plea negotiation is not appropriate:

- The alleged offending is sufficiently serious that a conviction for a lesser charge may not be in the public interest.
- The victim's family wants to see the accused punished appropriately for his actions, which suggests that they would not feel that justice was achieved if the accused was allowed to plead guilty to a lesser charge.

# 3.2.1 Principles of justice (AOS 2)

LEVEL 1

**1.** C **2.** C **3.** B

LEVEL 2

**4.**

| | | |
|---|---|---|
| ✓ | ✗ | I have defined fairness as requiring fair legal processes to be in place, and all parties receive a fair hearing (or similar).[1] |
| ✓ | ✗ | I have identified one way fairness is promoted.[2] |
| ✓ | ✗ | I have identified a second way fairness is promoted.[3] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'legal representation', 'civil', etc. |

*Exemplar response*

[The principle of fairness requires that unbiased legal processes are in place and that all parties receive an impartial hearing.[1]][One way the civil justice system achieves fairness is through having independent decision-makers, who are unbiased and not connected to the parties or witnesses.[2]][A second way the civil justice system achieves fairness is by giving all plaintiffs in civil disputes the opportunity to present evidence and legal arguments that persuade the court of their entitlement to a remedy for some injury caused by the defendant, that is to present their case in its best light.[3]]

**5.**

| | | |
|---|---|---|
| ✓ | ✗ | I have defined equality as all people treated equally before the law, with an equal opportunity to present their case (or similar).[1] |
| ✓ | ✗ | I have identified one way equality is promoted.[2] |
| ✓ | ✗ | I have identified a second way equality is promoted.[3] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'parties', 'equality', etc. |

*Exemplar response*

[The principle of equality requires that all people are treated the same way before the law, with the same opportunity to present their case, irrespective of their personal characteristics such as wealth, race and so on.[1]][One way equality is promoted is that all parties to civil cases are treated in the same manner by all those within the courts regardless of their age, gender, religion, disability, etc.[2]][A second way equality is promoted is the rules of evidence and procedure that govern how cases are presented are applied equally, in the same way across all cases.[3]]

**6.**

| | | |
|---|---|---|
| ✓ | ✗ | I have defined access as individuals, businesses and other organisations in society understanding their legal rights and having the ability to pursue a case (or similar).[1] |
| ✓ | ✗ | I have identified one way access is promoted.[2] |
| ✓ | ✗ | I have identified a second way access is promoted.[3] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'plaintiff', 'defendant', etc. |

*Exemplar response*

[The principle of access requires that all individuals, businesses and other organisations in society have an understanding of their legal rights and have the ability to pursue a case.[1]][One way access is promoted is through ensuring plaintiffs and defendants understand the procedures in court and the legal arguments and evidence presented by legal practitioners and witnesses.[2]][A second way access is promoted is through those who have suffered injury knowing whether a legal right has been infringed and if so how to take action to receive a remedy for that injury.[3]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have briefly explained the principle of access.[1] |
| ✓ ✗ | I have used an example that illustrates access.[2] |
| ✓ ✗ | I have briefly explained the principle of equality.[3] |
| ✓ ✗ | I have used an example that illustrates equality.[4] |
| ✓ ✗ | I have identified one difference between access and equality.[5] |
| ✓ ✗ | I have identified a second difference between access and equality.[6] |
| ✓ ✗ | I used linking words to distinguish, such as: 'however', 'on the other hand' or similar. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal rights', 'case', 'contract', 'Charter of Human Rights and Responsibilities', 'legislation', 'right', etc. |

*Exemplar response*

[The principle of justice of 'access' refers to the ability that individuals have to understand the law, their legal rights and pursue their case if they so choose.[1]][Access is promoted by free legal information provided by institutions and organisations such as Victoria Legal Aid and Consumer Affairs Victoria.[2]]

[On the other hand, the principle of equality refers to the belief that all people should be treated equally before the law, and have an equal opportunity to present their case. This is regardless of their ethnicity, socio-economic background or level of education.[3]][For example, no one should be treated differently under a telecommunications contract with a commercial provider due to a personal attribute or characteristic.[4]]

[A key difference between the two principles is that access is about individuals' capacity to use the legal system, whereas equality is more related to the way legal personnel, organisations and institutions treat individuals.[5]][A second difference is that whilst the principle of equality is enshrined under legislation in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), access to the legal system is widely recognised as worthy of being promoted but is not necessarily a right enshrined in law in Victoria.[6]]

# 3.2.2 Key concepts in the civil justice system

LEVEL 1

**1.** C **2.** C **3.** B

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated that the statement is correct.[1] |
| ✓ ✗ | I have detailed that the burden of proof usually rests with the plaintiff, as the party bringing the claim.[2] |
| ✓ ✗ | I have detailed that in some cases the burden of proof may rest with the defendant (and therefore not always with the plaintiff).[3] |
| ✓ ✗ | I have used an example of a situation where the burden of proof would sit with the defendant rather than the plaintiff; this may include but is not limited to: the defendant raising a defence or the defendant lodging a counterclaim.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'dispute', 'plaintiff', etc. |

*Exemplar response*

[The above statement is correct.[1]][The burden of proof usually rests with the plaintiff as they are the party bringing the claim initially in a dispute.[2]][However, the burden of proof will not always rest with the plaintiff because the defendant may themselves bring a claim in response,[3]][such as if they choose to raise a counterclaim. In such a case the burden of proving this counterclaim rests with the defendant.[4]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have defined what the standard of proof is in criminal cases: 'beyond reasonable doubt'.[1] |
| ✓ ✗ | I have explained what 'beyond reasonable doubt' means.[2] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', 'on the other hand', etc.[3] |
| ✓ ✗ | I have defined what the standard of proof is in civil cases: 'on the balance of probabilities'.[4] |
| ✓ ✗ | I have explained what 'on the balance of probabilities' means.[5] |
| ✓ ✗ | I have detailed that a higher standard of proof is required in criminal cases than in civil cases.[6] |
| ✓ ✗ | I have explained why the standard of proof is higher in criminal cases than in civil cases.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'dispute', 'plaintiff', etc. |

*Exemplar response*

[The standard of proof in a criminal case is 'beyond reasonable doubt'.[1]][That is, having presumed the accused is innocent, the evidence is so strong that there is no reasonable question about whether the accused committed the offence.[2]][On the other hand,[3]][in a civil case, the standard of proof is 'on the balance of probabilities'.[4]][This means that one party must prove their version of the facts are more likely correct.[5]][Therefore, a higher standard of proof is required in criminal proceedings than in civil proceedings[6]][as the degree of satisfaction that is required to make a determination 'beyond a reasonable doubt' is far greater than to make a decision that it is merely more probable that one party is more in the right than the other.[7]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated that representative proceedings refers to a claim involving seven or more plaintiffs.[1] |
| ✓ ✗ | I have stated that representative proceedings are made against a single defendant.[2] |

| | |
|---|---|
| ✓ ✗ | I have stated that representative proceedings may be commenced if the claims of all plaintiffs involve similar facts/ legal matters.[3] |
| ✓ ✗ | I have detailed that representative proceedings may be commenced if the claims of all plaintiffs arose from same/ similar circumstances.[4] |
| ✓ ✗ | I have described one benefit of representative proceedings.[5] |
| ✓ ✗ | I have described a second benefit of representative proceedings.[6] |
| ✓ ✗ | I have described a third benefit of representative proceedings.[7] |
| ✓ ✗ | I have signposted my answer appropriately by using terms such as: 'firstly', 'moreover', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'dispute', 'plaintiff', etc. |

*Exemplar response*

[Representative proceedings are a type of civil action lodged in the Supreme Court by one plaintiff on behalf of seven or more people[1]][against the same defendant.[2]][This can occur when their claims involve similar facts and/or legal matters,[3]][and come from the same (or similar sets) of circumstances.[4]]

[Firstly, representative proceedings enable costs to be shared amongst the plaintiffs, providing them with greater access to the legal system, which is especially useful if the claims are for a small amount.[5]]

[Another benefit of representative proceedings is that instead of hearing a number of similar disputes individually the courts can save time and money in hearing these disputes together.[6]]

[Moreover, a litigation funder may be prepared to pay the legal costs associated with a representative proceeding, enabling greater access to the legal system for individuals who may otherwise not be able to afford to pursue their claim.[7]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have defined the burden of proof in civil proceedings as belonging to the plaintiff.[1] |
| ✓ ✗ | I have explained what 'the burden of proof' means.[2] |
| ✓ ✗ | I have provided one reason why the burden rests with the plaintiff.[3] |
| ✓ ✗ | I have defined the standard of proof in civil proceedings as 'the balance of probabilities'.[4] |
| ✓ ✗ | I have explained what 'on the balance of probabilities' means.[5] |
| ✓ ✗ | I have provided one reason why this is the case.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil proceedings', 'plaintiff', 'claim', 'court', 'liable', 'loss', 'breach', 'evidence', 'remedies', 'sanctions', etc. |

*Exemplar response*

[The burden of proof in civil proceedings rests with the plaintiff,[1]][as they are bringing the claim before the courts and claiming that another should be held liable for their loss or a breach of their rights.[2]][This is justified as they therefore must have the responsibility of bringing sufficient arguments and evidence before the court, as they have initiated the action (rather than a defendant being required to prove his/her lack of liability).[3]]

[The standard of proof in civil proceedings is 'on the balance of probabilities'.[4]][The plaintiff bears the burden of proving 'it is more probable than not' that what they are claiming is true. The court weighs up the evidence and decides which version is more probably true.[5]][This is a lower standard of proof than criminal law because the wrong being addressed is usually less serious and the possible consequences of a breach of civil law (being the award of remedies) is less invasive for a civil defendant than criminal sanctions are for an accused person.[6]]

**8.**

- ✓ ✗ I have started my response by stating how similar I think representative proceedings are to standard civil proceedings.[1]
- ✓ ✗ I have defined representative proceedings.[2]
- ✓ ✗ I have identified one similarity between representative proceedings and standard proceedings.[3]
- ✓ ✗ I have explained this similarity.[4]
- ✓ ✗ I have identified one differences between representative proceedings and standard proceedings.[5]
- ✓ ✗ I have explained this difference.[6]
- ✓ ✗ I clearly signposted my answer with terms such as: 'one similarity is' and 'one difference is' or similar.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'civil proceedings', 'burden of proof', 'balance of probabilities', 'remedy', 'court', 'award costs', etc.

*Exemplar response*

[Representative proceedings are significantly similar to standard civil proceedings, with a few key differences.[1]][Representative proceedings are where a group of plaintiffs who have suffered similar loss and which require similar issues to be determined can join together to commence civil proceedings as a 'class action' against a defendant.[2]]

[One similarity between this and standard civil proceedings is that the plaintiffs still bear the burden of proof to the standard of 'on the balance of probabilities'.[3]][It is not a higher burden simply because the potential expense of providing a remedy to multiple plaintiffs may be higher for a defendant.[4]]

[One difference between representative proceedings and standard civil proceedings is that representative proceedings are overseen by a 'lead plaintiff', who can make decisions on behalf of the group.[5]][Courts can only award costs against the lead plaintiff, and not against all remaining class members, so class members are protected in a way other plaintiffs in standard proceedings may not be.[6]]

*Possible points to include:*

Similarities:

- Plaintiffs in both standard and representative proceedings have suffered loss that it is possible to restore under a civil law cause of action.
- Plaintiffs in both types of proceedings may be awarded a remedy that seeks to restore them to the position they were in before they suffered loss, provided they are successful.

Differences:

- A plaintiff can only join with others to bring representative proceedings if there are seven or more who have suffered similar loss which requires sufficiently similar issues to be determined by the court, whereas a single plaintiff can be sole and unique in their loss and legal problems.
- Representative proceedings do not require all members of the plaintiff class to participate in pre-trial procedures attend the proceedings or even fund the proceedings in the first place (if there is another source of funding or another arrangement where fees will be paid if and when damages are awarded), whereas typically a sole plaintiff in standard civil proceedings has to do all of these things.

LEVEL 4

**9.**

- ✓ ✗ I have stated the extent to which I agree that the burden of proof resting on the plaintiff upholds the principle of fairness.[1]
- ✓ ✗ I have provided one reason why I think that it does uphold fairness.[2]
- ✓ ✗ I have explained this reason specifically in relation to the principle of fairness.[3]
- ✓ ✗ I have provided one reason why I think that it may detract from fairness.[4]
- ✓ ✗ I have explained this reason specifically in relation to the principle of fairness.[5]

| | |
|---|---|
| ✓ ✗ | I have provided a brief conclusive statement that addresses the requirements of the task word.[6] |
| ✓ ✗ | I have used linking words to distinguish such as: 'on the other hand', 'generally', 'but', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'plaintiff', 'presumption of innocence', 'decision maker', 'loss', 'civil remedy', 'fair', 'evidence', 'legal representation' 'adverse cost order', 'legal advice', 'civil dispute resolution', etc. |

*Exemplar response*

[In many ways the responsibility on the plaintiff to prove all the required elements of their cause of action against the defendant in a civil law claim is fair, however, there may be some reasons why this can be disadvantageous towards some plaintiffs, detracting from fairness.[1]]

[The plaintiff must bear the burden of proof since, similar to the presumption of innocence that applies in criminal law, they are the party who is accusing the other party of being responsible for their loss, so they must satisfy the decision-maker that their claim can be proven based on facts and evidence they can present. If they cannot do so, they cannot be successful in receiving a civil remedy.[2]] [This is fair because the defendant needs to know the allegations and evidence relied upon before they are able to respond to defend themselves. It is also unfair to require a person to prove something did not take place, which is more difficult than proving something did occur.[3]]

[On the other hand, it may be seen as unfair that plaintiffs bear the burden of proof as they can commonly be more vulnerable than defendants because they have already suffered loss; they may also be less powerful than a defendant if the defendant is a business, large corporation or the government.[4]]

[The responsibility of seeking legal advice and/or representation and the risk of the court making an adverse cost order against them if they lose can deter many plaintiffs from pursuing their legal claims, even where they have suffered significant loss. If a particular plaintiff does not have legal advice or does not understand the processes and procedures of civil dispute resolution in a court, it may be unfair that they bear the burden of proof, since it may mean they cannot pursue their claim without experiencing disadvantage.[5]] [Generally it is fair that plaintiffs bear the burden of proof, but this can be unfair for some plaintiffs.[6]]

# 3.2.3 Factors to consider when iniating a civil claim

LEVEL 1

**1.** C **2.** B **3.** D **4.** C **5.** A

LEVEL 2

**6.**

- ✓ ✗ I have defined what negotiation is.[1]
- ✓ ✗ I have identified one advantage of negotiation.[2]
- ✓ ✗ I have explained how the feature of negotiation I have identified is advantageous.[3]
- ✓ ✗ I have identified a second advantage of negotiation.[4]
- ✓ ✗ I have explained how the feature of negotiation I have identified is advantageous.[5]
- ✓ ✗ I have signposted my answer appropriately using terms such as: 'further', 'secondly', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'negotiation', etc.

*Exemplar response*

[Negotiation is an informal discussion between parties which aims to resolve a dispute.[1]][An advantage of negotiation is that the costs of a civil action can be avoided.[2]][As a result, parties save money.[3]][Further, as parties have control over the outcome in a negotiation they are[4]][likely to accept the outcome.[5]]

**7.**

- ✓ ✗ I have identified some examples for legal costs.[1]
- ✓ ✗ I have stated that costs are generally high in deciding whether to initiate a civil claim.[2]
- ✓ ✗ I have described one way high costs affect a party deciding whether to initiate a claim (eg. deterred from initiating a claim, forced to settle out-of-court, self-represent etc.).[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'claim', 'costs', etc.

*Exemplar response*

[Costs in a civil dispute include fees for legal representation, fees associated with filing a claim in the courts and the risk of paying the other party's costs.[1]][The costs incurred as part of a civil claim are high.[2]]

[Due to these high costs, a plaintiff that does not have the money to pay for such costs is likely to be discouraged from pursuing a civil claim.[3]]

**8.**

- ✓ ✗ I have defined what limitation of actions are.[1]
- ✓ ✗ I have described the first reason why limitation of actions exist.[2]
- ✓ ✗ I have described a second reason why limitation of actions exist.[3]
- ✓ ✗ I have signposted my answer appropriately using terms such as 'One reason', 'additionally', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defendant', 'plaintiff', etc.

*Exemplar response*

[The limitation of actions refers to the legal restriction placed on the time within which a plaintiff can commence a civil claim.[1]]

[One reason why the limitation is imposed on the plaintiff is so the defendant does not fear an action being commenced against them for a significant or indefinite amount of time.[2]]

[Another reason for imposing the limitation is so evidence is not lost as people may not remember what happened if a civil action is lodged after a substantial delay.[3]]

**9.**

- ✓ ✗ I have stated that Toy Barn should be a defendant.[1]
- ✓ ✗ I have justified this conclusion by stating that employers are usually responsible for injury caused by their employees.[2]
- ✓ ✗ I have stated the parents should not take action against John personally.[3]
- ✓ ✗ I have justified this conclusion by stating that workers are not usually responsible for injury caused during the course of their employment.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'liable', 'defendant', etc.

*Exemplar response*

[It is likely the parents should take action against Toy Barn as a defendant in this case.[1]][Even though John was operating the machine that made the faulty toys, a business is usually legally responsible for the injury caused by their workers.[2]]

[The parents should not take action against John, as John is unlikely to be liable.[3]][This is because workers are usually not personally responsible for injuries caused by them doing their normal duties at work.[4]]

**10.**

- ✓ ✗ I have detailed the purpose of pursuing a civil claim.[1]
- ✓ ✗ I have detailed one enforcement issue.[2]
- ✓ ✗ I have detailed how this enforcement issue may affect a decision to initiate a civil claim.[3]
- ✓ ✗ I have signposted my answer appropriately using terms such as 'etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'claim', 'plaintiff', etc.

*Exemplar response*

[The main purpose, in a majority of civil claims, is to obtain compensation from the defendant that will restore the plaintiff to the position they were in prior to the infringement occurring.[1]][Therefore, a plaintiff must consider whether a defendant is able to pay compensation[2]][because, if a defendant is unable to do so, there is no purpose in initiating a civil claim (as this aim cannot be achieved).[3]]

*Possible points to include:*

Other enforcement issues that may be used include, but are not limited to:

- Whether the defendant is bankrupt
- If the defendant is unknown
- Whether the defendant is currently in prison
- If the defendant is otherwise uncontactable

LEVEL 3

**11.**

- ✓ ✗ I have identified one factor that Elliot should consider, in accordance with those listed in the relevant study design key knowledge.[1]
- ✓ ✗ I have explained why that factor is relevant in this scenario.[2]

| | |
|---|---|
| ✓ ✗ | I have identified a second factor that Elliot should consider, in accordance with those listed in the relevant study design key knowledge.[3] |
| ✓ ✗ | I have explained why that factor is relevant in this scenario.[4] |
| ✓ ✗ | I have clearly signposted my answer using phrases such as: 'One factor is...', 'A second factor is...', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil proceedings', 'negotiation', 'dispute resolution organisation', 'Consumer Affairs Victoria', 'private mediator', 'filing fees', 'pleadings', 'legal advice and representation', 'hearing fees', 'court', 'tribunal', 'costs', etc. |

*Exemplar response*

[One factor which Elliot should consider before commencing civil proceedings against his friend, or indeed against the telecommunication company is whether or not he might be able to make use of negotiation options, and negotiate a resolution of this dispute directly with his friend James or with his mobile phone company.[1]][This would be preferable as it is low cost and protects his relationship with James. As his phone insurance relates to providing goods and services, there are a number of dispute resolution organisations Elliot could attempt to use, including Consumer Affairs Victoria or he could hire a private mediator if his friend is willing to participate.[2]]

[Another factor Elliot should consider is the cost of initiating civil proceedings.[3]][This can include application or filing fees for documents such as pleadings, the cost of obtaining legal advice and representation, paying for hearing fees at the relevant tribunal or court and the potential he could have to pay part of the other side's legal costs if he loses. The cost of replacing his phone is likely to be less than these identified costs.[4]]

*Possible points to include:*

- Limitation of actions – depending on when this loss incurred (although it's likely to be recently as phone contracts typically don't last longer than six years).
- Scope of liability – this includes considering the possible defendants and the likelihood they may be found liable for the loss. In this scenario, if the friend caused the damage to the phone there may be little point in suing the telecommunications company.
- Enforcement issues – James may not be able to pay to replace Elliot's phone even if Elliot is successful in proving his loss should be restored by James. The potential cost of enforcement proceedings would surely contribute to the factor of 'costs' and lead to it being even less worthwhile for Elliot to pursue civil proceedings rather than just replace his phone.

**12.**

| | |
|---|---|
| ✓ ✗ | I have identified one reason why a plaintiff should consider the scope of liability.[1] |
| ✓ ✗ | I have explained why a plaintiff should consider the scope of liability.[2] |
| ✓ ✗ | I have identified one reason why a plaintiff should consider limitation of actions.[3] |
| ✓ ✗ | I have explained why a plaintiff should consider the limitation of actions.[4] |
| ✓ ✗ | I have used key legal terminology effectively such as: 'sue', 'defendant', 'plaintiff', 'loss', 'remedy', 'cause of action', 'defamation', 'breach of contract', 'defence', 'exception', etc. |

*Exemplar response*

[A plaintiff should consider the scope of liability that applies to their dispute because this will help them decide who it is best to initiate proceedings against.[1]][Sometimes it may be possible to sue more than one defendant, so the plaintiff should consider who is most likely to be held responsible by a court for their loss, and also, who is most likely to be able to pay damages or provide the remedy they are seeking.[2]]

[A plaintiff should also consider the limitation of actions before initiating a civil claim as there are restrictions that are in place depending on the particular cause of action they are trying to pursue.[3]][This can be one year, for defamation or up to six years, for breach of contract. If a plaintiff tries to launch proceedings outside of the limitation period that applies to their claim, the defendant may be able to use this as a defence, or the plaintiff may have to make a further application to the court to make an exception and extend the period that applies.[4]]

LEVEL 4

**13.**

| | |
|---|---|
| ✓ ✗ | I have identified one factor a plaintiff should consider.[1] |
| ✓ ✗ | I have explained the identified factor using precise details.[2] |
| ✓ ✗ | I have identified a second factor a plaintiff should consider.[3] |
| ✓ ✗ | I have explained the second identified factor using precise details.[4] |
| ✓ ✗ | I have stated one reason why limitations of actions uphold fairness.[5] |
| ✓ ✗ | I have stated a second reason why limitations of actions uphold fairness.[6] |
| ✓ ✗ | I have recognised ways limitation periods do not always promote fairness.[7] |
| ✓ ✗ | I have provided an explanation of how this limitation is overcome.[8] |
| ✓ ✗ | I have used signposting words to structure my response clearly. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'access', 'civil claim', 'dispute' 'defendant', 'settlement' 'negotiation', 'mediation', 'limitation of action', 'loss', 'evidence', 'witnesses', 'exception', 'court', 'minor', etc. |

*Exemplar response*

[In many instances, it is most cost effective and less time consuming and stressful to directly approach the person who a plaintiff thinks is responsible for their loss and try to negotiate a settlement.[1]][This is advice that many dispute resolution resources and organisations will provide. This could be directly between the two parties themselves, and quite informal. However, it could also involve contacting a private mediator to act as a neutral third party to help in the resolution of the dispute. It could also involve approaching a dispute resolution service such as Relationships Australia. It is important to note that while disputes may be resolved in this way negotiation is not appropriate in all cases.[2]]

[In addition to negotiation, under civil law, there are statutory limitation of actions which are time limits regarding how long a potential plaintiff has before they are barred from bringing their civil cause of action (unless of course they can convince the court to make an exception).[3]][As such, a plaintiff should research their cause of action and consider the relevant dates that the alleged loss occurred; for example, a defamation proceeding can only be brought within one year after the relevant publication was published.[4]]

[The concept of a limitation of action period upholds the principles of fairness as prospective defendants do not have to face legal action after a significant time has passed and evidence may have been lost.[5]][Furthermore, it upholds fairness for plaintiffs as it encourages them to bring their claim as soon as possible after they suffer the loss, which means they are more likely to be able to receive a fair trial of their claim, as evidence and witnesses are more reliable closer to the time the loss was suffered. Evidence, documents and witnesses' memories can fail over time, detracting from a fair trial of the facts.[6]][Whilst it may be unfair that a person cannot bring a claim unless it is within the limitation period, especially if they didn't start their action because they were unaware of such a limitation,[7]][there is always the potential that a court will grant an exception to these rules if exceptional circumstances exist, which preserves the possibility of fairness. Furthermore, there are no limitation periods in Victoria for plaintiffs claiming damages for sexual or physical abuse suffered as a minor, promoting fairness in these instances.[8]]

*Possible points to include:*

Students could also have included the following factors:

- Costs
  - There are significant costs involved in taking civil action through the courts, including court fees and fees for legal advice and representation. These fees may even amount to more than the amount of financial loss already suffered, which would be a practical reason not to take action.
- Scope of liability and possible defendants
  - It is typically only sensible to sue a defendant who can afford to pay the compensation or provide the remedy a plaintiff is seeking.
- Enforcement issues
  - If a plaintiff is unlikely to be able to sue an insurer or employer, they may decide it is not worth suing the individual who caused the loss, as they may not have significant funds to pay.

# 3.2.4 CAV and VCAT

LEVEL 1

**1.** B **2.** B **3.** A **4.** A

LEVEL 2

**5.**

- ✓ ✗ I have explained that CAV's dispute resolution service is free.[1]
- ✓ ✗ I have explained the link between CAV and the principle of access.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'dispute resolution', 'cost' etc.

*Exemplar response*

[One purpose of Consumer Affairs Victoria (CAV) is to provide dispute resolution without any cost.[1]] [The ability to access the civil justice system is therefore enhanced by CAV because consumers or tenants can pursue a resolution to a civil case at CAV that they might not have been able to afford to pursue if they went through the court system.[2]]

**6.**

- ✓ ✗ I have stated that CAV can handle disputes regarding the supply of goods and services.[1]
- ✓ ✗ I have stated that CAV can handle disputes regarding residential tenancies.[2]
- ✓ ✗ I have stated that CAV will only resolve disputes initiated by consumers or tenants, not landlords or businesses.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'disputes' etc.

*Exemplar response*

[Consumer Affairs Victoria can assist with disputes regarding the supply of goods and services,[1]] [and residential tenancies.[2]] [However CAV will only provide dispute resolution services in such cases if such complaints are brought by consumers or tenants, they will not resolve complaints initiated by businesses or landlords.[3]]

**7.**

- ✓ ✗ I have identified one way in which VCAT seeks to provide lower cost dispute resolution than the courts.[1]
- ✓ ✗ I have used an example from VCAT.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'VCAT', 'claims' etc.

*Exemplar response*

[One way in which VCAT achieves this is through charging lower filing fees than the courts.[1]] [For example, a standard filing fee in the Residential Tenancies List at VCAT for claims under $15,000 is about $65.[2]]

*Possible points to include:*

- Some VCAT lists have no filing fee (such as anti-discrimination disputes).
- Many VCAT disputes are resolved without legal representation, lowering costs (compared with courts that have complex procedures requiring legal representation).
- Fees can be waived for those in financial hardship (such as Health Care Card holders).

**8.**

- ✓ ✗ I have identified an instance in which VCAT is an appropriate body to resolve a civil dispute.[1]
- ✓ ✗ I have described this factor in detail.[2]
- ✓ ✗ I have identified an instance in which VCAT is not an appropriate body to resolve a civil dispute.[3]

| | |
|---|---|
| ✓ ✗ | I have described this factor in detail.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parties', 'VCAT', etc. |

*Exemplar response*

[VCAT is an appropriate dispute resolution body for civil cases within its jurisdiction.[1]][Specifically, civil claims about residential tenancies, disputes about the provision of goods and services and discrimination cases are all resolved at VCAT.[2]]

[VCAT is not an appropriate dispute resolution body in cases where parties do not feel comfortable self-representing.[3]][VCAT often requires parties to prepare and present their own case, and for the very young, elderly or those from a non-English speaking background this may be difficult, and such parties may prefer to use legal representation which is common in the courts.[4]]

*Possible points to include:*

VCAT is appropriate when:

- Parties are unable to negotiate a resolution themselves.
- Parties are willing to prepare and present their own claim.

VCAT is not appropriate when:

- The dispute is outside VCAT's jurisdiction (such as personal injury claims, representative proceedings, etc.).
- Having more appeal options is preferred.
- Parties would prefer a jury to be present.

LEVEL 3

**9.**

| | |
|---|---|
| ✓ ✗ | I have stated whether or not the dispute is appropriate for CAV to assist with.[1] |
| ✓ ✗ | I have provided one reason why CAV is/is not appropriate to assist in this matter to justify my statement.[2] |
| ✓ ✗ | I have provided a second reason why CAV is/is not not appropriate to assist in this matter to justify my statement.[3] |
| ✓ ✗ | I have used signposting to provide structure and cohesion to my response, such as: 'furthermore.' |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Consumer Affairs Victoria', 'complaints body', 'regulator', 'rights', 'conciliate', 'pre-trial procedures', 'judicial officer', 'dispute resolution method', 'binding decision' 'court', etc. |

*Exemplar response*

[Consumer Affairs Victoria (CAV) is unlikely to be appropriate to resolve this dispute.[1]][CAV is a complaints body and regulator that forms part of the Victorian Government's Department of Justice. It can provide support and advice to educate consumers and tenants about their rights under civil law in some circumstances, and it can conciliate disputes between tenants and landlords. Whilst Ellen may be a tenant, with a complaint against her landlord for failing to repair and maintain a safe balcony, the amount of money she is claiming is significant, which suggests that the dispute may require formal court processes such as pre-trial procedures and the testing of evidence before an objective judicial officer.[2]]

[Furthermore, it is unlikely that this dispute will settle through conciliation, which is the only dispute resolution method that CAV provides access to. A conciliator helps the parties come to a mutually beneficial decision between themselves but cannot make findings of fact or a binding decision. As such, given Ellen's significant alleged injuries and large claim, it is unlikely the parties will be able to compromise and reach a settlement, therefore CAV is not as appropriate as a court.[3]]

*Possible points to include:*

Students could have stated that Consumer Affairs Victoria is appropriate because:

- The matter is between a tenant and landlord.
- The matter is not before a court nor does it seem like it has been adjudicated in VCAT or a court.
- The dispute may settle through conciliation, which would be more affordable and timely than settling a claim through the courts.

**10.**

- ✓ ✗ I have provided a brief definition of Consumer Affairs Victoria.[1]
- ✓ ✗ I have provided a brief definition of the Victorian Civil and Administrative Tribunal.[2]
- ✓ ✗ I have explained one difference between CAV and VCAT.[3]
- ✓ ✗ I have explained a second difference between CAV and VCAT.[4]
- ✓ ✗ I have used linking words to demonstrate contrast, such as: 'however', 'whereas', 'on the other hand' or similar.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Consumer Affairs Victoria', 'alternative dispute resolution', 'binding outcome', 'enforceable', 'applications', 'applicants', etc.

*Exemplar response*

[Consumer Affairs Victoria is a government regulator who provides advice on consumer law issues to governments, as well as certain consumers, and can assist with some dispute resolution.[1]][The Victorian Civil and Administrative Tribunal (VCAT), on the other hand, is a tribunal, meaning their primary purpose is to adjudicate civil disputes.[2]]

[One key difference between the purposes of these two institutions is that decisions made by VCAT are binding on the parties, whereas Consumer Affairs Victoria can only assist parties who are willing to participate in the alternative dispute resolution method of conciliation, which does not offer a binding outcome. This means a person may be required to appear in VCAT against their will, and the order of VCAT may be made enforceable against that party, however, this is not part of CAV's function.[3]]

[A second difference in the purpose of these two institutions is that Consumer Affairs Victoria is primarily concerned with assisting consumers with their legal rights, whereas VCAT hears applications from consumers but also landlords, companies and even large corporations. VCAT's purpose is not purely to assist consumers including tenants, but to provide efficient, cost-effective and less-formal dispute resolution to a wide range of potential applicants.[4]]

*Possible points to include:*

Students could also have stated that:

- CAV can provide advice to the Government on consumer law affairs and legislation whereas VCAT does not do this.
- CAV can take action to enforce the law, whereas VCAT does not do this (VCAT is not a regulatory body, it is a dispute-resolution body).
- VCAT offers parties expertise in a wide range of areas of civil law, whereas this is not CAV's purpose, as they focus solely on consumers, tenants and small claims.

LEVEL 4

**11.**

- ✓ ✗ I have provided an overall evaluation of the extent to which VCAT promotes fairness and access.[1]
- ✓ ✗ I have provided one reason why VCAT promotes fairness.[2]
- ✓ ✗ I have linked to the stimulus material in my explanation.[3]
- ✓ ✗ I have provided a second reason why VCAT promotes fairness.[4]
- ✓ ✗ I have provided one reason why VCAT does not always promote fairness.[5]
- ✓ ✗ I have provided one reason why VCAT promotes access.[6]
- ✓ ✗ I have linked to the stimulus material in my explanation.[7]
- ✓ ✗ I have provided an additional reason/s why VCAT promotes access.[8]
- ✓ ✗ I have provided one reason why VCAT does not always promote access.[9]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'civil dispute resolution', 'cases', 'court system', 'dispute resolution practitioner', 'applicant', 'small tenancy matter', 'accessibility', 'dispute', 'member', 'legal representation', etc.

*Exemplar response*

[VCAT promotes fairness and access through fulfilling its overall purpose and objective to provide Victorians with low-cost, timely and informal civil dispute resolution.[1]][In particular, VCAT promotes fairness because it aims to hear a large number of matters in a timely fashion.[2]][In particular the information provided states that most cases are heard and finalised within 4 weeks. This is certainly quicker than most cases would be heard and finalised in a court, promoting fairness by minimising the negative impact of delays on parties to a case.[3]]

[Furthermore, VCAT's hearing process is flexible, providing for fairness as parties who are unrepresented are treated the same and have the same opportunities to present their case.[4]][However, not all lists are as timely as the Residential Tenancies list. Some lists, for example the Planning and Environment list, takes an average of 26 weeks to finalise cases.[5]]

[VCAT promotes access because of its comparatively low-fees compared with the court system or even with hiring a private alternative dispute resolution practitioner.[6]][For example, it is less than $100 for a standard applicant to apply regarding a small tenancy matter and no cost if the dispute is, for example, over a bond. This promotes accessibility as parties can have their dispute determined by an objective and experienced member, helping them either achieve the outcome they want or better understand the legal process and their rights, without paying significant fees.[7]]

[Furthermore, applicants usually don't need legal representation and the use of the online tool promotes access, making it easy and quick to apply.[8]][However, some applicants or respondents, particularly those who live in rural areas, may have trouble accessing VCAT as whilst it does hear some applications in regional areas, it hears most of its matters in its metropolitan location in Melbourne's CBD.[9]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have provided a statement evaluating the role of Consumer Affairs Victoria (CAV) in achieving the principles of justice.[1] |
| ✓ ✗ | I have explained one way that CAV promotes a principle of justice.[2] |
| ✓ ✗ | I have explained a second way that CAV promotes a principle of justice.[3] |
| ✓ ✗ | I have explained a limitation of CAV in promoting that principle of justice.[4] |
| ✓ ✗ | I have provided an explanation of one way CAV promotes a different principle of justice.[5] |
| ✓ ✗ | I have provided one limitation of CAV in promoting a different principle of justice.[6] |
| ✓ ✗ | I have provided a second limitation of CAV in promoting a different principle of justice.[7] |
| ✓ ✗ | I have used language to signpost my evaluation, such as: 'on the other hand'. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislation', 'rights', 'enforce', 'complaints body', 'conciliation', 'dispute', 'jurisdiction', 'advocate', 'rights', etc. |

*Exemplar response*

[In Australia, consumers are protected by a range of legislation, including the Australian Consumer Law, the *Fair Trading Act 2012* (Vic) and the *Competition and Consumer Act 2010* (Cth), however, not all individuals would be aware of their rights or able to enforce their rights under these laws easily. Consumer Affairs Victoria (CAV) plays an important role as an independent, government-funded complaints body who can assist consumers and ensure that their purchase of goods and services is fair and that they are treated equally.[1]]

[CAV empowers Victorians to exercise their consumer rights by providing them with information and support without cost. This supports the extent to which our civil justice system can achieve access to dispute resolution for all individuals because there is no financial barrier to becoming informed about one's rights.[2]][Where both parties are willing to participate, CAV can provide access to free conciliation, which is where a third party with expertise in the type of consumer law issue helps the parties to agree to reach a resolution.[3]][This is not accessible to all people, though, as the dispute must come within CAV's jurisdiction to be able to use this service, which includes disputes about goods and services up to a value of $40,000.[4]]

[CAV helps achieve fairness because it is specifically designed to educate, inform, protect and advocate on behalf of consumers, who are typically less powerful than companies and other providers of goods and services, so they can better pursue their own complaints. As such, its existence is intended to enhance the regulation, enforcement and protection of consumer rights. It also works to advocate on behalf of certain groups of people; for example, in 2016–2017 CAV look legal action against a door-to-door cleaning business who was found to have been using high-pressure tactics to influence its mostly elderly customers, and the business was required to refund consumers. This work by CAV helps facilitate a fair trial for those more vulnerable consumers in the community and helps protect their rights so they are not taken advantage of.[5]]

[On the other hand, as CAV does not provide legal representation to consumers whose rights have been infringed, nor does it have any capacity to require a provider of goods and services to attend dispute resolution hearings or make any binding final determinations providing redress to consumers, it cannot truly promote the equal and just treatment of every consumer.[6]]

[Furthermore, CAV will evaluate complaints that come to it and cannot assist everyone. This prioritisation process means not all disputes receive the exact same assistance. As such, whilst CAV does not actively discriminate, consumers may have different experiences in using their services, detracting from the principle of equality.[7]]

*Possible points to include:*

Students could also have mentioned that:

- The informal nature of the process enhances accessibility.
- However, the informal nature of the process may mean parties don't take the matter seriously, detracting from fairness.
- As there is no scope for the use of legal representation, some consumers may be less able to participate in the conciliation process due to language or cultural communication barriers, which detracts from fairness, equality and access.
- CAV aims to assist parties in a timely manner, enhancing the extent to which it promotes access.
- CAV can reject to assist in certain instances, such as where a consumer has denied a reasonable offer from the provider of goods or services, detracting from equality and access.

# 3.2.5 Purposes of civil pre-trial procedures

LEVEL 1

**1.** A

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have defined one civil pre-trial procedure.[1] |
| ✓ ✗ | I have identified one purpose of the civil pre-trial procedure.[2] |
| ✓ ✗ | I have explained this first purpose.[3] |
| ✓ ✗ | I have identified a second purpose of the civil pre-trial procedure.[4] |
| ✓ ✗ | I have explained this second purpose.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parties', 'trial', etc. |

*Exemplar response*

[Pleadings is a pre-trial procedure which entails the exchange of claims and defences between parties.[1]][One purpose of pleadings is to ensure the trial runs smoothly.[2]][This is achieved through the exchange of a statement of claim and a defence, which help parties clarify the legal issues in dispute, meaning parties and the courts are better prepared for the trial, so legal arguments and the presentation of evidence can run more efficiently.[3]][Another purpose is to assist in reaching an out-of-court settlement.[4]][As pleadings clarify the legal issues and help parties understand the strength of each other's case, the parties are more likely to attempt to settle the dispute before trial.[5]]

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief explanation of the purpose of discovery.[1] |
| ✓ ✗ | I have explained what this process of discovery includes, that helps it achieve its purpose.[2] |
| ✓ ✗ | I have provided a brief example.[3] |
| ✓ ✗ | I have provided a brief explanation of the purpose of exchange of evidence.[4] |
| ✓ ✗ | I have explained what this process of exchange of evidence includes, that helps it achieve its purpose.[5] |
| ✓ ✗ | I have use comparative language to distinguish between the two pre-trial procedures.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil dispute', 'pre-hearing stage', 'written interrogatories', 'witnesses', 'lay', 'expert', 'claims', 'defences', etc. |

*Exemplar response*

[The purpose of discovery is to provide the other party to the civil dispute all documents that are 'relevant' to the dispute to ensure fairness in the process of preparing for trial.[1]][Discovery is the pre-hearing stage in civil proceedings where the parties exchange further details; it may consist of the discovery of documents and written interrogatories.[2]][An example of a document which may be provided to the other side as part of discovery includes a medical record or a copy of an email.[3]]

[Exchange of evidence refers to the parties exchanging documents that outline the evidence that various witnesses including both lay and expert witnesses will provide at trial.[4]][This helps to allow both parties to prepare for cross examination, because they can consider weaknesses in the evidence that will be presented by witnesses for the other side.[5]][While the exchange of evidence stage enables parties to access the evidence that will be submitted in court and therefore allows them to strategise and avoid being surprised at trial, the discovery stage is where facts and documents are disclosed which form the basis of the parties' claims and defences.[6]]

**4.**

- ✓ ✗ I have provided a statement regarding the extent to which the scenario illustrates the purpose of civil pre-trial procedures.[1]
- ✓ ✗ I have identified one relevant purpose of civil pre-trial procedures.[2]
- ✓ ✗ I have explained one way in which the case achieves this purpose of civil pre-trial procedures.[3]
- ✓ ✗ I have identified a second relevant purpose of civil pre-trial procedures.[4]
- ✓ ✗ I have explained one way in which the case achieves this purpose of civil pre-trial procedures.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'loss', 'pleadings', 'discovery', 'out of court settlement', 'dispute', 'damages', 'evidence', 'settle', 'claim', 'trial', etc.

*Exemplar response*

[This scenario describes two large, complex civil class actions where plaintiffs had suffered loss due to the Black Saturday bushfires and the pre-trial procedures which would have taken place include pleadings and discovery. It illustrates the purpose of pre-trial procedures to a significant extent.[1]]

[This case achieves the purpose of facilitating an out of court settlement[2]] [because that is what was achieved. It is likely that this settlement was achieved because the parties could, through the process of pleadings and discovery and with the court's assistance, narrow the issues in dispute between them and illustrate the strength of each of their cases, allowing them to reach a settlement earlier.[3]]

[This case also illustrates the purpose of pre-trial procedures which is to allow the defendant to understand the amount of damages the plaintiffs were claiming, by being exposed to the exchange of evidence.[4]] [In this case, the amount of evidence the court would have had to hear was significant, but it seems it was sufficient to persuade the defendant that it would be appropriate to settle and pay the plaintiffs a sum based on their claims and evidence, avoiding the need for trial, thus upholding a purpose of pre-trial procedures.[5]]

LEVEL 4

**5.**

- ✓ ✗ I have provided a brief introduction which identifies what pre-trial procedures are and how they contribute to the principles of justice.[1]
- ✓ ✗ I have briefly described the relevant pre-trial procedure in the first scenario.[2]
- ✓ ✗ I have identified the relevant principle/s of justice that this procedure upholds.[3]
- ✓ ✗ I have explained how the procedure upholds this principle.[4]
- ✓ ✗ I have briefly described the relevant pre-trial procedure in the second scenario.[5]
- ✓ ✗ I have identified the relevant principle/s of justice that this procedure upholds.[6]
- ✓ ✗ I have explained how the procedure upholds this principle.[7]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'pleadings', 'discovery', 'exchange of evidence', 'case', 'trial', 'served', 'filed', 'judge', 'claim', 'defence', 'burden and standard of proof', 'obligations of disclosure', etc.

*Exemplar response*

[Civil pre-trial procedures refer to the stages in the lead up to a civil trial commencing. These procedures, including pleadings, discovery and exchange of evidence, are typically mandatory and are designed to ensure both sides are informed about the nature of the case and sufficiently prepared for trial. Pre-trial procedures have different purposes, however, all contribute to facilitating fairness, equality and access to varying degrees.[1]]

[In the first case, pleadings have been exchanged. This involves both parties setting out the particular aspects of their claim and defence, in formal documentation that is served on (provided to) the other side and also filed with the relevant court.[2]]

[This helps promote the principle of fairness[3]][because it ensures both sides and the judge can be informed of the nature of the parties' claims and both parties can begin to strategise and prepare to present their case in its best light at trial. Both parties are compelled to state the particular details of their claim and defence, which eliminates the possibility of surprise at trial, which would be contrary to fairness because it would not allow parties to know the case that must be met or the defences likely to be raised.[4]]

[In the second case, the pre-trial procedure of discovery has taken place. This stage requires that both parties make available to the other side all documents that are relevant to the issues in the dispute. This stage can help promote the possibility of a pre-trial settlement, as happened in this case, because a defendant may be forced to concede that the evidence the plaintiff has is strong and likely to discharge the burden and standard of proof.[5]][This promotes access to dispute resolution,[6]][because costs and time are reduced if a court trial does not need to occur.[7]]

*Possible points to include:*

Both procedures identified in these scenarios (pleadings and discovery) involve both parties being held to the same requirements regarding their obligations of disclosure about legal issues, documents, etc; therefore the procedure also upholds the principle of equality, because both sides are under the same obligations.

**6.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief introduction which defines pleadings and states their general purpose.[1] |
| ✓ ✗ | I have provided an explanation of a strength of pleadings in contributing to one of the principles of justice.[2] |
| ✓ ✗ | I have provided an explanation of another strength of pleadings in contributing to one of the principles of justice.[3] |
| ✓ ✗ | I have provided an explanation of how pleadings can detract from achieving one of the principles of justice.[4] |
| ✓ ✗ | I have provided an explanation of how pleadings can detract from achieving another of the principles of justice.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'filed', 'court', 'claims', 'defences', 'amend', 'delays', 'costs', 'legal and court fees', 'legal representatives', etc. |

*Exemplar response*

[The pre-trial procedure of pleadings is when formal documents such as a statement of claim are exchanged by the parties and filed with the relevant court as part of upholding procedural fairness. Both parties can have notice of the nature of the claim and defence that will be raised by the other side.[1]]

[The process of pleadings upholds fairness because pleadings help to define the issues that must be determined between the parties by the court by setting out and clarifying the claims and defences of the parties. It is a part of the Supreme Court Rules that a party must plead any matter that makes the other side's claim not maintainable or which would take the other party by surprise. By removing the 'element of surprise', both sides can prepare adequately for trial, promoting how 'fair' the final hearing of the dispute will be.[2]]

[Pleadings also enhances the principle of access, because by receiving the other side's pleadings, a party is better able to pursue their case or defend the claim against them, as the details of the claim or defence are plainly and clearly set out. Pleadings also make clear the evidence that will be required to be tendered in presenting each side's case, which further enhances one's ability to pursue one's case.[3]][However, as pleadings can be time consuming to complete, exchange and even at times seek to amend and resubmit, this process can detract from access to a final resolution of the matter because it can cause delays and also lead to increased costs in legal fees and court fees.[4]]

[The process of participating in the pre-trial procedure of pleadings does not always promote equality in the justice system, as a party's opportunity to present clear and competent pleadings to the other side and to the court will largely depend on the quality of their legal representatives, who will typically draft these pleadings on behalf of their client. They are a technical and formal document with precise formatting requirements and as such, require expertise, which can be costly and therefore not equally available to all parties. Furthermore, the court can only provide limited assistance in drafting pleadings for those representing themselves, as it is seen as a key aspect of party control.[5]]

*Possible points to include:*

Students could also have mentioned access and made the following points:

- Pleadings can promote access to a just resolution of the civil dispute because they may encourage an early settlement, thereby minimising costs.
- However, the pleadings process is so complex that parties need legal representation to ensure it is completed to an appropriate standard. This is costly, and the cost may be a barrier to accessing the courts to resolve the dispute.

# 3.2.6 The Victorian court hierarchy and civil cases

LEVEL 1

**1.** D **2.** C

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have defined what an appeal is.[1] |
| ✓ ✗ | I have detailed how the appeals process upholds fairness.[2] |
| ✓ ✗ | I have detailed how without the appeals process fairness would be compromised.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeals', 'court', etc. |

*Exemplar response*

[An appeal is an application to have a superior court review the decision of a lower court.[1]][The system of appeals helps to achieve fairness as a just outcome is more likely to take place because any mistakes made in the original court can be corrected.[2]][If there was no system of appeals, unfairness would result as there would be no process whereby unjust decisions could be corrected.[3]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined administrative convenience.[1] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'on the other hand', 'whereas', etc.[2] |
| ✓ ✗ | I have defined specialisation.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeals', 'court', etc. |

*Exemplar response*

[Administrative convenience refers to the efficiency gained by separating cases into different courts in the court hierarchy. The hierarchy ensures superior courts are free to devote time to long and complex matters, without these courts being clogged up with lots of minor disputes.[1]][On the other hand,[2]][specialisation refers to judges developing their own area of expertise. For example, Supreme Court justices develop skill and expertise in resolving complex civil disputes as this is what they hear and determine most often.[3]]

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief overview of the nature of the disputes heard in the Victorian Court hierarchy by way of introduction.[1] |
| ✓ ✗ | I have provided one reason for a court hierarchy.[2] |
| ✓ ✗ | I have explained this reason.[3] |
| ✓ ✗ | I have provided a second reason for a court hierarchy.[4] |
| ✓ ✗ | I have explained the second reason.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil law', 'disputes', 'pre-trial', 'alternative dispute resolution', 'commercial contract law', 'class action', 'tendered', 'jurisdiction', 'judicial officer', etc. |

*Exemplar response*

[The Victorian legal system, and within that the civil law system, needs to prepare for, hear and resolve a wide variety of disputes. These range from very small civil claims which may be straightforward and even resolved through pre-trial alternative dispute resolution, through to complex and significant commercial contract law disputes, involving multiple parties, or class actions, where thousands of documents need to be tendered to the court.[1]][By having different courts allocated distinct areas of jurisdiction, including lower courts in the hierarchy hearing less serious or complex disputes, and higher courts hearing more complex matters, the court hierarchy benefits from administrative convenience.[2]][Judges can develop expertise in particular areas of law, such as workplace health and safety disputes, and hear these disputes more often, making more consistent decisions than they might if they had to hear all manner of civil disputes.[3]]

[Another reason for a court hierarchy is that without such a structure, mistakes in judgements would not be able to be corrected through the appeals process.[4]][Unsatisfied parties who are granted leave to appeal can, in certain circumstances, have the decision reviewed, usually by a more senior judicial officer or multiple judges at once, ensuring the final decision is as fair and just as possible.[5]]

**6.**

| | | |
|---|---|---|
| ✓ | ✗ | I have provided one justification for a court hierarchy.[1] |
| ✓ | ✗ | I have explained this justification in relation to the dispute.[2] |
| ✓ | ✗ | I have provided a second justification for a court hierarchy.[3] |
| ✓ | ✗ | I have explained this justification in relation to the dispute.[4] |
| ✓ | ✗ | I have provided a third justification for a court hierarchy.[5] |
| ✓ | ✗ | I have explained this justification in relation to the dispute.[6] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'civil and criminal matters', 'leave to appeal', 'granted', 'judges', 'decision-maker', 'precedent', etc. |

*Exemplar response*

[The unfolding lawsuit against Hamish Hamer justifies the existence of a court hierarchy because it illustrates the importance of the capacity to appeal. Appeals are only possible if the courts are arranged into a hierarchy, with less senior courts at the bottom and the most senior court in the country being at the top, the High Court. The High Court can hear both civil and criminal matters from all the states and territories of Australia, provided that leave to appeal is granted.[1]][If the plaintiff, Hamish Hamer, sought and was granted leave to appeal, they would be able to benefit from the most senior judges in the country reviewing the Court of Appeal's decision and correcting any mistakes.[2]]

[This case also illustrates the power of the court hierarchy to ensure that decisions that may be unfair are able to be rectified.[3]][Without a system that allows parties to present their case and have their evidence and arguments heard by objective and neutral decisions makers, and then have the option for those decisions, including those of a jury as in this case, to be reviewed in certain circumstances, the legal system would not be fair.[4]]

[The Prime Minister is preparing to have this case appealed to the High Court of Australia, which is the most senior court in the country, therefore it is best placed to make the most accurate statement of how the law should develop, as it has the most sophisticated legal minds on the bench.[5]][As such, it should be able to have the final review of decisions which may otherwise lead to injustices to be enshrined in precedent set by lower courts' decisions.[6]]

LEVEL 4

**7.**

| | | |
|---|---|---|
| ✓ | ✗ | I have provided a brief introduction which describes how the relevant reason for a court hierarchy promotes fairness.[1] |
| ✓ | ✗ | I have described one reason why the appeal process promotes fairness.[2] |
| ✓ | ✗ | I have linked that description to the scenario in this question.[3] |
| ✓ | ✗ | I have described another reason why the appeal process promotes fairness.[4] |

| | |
|---|---|
| ✓ ✗ | I have linked that description to the scenario in this question.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'review', 'judgements', 'defamation', 'reversed', 'question of law', 'High Court', 'leave to appeal', 'precedent', 'case', etc. |

*Exemplar response*

[This case illustrates the principle of fairness because it demonstrates the nature of the appeal process as providing a process to review decisions, which is supported by the structure of the courts into a hierarchy.[1]]

[The appeal process, as shown in this case, allows for judgements and decisions to be reviewed by higher courts and corrected if necessary.[2]][As defamation law is a particularly complex area of law at the moment due to rapid advancements in technology and the communication of information, the law is not entirely resolved and precedent is being developed by the courts that reflects these technological changes.[3]]

[This case also demonstrates that cases can be heard on appeal multiple times, and the previous decision can be reversed each time. Whilst this is not common, the fact that it is possible where necessary upholds fairness because it ensures that processes are in place, where a difficult or complex question of law exists, to have decisions reviewed by the most expert and senior judges in higher courts.[4]][Provided that leave to appeal is granted, a party can even go to the High Court, which, as in this case, would offer their opinion on the particular question of law they are asked to resolve, which becomes precedent, and then send the matter back to the original trial court to be heard. This process upholds fairness because it ensures transparency and predictability in the decisions that will be made in future cases also.[5]]

# 3.2.7 Responsibility of key personnel in a civil trial

LEVEL 1

**1.** A **2.** A **3.** B **4.** C

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have identifed one responsibility of the judge in a civil trial.[1] |
| ✓ ✗ | I have described this responsibility.[2] |
| ✓ ✗ | I have identified one principle of justice, one of: fairness, access or equality.[3] |
| ✓ ✗ | I have linked how the responsibility I have identified upholds one principle of justice.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'civil', etc. |

*Exemplar response*

[One responsibility of the judge in a civil trial is to determine what evidence is admissible.[1]] [The judge decides which evidence is permitted, and can exclude evidence from the trial.[2]] [This responsibility helps to promote equality[3]] [because the rules of evidence apply uniformly to both parties so that no party has an unfair advantage over the other.[4]]

*Possible points to include:*

Other responsibilities of a judge in civil proceedings may include but are not limited to:

- Trial management
- Decide costs
- Determine who is liable (if required)
- Determine the appropriate remedy to be awarded
- Direct the jury (if required)

**6.**

| | |
|---|---|
| ✓ ✗ | I have described one similarity between the roles of a criminal and civil jury.[1] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', etc.[2] |
| ✓ ✗ | I have described one difference between the roles of a criminal and civil jury.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jury', 'civil', etc. |

*Exemplar response*

[Criminal and civil jurors are alike in the sense that they must be unbiased and put aside any prejudices they may have.[1]] [However,[2]] [the decision to be made by a criminal jury is different than that in a civil case. In a criminal case the jury can only deliver a guilty verdict if persuaded of the accused person's guilt beyond a reasonable doubt, whereas a civil jury is required to find in favour of one of the parties on the balance of probabilities.[3]]

*Possible points to include:*

Other similarities between criminal and civil juries (in terms of their responsibilities) may include but are not limited to:

- In both, juries follow directions from the judge.
- In both, juries consider the evidence presented and the reliability of each witness.

Other differences between criminal and civil juries (in terms of their responsibilities) may include but are not limited to:

- Civil juries may have a role in determining damages however criminal juries have no role in deciding the sanction to be imposed.

**7.**

- ✓ ✗ I have described why the first statement is incorrect: that the burden of proof rests with the plaintiff in civil proceedings not the prosecution.[1]
- ✓ ✗ I have described why the second statement is incorrect: that convictions don't exist in civil proceedings (only criminal cases) and a plaintiff would instead hope that they are 'found for'.[2]
- ✓ ✗ I have described why the third statement is incorrect: that compliance with the *Limitation of Actions Act* is the responsibility of the party initiating, not defending against, the action.[3]
- ✓ ✗ I have signposted my answer appropriately by using terms such as: 'also incorrect', 'lastly', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'plaintiff', etc.

*Exemplar response*

[The first statement is incorrect because the burden of proof does not rest with the prosecution in civil proceedings but with the plaintiff.[1]][The second statement is also incorrect because 'convictions' do not exist in civil cases – instead, the plaintiff would be hoping that the judge/jury finds in their favour, and not in favour of the defendant.[2]][Lastly, compliance with the *Limitations of Actions Act* is not a responsibility of the defendant but rather is a responsibility of the plaintiff (the party who initiates a civil claim), to ensure they begin their claim within the relevant time limit.[3]]

**8.**

- ✓ ✗ I have identified one responsibility of a legal practitioner.[1]
- ✓ ✗ I have described this first responsibility.[2]
- ✓ ✗ I have identified a second responsibility of a legal practitioner.[3]
- ✓ ✗ I have described this second responsibility.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'address', 'barrister', etc.

*Exemplar response*

[One responsibility of a legal practitioner is to make an opening address to the court.[1]][The barrister will summarise their client's legal argument as to why they are entitled to a remedy or not liable and summarise the facts and evidence they will present in the trial.[2]][A second responsibility is to examine witnesses.[3]][The barrister will draw out evidence to the court by questioning the witnesses called by their client, and test the reliability of the other party's evidence by cross-examining their witnesses.[4]]

*Possible points to include:*

- Closing address, summarising their client's case.
- Challenging the admissibility of the other's party's evidence.
- Not to mislead the court.
- To take all steps to ensure the trial is conducted in a timely way.

LEVEL 3

**9.**

- ✓ ✗ I have explained one role of the judge in this civil trial.[1]
- ✓ ✗ I have explained a second role of the judge in this civil trial.[2]
- ✓ ✗ I have explained a third role of the judge in this civil trial.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'trial', 'case management', 'directions', 'point of law', 'cross-examination', 'jury', 'liability', 'defamed', etc.

*Exemplar response*

[In this case the judge, Judge Macnamara, had to manage the trial, which would have included using powers of case management to make any directions required during the pre-trial stages and also trial itself, such as deciding a point of law (for example whether or not the newspaper the Benalla Ensign could argue the 'substantial sting' of the article was true, thus pleading the defence of 'truth').[1]]

[Judge Macnamara would also have presided over the courtroom process, with the assistance of court staff, ensuring that the trial was conducted fairly and objectively and in accordance with the rules of evidence and procedure. The plaintiff, Mirabella, would have first put his case and then the Benalla Ensign and their lawyers would have had a chance to respond, including cross examination.[2]]

[As there was a civil jury in this case, the judge would also have been responsible for instructing the jury when they were being sent off to begin deliberations and decide the question of liability (that is, deciding whether or not the plaintiff Mirabella had proven the case on the balance of probabilities or not). This would require Judge Macnamara to explain the law of defamation and the requirements of each of the elements of the cause of action Mirabella was pleading.[3]]

*Possible points to include:*

Students could have mentioned that it is also the role of the judge to:

- decide on the admissibility of any evidence if contentious
- attend to and instruct the jury if there was one
- make a finding regarding appropriate remedies
- make a finding as to legal costs.

**10.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief introduction that provides contextual information about the role of civil juries, addressing the task word.[1] |
| ✓ ✗ | I have provided one justification for the use of a jury in a civil trial.[2] |
| ✓ ✗ | I have provided a second justification for the use of a jury in a civil trial.[3] |
| ✓ ✗ | I have provided a third justification for the use of a jury in a civil trial.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'objectively', 'evidence', 'liability', 'representative', 'random selection', 'empanelment', 'justice', 'legal system', etc. |

*Exemplar response*

[A jury for a civil trial in Victoria is not compulsory but can be used in certain circumstances, for example if either party wishes and provided the court approves. Using a civil jury has a number of benefits.[1]]

[Firstly, there are six minds rather than one (in the case of a single sitting judge), and they are each required to listen to the evidence objectively and make a decision regarding liability based solely on the evidence put before them in court. A group decision such as that of a jury is more likely to be correct, as if all or a majority of a group of people agree on an outcome, it is more likely to be 'right'.[2]]

[Juries are supposed to be representative of Victorian society, so the process of random selection and empanelment is designed to ensure a civil jury reflects Victoria in terms of ethnicity, cultures, age, gender and socio-economic status. Consequently, decisions can be more likely to be said to reflect the values of the community.[3]]

[Jury trials in civil law matters can also be justified because they allow the community to participate directly in the administration of justice, enhancing understanding of and confidence in the legal system.[4]]

LEVEL 4

**11.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief introduction that addresses the task word.[1] |
| ✓ ✗ | I have explained one reason why the responsibilities of the parties and their legal representatives contributes to fairness.[2] |
| ✓ ✗ | I have explained a second reason why the responsibilities of the parties and their legal representatives contributes to fairness.[3] |
| ✓ ✗ | I have explained reason/s why the responsibilities of the parties and their legal representatives does not always contribute to fairness.[4] |
| ✓ ✗ | I have provided a brief concluding statement.[5] |

| | |
|---|---|
| ✓ ✗ | I have used signposting to structure my response clearly such as: 'however', 'also', 'furthermore', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'jury', 'adversarial system', 'trial', 'witness testimony', 'party control', 'burden of proof', 'balance of probabilities', 'pleadings', 'self-represented', 'advocacy', etc. |

*Exemplar response*

[The parties and their legal representatives have a significant degree of control over the way a case is prepared and presented before a judge and/or jury. This can maximise fairness in some respects, however, the significant variation between legal representatives can detract from fairness in some instances.[1]]

[A key rationale for the significant level of control given to parties and their legal representatives in our legal system is our use of the adversarial system of trial. Under this system, the two parties are pitted against each other and the decision maker (either judge or jury) rarely 'descends into the arena' to become involved in the presentation of the case, for example analysis of witness testimony. This promotes fairness because both parties the same opportunities to exercise control over the presentation of their case. They can choose which witnesses to call. They should feel more satisfied with the outcome as they were able to exercise control over their case, which is fair.[2]]

[The individual roles of the two parties, and their legal representatives, also promotes fairness. For example, the plaintiff is the party bringing the legal claim against the defendant, and as such, should bear the burden of proof. The defendant may choose to present a defence but does not have to: the plaintiff must discharge the burden to the relevant standard of 'balance of probabilities', which is also fair.[3]]

[However, the level of party control and the responsibilities of the parties may at times lead to unfairness, because the quality of the case presented, including the way pleadings are drafted, which witnesses are called and which questions they are asked, all depends on the strategy of the legal representatives, who are taking instructions from their client but who are the ultimate expert. Parties will usually entrust many decisions to their legal representatives. Furthermore, there is a level of expertise and discretion involved in the presentation of a case which tends to mean the more expensive and elite legal representatives are more talented and strategic. This may undermine fairness as, if a party is less wealthy or even self-represented, the quality of their legal representation may not mean they can compete in a completely even and fair way with the skills of the other side's advocacy team, as they cannot present their case in its best light.[4]]

[Increasingly our justice system aims to provide some assistance to parties, especially when self-represented, to ensure their right to a fair trial is upheld. Judicial powers of case management in civil matters also mean the risk of unfairness arising from the role of the parties and legal representatives is further minimised.[5]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have addressed the task word with a brief introductory statement.[1] |
| ✓ ✗ | I have explained why the owners must tell their lawyers, referencing the relevant overarching obligations.[2] |
| ✓ ✗ | I have explained the overarching obligations that apply to the legal representatives in this case.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: '*Civil Procedure Act 2010* (Vic)', 'court', 'relevant documents', 'discovery', 'disclose', 'dispute', etc. |

*Exemplar response*

[The owners must tell their lawyers about this email, even though it may be quite detrimental to their case in response to the plaintiffs' claims.[1]]

[The parties have overarching obligations under the *Civil Procedure Act 2010* (Vic). These overarching obligations include the obligation to not mislead or deceive the other side or the court, and to disclose all relevant documents through the process of discovery. As such, they must comply with these and disclose the email, or else face potential consequences for being in breach of their legal responsibilities.[2]]

[Once they have been told about these documents, the lawyers must disclose them, as they are 'relevant' to the issues in dispute and this is part of the overarching obligations which they are also bound by under the *Civil Procedure Act 2010* (Vic). Whilst the lawyers may be tempted to want to put their client's case forward in the best light, and therefore to 'bury' the document, this would be contrary to their overarching obligation to the court, and the requirement that they not mislead the court. Whilst they must advocate on behalf of their client to the best of their ability, their primary role is to assist the court with the resolution of the dispute, and to that end they must be honest in all that they do.[3]]

# 3.2.8 Judicial powers of case management

LEVEL 1

**1.** B **2.** C

LEVEL 2

**3.**

| | | |
|---|---|---|
| ✓ | ✗ | I have detailed what the power to order mediation is.[1] |
| ✓ | ✗ | I have identified the way mediation helps minimise costs to parties.[2] |
| ✓ | ✗ | I have listed a few costs that may be avoided if a dispute is resolved via mediation and not the courts.[3] |
| ✓ | ✗ | I have linked how reduced costs enables greater access to justice.[4] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'mediation', 'parties', etc. |

*Exemplar response*

[A judge has the power to refer a civil proceeding to mediation.[1]][The power to order mediation helps to uphold access to the civil justice system by providing a more cost-effective resolution process.[2]][By having a dispute resolved through mediation parties are able to avoid court hearing fees and if the dispute is settled at mediation this minimises the time parties need to pay for a lawyer.[3]] [Therefore, as mediation reduces costs parties are often directed to attempt mediation as a way to promote access to justice.[4]]

**4.**

| | | |
|---|---|---|
| ✓ | ✗ | I have defined the power to give directions.[1] |
| ✓ | ✗ | I have stated the purpose of this power.[2] |
| ✓ | ✗ | I have provided one example of a direction that may be given.[3] |
| ✓ | ✗ | I have provided a second example of a direction that may be given.[4] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'order', 'dispute', etc. |

*Exemplar response*

[The court may give an order to one or more parties, which imposes an obligation on a party to do something by a particular time or dictates how a proceeding is to be conducted.[1]][The court may give any order that facilitates the just, efficient and cost-effective resolution of a dispute.[2]][For example, the court can order parties to complete the production of documents by a set date[3]][and set time limits for the questioning of witnesses in a trial.[4]]

LEVEL 3

**5.**

| | | |
|---|---|---|
| ✓ | ✗ | I have identified one error in the scenario.[1] |
| ✓ | ✗ | I have provided a correction for that error.[2] |
| ✓ | ✗ | I have identified a second error in the scenario.[3] |
| ✓ | ✗ | I have provided a correction for the second error.[4] |
| ✓ | ✗ | I have identified a third error in the scenario.[5] |
| ✓ | ✗ | I have provided a correction for the third error.[6] |

| | |
|---|---|
| ✓ ✗ | I have used linking words to connect my discussion and ensure it is cohesive such as: 'also', 'lastly', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'examining', 'cross examining', 'witnesses', 'issues in dispute', 'causation', etc. |

*Exemplar response*

[The first error is it is not likely the court would not make any orders regarding witnesses.[1]][Given that the number of witnesses Gina plans to call seems excessive, it is highly likely that the court would see it as their responsibility to make an order that limits the time Gina may take to present her case, including limiting the time to be taken in examining, cross-examining or re-examining witnesses.[2]]

[It is incorrect the court would limit time to be spent on the most complicated issue in the trial.[3]][As the issue of causation is the most complicated of the issues in dispute, the court would be unlikely to direct the parties to limit time spent on this issue, but might direct them to limit the time spent on other, less complicated issues.[4]]

[Lastly, it is incorrect the court has no responsibilities under the *Civil Procedure Act 2010* (Vic).[5]][The act states that the court must seek to give effect to the just, efficient, timely and cost-effective resolution of issues in dispute and the court does so through its powers of case management.[6]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have identified what the role of the judge requires them to do in the context of case management.[1] |
| ✓ ✗ | I have identified one specific power that judges have to engage in case management that is relevant to this scenario.[2] |
| ✓ ✗ | I have explained what the judge is likely to do in this scenario based on that power.[3] |
| ✓ ✗ | I have identified a second specific power that judges have to engage in case management that is relevant to this scenario.[4] |
| ✓ ✗ | I have explained what the judge is likely to do in this scenario based on that power.[5] |
| ✓ ✗ | I have predicted what the judge may do in this scenario if Turf R Us don't comply.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal representatives', 'directions' 'conference', 'trial', 'strike out', 'defence', etc. |

*Exemplar response*

[Under the *Civil Procedure Act 2010* (Vic), judges are required to actively help achieve the just, efficient and timely resolution of a civil dispute.[1]][Under this act, judges are given the power to make any directions they consider appropriate with respect to the conduct of proceedings.[2]][In this case, as Turf R Us have not complied with their responsibility in the pre-trial procedure of 'discovery' to disclose the existence of relevant documents, it is open to the judge to give directions that Turf R Us provide those documents by a certain date.[3]]

[It is also possible the judge could order the attendance of both parties or their legal representatives for a conference[4]][to try and work out why Turf R Us are delayed, with the hope that such a conference could ultimately shorten the time taken in preparation for the trial.[5]]

[If Turf R Us do not comply with the directions of the court, the court may take any step it considers appropriate, including directing Turf R Us to pay the costs of the local council, or strike out or limit the defence filed by Turf R Us.[6]]

LEVEL 4

**7.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I believe judicial powers of case management contribute to achieving one, some or all of the principles of justice.[1] |
| ✓ ✗ | I have defined what judicial powers of case management are and where they come from.[2] |
| ✓ ✗ | I have identified the first specific principle of justice that I will be evaluating.[3] |
| ✓ ✗ | I have described one way judicial powers of case management help achieve this principle of justice.[4] |

| | |
|---|---|
| ✓ ✗ | I have described one way the judicial powers of case management may not always achieve this principle of justice.[5] |
| ✓ ✗ | I have identified the second specific principle of justice that I will be evaluating.[6] |
| ✓ ✗ | I have described one way judicial powers of case management help achieve this principle of justice.[7] |
| ✓ ✗ | I have described one way the judicial powers of case management may not always achieve this principle of justice.[8] |
| ✓ ✗ | I have provided a brief conclusion that addresses the requirements of the task word.[9] |
| ✓ ✗ | I have signposted my response with language such as: 'the first principle', 'however', 'a second principle', 'on the other hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'case', 'discovery', 'relevant documents', 'judicial officers', 'impartial', 'dispute', 'court processes', 'legal representation', 'timelines', etc. |

*Exemplar response*

[As judicial powers of case management are intended to ensure that civil disputes are resolved in a just, efficient, timely and cost-effective way, I believe they contribute a lot to achieving fairness, equality and access.[1]][Judicial powers of case management are powers to make orders and directions regarding the pre-trial and trial procedures, including the conduct of the parties, and are provided in the *Civil Procedure Act 2010* (Vic).[2]]

[The first principle of justice I will evaluate case management regarding is fairness.[3]][Judicial powers of case management can enhance fairness because they ensure that both parties have the same opportunities to present their case. For example, by ordering timelines for certain discovery milestones to be achieved, they ensure both sides can access relevant documents efficiently.[4]]

[However, as judicial powers of case management are exercised by judicial officers on a discretionary basis, not all parties may experience the same degree of directions being given, depending on the individual judge.[5]]

[The second principle of justice I will evaluate case management regarding is equality.[6]][Powers of case management can enhance equality because judges are required to be impartial when they are making directions under the Civil Procedure Act, and are motivated to facilitate the timely resolution of the dispute rather than its resolution in any particular party's favour. For example, they may narrow the issues in the dispute which will help both parties equally to have resolution more efficiently.[7]]

[On the other hand, the way that each party prepares for trial and therefore is treated by the judge will depend on their understanding of legal and court processes, which is usually connected to whether or not they have legal representation. Those without legal representation may be disadvantaged in the way the judge treats them and less able to persuade the judge to make particular directions, compared to the other party, including the timelines that are set or other directions that are given.[8]]

[Judges have wide ranging powers to make orders and give directions as part of case management, and whilst this mostly enhances fairness and equality, there is the potential for it to not promote just outcomes in all cases.[9]]

*Possible points to include:*

Students could have made a number of additional points about fairness and equality:

- Fairness is enhanced because the judge will explain the reasons for case management, ensuring the parties understand the processes that apply and why.
- Case management is designed to better equip the parties to resolve the key issues in dispute.
- However some parties may feel the powers of case management are used against them in an unfair or biased manner, as they are discretionary.
- Equality is enhanced because these powers are initiated and used by the objective, neutral judge, rather than being something the parties and their legal representatives need to initiate or make sure of.

Regarding access, students could have said:

- Case management contributes to access because:
  - Judicial powers of case management are designed to speed up the resolution of the dispute by ensuring the parties comply with their overarching obligations to be honest and not delay proceedings in any case, which minimises costs. As such, these powers are designed to help both parties access a speedy and cost-effective solution.
  - By ordering the parties to mediate where appropriate, the court is facilitating access to alternative dispute resolution.

- Case management detracts from access because:
  - The variety and nature of the pre-trial processes and procedures a party may need to comply with can be daunting, particularly for a plaintiff who experiences financial or communication based barriers, or who may be self-represented. This can mean the potential for case management to lead to adverse cost orders presents a real barrier to it enhancing access to justice.

**8.**

| | |
|---|---|
| ✓ ✗ | I have addressed the task word requirements by providing a statement of opinion early in my response.[1] |
| ✓ ✗ | I have explained one reason why judicial powers of case management contribute to achieving fairness.[2] |
| ✓ ✗ | I have explained a second reason why judicial powers of case management contribute to achieving fairness.[3] |
| ✓ ✗ | I have explained a third reason why judicial powers of case management contribute to achieving fairness.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil justice system', 'legislative', 'sanctions', 'litigation', 'case', 'dispute', 'alternative dispute resolution', 'mediation', 'parties', 'judicial determination', 'fairness', etc. |

*Exemplar response*

[I do think that judicial powers of case management enhance fairness in the civil justice system[1]][because they provide a clear legislative confirmation that judges can and should manage cases proactively to promote the timely resolution of disputes. Delays can make plaintiff's suffering worse, which is unfair. Judges can also impose sanctions on any party to litigation who does not meet the standards and obligations imposed by the Civil Procedure Act.[2]]

[These powers of case management are a clear restatement and clarification of the standard of conduct expected of parties to civil litigation, including to avoid delays and to ensure the other side has a comprehensive understanding of the case against them and every opportunity to respond to it. This promotes fairness because parties are better able to prepare and present their own case.[3]]

[The powers of judicial officers also contribute to achieving fairness because they do not require the judge to actively manage every case by narrowing the issues in dispute, or order every case to participate in alternative dispute resolution such as mediation, but they have powers to do this only where it is in the interests of justice to do so. This means judges can manage a case based on the specifics of each case, including the specific parties. It is fair to have individual circumstances taken into consideration in this way. Parties can still access judicial determination and have a final trial and binding determination made by a judge if appropriate in the circumstances, which promotes fairness.[4]]

# 3.2.9 Methods used to resolve civil disputes

LEVEL 1

**1.** C **2.** A **3.** C

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have described mediation as a process in which parties reach their own resolution.[1] |
| ✓ ✗ | I have described the role of the independent third party.[2] |
| ✓ ✗ | I have described the role of legal representation.[3] |
| ✓ ✗ | I have described whether the decision is binding.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'mediation', 'parties', etc. |

*Exemplar response*

[Mediation is an informal and cooperative dispute resolution process in which parties reach a voluntary resolution to their dispute.[1]]
[An independent third party, the mediator, encourages the two parties to communicate and reach a conclusion.[2]]

[Legal representation is usually not used in mediation.[3]]

[The decision reached by the parties is itself not binding, but it is common for parties to have a court issue orders by consent binding them to the outcome agreed at mediation.[4]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have described conciliation as a process in which parties reach their own resolution.[1] |
| ✓ ✗ | I have described the role of the independent third party.[2] |
| ✓ ✗ | I have described the role of legal representation.[3] |
| ✓ ✗ | I have described whether the decision is binding.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'conciliation', 'parties', etc. |

*Exemplar response*

[Conciliation is an informal and cooperative dispute resolution process in which parties reach a voluntary resolution to their dispute.[1]]
[An independent third party, the conciliator, encourages the two parties to communicate and reach a conclusion, and will offer suggestions to the parties as to how the dispute might be resolved.[2]]

[Legal representation is usually not used in conciliation.[3]]

[The decision reached in conciliation by the parties is itself not binding, but it is common for parties to have VCAT or a court issue orders by consent binding them to the outcome agreed at conciliation.[4]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have described arbitration as a process in which parties present their case and a decision is made.[1] |
| ✓ ✗ | I have described the role of the independent third party.[2] |
| ✓ ✗ | I have described the role of legal representation.[3] |
| ✓ ✗ | I have described whether the decision is binding.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'arbitration', 'parties', etc. |

*Exemplar response*

[Arbitration is a less-formal (compared to courts) dispute resolution process in which parties present their own evidence and legal arguments to an arbitrator.[1]][This independent third party listens to the case presented by each party and decides an outcome.[2]]

[Legal representation is usually not used in arbitration.[3]][The decision imposed in arbitration is legally binding.[4]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have addressed the task word by explaining this case may be appropriate for mediation.[1] |
| ✓ ✗ | I have provided a brief explanation of mediation as an alternative method of dispute resolution.[2] |
| ✓ ✗ | I have identified one reason why mediation may/may not be appropriate in this case.[3] |
| ✓ ✗ | I have explained the identified reason why mediation may/may not be appropriate in this case.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'dispute resolution', 'courts', 'tribunals', 'dispute', 'binding decision', 'compensation', etc. |

*Exemplar response*

[This dispute between Madeleine and her employer may be appropriate for mediation.[1]]

[Mediation is an alternative dispute resolution process which may be used by courts or tribunals as part of pre-trial attempts to resolve the dispute, or may be attempted separately to the court process, through engaging a private mediator.[2]]

[One key factor that would impact whether or not this dispute between Madeleine and her employer is appropriate for mediation is how willing both parties are to cooperate and reach a mutually beneficial solution or compromise to the dispute.[3]][If Baking Deelight are not willing to admit liability or agree to pay any compensation then mediation is not likely to be appropriate because the mediator is a neutral third party who will not make suggestions for resolution of the dispute nor make a binding decision. Mediation may be appropriate if Madeleine's employer are willing to admit liability and the amount of compensation is the only issue.[4]]

*Possible points to include:*

- If Madeleine wishes to continue working at her place of employment, in order to maintain an ongoing relationship, mediation may be more appropriate than the court system as it is less adversarial.
- It may be inappropriate due to the age differences between the employer and a young person.

**8.**

| | |
|---|---|
| ✓ ✗ | I have provided a statement that outlines the extent to which these methods are similar.[1] |
| ✓ ✗ | I have identified a similarity of conciliation and arbitration.[2] |
| ✓ ✗ | I have explained the identified similarity.[3] |
| ✓ ✗ | I have identified a difference between conciliation and abitration.[4] |
| ✓ ✗ | I have explained the identified difference.[5] |
| ✓ ✗ | I have identified another similarity/difference between conciliation and abitration.[6] |
| ✓ ✗ | I have explained the identified similarity/difference.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'alternatie dispute resolution', 'plaintiff', 'filing', 'court', 'judicial determination', 'judge', 'binding decision', 'dispute', 'legal representation', 'evidence', 'procedure', etc. |

*Exemplar response*

[There are significant similarities between conciliation and arbitration, however, there are also some key differences.[1]]

[Both are methods of alternative dispute resolution that are used instead of a plaintiff filing a civil claim in a court system to have their dispute resolved through judicial determination.[2]][This means that both conciliation and arbitration involve the resolution of a dispute by a third party who is not a judge.[3]][However, there are distinctions between these two approaches. For example, conciliation does not result in a binding decision.[4]][Conciliation requires both parties to agree to participate, and whilst the conciliator can suggest solutions to the dispute which may be based on their knowledge or expertise, they cannot force a binding outcome on the parties, who must instead agree on the outcome themselves. This is different to arbitration, where a binding decision is made. Further, this decision is made by a third party, and not by the parties themselves.[5]]

[Furthermore, arbitration is more likely to be more formal than conciliation and may even involve legal representation.[6]][For example, it can even include rules of evidence and procedure, including a form of pre-trial preparation such as the exchange of relevant documents ('discovery'). Conciliation, in contrast, tends to be closer to mediation, and whilst parties may bring a 'support person', typically legal representation is not used and the process is much less formal.[7]]

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have provided a statement that outlines my view on the appropriateness of conciliation in this instance.[1] |
| ✓ ✗ | I have stated a reason why conciliation may/may not be appropriate in this instance.[2] |
| ✓ ✗ | I have explained the reason why conciliation may/may not be appropriate in this instance.[3] |
| ✓ ✗ | I have stated another reason why conciliation may/may not be appropriate in this instance.[4] |
| ✓ ✗ | I have explained the second stated reason why conciliation may/may not be appropriate in this instance.[5] |
| ✓ ✗ | I have restated my overall evaluation as a brief conclusion.[6] |
| ✓ ✗ | I have addressed both the benefits and disadvantages of conciliation in my response. |
| ✓ ✗ | I have structured my response appropriately used language such as: 'however', 'firstly', 'on the other hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'negotiation', 'civil dispute', 'conciliator', 'Consumer Affairs Victoria', 'jurisdiction', etc. |

*Exemplar response*

[Conciliation may be an appropriate method for resolving this dispute, however, it will depend on a number of factors.[1]]

[Firstly, conciliation may not be necessary if the parties can negotiate between themselves.[2]][Clearly there has been loss caused as a result of the landlord's failure to respond to reasonable requests for maintenance, so the parties may be able to agree between themselves, making more formal dispute resolution inappropriate and unnecessary.[3]]

[Conciliation may be appropriate where the parties cannot agree between themselves.[4]][Having a neutral, professional third party with some knowledge of or expertise in the resolution of civil disputes between landlords and tenants may be extremely valuable in helping the parties reach a mutually agreeable solution, given that the conciliator may be able to suggest possibilities in an attempt to bring the parties closer together if they are far apart in their positions. This is the sort of dispute that Consumer Affairs Victoria is likely to assist with, provided that both parties agree to participate, and that Daniel is not claiming more than $40,000, which places it outside of their jurisdiction.[5]]

[For these reasons, provided the parties cannot agree and provide their consent to participate, conciliation may be, on balance, an appropriate option in this instance.[6]]

*Possible points to include:*

- Conciliation may be appropriate if the parties have limited finances available to direct to resolving the dispute, because usually there is not use of legal representation and it is significantly cheaper than issuing proceedings in a court.
- If the parties have an ongoing relationship, such as here, where Daniel may wish to continue residing in the property, then conciliation may be appropriate as it is solution-focused and less adversarial, therefore protecting the relationship between parties.

**10.**

| | |
|---|---|
| ✓ ✗ | I have provided a brief introduction that introduces the reasons for and against the stated contention.[1] |
| ✓ ✗ | I have provided a brief explanation of what 'methods of alternative dispute resolution' refers to.[2] |
| ✓ ✗ | I have explained one reason why methods of alternative dispute resolution may/may not be appropriate.[3] |
| ✓ ✗ | I have explained a second reason /why methods of alternative dispute resolution may/may not be appropriate.[4] |
| ✓ ✗ | I have provided a statement of the opposing view.[5] |
| ✓ ✗ | I have provided one explanation for this opposing view.[6] |
| ✓ ✗ | I have provided a second explanation/s for this opposing view.[7] |
| ✓ ✗ | I have provided a third explanation/s for this opposing view.[8] |
| ✓ ✗ | I have provided a brief concluding statement restating my response to the task word and contention.[9] |
| ✓ ✗ | I have used signposting language to structure my response such as: 'whilst', 'furthermore', 'as', 'in addition', 'also', 'lastly', 'in conclusion', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'disputes', 'mediation', 'conciliation', 'arbitration', 'courts', 'tribunals', 'filing a complaint', 'procedural requirements', 'legal advice or representation', 'filing fees', 'hearing fees', 'third party practitioner', 'plaintiff', etc. |

*Exemplar response*

[Whilst it may seem that alternative dispute resolution is always the preferable first choice for resolving civil disputes due to the typically more timely and cost effective nature of it, there are some disputes where non-judicial resolution is not preferable and specifically should not be attempted.[1]]

[Alternative methods of dispute resolution include methods such as mediation, conciliation and arbitration. Mediation and conciliation can be used by courts and tribunals as well as complaints bodies such as Consumer Affairs Victoria (CAV) and also private practitioners.[2]] [In many instances it may be preferable to a plaintiff filing a complaint with a court. This is because it does not have as many technical, formal, procedural requirements to prepare for and participate in, it does not typically require legal advice or representation to attempt.[3]] [Furthermore, it is typically cheaper to use non-judicial resolution, as there are not costs such as filing fees and hearing fees – usually there is only a one-off cost for the third party practitioner. In some instances, such as where CAV is utilised, it may even be free to access these methods. This means that the availability of alternative processes helps uphold the principle of access to justice, as a principle that the legal system strives to promote.[4]]

[Whilst the above may be acknowledged benefits of non-judicial resolution, it is not accurate to say that these methods are always preferable and should be attempted in every instance. There are times when out-of-court settlement is clearly not appropriate and the formality and expertise of the court system should be utilised.[5]] [The first reason for this relates to upholding the principle of fairness. Alternative methods may not be appropriate where one party is significantly more powerful than another. One party may be unable to advocate for themselves to get an outcome they can expect will be cooperated with, or may not be in a strong position to reach a mutually beneficial compromise, denying them from experiencing fairness in the resolution of their dispute unless they can benefit from having legal represntation.[6]] [In addition, if the parties cannot agree on any facts, such as may be the case in a contractual dispute, out-of-court settlement is not appropriate as there will not be a binding final determination made by a third party in both mediation and conciliation.[7]] [Lastly, where the matter is particularly urgent and serious, such as a plaintiff who is dying of a dust-related disease such as asbestos, a matter filed in the courts and heard urgently is more appropriate than attempting to use methods such as mediation or conciliation.[8]]

[In conclusion, whilst alternative dispute resolution is usually preferable to the courts and worth trying for many civil disputes, it is not preferable and indeed may be inappropriate in some instances.[9]]

*Possible points to include:*

Both parties must consent to participate in ADR, so it is not 'preferable' where one party is unwilling to agree to participate.

# 3.2.10-11 Purposes of remedies

LEVEL 1

**1.** A

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have stated that Rebel Wilson was awarded damages.[1] |
| ✓ ✗ | I have defined what damages are.[2] |
| ✓ ✗ | I have defined the overall purpose of damages.[3] |
| ✓ ✗ | I have linked this purpose of damages to the facts in Wilson's case.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'damages', 'compensate', etc. |

*Exemplar response*

[Rebel Wilson was awarded damages,[1]][which is an award of financial compensation for the loss suffered by Wilson because of Bauer Media's actions.[2]]

[The purpose of damages is to return the plaintiff to the position they were in before the civil wrong occurred,[3]][ to compensate Wilson for lost future income and the emotional suffering caused by the defamation.[4]]

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated that the type of damages referred to in this instance are aggravated damages.[1] |
| ✓ ✗ | I have provided a brief definition of aggravated damages that justifies why the judge in this instance is referring to aggravated damages.[2] |
| ✓ ✗ | I have briefly identified the purpose of this category of compensatory damages.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'jury', 'aggravated', 'compensatory damages', 'claimant', 'defendant', 'tort', 'balance of probabilities', 'restore', 'loss', etc. |

*Exemplar response*

[The court reporter overheard a judge explaining to a jury the possibility that they may award 'aggravated' compensatory damages.[1]]

[These damages are awarded in cases where the actions of the defendant are serious enough to justify the awarding of extra money to the claimant. Circumstances which may give rise to these damages include seriously improper conduct by the defendant, such as where a tort was committed in a particularly insulting and humiliating manner, and where significant injury to the claimant resulted, including suffering of an emotional or personal nature. The plaintiff needs to provide facts and evidence that suggest on the balance of probabilities that an award of aggravated damages is necessary and appropriate.[2]]

[The purpose of these damages is to ensure that the plaintiff receives a tailored amount of fair and reasonable compensation to restore them as closely as possible to the position they were in before they suffered the relevant loss.[3]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have provided a definition of compensatory damages.[1] |
| ✓ ✗ | I have provided a definition of exemplary damages.[2] |
| ✓ ✗ | I have explained one difference between these two categories of damages.[3] |
| ✓ ✗ | I have explained a second difference between these two categories of damages.[4] |
| ✓ ✗ | I have used signposting language to structure my response such as: 'One key difference...', 'Another key difference...', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil remedy', 'financial compensation', 'general and specific loss', 'plaintiff', 'injuries', 'defendant', 'deter', 'punish', 'court', 'malice', 'fraud', 'plaintiff's rights', etc. |

*Exemplar response*

[Compensatory damages typically form the most common civil remedy and include financial compensation for general and specific loss, as well as potentially aggravated damages where appropriate. The overall aim when a court awards these damages is that the plaintiff is to be awarded fair and reasonable compensation for her injuries, loss and damage in an attempt to restore her to the position they were in before they suffered loss.[1]]

[Exemplary damages, sometimes also referred to as 'punitive' damages, are rare and somewhat controversial in an Australian context because they may be awarded where it is considered appropriate to punish the defendant. That is, a financial sum may be awarded to the plaintiff which goes beyond what is strictly required to compensate them. These damages may be awarded where the court considers that it is appropriate to deter the defendant, or others, from acting in a similar way in the future.[2]]

[One key difference between the two identified types of damages is that the purpose of compensatory damages is to compensate the plaintiff, not to punish the defendant. As such, the focus is squarely placed on the specific nature and extent of loss the plaintiff has suffered that has been caused by the defendant when calculating compensatory damages.[3]]

[Another key difference between these two types of damages is that an award of exemplary damages requires close examination of the defendant's conduct, beyond simply whether or not the required elements of the claimed cause of action have been made out. This means that for a court to be satisfied that an award of exemplary damages is appropriate, they must examine the defendant's conduct and find that it was motivated by malice, cruelty, fraud, gaining profit at the plaintiff's expense or involving insulting disregard for the plaintiff's rights, whereas compensatory damages are focused solely on the plaintiff and the injury they have sustained.[4]]

LEVEL 4

**5.**

| | |
|---|---|
| ✓ ✗ | I have provided a statement of my opinion in response to the question.[1] |
| ✓ ✗ | I have provided one reason that explains ways damages can restore plaintiffs.[2] |
| ✓ ✗ | I have provided one reason that explains ways damages cannot completely restore plaintiffs.[3] |
| ✓ ✗ | I have provided an additional reason that explains how damages can/cannot restore plaintiffs.[4] |
| ✓ ✗ | I have referred to the stimulus scenario in my response. |
| ✓ ✗ | I have used used key legal studies terminology effectively such as: 'remedy', 'damages', 'restore', 'plaintiff', 'court', 'judge', 'jury', 'loss', 'specific damages', 'general damages', 'pain and suffering', 'loss of enjoyment of life', 'future earnings', 'civil trial', etc. |

*Exemplar response*

[I do believe that the primary remedy awarded in civil law, damages, can only ever partially compensate a successful plaintiff. Whilst I acknowledge that damages can go a long way to achieving their aim, which is to restore as closely as possible a plaintiff to the position they were in before they suffered loss, it is never a complete restoration.[1]]

[Partial restoration of a plaintiff's loss is achieved through a court (either a judge or a jury if there is one) determining the specific nature and extent of loss that has been suffered by the plaintiff and calculating a financial sum the defendant must pay. The categories of damages accord to the different types of loss a plaintiff could suffer: 'specific damages' can be accurately and precisely quantified because they restore a plaintiff's financial loss such as medical expenses or lost income from being unable to work.[2]]

[Whilst these do completely restore the loss suffered by the plaintiff to an extent, 'general damages' are merely the court's attempt to put a financial figure on loss that cannot be easily calculated, such as pain and suffering, loss of enjoyment of life, or loss of future earnings or future opportunities. Because plaintiffs can only claim damages once and for all time, the future circumstances and needs of the plaintiff need to be estimated, which means they may not be entirely accurate and therefore may be only 'partial compensation'.[3]]

[I also believe damages are merely 'partial compensation' because typically a plaintiff has suffered significantly to be at the stage in a civil law trial where they are being awarded damages and usually that loss is not only financial but may also be physical and/or emotional, which can never be completely restored by an amount of money. As is the case with the Black Saturday bushfires, plaintiffs who lost their homes and personal belongings, witnessed the death or injury to family or livestock and had to consider whether to move away from their community cannot be restored solely by money to the position they were in if the fire had never occurred.[4]]

**6.**

| | | |
|---|---|---|
| ✓ | ✗ | I have provided a statement that addresses the extent to which I agree with the contention.[1] |
| ✓ | ✗ | I have established that courts are able to award the remedies they identify as necessary and appropriate.[2] |
| ✓ | ✗ | I have identified that the overall purpose of civil law remedies is to restore the plaintiff to the position they were in before they suffered the loss.[3] |
| ✓ | ✗ | I have explained the role and purpose of injunctions.[4] |
| ✓ | ✗ | I have explained the role and purpose of damages.[5] |
| ✓ | ✗ | I have provided an explanation in support of my initial opinion statement that addresses the extent to which I agree with the contention.[6] |
| ✓ | ✗ | I have key legal studies terminology effectively such as: 'plaintiff', 'award', 'remedy', 'loss', 'claim', proceedings', 'civil law cause of action', 'breach', 'restore', 'interlocutory', 'restrictive injunction', 'mandatory injunction', 'specific damages', 'general damages', 'restrain', etc. |

*Exemplar response*

[I agree that sometimes a plaintiff may require the court to award them more than one category of civil remedy to properly and completely address the loss they have suffered.[1]]

[Typically, courts are empowered to award any one or more of a range of remedies – monetary and non-monetary – to plaintiffs who successfully bring proceedings under a civil law cause of action. Breaches of civil law rights may have diverse consequences for plaintiffs. The range of remedies that a plaintiff may claim are necessary and which a court may award are therefore dependent on the different objectives, experiences and circumstances of plaintiffs and the loss they have suffered.[2]]

[All civil remedies aim to restore loss that has been suffered by a plaintiff in an attempt to restore them as closely as possible to the position they were in before they suffered loss.[3]] [In some instances they even aim to prevent loss that is about to be suffered, in the case of an interlocutory injunction. Injunctions broadly are an order from the court directing a defendant to do something (mandatory injunction) or not do something (restrictive injunction). An interlocutory injunction aims to to preserve the status quo by preventing one party from committing, repeating or continuing a wrongful act prior to trial. This may be appropriate where the plaintiff successfully argues that it is necessary to restrain or prohibit another party from doing a certain thing, such as, for example, to restrain a publishing house from publishing a book, or to restrain the publication of confidential information, or the demolition of an important structure.[4]]

[Civil damages are the most commonly awarded civil remedy. It may be appropriate for a plaintiff to seek specific damages where they have suffered financial loss such as medical bills, or general loss, such as pain and suffering.[5]]

[It is not necessarily always possible for all the loss that a plaintiff has suffered to be restored through a financial payment. An example may be where progress at a building site has been delayed due to ongoing protests. This requires an order from the court that the trespass ceases, as well as a payment to compensate the building site owners from the delays experienced in the course of construction. As such, in some instances, only an injunction or only damages alone will not achieve the aim of fully restoring all relevant loss, and more than one remedy may be required.[6]]

# 3.2.12 Factors that affect principles of justice (AOS 2)

LEVEL 1

**1.** D **2.** D **3.** D

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have briefly described the role of VCAT.[1] |
| ✓ ✗ | I have stated that VCAT is less costly than the courts.[2] |
| ✓ ✗ | I have identified one reason VCAT is less costly.[3] |
| ✓ ✗ | I have identified a second reason VCAT is less costly.[4] |
| ✓ ✗ | I have linked VCAT being less costly to improved access to dispute resolution.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'claim', 'parties', etc. |

*Exemplar response*

[VCAT is a body that provides an alternative to court for the resolution of minor civil claims.[1]][Pursuing a claim through VCAT is often far more cost-effective for parties than going to court[2]][because the filing fees are significantly lower[3]][and in most cases legal representation is not required.[4]]

[Therefore VCAT improves access to justice by providing a more affordable means of resolving civil disputes for parties who cannot afford to go to court.[5]]

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified one cause of delay in civil cases.[1] |
| ✓ ✗ | I have identified a second cause of delay in civil cases.[2] |
| ✓ ✗ | I have identified one negative consequence of delays in resolving civil matters.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'claim', 'plaintiff', 'witnesses', etc. |

*Exemplar response*

[One cause of delays is that pre-trial procedures such as pleadings and discovery take time to complete, particularly for large and complex cases.[1]][A second reason there are delays is due to court backlogs, with the courts' caseload growing more rapidly than the funding for the courts' judges and staff.[2]]

[One reason why delays are undesirable are that civil trials rely on oral evidence, but as memories fade over time the accuracy and reliability of such evidence may be diminished.[3]]

*Possible points to include:*

Causes of delay:

- Time taken to appeal judgements and damages awarded, creating a delay in the final resolution of a case.
- Trial procedures are slow, with legal practitioners' oral arguments and the question-answer process for evidence being presented both taking a lot of time.

Negative consequences of delay:

- For an injured party seeking compensation for loss or injury, the delay compounds their suffering.
- Awaiting trial with an outcome unresolved is stressful for a defendant.

**6.**

| | |
|---|---|
| ✓ ✗ | I have described how the lack of legal representation minimises costs and therefore promotes access to dispute resolution for those who cannot afford the courts.[1] |
| ✓ ✗ | I have stated that some individuals will have difficulty self-representing.[2] |
| ✓ ✗ | I have identified one example of those who will have difficulty self-representing.[3] |
| ✓ ✗ | I have identified a second example of those who will have difficulty self-representing.[4] |
| ✓ ✗ | I have linked the difficulty of self-representing to access to justice.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'claim', 'legal representation', etc. |

*Exemplar response*

[The absence of legal representation minimises costs to resolve a case at VCAT, and therefore promotes access to dispute resolution for those who cannot afford the courts, where having a lawyer is necessary.[1]]

[However some parties to a dispute at VCAT will have difficulty preparing and presenting their case in its best light, including[2]] [recent migrants from a non-English speaking background[3]] [and those who are very young.[4]]

[This difficulty may mean some parties do not understand the law and processes during their VCAT hearing or may choose not to pursue a claim as they are discouraged by the need to self-represent, limiting access to justice.[5]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have identified one possible factor affecting one specific principle of justice in this instance.[1] |
| ✓ ✗ | I have explained how that factor applies in this scenario.[2] |
| ✓ ✗ | I have identified another possible factor affecting one specific principle of justice in this instance.[3] |
| ✓ ✗ | I have explained how that factor applies in this scenario.[4] |
| ✓ ✗ | I have used signposting language such as 'One factor...'; 'Another factor...' |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'access', 'list', 'Victorian Civil and Administrative Tribunal', 'jurisdiction', 'legal representation', 'filing', 'directions hearing', 'hearing', etc. |

*Exemplar response*

[One factor which is likely to impact on Tim's experience of access in our civil law system is the significant cost of challenging this decision.[1]] [He will have to go to the Planning and Environment List at the Victorian Civil and Administrative Tribunal (VCAT) as they have jurisdiction in this type of dispute. In this list parties often use legal representation, meaning Tim may need to engage a lawyer to effectively challenge his local council who are likely to be represented. Furthermore, the costs of filing and hearing in this list in VCAT is higher, as the value of the dispute is higher.[2]]

[Another factor which could affect Tim's access to justice in this instance is accessibility due to his regional location.[3]] [Whilst VCAT occasionally hears matters in Shepparton, its main hearing venue is 55 King Street, Melbourne. As he is unemployed, Tim may need to consider how realistic it is for him to pay and travel to Melbourne for any directions hearings (if he needs to) and also the hearing day/s.[4]]

*Possible points to include:*

- The time it may take for this dispute to be listed and heard and resolved in VCAT, given the significant delays which can be experienced by parties in the Planning and Environment List (median wait time was 26 weeks in 2016-2017)
- Other costs students could have mentioned include VCAT fees, disbursements
- Other issues with accessibility include Tim knowing and understanding the rules of procedural fairness that apply in VCAT, including that he can request a copy of any document relevant to the decision under review.

**8.**

| | |
|---|---|
| ✓ ✗ | I have identified one reason how/why costs is addressed to enhance the achievement of the principles of justice.[1] |
| ✓ ✗ | I have provided an explanation or example to illustrate my reason.[2] |
| ✓ ✗ | I have identified one reason how/why delays can be addressed to enhance the achievement of the principles of justice.[3] |
| ✓ ✗ | I have provided an explanation or example to illustrate my reason.[4] |
| ✓ ✗ | I have used signposting language that links to the task word, such as: 'It is possible because; 'It is also possible...' |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil dispute', 'access', 'dispute resolution', 'institution', 'VCAT', 'self-represent', 'Consumer Affairs Victoria', 'ombudsman', 'alternative dispute resolution', 'residential tenancies', 'judge', 'powers of case management', 'court', etc. |

*Exemplar response*

[It is possible for a party to a civil dispute with limited finances to access justice because they may be able to utilise a lower-cost dispute resolution institution such as VCAT, where they may be able to self-represent.[1]][They may also be able to access justice by using other organisations such as Consumer Affairs Victoria to help them use alternative dispute resolution either at low cost or no cost.[2]]

[It is also possible for a party to access justice even if they do have time constraints or if delays are going to cause problems.[3]][Many VCAT matters are resolved quickly, for example residential tenancies matters in a matter of weeks. Furthermore, if the matter is being heard in a court, judges have significant powers of case management to require the parties to keep to timelines set by the court, which can reduce the impact of delays.[4]]

*Possible points to include:*

- Reduced fees at VCAT and some courts are available for some parties due to them being health care or concession card holders.
- Some VCAT lists are very cheap or even free (such as Equal Opportunity matters).
- Even in court parties can self-represent and can expect to receive some assistance and guidance from a judge.
- Parties could access alternative dispute resolution of their own accord, which is often cheaper and quicker than a court or tribunal.

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have addressed the task word 'identify' by stating my chosen factor from those listed in the Study Design.[1] |
| ✓ ✗ | I have identified one way this factor detracts from the principles of justice.[2] |
| ✓ ✗ | I have chosen and identified at least one principle of justice to focus on specifically (that is limited by this factor).[3] |
| ✓ ✗ | I have explained how this factor detracts from my chosen principle of justice.[4] |
| ✓ ✗ | I have identified one way this factor enhances the principles of justice.[5] |
| ✓ ✗ | I have chosen and identified at least one principle of justice to focus on specifically (that is promoted by this factor).[6] |
| ✓ ✗ | I have explained how this factor enhances my chosen principle of justice.[7] |
| ✓ ✗ | I I have used signposting language that links to the task words such as: 'One factor that', 'however', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'civil justice system', 'principles of justice', 'accessibility', 'barriers to communication', 'culturally appropriate services', 'equality', 'representative proceedings', 'fairness', 'loss', 'legal practitioners', 'costs', etc. |

*Exemplar response*

[One factor that affects the extent to which the civil justice system can achieve the principles of justice for all persons who need help is accessibility.[1]][This includes aspects such as barriers to communication,[2]][which can significantly detract from equality and access.[3]][Barriers to communication can include language or cultural barriers. Difficulties a person may face in accessing culturally appropriate services, for example legal assistance, detracts from a person's ability to use the law to resolve their civil dispute. This also detracts from their right to not be treated differently or unfavourably because of a personal characteristic.[4]]

[However, accessibility as a factor also refers to the availability of class actions, or 'representative proceedings',[5]][which can enhance fairness and access.[6]][Representative proceedings can enhance fairness, because they allow parties who have suffered factually similar loss to join together in the one claim, which provides parties with the opportunity to bring a case they otherwise may not be able to, especially if the loss is relatively small. Representative proceedings also enhance access, because they allow individuals to be represented by skilled legal practitioners in circumstances where they otherwise may not be able to, due to costs.[7]]

*Possible points to include:*

**Costs**

Three cost factors that affect the ability of the civil justice system to achieve the principles of justice:

- Legal costs – The first factor can reduce or restrict the ability of the civil justice system to achieve justice.
  - Costs are driven by the cost of hiring legal representation; court fees such as hearing fees; fees when filing documents with a court such as pleadings; the risk of having to pay the other party's costs, etc.
  - Costs can limit access because engaging a private lawyer to represent you, or filing with a court can be expensive. Furthermore, most parties are not able to access legal aid, because most of legal aid funding is spent on aid for criminal and family law cases rather than civil disputes.
  - Costs can limit fairness because some people with a civil problem are forced to either abandon, withdraw or settle their claim because of the costs involved in pursuing their perceived breach of rights.
- VCAT costs – The second factor can both reduce and enhance the achievement of justice.
  - VCAT costs can promote access because VCAT's fees for most disputes are much lower than a court's and in particular they have introduced a three tier fee system to ensure different income earners pay what is appropriate and affordable for them.
  - VCAT costs can limit access sometimes because some lists have higher fees than others, even with the three-tier system. Furthermore, some lists more commonly use legal representation in their hearing.
- Increased use of alternative dispute resolution methods – enhances the ability of the civil justice system to achieve justice
  - Use of ADR promotes access because in the pre-trial stages of a court civil dispute the judge may order the parties to mediate, which may lead to resolution without the need to go to court. The earlier a dispute is solved, the more money is saved.

**Delays**

Four time factors that affect the ability of the criminal justice system to achieve the principles of justice:

- Court delays, especially due to backlogs but also the process of completing pre-trial procedures, limits fairness because they can cause parties to experience significant stress, wasted time and inconvenience in attempting to use the dispute resolution process.
- VCAT waiting times, especially due to increased usage of certain lists, limits fairness because different people may have to wait for differing periods of time to have their hearing and access resolution of their dispute because it depends to a significant extent which list their matter needs to be heard within.
- Appeal processes, including the process of seeking leave to appeal and having it granted can limit fairness by leaving parties in limbo, unable to anticipate the outcome of their application, limiting their right to transparent, impartial and objective treatment whilst the process is unfolding. However this can also promote access in the instance that the parties are appealing to the Court of Appeal or High Court, who have recently streamlined their appeal processes, making it easier by allowing parties to simply apply and be granted or denied leave to appeal 'on the papers', without an oral hearing.
- Use of case management powers (as per the *Civil Procedure Act 2010* (Vic)) allows judges broad sweeping powers to make a range of directions which may contribute to shortening the amount of time, for example, by narrowing the issues in the dispute or setting timelines for the completion of discovery. This minimises delays and therefore promotes fairness by allowing the independent judge the power to promote the timely resolution of civil disputes, and this can help parties access the system because they are not as burdened by the time and costs in undertaking certain pre-trial procedures to the extent they may otherwise be.

**10.**

| | |
|---|---|
| ✓ ✗ | I have provided a sentence that outlines the extent to which I agree with the statement.[1] |
| ✓ ✗ | I have provided an explanation of the extent to which I agree with the statement, including an outline of the reasons I will provide in my response.[2] |
| ✓ ✗ | I have identified one reason why costs are a hurdle to achieving one or more of the principles of justice.[3] |
| ✓ ✗ | I have explained one reason why costs are a hurdle to achieving one or more of the principles of justice.[4] |
| ✓ ✗ | I have explained a second reason why costs are a hurdle to achieving one or more of the principles of justice.[5] |
| ✓ ✗ | I have identified one another factor that is also a hurdle to achieving one or more of the principles of justice.[6] |
| ✓ ✗ | I have explained one reason why this other factor is also a hurdle to achieving one or more of the principles of justice.[7] |
| ✓ ✗ | I have explained a second reason why this other factor is also a hurdle to achieving one or more of the principles of justice.[8] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal representation', 'court fees', 'delays', 'costs', 'civil dispute', 'fair', 'settle', 'withdraw their claim', 'self-represent', litigant', 'legal issue', 'procedures', 'pre-trial procedures', etc. |

*Exemplar response*

[I agree that costs, including the cost of legal representation and court fees, are the most significant factor that contributes to unfairness and inaccessibility in our civil justice system.[1]] [However, other factors such as delays caused by court delays are also a significant hurdle for persons looking to resolve their civil disputes.[2]]

[Costs are a significant hurdle for individuals because many people cannot afford or are concerned about the nature of costs they may incur if they engage a private lawyer to provide them advice or represent them in their civil dispute.[3]] [This impacts on the extent to which the system is fair, because if people do not have access to money to pay for legal costs, they may be forced to settle or withdraw their claim, or self-represent, which can lead to a party being unable to pursue their civil claim, being denied justice.[4]] [Furthermore, whilst the court does have a duty to ensure a fair trial and it is a judge's responsibility to assist a self-represented party, self-represented litigants may still struggle to understand legal issues or procedures which may mean they cannot advocate on their behalf as effectively, or are denied the best outcome, which detracts from fairness.[5]]

[The delays a party may experience due to court delays can also present a hurdle for parties, limiting their ability to access the civil justice system.[6]] [The time it takes for a court to list a particular matter, hear and resolve that matter can vary depending on the complexity of the case, the number of parties involved, and the court in which the claim was issued and the nature of the claim. This detracts from access because a party may have to wait months to have their first appearance in court, contributing to stress and uncertainty in the meantime. They may even be deterred from taking action altogether if they are worried about delay.[7]] [Furthermore, the completion of pre-trial procedures can further exacerbate delays due to the time it takes parties to complete pleadings, discovery of all relevant documents and exchange of evidence.[8]]

*Possible points to include:*

Other factors that present a hurdle include:

**Costs**

- VCAT costs (in some lists).
- Potential of having to pay the other party's costs if the claim is not successful.

However, the hurdle that costs present is being addressed by the increased use of Alternative Dispute Resolution.

**Delays**

- VCAT waiting times.
- Appeal processes.

However, the hurdle that delays present is being addressed by changes to some courts' appeal processes and also increased use of judicial powers of case management. Students could have also talked about the extent of accessibility a party has, due to any barriers to communication they experience or whether or not they live in a regional or rural area.

However, the hurdle to accessing justice in civil law is partially addressed due to the availability of representative proceedings in some instances.

# 3.2.13 Recent and recommended reforms

LEVEL 1

**1.** D **2.** D

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have described contingency fees as 'a set percentage of the damages awarded to the plaintiffs, payable only if the plaintiffs' claim is successful' (or similar).[1] |
| ✓ ✗ | I have stated such fee arrangements can only be in used in representative proceedings.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'representative proceedings', 'court', 'plaintiff', etc. |

*Exemplar response*

[Contingency fees are charged by plaintiffs' solicitors as a set percentage of the damages awarded to the plaintiffs, payable only if the claim is successful.[1]][This reform is designed to increase access to civil dispute resolution by addressing costs as a barrier to making a claim, but can only be applied in representative proceedings in the Supreme Court.[2]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated this is only partially correct.[1] |
| ✓ ✗ | I have stated why this is correct, describing how juries lead to delay.[2] |
| ✓ ✗ | I have used a contrasting word such as 'however' to show both sides.[3] |
| ✓ ✗ | I have stated why this is incorrect, as juries are used in a small proportion of cases so the impact on delays in minimal.[4] |
| ✓ ✗ | I have used key legal terminology studies effectively such as: 'claim', 'parties', etc. |

*Exemplar response*

[This statement is correct to a limited extent.[1]]

[One reason it is correct, and delays will reduce, is because empanelling a jury, giving directions to a jury and awaiting a verdict all take time. Removing juries would therefore see civil trials conducted more quickly.[2]]

[However,[3]][one reason it is not correct is because most civil cases do not involve a jury. The majority of cases settle before a trial and few trials use a jury. So the reduction in delays will impact on a tiny portion of cases.[4]]

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have described one recent OR recommended reform.[1] |
| ✓ ✗ | I have explained how it is aimed at enhancing the ability of the civil justice system to achieve the principles of justice.[2] |
| ✓ ✗ | I have described a second recent OR recommended reform.[3] |
| ✓ ✗ | I have explained how it is aimed at enhancing the ability of the civil justice system to achieve the principles of justice.[4] |
| ✓ ✗ | I have identified one similarity between the two reforms.[5] |

| | |
|---|---|
| ✓ ✗ | I have identified one difference or distinguishing factor between the two reforms.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'courts', 'VCAT', 'court system', 'institutions', 'legislation', 'dispute', etc. |

*Exemplar response*

[One recent reform is that the Supreme Court of Victoria have changed their practice to embrace more flexible and progressive use of digital technology in certain civil law circumstances. The Supreme Court (E-Filing and Other Amendments) Rules 2018 came into effect on the 2nd of July 2018, amending the Rules of the Supreme Court to state that all documents sought or required to be filed in a proceeding in the Commercial Court, the Common Law Division or the Costs Court shall be filed in an electronic filing system in operation in the Court. This means that the pre-trial process of discovery can also be handled digitally in some circumstances.[1]]

[It is aimed at improving access to justice, because using technology rather than hard copy processes will reduce time and costs by reducing copying and manual review of documents. This is specifically the case for matters which attract significant volumes of paper evidence and documentation to be filed and provided to the other side.[2]]

[A recommended reform that has been made by the Productivity Commission is that each government publish 'plain language' guides to make the law easier for people to understand. The Commission recommends that Australian, State and Territory Government agencies should publish guides that summarise legislation in relevant areas of the law that are regularly encountered by individuals and small businesses, such as welfare, taxation and workplace relations and safety.[3]] [The development of these guides would improve equality, as the draftees would have particular regard to the needs of those disadvantaged groups most likely to be involved in these areas of civil law. Since the law applies to everyone, it needs to be possible for everyone to understand it. These guides improve the potential that people will be able to read and know what the law means.[4]]

[A similarity between these two reforms is that they are both aimed at ensuring those who seek to access the legal system can do so, by ensuring the justice system is optimally efficient and accessible.[5]]

[A difference between these two reforms is that increased use of technology will really only assist persons who are already involved in a matter that involves the courts, whereas the plain language guides would be more preventative as they could provide informative before a dispute ends up in the courts and therefore may be able to be of assistance to a wider number of people, improving the general public's understanding of the legal system's language, processes, systems and rules.[6]]

*Possible points to include:*

Students could have chosen any number of recent or recommended reforms:

- Similarities identified could be the intended impact on one of the factors that impact the ability of the civil justice system to achieve the principles of justice (such as costs, time, accessibility) or that the reform is designed to improve the same principle of justice.
- Differences could be how the reform works to achieve its intended impact, or that the reform is designed to improve a different principle of justice.

**6.**

| | |
|---|---|
| ✓ ✗ | I have briefly identify that costs is the challenge identified.[1] |
| ✓ ✗ | I have described of the specific nature of the chosen reform.[2] |
| ✓ ✗ | I have provided one reason this reform addresses the challenge of costs.[3] |
| ✓ ✗ | I have provided a second reason this reform addresses the challenge of costs.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legal representation', 'fees', 'legal advice and representation', 'filing and hearing a dispute', 'jury', 'fee structure', 'small civil disputes', etc. |

*Exemplar response*

[The cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system due to the fees for engaging professional legal advice and representation being significant, as well as the court fees for the filing and hearing of a dispute, especially if a jury is desired.[1]]

[One recent reform aimed at ensuring vulnerable persons are not disadvantaged is the 2020 funding boosts provided to VLA and CLCs by the federal and Victorian governments in response to the pandemic, to provide additional legal services and to invest in new technologies to do so remotely.[2]] [During 2020 and into 2021 the economic consequences of the pandemic saw more and more people face legal issues regarding debt repayments, employment rights and housing/tenancy matters.

This reform ensured VLA's and CLCs' ability to provide advice regarding such legal issues grew in line with this demand.[3] [In addition, the growing number of Victorians who were unemployed or under-employed meant fewer individuals could afford the costs of seeing a private solicitor for legal advice. This reform ensured this growing number of financially vulnerable persons could access the legal assistance they require.[4]]

LEVEL 4

**7.**

| | |
|---|---|
| ✓ ✗ | I have addressed the task word in a short introduction directed at explicitly answering the question.[1] |
| ✓ ✗ | I have identified two recent reforms I will discuss.[2] |
| ✓ ✗ | I have identified two recommended reforms I will discuss.[3] |
| ✓ ✗ | I have provided an explanation of the first recent reform.[4] |
| ✓ ✗ | I have discussed a strength of that recent reform in relation to the principle/s of justice.[5] |
| ✓ ✗ | I have discussed a weakness or limitation of that reform in relation to the principle/s of justice.[6] |
| ✓ ✗ | I have provided an explanation of the second recent reform.[7] |
| ✓ ✗ | I have discussed a strength of that recent reform in relation to the principle/s of justice.[8] |
| ✓ ✗ | I have discussed a weakness or limitation of that reform in relation to the principle/s of justice.[9] |
| ✓ ✗ | I have provided an explanation of the first recommended reform.[10] |
| ✓ ✗ | I have discussed a strength of that recommended reform in relation to the principle/s of justice.[11] |
| ✓ ✗ | I have discussed a weakness or limitation of that recommended reform in relation to the principle/s of justice.[12] |
| ✓ ✗ | I have provided an explanation of the second recommended reform.[13] |
| ✓ ✗ | I have discussed a strength of that recommended reform in relation to the principle/s of justice.[14] |
| ✓ ✗ | I have discussed a weakness or limitation of that recommended reform in relation to the principle/s of justice.[15] |
| ✓ ✗ | I have included a brief conclusion that links back to the question.[16] |
| ✓ ✗ | I used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'appeal', 'leave to appeal', 'VCAT', 'legal aid', 'High Court', 'enforce', 'order', 'monetary', 'non-monetary', 'judicial officers', 'pre-trial procedures', 'funding', 'individual rights', etc. |

*Exemplar response*

[The civil justice system aims to maximise the principles of fairness, equality and access, however, the achievement of these principles can always be improved upon by the need for constant reform of our civil justice system.[1]]

[Two recent reforms that aim to further uphold the principles of justice are making it easier to enforce orders of the Victoria Civil and Administrative Tribunal (VCAT) and the introduction of the contingency fees in representative proceedings in the Supreme Court.[2]]
[Two recommended reforms include removing juries from civil trials and increasing legal aid funding for civil matters. I will now discuss these in turn, considering the extent to which these will improve specific principles of justice.[3]]

[One recent reform, legislated in 2018 by the Victorian government is for it to be immediately possible to enforce an order made by VCAT. Until this change, VCAT orders require filing with the Magistrates' Court for certification before they can be enforced. This step takes time and costs parties a fee.[4]][By making VCAT orders as effective as a court order, this extra step in enforcement would be removed, promoting fairness for parties awaiting a remedy as delays are reduced.[5]][In reality though, the number of people who do not comply with VCAT orders when they are made would be relatively low, so this is a reform which would only improve fairness in a small number of cases.[6]]

[Contingency fees are charged by plaintiffs' solicitors as a set percentage of the damages awarded to the plaintiffs, payable only if the claim is successful. Such fee arrangements are prohibited in Victoria, except (following this reform) in representative proceedings in the Supreme Court.[7]][This reform is designed to increase access to civil dispute resolution by reducing costs as a barrier to making a claim,[8]][however such arrangements can only be applied in class actions in the Supreme Court, which make up a very small proportion of all civil cases meaning the impact on access to justice is limited.[9]]

[One recommended reform aimed at reducing delays and therefore promoting fairness is to remove juries from civil matters.[10]] [The process of empanelling a jury, having judges give directions to the jury and the jury's deliberations all add to the delay in the resolution of civil cases. Removing a jury removes these delays, promoting fairness for parties.[11]][However, juries are used in tiny proportion of civil disputes, so the benefit of this reform are relatively limited.[12]]

[A second recommended reform is ensuring that governments provide even greater funding for legal aid, in particular in a wider variety of civil disputes.[13]][Increased legal aid funding, as proposed by the Law Council of Australia's Justice Project in 2018 would enhance access to justice as it would allow legal aid to assist more people who cannot afford to fund private lawyers, or who experience other barriers such as communication, cultural or linguistic challenges. Better funding would also allow legal aid to provide more free legal information guides for the public to access, allowing more people to know about the law and how its processes work, so they can better protect their individual rights.[14]][Legal aid is a finite resource, though, and as demand for legal aid is constantly increasing, more funding will still probably not ensure that all persons are able to access and use the civil law unless governments increase funding by the large amount proposed by the Law Council, $390 million per year, which is not likely to happen.[15]]

[These reforms are crucial in ensuring our civil justice system can be utilised by all persons to achieve a fair and timely resolution of their dispute.[16]]

**8.**

| | | |
|---|---|---|
| ✓ | ✗ | I have provided an introduction that explains what access to justice is and why it requires ongoing reforms to improve.[1] |
| ✓ | ✗ | I have identified the first reform designed to address access.[2] |
| ✓ | ✗ | I have explained the first reform.[3] |
| ✓ | ✗ | I have identified a positive improvement this reform provides.[4] |
| ✓ | ✗ | I have identified a limitation/weakness/discussion of what else is required to address the identified problem.[5] |
| ✓ | ✗ | I have identified a second reform designed to address access.[6] |
| ✓ | ✗ | I have explained the second reform.[7] |
| ✓ | ✗ | I have identified a limitation/weakness/discussion of what else is required to address the identified problem.[8] |
| ✓ | ✗ | I have identified a positive improvement this reform provides.[9] |
| ✓ | ✗ | I have included a brief conclusion which returns to the question and introduction.[10] |
| ✓ | ✗ | I have included signposting terms to provide structure to my response, such as: 'however', 'also', 'another', etc. |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'court', 'tribunal', 'alternative dispute resolution', 'access', 'civil law', 'legal advice', 'representation', etc. |

*Exemplar response*

[Access to the civil justice system refers to a party's capacity to understand their legal rights and pursue their dispute using court, tribunals, ombudsmen and alternative forms of dispute resolution in areas of civil law such as money, debt, injury, health, housing, relationships and dealings with governments. Access to civil law is important to protect individuals' private rights and promote social cohesion, however, there are many factors that cause individuals to face barriers in accessing the legal system, and recent and recommended reforms go some way towards addressing these challenges. I will focus on reforms designed to address the complexity of the law and the legal system, improving people's knowledge of and capacity to use it.[1]]

[It can be difficult for some people to identify the right assistance and to find the right information to resolve a legal problem. One recent recommended reform is to ensure there is a well-recognised entry point or 'gateway' for legal assistance and referral in each state.[2]][This would require improved coordination and communication amongst the various community and not-for-profit legal service providers.[3]][This reform would help ensure many more people know how to begin resolving their civil law problem, as it would be easier to promote one single entry point,[4]][however, there will be some disadvantaged people who would not use a well-recognised entry point and require additional assistance to identify and resolve their legal problems, such as a 'legal health check' where community workers can identify those likely to experience legal problems and direct them to the best organisation or resource for assistance. Clearly, resolving the legal and non-legal problems experienced by disadvantaged Australians requires greater collaboration between legal and non-legal organisations, but it would significantly improve access to the civil justice system.[5]]

[Another recent reform designed to address people's knowledge of, and therefore access to, the civil justice system is Victorian Legal Aid's pilot online self-help tool called 'Legal Aid Check'.[6]][The online tool requires people to answer general prompting questions, to tailor the information they will receive based on their responses.[7]][One weaknesses with this reform in improving access to justice include the fact that it is currently only a prototype and therefore only offers information regarding limited areas of civil law. It also will not replace the need for specific and individual legal advice and even representation, because the advice is general in nature.[8]] [However, it does improve access because it makes it easier for people to find the relevant free legal information that VLA was already providing, by making an easy and user-friendly free website available.[9]]

[Through ongoing innovation and commitment to improvement, the legal profession will continue to improve access and capacity in using the civil justice system.[10]]

*Possible points to include:*

Other recent and recommended reforms designed to improve accessibility which students could have analysed:

- Increased use of technology in civil trials.
- Expansion of information available from Legal Aid.
- Students could also have included analysis of reforms designed to improve the way time and delays impact on access to justice, and mentioned recent and recommended reforms designed to address these.

# AOS Questions: Unit 3 AOS 2

LEVEL 5

**1.**

| | |
|---|---|
| ✓ ✗ | I have described the sources of costs in civil cases.[1] |
| ✓ ✗ | I have identified one way costs undermine the achievement of fairness, access or equality.[2] |
| ✓ ✗ | I have described this link between costs and fairness, access or equality.[3] |
| ✓ ✗ | I have identified a second way costs undermine the achievement of fairness, access or equality.[4] |
| ✓ ✗ | I have described this second link between costs and fairness, access or equality.[5] |
| ✓ ✗ | I have identified one way pre-trial procedures promote access.[6] |
| ✓ ✗ | I have described this positive link between pre-trial procedures and access.[7] |
| ✓ ✗ | I have identified one way judicial powers of case management promote access.[8] |
| ✓ ✗ | I have described this positive link between judicial powers of case management and access.[9] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'further', 'however', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'dispute', 'trial', 'plaintiff', etc. |

*Exemplar response*

[Costs in civil proceedings include needing to pay courts' filing fees, paying a solicitor to prepare pleadings and other pre-trial steps, as well as the possibility of paying the other party's legal costs too.[1]]

[One way costs impact on justice is they can prevent some injured parties from initiating civil claims, undermining access to justice.[2]] [Given the high costs associated with preparing and filing a claim and the risk of paying the defendant's costs if unsuccessful, some injured persons may be discouraged from starting a civil claim or might be unable to afford to if they do not have a high income, undermining access to justice.[3]]

[A second way costs impact on justice is that in some cases a party may have to represent themselves, limiting their ability to get a fair hearing.[4]] [This is because those without legal representation will have difficulty preparing a case of equal quality to the other party, and will not necessarily know how to present evidence in its best light and which legal principles to apply. This can mean the best presented case wins, not the party in the right, which is unfair.[5]]

[Civil pre-trial procedures promote access to justice as they encourage early settlement of disputes.[6]] [Pleadings and discovery assist the parties to know the strength of each others case and often lead to an early settlement without a trial, minimising costs of resolving civil cases and therefore making the courts more accessible as a way to resolve disputes.[7]]

[Judicial powers of case management include the ability for judges to direct parties to mediation, which promotes access to justice.[8]] [By ordering parties to attempt mediation in the pre-trial process it encourages parties to settle early, at a lower cost than if the case goes to trial and in a way that is confidential. These factors make dispute resolution for cases going through the court more accessible to all parties.[9]]

*Possible points to include:*

Judicial powers of case management also promote access to dispute resolution by minimising delays and costs, as judges have the broad power to make any order that achieves a quicker, cheaper resolution of the case (such as limiting the number of witnesses that can be called, time limits for completion of pre-trial steps and so on).

**2.** **a)**

| | |
|---|---|
| ✓ ✗ | I have identified one factor relevant to Morgan's claim.[1] |
| ✓ ✗ | I have described how this first factor would impact on Morgan initiating his claim.[2] |
| ✓ ✗ | I have identified a second factor relevant to Morgan's claim.[3] |

| | |
|---|---|
| ✓ ✗ | I have described how this second factor would impact on Morgan initiating his claim.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'claim', 'liability', 'costs', etc. |

*Exemplar response*

[One factor that Morgan should consider when initiating this claim is the scope of liability.[1]][As Morgan was operating a machine he was not licensed to use, he acted recklessly which is likely to impact negatively on his opportunities for success given that he contributed to his injuries. As such, Morgan should consider whether he makes himself vulnerable by initiating this claim.[2]]

[Costs are also a significant factor that Morgan should consider.[3]][As he is unemployed and has no savings it will be difficult for Morgan to pay for costs incurred due to pursuing this claim such as fees for legal representation and the court's filing fees. As such, Morgan should consider whether he is able to afford to pursue this claim before doing so.[4]]

*Possible points to include:*

Other factors that Morgan might consider when initiating this claim include:

- Enforcement issues against Sharyn if she is found to be liable, as she has left Australia
- Issues attempting to negotiate a resolution(perhaps via mediation) as Sharyn has left Australia

**b)**

| | |
|---|---|
| ✓ ✗ | I have stated that damages rather than an injunction would better achieve the purposes of remedies in this case.[1] |
| ✓ ✗ | I have stated what the purpose of civil remedies is.[2] |
| ✓ ✗ | I have described the injury caused and concluded that damages would return Morgan to his original position more effectively than an injunction.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'claim', 'injunction', 'damages', etc. |

*Exemplar response*

[Awarding damages would more effectively achieve the purpose of remedies than an injunction,[1]][which is to return Morgan to the position he was in before the injury occurred.[2]][As Morgan has suffered physical injury, loss of earnings and medical expenses, only an award of damages would help compensate Morgan for this loss, an injunction would not.[3]]

**3. a)**

| | |
|---|---|
| ✓ ✗ | I have identified that Anthony's comment refers to the concept of limitation of actions.[1] |
| ✓ ✗ | I have briefly defined the concept of the limitation of actions.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'limitation of actions', 'claim', 'civil, etc. |

*Exemplar response*

[Anthony's comment that 'it might be too late' refers to the limitation of actions, a factor to be considered before initiating a civil case.[1]][This refers to the time limit in which a civil claim should be initiated; after the time limit expires the plaintiff may be prevented from starting proceedings in the court.[2]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have identified one institution that can assist Mikayla.[1] |
| ✓ ✗ | I have described the role of that institution in assisting Mikayla.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'VLA', 'legal representation', etc. |

*Exemplar response*

[One institution that could help Mikayla is Victoria Legal Aid.[1]][VLA could assist Mikayla by providing her with legal representation, since Mikayla is homeless and charged with a serious offence she is likely to qualify for a grant of free legal representation.[2]]

*Possible points to include:*

Alternative assistance from VLA could include:

- Mikayla could read VLA's freely published legal information about criminal proceedings and the courts.
- Legal advice to Mikayla prior to her trial.

An alternative institution is a community legal centre. CLCs may assist Mikayla by:

- Mikayla could read a CLC's published legal information about criminal proceedings and the courts.
- Legal advice to Mikayla prior to her trial, although a CLC is unlikely to be able to provide legal representation.

**c)**

| | |
|---|---|
| ✓ ✗ | I have described 'punishment' as the court imposing retribution for the harm caused by an offender (or similar).[1] |
| ✓ ✗ | I have used a contrasting term such as 'unlike' or 'compared to' or similar, to show distinction.[2] |
| ✓ ✗ | I have described the purpose of damages as returning Anna to the position she was in prior to the injury occuring.[3] |
| ✓ ✗ | I have explicitly referred to Anna and Mikayla in my response. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'punishment', 'civil, 'judge', etc. |

*Exemplar response*

[The purpose of the sanction imposed here, to punish, means the court is seeking to achieve retribution for Mikayla's conduct, exacting revenge so Anna, her family and the community do not feel the need to exact revenge themselves.[1]][This is unlike[2]][the purpose of damages which is focused on Anna rather than Mikayla, with the aim of returning Anna to the position she was in before the injury occurred through compensating Anna for her loss and suffering.[3]]

**4. a)**

| | |
|---|---|
| ✓ ✗ | I have stated that Amanda has the burden of proof in this case.[1] |
| ✓ ✗ | I have stated that the standard of proof in this case is 'on the balance of probabilities'.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'plaintiff', 'claim', etc. |

*Exemplar response*

[Amanda has the burden of proof in this case because she is the plaintiff, bringing a claim against the magazine (the defendant).[1]][The standard of proof is 'on the balance of probabilities', as this is a civil case.[2]]

**b)**

| | |
|---|---|
| ✓ ✗ | I have identified one responsibility of the jury in Amanda's case.[1] |
| ✓ ✗ | I have described this responsibility in further detail.[2] |
| ✓ ✗ | I have described a second responsibility of the jury in Amanda's case.[3] |
| ✓ ✗ | I have described this responsibility in further detail.[4] |
| ✓ ✗ | I have signposted my response appropriately, such as: 'one responsibility', 'another responsibility', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'juror', 'liability', 'damages', 'plaintiff', 'defendant', etc. |

*Exemplar response*

[One responsibility of the jury in Amanda's case is to be objective.[1]][A jury must be independent and unbiased when reaching decisions. Potential jurors who believe they cannot remain impartial must ask to be excused during the process of jury empanelment.[2]][A second responsibility of the jury in this case is to decide on liability.[3]][The jury in a civil trial must determine whether the defendant is responsible for the harm suffered by the plaintiff, based on whether the plaintiff has proven their case on the balance of probabilities. In some matters other than defamation cases like Amanda's, the jury will also calculate damages.[4]]

*Possible points to include:*

Other possible responsibilities of the jury:

- Listen to the evidence, directions from the judge and legal representatives' submissions – the jury must remain alert and keep track of (often complex) information. They may take notes to remember all of the evidence and facts of the case, and must listen to all directions given by the judge throughout the trial.

**c)**

| | |
|---|---|
| ✓ ✗ | I have identified one case management power that achieves access.[1] |
| ✓ ✗ | I have explained the case management power in reference to this dispute.2 |
| ✓ ✗ | I have explained how the case management power achieves access in this dispute.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'mediation', 'parties', etc. |

*Exemplar response*

[One way in which the judge's use of case management powers could achieve access in this dispute is through the power to refer parties to mediation.[1]] [Directions given by the judge requiring the parties to attend mediation can minimise time and cost in a civil trial. For example, if Amanda's case is referred to mediation and resolved this way, both parties will engage legal representation for a shorter time and will avoid the expenses and delays associated with a trial.[2]] [Thus, by referring the parties in this case to mediation, the judge's use of case management powers would promote access by saving the parties and the court system time and resources.[3]]

*Possible points to include:*

Other possible case management powers that achieve access:

- Power to give directions – directions minimise the time it takes to resolve disputes and should restrict the time for which parties engage legal representation – this minimises costs, ensuring the courts remain more accessible for parties pursuing civil claims/defending civil claims.
  - For example, the judge in this case might give directions relating to timelines for the discovery of documents, or limiting the number of witnesses allowed at trial, which ensure that both parties have equal opportunity to present their case and be aware of the case against them, promoting a more timely and accessible trial process.

**d)**

| | |
|---|---|
| ✓ ✗ | I have identified one remedy that may be awarded to Amanda.[1] |
| ✓ ✗ | I have stated one purpose of this remedy.[2] |
| ✓ ✗ | I have explained how the remedy does achieve this purpose in the case.[3] |
| ✓ ✗ | I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[4] |
| ✓ ✗ | I have explained how the remedy may not achieve this purpose in the case.[5] |
| ✓ ✗ | I have stated a second purpose of this remedy.[6] |
| ✓ ✗ | I have explained how the remedy does achieve this purpose in the case.[7] |
| ✓ ✗ | I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[8] |
| ✓ ✗ | I have explained how the remedy does not achieve this purpose in the case.[9] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'injunction', 'plaintiff', 'defendant', etc. |

*Exemplar response*

[One remedy that may be awarded to Amanda is an injunction.[1]]

[One purpose of an injunction is to restore the plaintiff to the position they were in before the defendant infringed their rights.[2]] [A mandatory injunction could, to some extent, restore Amanda to her former position in this dispute. For example, if Amanda is awarded a mandatory injunction requiring the defendant to apologise for the defamatory publication, this would benefit Amanda and help return her to the position she was in before she suffered loss.[3]] [However,[4]] [an injunction cannot fully achieve this purpose as Amanda has already suffered harm from the defamatory publication, and an injunction cannot reverse this harm.[5]]

[A second purpose of injunctions is to prevent harm to the plaintiff.[6]] [A restrictive injunction could prevent further harm to Amanda in this case by preventing the defendant from republishing this defamatory material in the future, thus protecting Amanda's reputation.[7]] [On the other hand,[8]] [this will provide limited benefit if Amanda has already suffered a substantial loss of reputation due to the original publication. The effectiveness of an injunction like this could also be restricted by the defendant not adhering to the conditions of the injunction.[9]]

*Possible points to include:*

Other possible remedies that could be awarded to Amanda:

- Damages – damages aim to return the plaintiff to the position they were in before the harm occurred by compensating them for any loss suffered.
  - Damages could achieve this purpose in Amanda's case by reimbursing Amanda for any loss of income that she may have experienced as a result of the defamatory publication (specific damages) and providing monetary compensation for pain and suffering or humiliation (general damages).
  - However, damages cannot fully restore Amanda to her former position because they cannot reverse the harm she suffered. It may also be difficult for the courts to place a monetary value on the emotional loss or humiliation that Amanda experienced as a result of the defamatory publication.

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which I agree with the prompt.[1] |
| ✓ ✗ | I have identified one strength of the role of the judge.[2] |
| ✓ ✗ | I have described how this strength is linked to the principle of fairness.[3] |
| ✓ ✗ | I have identified one weakness of the role of the judge.[4] |
| ✓ ✗ | I have described how this weakness is linked to the principle of fairness.[5] |
| ✓ ✗ | I have identified a second strength of the role of the judge.[6] |
| ✓ ✗ | I have described how this strength is linked to the principle of access.[7] |
| ✓ ✗ | I have identified a second weakness of the role of the judge.[8] |
| ✓ ✗ | I have described how this weakness is linked to the principle of access.[9] |
| ✓ ✗ | I have identified one strength of the role of the jury.[10] |
| ✓ ✗ | I have described how this strength is linked to the principle of fairness.[11] |
| ✓ ✗ | I have identified one weakness of the role of the jury.[12] |
| ✓ ✗ | I have described how this weakness is linked to the principle of fairness.[13] |
| ✓ ✗ | I have identified a second strength of the role of the jury.[14] |
| ✓ ✗ | I have described how this strength is linked to the principle of access.[15] |
| ✓ ✗ | I have identified a second weakness of the role of the jury.[16] |
| ✓ ✗ | I have described how this weakness is linked to the principle of access.[17] |
| ✓ ✗ | I have included examples specific to criminal and civil trials in my response. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judge', 'jury', 'parties', 'accused', etc. |

*Exemplar response*

[The use of a judge and jury in criminal and civil trials can promote fairness and access in the justice system to a significant extent, though this may be limited in some instances.[1]]

[The role of the judge promotes fairness by acting as an impartial and independent decision-maker.[2]][This achieves fairness by ensuring that a trial is conducted without bias, according to the rules of evidence and procedure; this means that decisions made at trial are based on law and reliable facts alone, promoting a fair outcome for all parties.[3]][However, even though judges are impartial adjudicators and skilled at applying the law, they may still be subject to personal bias,[4]][perhaps causing them to unconsciously discriminate against certain parties, which would limit fairness in a trial if it occurred.[5]]

The role of the judge also promotes access in criminal and civil trials by ensuring that the legal principles and terminology used are understood by all parties.[6] For example, in criminal trials, judges' explanation of the law to the jury ensures the accused person also understands the criminal proceedings they are a party to, thus making the entire trial process more accessible for those accused persons who are not familiar with the law.[7] On the other hand, judges must remain impartial.[8] They cannot assist accused persons or parties without legal representation by explaining any lawful defences or advising them how to prepare and present their case; in this respect the judge's independence in criminal and civil trials does not promote access to justice system for unrepresented parties.[9]

The role of the jury in criminal and civil trials achieves fairness by providing for trial-by-peers.[10] A cross-section of the community is used as the decision-maker, so the parties to criminal or civil disputes should feel that their case has been decided by their equals; this prevents parties from feeling as though they have been oppressed by the state, which promotes fairness.[11] However, juries are only used in a small proportion of criminal trials, and hardly ever used in civil trials;[12] thus they are able to promote the achievement of fairness in relatively few cases.[13]

Juries also promote access in the criminal and civil justice systems by ensuring that plain English is used in court and less legal jargon is used (to ensure that the jury understand the court's procedures and the evidence they are being asked to make a decision upon);[14] this promotes access for unrepresented parties by allowing them to better understand court processes and rules of evidence.[15] On the other hand, the use of juries can lead to delays and added costs (in civil trials), limiting access to the justice system.[16] In civil trials, additional fees are required for jury trials, which may make it not financially accessible for some parties to request them. The use of juries also creates delays in both criminal and civil trials due to the time taken for empanelling the jury, explaining evidence, and waiting for a decision to be made. Thus, juries do not always make the justice system more accessible.[17]

*Possible points to include:*

Other weaknesses of the role of the judge that limit fairness:

- Judges rely on the parties to present all relevant evidence during a trial; if parties have no legal representation this may prevent all relevant facts being presented to the court, as judges cannot actively seek out evidence they may need to deliver a verdict. If this occurs, it may prevent a decision based on all relevant facts, which can lead to an unfair result and/or award of damages.

Other strengths of the role of the judge that achieve access:

- Judges' ability in trials to actively manage proceedings (setting time limits for examination of witnesses, limiting the number of witnesses, etc) minimises costs in civil trials and thereby ensures the justice system remains more accessible.

Other strengths of the role of the jury that achieve fairness:

- Juries are independent of all parties to a dispute. They are randomly selected from the community, have no connection to the plaintiff, defendant, witnesses, etc. Further, they cannot seek additional information about the case beyond the courtroom. They can therefore be completely impartial which promotes fairness.

Other weaknesses of the role of the jury that limit fairness:

- Jurors may be influenced by what they hear about a party to a case in the media, and may therefore make a decision based on preconceived ideas about the case, not just the evidence heard in court. This is not fair on the parties in civil matters, accused persons and victims of crime.
- Making decisions in legal cases is a complex task undertaken by people with no legal training, creating the risk of an incorrect verdict. In addition, because juries do not need to provide reasons for their decisions there is no certainty they have actually applied the law to the facts correctly. This could be unfair on accused persons and victims of crime.
- The use of juries creates delays, because time is taken to empanel the jury, to explain court procedures and jurors' roles, to slowly explain evidence, to remove juries from courtrooms for legal arguments and the time taken for the jury to reach a decision. These delays add to the stress and suffering of all parties to criminal and civil cases.

Other weaknesses of the role of the jury that limit access:

- Very few matters are tried by jury as most criminal offences are summary offences resolved in the Magistrates' Court and many civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is further limited by the way cases are distributed in the court hierarchy.

# 4.1.1 Roles of the Crown and the Houses of parliament in law-making

LEVEL 1

**1.** B **2.** D **3.** A **4.** D **5.** B **6.** B

LEVEL 2

**7.**

- ✓ ✗ I have stated one role that the Governor-General carries out.[1]
- ✓ ✗ I have detailed what this role entails.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'bill', 'legislation', 'Act of parliament', etc.

*Exemplar response*

[One role of the Governor-General is to grant royal assent.[1]][This involves the formal signing of a bill so after which it can be declared an official Act of parliament.[2]]

*Possible points to include:*

Other roles of the Governor-General include but are not limited to:

- withholding royal assent
- suggesting amendments to legislation passed by both houses of parliament.

**8.**

- ✓ ✗ I have briefly outlined s.7 of the Constitution.[1]
- ✓ ✗ I have stated that the Senate should have equal representation from each state.[2]
- ✓ ✗ I have outlined the reason for this requirement.[3]
- ✓ ✗ I have outlined a disadvantage that would occur if the number of senators for each state was proportionate to the population of that state.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Senate', 'legislation', etc.

*Exemplar response*

[Section 7 of the Constitution provides the requirement that the Senate should have equal representation from each state.[1]][ There are 12 senators for each state in the Senate, regardless of the state's size or population.[2]][In this way, the interests of the states, especially the less populated ones, are protected.[3]][If the number of senators for each state was proportionate to the population of people in that state the more populated states would hold most of the power in the Senate, resulting in law-making that favours the larger states' interests.[4]]

**9.**

- ✓ ✗ I have explained that the House of Representatives passes new laws and amendments.[1]
- ✓ ✗ I have outlined that any member can introduce a bill.[2]
- ✓ ✗ I have stated that bills must be passed by both houses before it can become a law.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'House of Representatives', 'legislation', etc.

*Exemplar response*

[One of the main roles of the House of Representatives is to initiate laws. The House of Representatives considers and passes new laws, whilst also passing amendments or changes to existing laws.[1]][Most new laws are usually introduced in the lower house by the minister to whom the bill relates, however any member may introduce a bill.[2]][The bills must be passed by both houses to become a law.[3]]

**10.**

- ✓ ✗ I have described royal assent as the 'formal signing of a proposed law' (or similar).[1]
- ✓ ✗ I have stated that royal assent is performed by the Crown.[2]
- ✓ ✗ I have explained that royal assent is necessary for an act to become law.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Royal Assent', 'Crown', etc.

*Exemplar response*

[Royal assent is the formal signing of a proposed law[1]][by the Crown.[2]][Royal assent is necessary after a bill passes both houses of parliament, before the bill can be declared law.[3]]

**11.**

- ✓ ✗ I have stated that the statement is incorrect.[1]
- ✓ ✗ I have used contrasting linking words, such as: 'however', 'whereas', 'although', 'whilst'.[2]
- ✓ ✗ I have outlined that Frank was correct in saying that initiating new laws is a role of a lower house.[3]
- ✓ ✗ I have explained that the Legislative Council can also initiate laws (except money bills).[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Legislative Council', 'legislation', etc.

*Exemplar response*

[No, Frank's statement that members of the Legislative Council cannot initiate new laws is incorrect.[1]][Whilst[2]][the latter part of his statement is correct in terms of initiating laws being a role of the lower house,[3]][the upper house (Legislative Council) can also initiate laws (except money bills).[4]]

**12.**

- ✓ ✗ I have outlined the role of the House of Government.[1]
- ✓ ✗ I have explained that as the government is elected, its decisions should reflect the community.[2]
- ✓ ✗ I have explained that the elected government can represent the views of the majority through initiating new laws.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Legislative Assembly', 'government', etc.

*Exemplar response*

[The role of the House of Government is that after an election, the party with the most seats (members) in the Legislative Assembly forms the government.[1]][As the government is elected by Victorians, the government should make decisions that represent the views of the public.[2]][Additionally, as most laws are initiated in the Legislative Assembly, the elected government can represent the views of the majority through these new laws.[3]]

LEVEL 3

**13.**

- ✓ ✗ I have stated that most bills are introduced in the House of Representatives.[1]
- ✓ ✗ I have explained why most bills are initiated in the House of Representatives, as it is where government is formed (or similar).[2]
- ✓ ✗ I have described a similarity between the roles of the Senate and the House of Representatives in law-making.[3]
- ✓ ✗ I have described a difference between the roles of the Senate and the House of Representatives in law-making.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'legislation', 'bills', 'Senate', etc.

*Exemplar response*

[The majority of legislation is introduced into the Commonwealth Parliament in the lower house (the House of Representatives).[1]] [This is because the government of the day introduces most bills, and government is formed in the lower house by the party holding the majority of seats.[2]]

[One similarity between the roles of the Senate and House of Representatives is that legislation on almost all matters can be introduced in either house of parliament, by any member of each house.[3]]

[A difference between the roles of the Senate and the House of Representatives, however, is that any legislation that raises taxation or spends Commonwealth money can only be introduced and amended in the House of Representatives – such legislation cannot be initiated or amended in the Senate.[4]]

*Possible points to include:*

Other similarities include:

- Each house acts to review bills passed by the other house.
- Representing the values of the community in debating (and voting for/against) proposed changes to the law, as all members of both houses are democratically elected.

Other differences include:

- Government is determined by the party with the majority of seats in the House of Representatives, not the Senate.

**14.**

| | | |
|---|---|---|
| ✓ | ✗ | I have identified the first error in the passage (timing of royal assent).[1] |
| ✓ | ✗ | I have explained the correct timing of royal assent.[2] |
| ✓ | ✗ | I have identified the second error in the passage (representative of the Crown in Commonwealth Parliament).[3] |
| ✓ | ✗ | I have identified correctly the representative of the Crown.[4] |
| ✓ | ✗ | I have identified the third error in the passage (the name of the upper house).[5] |
| ✓ | ✗ | I have identified correctly that the upper house is the Senate.[6] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'Senate', 'royal assent', 'Governor-General', etc. |

*Exemplar response*

[The first error in this passage is the statement about the bill being presented for royal assent before being passed through the houses of parliament.[1]] [In practice, royal assent is given to legislation after the bill passes houses of parliament, not before.[2]]

[The second error is to state that royal assent is provided by the governor.[3]] [Instead, the Governor-General is the representative of the Crown in the Commonwealth Parliament, whereas the governor is the Crown's representative in the state parliament.[4]]

[Finally, the upper house of the Commonwealth Parliament is not the Legislative Council,[5]] [it is the Senate.[6]]

LEVEL 4

**15.**

| | | |
|---|---|---|
| ✓ | ✗ | I have stated the Senate does not achieve the 'states' house' purpose.[1] |
| ✓ | ✗ | I have described why the Senate does not achieve the states' house purpose, due to Senators voting on party lines (or similar).[2] |
| ✓ | ✗ | I have stated that the house of review function is usually achieved.[3] |
| ✓ | ✗ | I have described when the house of review function will be achieved – Senate majority held by opposition/minor parties ensure debate/amendments (or similar).[4] |
| ✓ | ✗ | I have identified that the Senate being composed this way and therefore achieving its review function is most common.[5] |

| | |
|---|---|
| ✓ ✗ | I have described when the house of review function will not be achieved – Senate majority held by government will not ensure debate (or similar).[6] |
| ✓ ✗ | I have identified that the government controlling both houses (limiting the review function) is uncommon.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Senate', 'government', 'party lines', etc. |

*Exemplar response*

[Firstly, the Senate does not achieve its role as a states' house even though there is an equal number of Senators for every state.[1]] [This is because Senators are almost always members of political parties, and therefore usually vote for and against legislation on party lines (that is, as directed by the party's leader) rather than based on whether legislation will or will not benefit the state they represent.[2]]

[The Senate will usually achieve the 'house of review' purpose, depending largely upon the composition of the Senate at any one time.[3]]

[Often the majority of the Senate will be controlled by the opposition or the balance of power is held by minor parties. In these instances, legislation introduced into the Senate from the lower house will be debated and reviewed before being passed. Indeed, the opposition or minor parties may demand certain changes to the law before passing it.[4]] [It is most common for the opposition to hold the majority in the Senate or for minor parties to hold the balance of power, so the Senate usually does achieve its purposes as a house of review.[5]]

[Yet if the government holds a majority in both houses, it can rush legislation through with little or no debate, meaning the review function of the Senate is not achieved.[6]] [It is, however, very rare for one party to control both houses.[7]]

# 4.1.2 Division of Constitutional law-making powers

LEVEL 1

**1.** B **2.** B **3.** D **4.** D

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated that the bill will not be valid.[1] |
| ✓ ✗ | I have explained that minting currency is an exclusive power.[2] |
| ✓ ✗ | I have outlined what an exclusive power is.[3] |
| ✓ ✗ | I have referred to the provided stimulus.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Constitution', 'exclusive', etc. |

*Exemplar response*

[No, this bill will not be valid.[1]][The power to mint currency is an exclusive power[2]][and so the Victorian parliament cannot make laws in that area. Only the Commonwealth Parliament can make laws in areas of exclusive power.[3]][Therefore, as the Victorian parliament does not have the jurisdiction to make laws regarding currency, Sammy's proposed bill would be invalid.[4]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined concurrent powers as law-making powers granted to the Commonwealth and the states in the Constitution (or similar).[1] |
| ✓ ✗ | I have included an appropriate example, which may include but is not limited to: taxation, marriage, trade.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Constitution', 'concurrent', etc. |

*Exemplar response*

[Concurrent powers are a type of specific power, meaning they are law-making powers of the Commonwealth explicitly stated in the Constitution that are shared with the states; both the Commonwealth Parliament and the state parliaments have jurisdiction to make laws in areas of concurrent power.[1]][An example of a concurrent power is taxation law.[2]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have explicitly stated that the statement is incorrect.[1] |
| ✓ ✗ | I have stated that residual powers are not specifically listed in the Constitution.[2] |
| ✓ ✗ | I have stated that only state parliaments have jurisdiction to make laws in areas of residual powers, and therefore the Commonwealth cannot make laws in those areas.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Constitution', 'residual', etc. |

*Exemplar response*

[No, the above statement is incorrect.[1]][Residual powers are not specifically listed in the Constitution as they were left with the states at time of federation.[2]][As such, only state parliaments have jurisdiction to make laws in areas of residual powers. Therefore, the Commonwealth Parliament cannot make laws in areas of residual powers.[3]]

**8.**

- ✓ ✗ I have stated that the Victorian law would not be valid.[1]
- ✓ ✗ I have provided the reason as to why the Victorian law will be invalid – because it is in conflict with the Commonwealth law.[2]
- ✓ ✗ I have described section 109 of the Constitution.[3]
- ✓ ✗ I used the term 'to the extent of the inconsistency'.[4]
- ✓ ✗ I have addressed and linked to the provided stimulus material explicitly.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Constitution', 'invalid', 's.109', etc.

*Exemplar response*

[No, the Victorian law would not be valid[1]][as it is conflicting with the Commonwealth law.[2]][According to section 109, in the event of an inconsistency between Commonwealth and state law, the Commonwealth law will prevail and state law will be invalid[3]][to the extent of the inconsistency.[4]][Therefore, as the Victorian law states that the minimum age for marriage is 16, whereas the Commonwealth has made the minimum age for marriage 18, therefore the Victorian law is inconsistent with the Commonwealth law and hence will be declared invalid when challenged in the High Court.[5]]

LEVEL 3

**9.**

- ✓ ✗ I have stated that the Victorian law is outside its law-making power.[1]
- ✓ ✗ I have justified this conclusion by describing defence as being an exclusive power of the Commonwealth.[2]
- ✓ ✗ I have described an 'exclusive power' as a law-making power only the Commonwealth may exercise (or similar).[3]
- ✓ ✗ I have been careful not to simply reuse the word 'exclusive' when defining 'exclusive power'.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'division of powers', 'parliament', etc.

*Exemplar response*

[This legislation will be declared invalid in the High Court because it is outside the state's law-making authority according to the constitutional division of powers.[1]]

[According to section 114 of the Constitution, law-making regarding defence is an exclusive power,[2]][meaning only the Commonwealth Parliament could pass such a law. The Victorian legislation is therefore invalid.[3]]

**10.**

- ✓ ✗ I have identified the first reason Victorian law may be declared invalid as entering into the exclusive powers.[1]
- ✓ ✗ I have described an 'exclusive power' as a law-making power only the Commonwealth may exercise (or similar).[2]
- ✓ ✗ When defining 'exclusive power' I have included an example (such as defence or currency).[3]
- ✓ ✗ I have linked the description of exclusive powers to a conclusion about the validity of the Victorian law in the question.[4]
- ✓ ✗ I have identified the second reason Victorian law may be declared invalid as being inconsistent with Commonwealth law.[5]
- ✓ ✗ I have described the operation of s.109 as parts of state law inconsistent with Federal law being invalid (or similar).[6]
- ✓ ✗ I have linked the description of s.109 to a conclusion about the validity of the Victorian law in the question.[7]
- ✓ ✗ I have been careful not to simply reuse the word 'exclusive' when defining 'exclusive power'.

| | |
|---|---|
| ✓ ✗ | I have signposted my answer appropriately with 'One reason the Victorian law would be invalid is...' (or similar). |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'inconsistent', 'parliament', 'invalid', etc. |

*Exemplar response*

[One reason the Victorian law may be declared invalid in this case is because it enters into the exclusive powers.[1]][The division of powers allows the Commonwealth to be the sole law-maker on some matters (called 'exclusive powers')[2]][such as currency.[3]] [A Victorian law that enters the exclusive powers is outside its law-making authority and therefore invalid.[4]]

[A second reason the Victorian law would be declared invalid is because it's inconsistent with Commonwealth law.[5]][Under section 109, sections of state law that are inconsistent with Commonwealth law will be declared invalid and the Commonwealth law will be followed instead.[6]][Therefore, in this case the High Court may decide some sections of Victorian law are invalid if they are inconsistent with Federal law.[7]]

**11.**

| | |
|---|---|
| ✓ ✗ | I have stated that Mark's challenge will fail due to the Commonwealth law prevailing over inconsistent Victorian law.[1] |
| ✓ ✗ | I have described the inconsistency between the two laws in this case.[2] |
| ✓ ✗ | I have described the operation of section 109 in cases of inconsistency as the Commonwealth law prevailing over inconsistent sections of state law (or similar).[3] |
| ✓ ✗ | I have linked the operation of section 109 to the conclusion that the police officer's action was lawful and Mark's challenge will fail.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'inconsistency', 'valid', etc. |

*Exemplar response*

[Mark's challenge will fail because the Commonwealth law and the Victorian law are inconsistent, and in such cases the Commonwealth law will prevail.[1]]

[In this case, the Commonwealth law allows the police to request Mark's name and address without providing a reason. While the Victorian law does require the police to provide a reason,[2]][due to the operation of section 109 of the Constitution, this inconsistent section of the Victorian law will be declared invalid and the Commonwealth law will prevail.[3]][Therefore the request for his details without a reason is lawful and Marks' challenge will fail.[4]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have described 'residual powers' as law-making power granted only to the states (or similar).[1] |
| ✓ ✗ | I have given one appropriate example of residual powers, such as road rules, education, criminal law, public transport, or public health.[2] |
| ✓ ✗ | I used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand' or similar.[3] |
| ✓ ✗ | I have described 'concurrent powers' as matters both the states and Commonwealth can legislate on.[4] |
| ✓ ✗ | I have given one appropriate example of concurrent powers, such as: taxation, marriage, divorce.[5] |
| ✓ ✗ | I have been careful not to simply reuse the words 'residual' and 'concurrent' when defining residual and concurrent powers. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'law-making', 'parliament', etc. |

*Exemplar response*

[Residual powers are the law-making powers that may be exercised only by the states and not the Commonwealth Parliament,[1]][such as law-making with respect to road rules.[2]]

[By contrast,[3]][concurrent powers are the law-making authority shared by both the state and Commonwealth parliaments under the constitutional division of powers,[4]][such as law-making about taxation.[5]]

LEVEL 4

**13.**

| | |
|---|---|
| ✓ ✗ | I have stated that I agree partially with this contention.[1] |
| ✓ ✗ | I have described the operation of s.109 as Commonwealth law prevailing over inconsistent sections of state law (or similar).[2] |
| ✓ ✗ | I have described how s.109 restricts states' law-making powers on matters within the concurrent powers.[3] |
| ✓ ✗ | I have described how s.109 only declares sections of state law inconsistent with Commonwealth law invalid, meaning other aspects of state law continue to operate.[4] |
| ✓ ✗ | I have described how s.109 does not prevent the states from passing laws on matters within the residual powers.[5] |
| ✓ ✗ | I have concluded by weighing up the extent of the restriction on the states and linking back to my opening opinion statement.[6] |
| ✓ ✗ | I have linked back to the contention – the ability of 'state parliaments tackling social issues' – throughout my answer. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'inconsistency', etc. |

*Exemplar response*

[I only agree with this statement to some extent, as section 109 does in some ways restrict the states' powers.[1]]

[Section 109 states that if a state law and a Commonwealth law are inconsistent, the Commonwealth law shall prevail to the extent of the inconsistency.[2]]

[This is a restriction on the law-making powers of the states in the areas of concurrent law-making power, because any part of a state law that is inconsistent with a Federal law will be declared invalid when challenged in the High Court. This means in some cases a state parliament is less able to tackle social issues as they arise.[3]]

[However, I agree with the statement in that only those parts of state law inconsistent with Federal law will be invalid. In this sense, section 109 provides only a limited restriction on states' law-making power, as the remainder of any such law challenged in the High Court keeps operating. That is, passages of legislation on topics within the concurrent powers that aren't inconsistent with Commonwealth law keep operating.[4]]

[Furthermore, section 109 relates to inconsistent laws within the concurrent powers, therefore it does not prevent state parliaments from passing laws to tackle social issues that fall within the residual powers.[5]]

[Overall, I agree with the statement to some extent, as section 109 provides some limitations on the states' powers to pass laws as new issues arise in society, but does not completely prevent the states from doing so.[6]]

# 4.1.3 The Australian Constitution as a check on parliamentary law-making

LEVEL 1

**1.** A **2.** D **3.** D **4.** B **5.** B

LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated that the Senate reviews the bills passed by the House of Representatives.[1] |
| ✓ ✗ | I have stated that the government holds the majority of seats in the House of Representatives.[2] |
| ✓ ✗ | I have explained how the review of bills acts as a check on parliamentary law-making.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Senate', 'bicameral', 'Constitution', etc. |

*Exemplar response*

[The bicameral structure of the Commonwealth Parliament acts as a check on parliamentary law-making as it ensures that bills passed by the House of Representatives are reviewed by the Senate before becoming law.[1]] [The government holds the majority of seats in the House of Representatives which may result in laws being made out of a political interest rather than a public interest.[2]] [However, the government typically does not hold the majority in the Senate, and therefore the Senate can review the bills passed by the lower house and act as a check on parliamentary law-making by ensuring new laws are reviewed and radical changes in the law not rushed.[3]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have introduced the principle of the separation of powers as established by the Constitution to prevent abuses of power (or similar).[1] |
| ✓ ✗ | I have stated that the legislative power is vested with parliament.[2] |
| ✓ ✗ | I have described legislative power as the ability to make laws.[3] |
| ✓ ✗ | I have stated that executive power is granted to the Crown but exercised by ministers.[4] |
| ✓ ✗ | I have described executive power as the ability to administer the law.[5] |
| ✓ ✗ | I have stated judicial power is granted to courts.[6] |
| ✓ ✗ | I have described judicial power as the ability to apply the law to resolve disputes.[7] |
| ✓ ✗ | I have explained the overlap of executive and legislative powers.[8] |
| ✓ ✗ | I have explained that judicial power is entirely separate.[9] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judicial', 'executive', 'ministers', etc. |

*Exemplar response*

[The separation of powers principle is established by the Constitution to ensure there is no abuse of power by the three bodies governing Australia.[1]] [The legislative power is vested with parliament[2]] [which is the power to make laws.[3]] [The executive power is granted to the Governor-General but in practice is carried out by the ministers in charge of government departments[4]] [and it is the power to administer the law and manage government business.[5]] [Judicial power is given to the courts[6]] [and it is the power to apply the law and settle disputes.[7]] [The legislative and executive powers overlap because ministers (who exercise executive power) are also members of parliament.[8]] [Judicial power is kept entirely separate and independent.[9]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have stated that express rights are actually written in the Constitution.[1] |
| ✓ ✗ | I have used the term 'entrenched' in my answer and have explained what entrenched means.[2] |
| ✓ ✗ | I have identified an example of an express right.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'entrenched', 'referendum', etc. |

*Exemplar response*

[Express rights are those explicitly stated in the Constitution.[1]][They are protected in the Constitution because they are entrenched, meaning they cannot be removed or amended except by the referendum process stated in s.128.[2]][An example of an express right is that the Commonwealth must provide just terms if passing legislation to compulsorily acquire a person's property.[3]]

*Possible points to include:*

Other express rights include:

- Right to trial by jury for Commonwealth indictable offences
- Non-discrimination based on state of residence
- No Commonwealth legislation restricting freedom of religion
- Freedom of interstate trade and movement

**9.**

| | |
|---|---|
| ✓ ✗ | I have broadly outlined the role of the High Court in interpreting the Constitution.[1] |
| ✓ ✗ | I have described the process of the High Court ensuring laws are valid under the Constitution.[2] |
| ✓ ✗ | I have linked back to the question by describing this power of the Court upholding the Constitution as a check on parliamentary law-making.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'invalid', 'High Court', etc. |

*Exemplar response*

[One of the roles of the High Court is that it can rule as to the Constitutional validity of laws.[1]][If the High Court finds that legislation infringes the Constitution, the High Court will declare the offending aspects of the legislation invalid.[2]][Therefore, the High Court restricts the ability of law-makers to implement Constitutionally invalid legislation. This acts as a check on parliamentary law-making as legislation must be consistent with the Constitution or the Court will declare it invalid.[3]]

**10.**

| | |
|---|---|
| ✓ ✗ | I have identified one way in which the double majority provision acts as a check on parliamentary law-making.[1] |
| ✓ ✗ | I have described how the double majority requirement acts as a check on parliamentary law-making.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'Constitution', etc. |

*Exemplar response*

[One way in which the double majority provision acts as a check on parliamentary law-making is that it ensures the Constitution cannot be altered without public knowledge and consent.[1]][This is a check on parliamentary law-making as it prevents parliament from altering the Constitution as they desire, as parliament must gain the people's informed agreement.[2]]

*Possible points to include:*

Another way is the requirement for a majority of voters in a majority of states to vote in favour of the proposed change acts as a check on parliamentary law-making, as it ensures the interests of the smaller states are protected, which in turn provides a check on the power of the more populated states (who dominate the House of Representatives).

LEVEL 3

**11.**

| | |
|---|---|
| ✓ ✗ | I have stated that the Commonwealth cannot insert this new law-making power in the Constitution.[1] |
| ✓ ✗ | I have identified the double majority requirement in a referendum as the limitation on the Commonwealth Parliament's power.[2] |
| ✓ ✗ | I have stated that the Commonwealth does first pass legislation to change the Constitution.[3] |
| ✓ ✗ | I have described accurately the double majority requirement for a referendum.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'voters', 'Commonwealth', etc. |

*Exemplar response*

[The Commonwealth Parliament cannot, on its own, pass legislation granting itself law-making power over road rules[1]] [because such a change to the words of the Constitution requires a referendum, with the double-majority requirement being satisfied, which works to limit the power of the parliament.[2]] [While the Commonwealth must first pass legislation to change the Constitution in this way,[3]] [it must then be put to the voters and receive a 'yes' vote from the majority of voters Australia-wide and the majority of voters in the majority of states.[4]]

**12.**

| | |
|---|---|
| ✓ ✗ | I have stated that the proposal to change the Constitution did not succeed.[1] |
| ✓ ✗ | I have identified that the double majority requirement is the reason the change did not occur.[2] |
| ✓ ✗ | I have described accurately the double-majority requirement (to achieve a 'yes' vote from the majority of voters Australia-wide and the majority of voters in the majority of states).[3] |
| ✓ ✗ | I have linked the double majority requirement to the facts of this referendum to conclude it did not succeed on the 'majority of voters in the majority of states' requirement.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'voters', 'Commonwealth', etc. |

*Exemplar response*

[This constitutional reform did not succeed,[1]] [as it did not meet the requirements of the double majority at the referendum.[2]] [The double majority requires that the proposed change to the Constitution is supported with a 'yes' vote from the majority of voters Australia-wide and a 'yes' vote from the majority of voters in the majority of states.[3]] [This proposal received a 'yes' from the majority Australia-wide, but with a 'yes' majority only in New South Wales and Victoria, it did not meet the second part of the double majority requirement, so the Constitution did not change.[4]]

**13.**

| | |
|---|---|
| ✓ ✗ | I have stated that the Commonwealth cannot remove s.44 from the Constitution.[1] |
| ✓ ✗ | I have identified the double majority requirement in a referendum as the limitation on the Commonwealth Parliament's power.[2] |
| ✓ ✗ | I have stated that the Commonwealth does first pass legislation to change the Constitution.[3] |
| ✓ ✗ | I have described accurately the double majority requirement at a referendum.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'voters', 'Commonwealth', etc. |

*Exemplar response*

[The Commonwealth Parliament cannot, on its own, pass legislation removing section 44[1]] [because such a change to the words of the Constitution requires a referendum, with the double-majority requirement being satisfied, which works to limit the power of the parliament.[2]] [While the Commonwealth must first pass legislation to change the Constitution in this way,[3]] [it must then be put to the voters and receive a 'yes' vote from the majority of voters Australia-wide and the majority of voters in the majority of states.[4]]

**14.**

| | |
|---|---|
| ✓ ✗ | I have described the High Court's role as the guardian of the Constitution.[1] |
| ✓ ✗ | I have stated the High Court's role as guardian of the Constitution acts as a limitation on parliament's power.[2] |
| ✓ ✗ | I have stated the Court can only act to limit parliament's power when a law is challenged.[3] |
| ✓ ✗ | I have stated these leaders have standing and can therefore challenge the law's validity in the High Court.[4] |
| ✓ ✗ | I have stated that some aspects of the new law breach s.116.[5] |
| ✓ ✗ | I have described how Parts 1 and 4 breach s.116.[6] |
| ✓ ✗ | I have stated that some aspects of the new law do not breach s.116.[7] |
| ✓ ✗ | I have described how Parts 2 & 3 do not breach s.116, as they do not restrict the free practice of religion.[8] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'standing', 'invalid', 'Commonwealth', etc. |

*Exemplar response*

[The High Court is 'guardian of the Constitution', meaning it declares invalid any law that infringes upon the principles and system of government the Constitution establishes.[1]][Therefore, it limits the parliament's power by striking down any law that breaches the Constitution,[2]][when such a law is challenged.[3]]

[I would advise the group of leaders that they can challenge the validity of this legislation in the High Court as they are affected by the law and therefore have standing.[4]][I would further advise these leaders that some aspects of the law would be declared invalid as they breach the express right to freedom of religion in section 116.[5]][Section 116 prevents the parliament from creating a religion or setting a religious test for an office in the Commonwealth, so parts 1 and 4 of the law would be declared invalid.[6]]

[However, I would advise the religious leaders that parts 2 and 3 do not breach section 116 of the Constitution.[7]][This is because section 116 protects the free practice of religion, and these parts of the new law do not restrict the free practice of religion.[8]]

**15.**

| | |
|---|---|
| ✓ ✗ | I have identified the first error in the passage (law giving parliament judicial power).[1] |
| ✓ ✗ | I have explained the separation of judicial power.[2] |
| ✓ ✗ | I have identified the second error in the passage (legislation passing one house only).[3] |
| ✓ ✗ | I have explained that legislation must pass both houses.[4] |
| ✓ ✗ | I have identified the third error in the passage (the High Court claiming it doesn't have the power to resolve this case).[5] |
| ✓ ✗ | I have described the High Court's role as the guardian of the Constitution, so it therefore must hear such a case.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'invalid', 'judicial power', etc. |

*Exemplar response*

[Firstly, the parliament cannot pass legislation granting itself the ability to hear criminal cases and impose sentences.[1]][Instead, the power to do so rests with the courts and under the separation of powers such authority cannot be exercised by the members of parliament or ministers.[2]][The second error is to suggest new legislation can be passed by only one house before gaining royal assent.[3]][The Constitution establishes a bicameral parliament to ensure new laws are debated and reviewed, and all legislation must be passed by the Senate as well as the House of Representatives.[4]]

[Finally, it is incorrect for the High Court to say that it can't resolve this dispute.[5]][As the guardian of the Constitution it has the role of declaring invalid any law that breaches the Constitution, including laws that breach the separation of powers.[6]]

LEVEL 4

**16.**

| | |
|---|---|
| ✓ ✗ | I have stated how effective the bicameral structure of parliament is as a limit on parliamentary power.[1] |
| ✓ ✗ | I have identified one reason the bicameral structure of parliament is an effective limit on parliamentary power.[2] |
| ✓ ✗ | I have described this strength, detailing how the bicameral structure limits the ability for laws to be rushed through parliament.[3] |
| ✓ ✗ | I have identified a second reason the bicameral structure of parliament is an effective limit on parliamentary power.[4] |
| ✓ ✗ | I have described this second strength, detailing how the bicameral structure is entrenched in the Constitution.[5] |
| ✓ ✗ | I have used signposting such as: 'however', to show I am discussing 'both sides'.[6] |
| ✓ ✗ | I have identified a limitation of the bicameral structure as a check on the power of the parliament.[7] |
| ✓ ✗ | I have described this limitation of the bicameral structure as a check on parliamentary power.[8] |
| ✓ ✗ | I have weighed these pros & cons and reached a conclusion about the effectiveness of bicameral structure as a check on parliamentary power. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Senate', 'bicameral', etc. |

*Exemplar response*

[The bicameral structure of parliament as established in the Constitution does provide an effective limitation on the power of the parliament.[1]]

[One reason for this is that the government of the day is usually able to easily pass legislation through the lower house quickly, as it holds the majority of seats.[2]] [The presence of a second house (the Senate) should ensure that new laws are appropriately debated, reviewed and considered before being changed. It is common for the upper house to be controlled by the opposition or the balance of power to be held by minor parties and independents, not the government. The opposition and minor parties often demand changes to legislation in return for their support, this ensures laws are just and appropriate. Further, this ensures radical changes that may not have enough support in the community can be blocked.[3]]

[A second reason is that this bicameral structure is entrenched in the Constitution. It could only be removed with the consent of the voters at a referendum, which is difficult to achieve).[4]] [Therefore, the parliament cannot itself remove the second house (even if the second house of parliament is making it very difficult for the government to pass legislation).[5]]

[However,[6]] [the bicameral structure may not always limit the power of the Commonwealth Parliament if the same party controls the majority of seats in both houses.[7]] [While this is rare, it can mean all legislation introduced by the government may pass with little or no debate and review, meaning the government's power is not limited by the presence of a second house of parliament.[8]]

[Given this is uncommon, the presence of two houses is a largely effective limit on the parliament's power.[9]]

**17.**

| | |
|---|---|
| ✓ ✗ | I have included a statement about whether I agree with the contention.[1] |
| ✓ ✗ | I have identified one weakness of the express rights as a limit on parliamentary power.[2] |
| ✓ ✗ | I have described this first weakness in detail.[3] |
| ✓ ✗ | I have identified a second weakness of the express rights as a limit on parliamentary power.[4] |
| ✓ ✗ | I have described this second weakness in detail.[5] |
| ✓ ✗ | I have used signposting such as: 'however', to show I am discussing 'both sides'.[6] |
| ✓ ✗ | I have identified one strength of the express rights in limiting parliamentary power.[7] |

| | |
|---|---|
| ✓ ✗ | I have described this first strength in detail.[8] |
| ✓ ✗ | I have identified a second strength of the express rights in limiting parliamentary power.[9] |
| ✓ ✗ | I have described this second strength in detail.[10] |
| ✓ ✗ | I have weighed these pros and cons and reached a conclusion about the effectiveness of express rights as a check on parliamentary power, linked to the contention.[11] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'express rights', 'entrenched', 'fully enforceable', etc. |

*Exemplar response*

[I agree with this statement to a large extent. Despite some benefits, the express rights in the Constitution provide only a limited check on parliamentary power.[1]]

[The first reason I agree the Constitution's provides a relatively small check on the power of the parliament is because there are so few rights protected,[2]][with only five express rights limiting parliamentary power.[3]]

[A further reason I agree the express rights provide a limited check on parliamentary power is these five express rights are very narrow in their operation.[4]][For example, s.116 provides for freedom of religion but only at the Commonwealth level, it does not limit the law-making powers of the states. Further, s.80 provides for trial by jury on Commonwealth indictable offences, but the Commonwealth decides which offences are indictable or summary, and most criminal law is made by the states.[5]]

[On the other hand,[6]][a reason why I believe the express rights provide some form of a check on parliamentary power is because they are entrenched in the Constitution,[7]][meaning they cannot be removed by the Commonwealth, only with the voters' consent in a referendum, and a successful referendum to alter or remove express rights is very difficult to achieve.[8]]

[Further, the express rights are fully enforceable,[9]][so any legislation breaching such rights will be declared invalid by the High Court when challenged.[10]]

[Despite these aspects of the express rights that do limit parliamentary power, the very small number of rights and their narrow operation lead me to agree to a large extent that they provide a limited check on parliamentary power.[11]]

# 4.1.4 High Court interpretations of the Australian Constitution



LEVEL 1

**1.** D

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have briefly outlined the purpose and function of High Court interpretation.[1] |
| ✓ ✗ | I have identified one advantage of High Court interpretation of the Constitution.[2] |
| ✓ ✗ | I have referenced one appropriate case.[3] |
| ✓ ✗ | I have explained how s.7 and s.24 were interpreted in the case I have selected.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'Constitution', etc. |

*Exemplar response*

[The High Court has jurisdiction to hear disputes involving the interpretation of the Constitution, whereby it can change the way words are interpreted and applied.[1]][One advantage of High Court interpretation is that it is a relatively efficient means of keeping the Constitution relevant and up-to-date. Giving meaning to the words of the Constitution within the context of current community standards ensures the Constitution is applied in line with the views and values of society.[2]][This was demonstrated in the case of *Roach v Electoral Commissioner* [2007][3]][in which a High Court interpretation found that sections 7 and 24 of the Constitution protect the notion of representative government. It was therefore found that a Commonwealth law preventing all prisoners from voting was invalid as it violated the notion of representative government.[4]]

*Possible points to include:*

Other advantages include:

- High Court Interpretation can help to guard against an abuse of power.
- High Court Interpretation can help to give meaning to words.

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have made a comment about the likely validity of this law.[1] |
| ✓ ✗ | I have described the High Court's reasoning in *Roach* regarding when the right to vote can be removed, referring to sections 7 & 24.[2] |
| ✓ ✗ | I have linked the facts of this case to the Roach decision to draw a conclusion about the law's validity.[3] |
| ✓ ✗ | I have stated that the law operates until challenged in the High Court.[4] |
| ✓ ✗ | I have stated that the law can only be challenged by a party with standing.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'standing', etc. |

*Exemplar response*

[This law would likely be declared invalid when challenged in the High Court.[1]][The *Roach* decision made clear that the Commonwealth can decide who can and cannot vote, however the ability to vote can only be taken away for a substantial reason. This is because sections 7 & 24 of the Constitution require the parliament to be chosen by a substantial majority of the community.[2]] [In this case, removing such a large group of voters due to their younger age would not be a 'substantial reason' and would therefore not be valid.[3]]

[This law would operate, however, until challenged in the High Court.[4]][Its validity would need to be challenged by a person with standing, such as an individual under 25 who was no longer able to vote.[5]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have defined the Court's role as the 'guardian of the Constitution'.[1] |
| ✓ ✗ | I have described the Court's decision in the Australian Capital Television.[2] |
| ✓ ✗ | I have linked the Court's decision to its role in protecting (i.e. upholding) the system of government established in the Constitution.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'invalid', 'implied right', etc. |

*Exemplar response*

[Acting as the 'guardian of the Constitution' means the High Court gives meaning to the words in the Constitution and, if necessary, declares invalid any law that infringes upon the principles and system of government the Constitution establishes. As such, it is protecting the system of government set up by the Constitution.[1]]

[The decision in Australian Capital Television is an example of this, as the Court held the Constitution includes an implied right of freedom of political communication, and legislation breaching this right was declared invalid.[2]] [Therefore, the High Court in this case protected an aspect of the system of government set up by the Constitution.[3]]

LEVEL 4

**5.**

| | |
|---|---|
| ✓ ✗ | I have made a statement in favour of the contention.[1] |
| ✓ ✗ | I have described the Court's judgement in a relevant case.[2] |
| ✓ ✗ | I have described how this aspect of the decision limits Commonwealth power.[3] |
| ✓ ✗ | I have used signposting such as 'however' to show I am discussing 'both sides'.[4] |
| ✓ ✗ | I have made a statement opposing the contention.[5] |
| ✓ ✗ | I have described further detail about the Court's judgement in a relevant case.[6] |
| ✓ ✗ | I have described how this aspect of the decision does not limit Commonwealth power.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Constitution', 'representative government', etc. |

*Exemplar response*

[In some ways, the Court's interpretation does limit the powers of the parliament.[1]] [For example, the High Court's interpretation of sections 7 & 24 in Australian Capital Television recognised the implied right to freedom of political communication, as being necessary to ensure representative government is achieved.[2]] [The Court will therefore declare invalid any laws that limit free political communication, limiting parliament's ability to prevent such communication.[3]]

[However,[4]] [the Court's interpretation in this case does not provide a big limitation on the Commonwealth's powers.[5]] [This is because the implied right only protects political communication, not free speech in general.[6]] [Therefore, the Commonwealth's power is only slightly limited by this interpretation.[7]]

*Possible points to include:*

An alternative case to discuss includes *Roach v Electoral Commissioner* [2007].

- For the contention: Decision in Roach limits Commonwealth power in that it cannot legislate to remove the vote except for a substantial reason.
- Against the contention: The decision confirmed the Commonwealth's ability to determine who may vote, so its power to do so is only limited partially.

# 4.1.5 Constitutional Referendums

LEVEL 1

**1.** B

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have described what a referendum is.[1] |
| ✓ ✗ | I have identified one referendum that either changed/protected the Constitution.[2] |
| ✓ ✗ | I have described in detail how the referendum I selected protected/changed the Constitution.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'amendment', 'Constitution', etc. |

*Exemplar response*

[A referendum is a proposal for Constitutional change that is presented to the voters for a compulsory yes/no vote. A successful referendum results in a change to the words in the Constitution.[1]][An example of a referendum to change the Constitution is the 1946 social services referendum.[2]][This successful referendum gave the Commonwealth Parliament law-making power over welfare payments including maternity allowances and unemployment benefits.[3]]

*Possible points to include:*

The unsuccessful 1988 referendum proposal to change Commonwealth parliamentary terms to be fixed, four year terms.

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have identified the role of the people as to vote in a referendum, a yes/no vote on the proposed change.[1] |
| ✓ ✗ | I have identified one factor that makes the proposal more likely to succeed.[2] |
| ✓ ✗ | I have explained how this factor makes the referendum more likely to receive the required level of support.[3] |
| ✓ ✗ | I have identified a second factor that makes the proposal more likely to succeed.[4] |
| ✓ ✗ | I have explained how this second factor makes the referendum more likely to receive the required level of support.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'bipartisan', 'referendum', etc. |

*Exemplar response*

[The role of the Australian people in changing the Constitution in this way is to vote in a referendum, a compulsory yes/no vote to change the words in the Constitution.[1]]

[One factor that would make this more likely to succeed is the proposal having bipartisan support, which means the endorsement of the two major political parties, which it may have in this instance.[2]][This would increase the likelihood of success as many voters will be likely to vote 'yes' if the political party they usually support is in favour of change. If both major parties support the change, this makes the high level of 'yes' votes needed to achieve the double majority more likely to be achieved.[3]]

[Secondly, such a proposal is more likely to succeed at a referendum if the vote is held separately from an election.[4]][If held with an election, voters are more likely to be thinking about choosing a government and give the proposal little thought, and therefore vote 'no'. However, if the referendum is a stand-alone vote, the voters can spend more time learning about and considering the proposal to change the Constitution, creating a greater likelihood of the required yes votes.[5]]

*Possible points to include:*

Factors that will make the proposal more likely to succeed:

- If it is well understood; voters are unlikely to support a proposed change to the Constitution they do not understand, but are more likely to vote yes if the proposal (and the benefits of change) are easy to understand.

- The timing of the referendum; if held with an election, voters are likely to give the proposed change little thought and therefore vote 'no'; if the referendum is held as a stand-alone vote it is likely to be better understood and considered, increasing the chances of the required support from voters.
- If the proposal has bipartisan support voters are more likely to vote 'yes' if the political party they usually support is in favour of the change (which it may have in this case).

LEVEL 4

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated an argument in favour of the prompt, regarding the people's role in changing Commonwealth power under the Constitution.[1] |
| ✓ ✗ | I have described this role of the people in detail.[2] |
| ✓ ✗ | I have provided a relevant example of the people changing (or protecting) Commonwealth power under the Constitution.[3] |
| ✓ ✗ | I have stated an argument against the prompt, regarding Commonwealth power under the Constitution changing without the people participating.[4] |
| ✓ ✗ | I have described this change process not involving the people in detail.[5] |
| ✓ ✗ | I have provided a relevant example of Commonwealth power under the Constitution changing without the people.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'voters', 'referendum', 'double majority', etc. |

*Exemplar response*

[One argument in favour of this statement is that the words in the constitution can only be changed with the consent of the voters in a referendum.[1]][This is a compulsory yes/no vote that must achieve the support of the majority of voters in Australia and the majority of voters in the majority of states to change the Commonwealth's powers in the constitution.[2]][An example of such a referendum was the 1946 referendum which gave the Commonwealth new law-making power over some welfare payments.[3]]

[One argument against this statement is that the Commonwealth's powers can also be changed by High Court interpretation of the Constitution, without the participation of the public.[4]][While this does not change the words of the Constitution it does change their operation, often expanding the Commonwealth's powers.[5]][For example, the decision in Tasmanian Dams increased Commonwealth law-making power at the end of a dispute between two levels of government, not involving the voters.[6]]

*Possible points to include:*

Arguments FOR the statement could also include:

- Provided an individual has standing, they can challenge Commonwealth legislation in the High Court and the outcome can change Commonwealth power under the Constitution; e.g. the outcome in *Roach v Electoral Commissioner* changed Commonwealth power regarding their ability to regulate voting.

Arguments AGAINST the statement could also include:

- Though the people are involved in changing the words of the constitution in a referendum, they cannot initiate the change. Legislation must first pass the Commonwealth Parliament, and the parliament is free to ignore public pressure to conduct a referendum.

# 4.1.6 The High Court and the division of constitutional law-making powers

## LEVEL 1

**1.** C

## LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have identified one relevant High Court case.[1] |
| ✓ ✗ | I have briefly detailed the facts of the case.[2] |
| ✓ ✗ | I have detailed what the decision was in the case.[3] |
| ✓ ✗ | I have detailed how the decision in this case impacted on the division of law-making power.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'interpretation', etc. |

*Exemplar response*

[One High Court decision that has had an impact on the division of law-making power was made in *R v Brislan* [1935].[1]] [In this case the High Court's interpretation of s.51(v) of the Constitution expanded the definition of a 'postal, telegraphic... and other like service' to encompass wireless radios.[2]] [This decision meant that Commonwealth Parliament would now have jurisdiction over any new technology that serves as a form of communication,[3]] [thereby extending Commonwealth law-making power at the expense of the states.[4]]

*Possible points to include:*

Other appropriate cases include:

- *Commonwealth v Tasmania* [1983] 'Tasmanian Dams Case'
- *Victoria v Commonwealth* [1926] 'Roads Case'

## LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated the Victorian government does not have to take this grant.[1] |
| ✓ ✗ | I have explained why a state is likely to usually accept such grants, due to financial dependence on the Commonwealth (or similar).[2] |
| ✓ ✗ | I have stated that the challenge is unlikely to succeed.[3] |
| ✓ ✗ | I have described the High Court's interpretation of the Constitution in the *Roads Case*.[4] |
| ✓ ✗ | I have linked the decision in the *Roads Case* to the facts in this case, to conclude the likely outcome the grant is valid.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'tied grant', 'High Court', 'residual powers', etc. |

*Exemplar response*

[The Victorian government does not have to accept such a grant from the Commonwealth,[1]] [however due to the states' financial dependence on the Commonwealth, in many cases like this the states will accept a grant that includes conditions entering into the residual powers.[2]]

[Such a challenge is unlikely to succeed.[3]] [As the High Court stated in the Roads case the Commonwealth is able to pass legislation granting funds to the states with any conditions attached, including conditions that enter into the residual powers. This is called a 'tied grant' and can be made under s.96 of the Constitution.[4]] [Given this interpretation of the Constitution in the Roads case, the grant in this question requiring Victoria to spend the money on hospitals is likely to be valid, even though it enters the residual powers.[5]]

LEVEL 4

**4.**

| | |
|---|---|
| ✓ ✗ | I have described how the Court can change the division of powers through interpretation.[1] |
| ✓ ✗ | I have made a comment about the impact of this interpretation on the division of powers.[2] |
| ✓ ✗ | I have used an example to illustrate the impact of interpretation on the division of powers.[3] |
| ✓ ✗ | I have used linking words such as 'however' or 'having said that' or 'it is important to note though' to signpost both sides of the analysis.[4] |
| ✓ ✗ | I have described one limitation on the Court's ability to change the division of powers.[5] |
| ✓ ✗ | I have described a second limitation on the Court's ability to change the division of powers.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'tied grant', 'High Court', 'interpretation', etc. |

*Exemplar response*

[The High Court is able to change the division of law-making powers through interpreting the words in the Constitution.[1]][By giving a broad meaning to the powers granted to the Commonwealth in the Constitution, it has tended to shift law-making power from the states to the Commonwealth.[2]]

[For example, in the *Tasmanian Dams Case* the High Court decided the external affairs power gives the Commonwealth the ability to enter international treaties pass laws that give effect to those treaties, allowing the Commonwealth to pass laws on any matter within a treaty it has signed, even if that law is about a topic that enters into the states' residual powers.[3]]

[However,[4]][the High Court's ability to change the division of powers is limited in that it can only do so in response to a relevant case being brought before it requiring interpretation of the Constitution. It cannot initiate a change in the division of powers.[5]]

[Further, the High Court cannot change the words in the Constitution, that must be done by referendum. The Court can only interpret and give meaning to the words in the Constitution.[6]]

*Possible points to include:*

Students could also discuss the *Roads Case* as an example of High Court interpretation, in which the Court held that section 96 allows the Commonwealth to make grants to the states that instruct the state on how to use the grant (called a 'tied grant'), even if such instructions enter into the residual powers.

Additional limitations on the Court's ability to change the division of powers include:

- Cases requiring an interpretation of the Constitution that may lead to a change in the division of powers must be brought by a party that has standing.
- To pursue a case in the High Court that leads to a change in constitutional power is very time-consuming and costly for the parties involved, meaning those with standing may not take such action (leading to no change in constitutional power).

# 4.1.7 External affairs power

LEVEL 1

**1.** B

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have described the impact of the Court's interpretation of the external affairs power upon the division of powers.[1] |
| ✓ ✗ | I have identified a relevant case interpreting the external affairs powers.[2] |
| ✓ ✗ | I have described how the Court broadly interpreted the external affairs power with reference to a treaty and the impact on the division of powers.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'treaty', etc. |

*Exemplar response*

[The High Court has given the external affairs power a very broad interpretation, changing the division of powers by increasing the law-making powers of the Commonwealth.[1]] [An example of this interpretation is in the *Tasmanian Dams* case.[2]] [The High Court's decision was that the external affairs power allows the Commonwealth to pass laws on all matters contained in a treaty it has signed, even if those laws enter into the residual powers.[3]]

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have described residual powers as the law-making powers left to the states (or similar).[1] |
| ✓ ✗ | I have described how the external affairs power enables legislation on matters within the residual powers when ratifying a treaty.[2] |
| ✓ ✗ | I have supported this conclusion by describing a relevant High Court decision in which this interpretation of the external affairs power was provided.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'treaty', 'High Court', 'residual powers', etc. |

*Exemplar response*

[Residual powers are the law-making powers of the states. This includes law-making on all matters not granted to the Commonwealth in the Constitution.[1]]

[The external affairs power would enable the Commonwealth to make laws on matters within the residual powers, such as environmental protection, if the Commonwealth was passing legislation to ratify a treaty.[2]]

[This is because the High Court has interpreted the external affairs power very broadly in cases such as the *Tasmanian Dams* case. In this case the Court decided the external affairs power allows the Commonwealth to pass laws on any matter that is the subject of a treaty it has signed, even if it is on a topic that enters into the residual powers.[3]]

*Possible points to include:*

Other cases students could refer to regarding the broad interpretation of the external affairs power include:

- *R v Burgess; Ex parte Henry* [1936]
- *Koowarta v Bjelke-Petersen* [1982]

LEVEL 4

**4.**

| | |
|---|---|
| ✓ ✗ | I have described how the interpretation of the external affairs power regarding the impact of treaties has increased Commonwealth power.[1] |
| ✓ ✗ | I have explained the High Court's interpretation of the external affairs power.[2] |
| ✓ ✗ | I have described a relevant decision of the High Court to support this statement about the Commonwealth's law-making ability under the external affairs power.[3] |
| ✓ ✗ | I have signposted my answer with 'however' (or similar) to show that I am discussing 'both sides'.[4] |
| ✓ ✗ | I have described a limitation on the Commonwealth's powers under the external affairs power.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'treaty', 'High Court', 'external affairs power', etc. |

*Exemplar response*

[Australia's commitment to a large number of international treaties has had a very significant impact on the division of powers, by increasing the Commonwealth's law-making power.[1]]

[Signing a treaty with another nation in itself does not impact on Australian law. However, the High Court has held that under the external affairs power, the Commonwealth is able to pass laws to give effect to the commitments made within a treaty, even if that law is on a topic within residual powers of the states.[2]][For example, the Court decided in Tasmanian Dams that the Commonwealth could pass laws regarding environmental protection as it had signed a treaty on this matter, despite environmental protection being a residual power of the states.[3]]

[However, this increase in Commonwealth power is not unlimited.[4]][The High Court has stated that the external affairs power only gives the Commonwealth power to make laws to give effect to the commitments made in the treaty, rather than being a wide power to make laws of any kind on the subject within the treaty.[5]]

*Possible points to include:*

Alternative cases could be used as examples of this interpretation of the external affairs power, such as:

- *Koowarta v Bjelke-Petersen* [1982]

# AOS Questions: Unit 4 AOS 1

LEVEL 5

**1.**

| | |
|---|---|
| ✓ ✗ | I have indicated 'how much' I agree with the statement i.e. to a large/certain/limited extent.[1] |
| ✓ ✗ | I have identified a check on the power of the Commonwealth Parliament.[2] |
| ✓ ✗ | I have described this first check on the power of the Commonwealth Parliament.[3] |
| ✓ ✗ | I have identified a second check on the power of the Commonwealth Parliament.[4] |
| ✓ ✗ | I have described this second check on the power of the Commonwealth Parliament.[5] |
| ✓ ✗ | I have used a term such as 'however' or 'yet' or similar, to show contrast and moving to the other side of the discussion.[6] |
| ✓ ✗ | I have identified one check on the power of the states.[7] |
| ✓ ✗ | I have described this first check on the power of the states.[8] |
| ✓ ✗ | I have identified a second check on the power of the states.[9] |
| ✓ ✗ | I have described this second check on the power of the states.[10] |
| ✓ ✗ | I have concluded the discussion by linking back to the prompt.[11] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'firstly', 'this is because', 'secondly','however', 'further', 'therefore', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'exclusive', 'concurrent', 'residual', 'express rights', 'Commonwealth Parliament', etc. |

*Exemplar response*

[I agree partially with the above statement, because while the Constitution does limit the power of the Commonwealth, it also limits the powers of the states.[1]]

[The Commonwealth Parliament does not have unlimited law-making power and faces restrictions, such as in areas of residual power.[2]] [The Commonwealth Parliament is not able to make law in areas of residual power, such as education, as only state parliaments can make laws in such areas.[3]]

[Further, the law-making powers of the Commonwealth Parliament are restricted by the express rights.[4]] [For example, the Commonwealth Parliament may not make laws restrict the free practice of religion (s. 116). Commonwealth laws that breach the express rights will be declared invalid.[5]]

[However,[6]] [the Australian Constitution also places limits on the powers of the states, who are restricted from making law in areas of exclusive power.[7]] [Exclusive law-making powers such as the power to impose custom and excise duties (s. 90) may only be exercised by the Commonwealth Parliament.[8]]

[Secondly, despite the ability of states to make law in areas of concurrent power they are restricted by the operation of s.109 of the Constitution.[9]] [Section 109 states in the event that state and Commonwealth laws are inconsistent the Commonwealth law prevails and the State law is invalidated to the extent that it conflicts with a Commonwealth law, limiting the ability of state to make law in areas of concurrent power.[10]]

[Therefore, whilst it is correct to say the Commonwealth Parliament is restricted, the Constitution also limits the powers of the states.[11]]

*Possible points to include:*

Other limits on Commonwealth power (created by the Constitution) that could be discussed are

- The bicameral structure of the Commonwealth parliament
- The double-majority provision
- The separation of powers principle
- The High Court's ability to interpret the legislation and declare invalid legislation that is unconstitutional

Other limits on state power (created by the Constitution) that could be discussed are

- The High Court's ability to interpret the legislation and declare invalid legislation that is unconstitutional
- Some express rights apply to the states (ss. 92 and 117)

**2.**

| | |
|---|---|
| ✓ ✗ | I have defined exclusive powers of the Commonwealth.[1] |
| ✓ ✗ | I have given an example of exclusive powers.[2] |
| ✓ ✗ | I have defined residual powers of the states.[3] |
| ✓ ✗ | I have given an example of residual powers.[4] |
| ✓ ✗ | I have defined concurrent powers shared by the states and Commonwealth.[5] |
| ✓ ✗ | I have given an example of concurrent powers.[6] |
| ✓ ✗ | I have made an overall comment about the people's role in changing the Constitutional division of powers.[7] |
| ✓ ✗ | I have described one positive aspect about the people's role in changing the division of powers/way the people can affect change in the division of powers.[8] |
| ✓ ✗ | I have described a second positive aspect about the people's role in changing the division of powers/way the people can affect change in the division of powers.[9] |
| ✓ ✗ | I have used a term such as 'however' or 'yet' or similar to show my discussion includes both sides.[10] |
| ✓ ✗ | I have described one negative aspect about the people's role in changing the division of powers/limit to the way the people can affect change in the division of powers.[11] |
| ✓ ✗ | I have described a second negative aspect about the people's role in changing the division of powers/limit to the way the people can affect change in the division of powers.[12] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'this is because', 'firstly', 'secondly' etc. |
| ✓ ✗ | I have avoided re-using terms I am defining such as: 'exclusive'. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'referendum', 'Constitution', 'parliament', etc. |

*Exemplar response*

[The Constitution gives some law-making powers to the Commonwealth that only the Commonwealth can exercise, called the exclusive powers.[1]][For example, law making about currency.[2]][Some law-making powers are given only to the states, called residual powers,[3]] [such as law-making about crime.[4]][Other law-making powers are shared between the states and the Commonwealth, called the concurrent powers,[5]][such as law making about tax.[6]]

[The people can have a role in the changing of the division of powers, but it's limited overall.[7]]

[One way the people can have a role in changing the constitutional division of powers is by voting in a referendum, as this is necessary to change the words in the Constitution.[8]]

[Another way the people can have a role in changing the division of powers is by challenging in the High Court the validity of legislation, as the Court's interpretation of the words in the Constitution when resolving such a case might lead to a change in the division of powers, by altering what the Commonwealth and states can make laws on.[9]]

[However,[10]][the role of the people is limited in that they cannot initiate any change in the wording of the Constitution, it is up to the parliament to start the referendum process by first passing legislation before the yes/no vote is held.[11]]

[Another way the people's role in changing the division of powers is limited is that to challenge legislation in the High Court, a person must have standing. Only a person actually affected by a law may test its validity in the Court, restricting who can use this as a way to impact the division of powers.[12]]

*Possible points to include:*

Other ways the people can have a role in changing the division of powers

- Pressuring members of parliament to introduce laws that begin the process of constitutional change, such as using social media or petitions

Other ways the people have a limited role in changing the division of powers

- The people have generally voted 'no' to almost all proposed changes to the division of powers at referendums.
- There is some evidence that many voters don't understand the Constitution and the process of changing it.
- To challenge legislation in the High Court is both expensive and time-consuming – so a person seeking to do so (and potentially impact the division of powers) must have money and time, as well as standing.

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated why the first statement is incorrect.[1] |
| ✓ ✗ | I have described the correct role of the House of Representatives regarding the formation of government.[2] |
| ✓ ✗ | I have stated why the second statement is incorrect.[3] |
| ✓ ✗ | I have described the correct procedure about the resolution of inconsistencies between state and Commonwealth law.[4] |
| ✓ ✗ | I have stated why the third statement is partially correct.[5] |
| ✓ ✗ | I have described how the double majority does restrict Commonwealth power.[6] |
| ✓ ✗ | I have used a term such as 'however' or 'yet' or similar to show my discussion includes 'both sides'.[7] |
| ✓ ✗ | I have described a way the double majority does not restrict Commonwealth power.[8] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'first statement is', 'this is because', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'House of Representatives', 'referendum', 'section 109', etc. |

*Exemplar response*

[The first statement is incorrect because the Legislative Assembly is not the only house responsible for the formation of government.[1]] [The House of Representatives is also responsible for the formation of government, but in the Commonwealth Parliament.[2]]

[The next statement about conflicting laws is incorrect,[3]] [because the Commonwealth law will prevail over the state law to the extent of the inconsistency due to the operation of section 109.[4]]

[The final comment about the double majority requirement is partially correct, in that it does restrict Commonwealth power but only in a limited way.[5]] [It is correct in that the double majority requirement in section 128 means the Commonwealth cannot change the words in the Constitution without the consent of the majority of voters, spread across a majority of states, so limits their power to change the Constitution.[6]] [But,[7]] [it only limits their power somewhat, because it applies only to changes in the Constitution, the Commonwealth does not need the consent of the voters to pass laws on any other topic within their jurisdiction.[8]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have identified one way in which the Constitution acts as a check on parliament.[1] |
| ✓ ✗ | I have provided a statement of evaluation.[2] |
| ✓ ✗ | I have described one strength of this check.[3] |
| ✓ ✗ | I have described a second strength of this check.[4] |
| ✓ ✗ | I have described one weakness of this check.[5] |
| ✓ ✗ | I have described a second weakness of this check.[6] |
| ✓ ✗ | I have identified a second way in which the Constitution acts as a check on parliament.[7] |

| | |
|---|---|
| ✓ ✗ | I have provided a statement of evaluation.[8] |
| ✓ ✗ | I have described one strength of this check.[9] |
| ✓ ✗ | I have described a second strength of this check.[10] |
| ✓ ✗ | I have described one weakness of this check.[11] |
| ✓ ✗ | I have described a second weakness of this check.[12] |
| ✓ ✗ | I have signposted my response appropriately, such as 'one way', 'furthermore', however', 'moreover', etc. |
| ✓ ✗ | I have made reference to the appropriate sections of the Australian Constitution throughout my response. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Constitution', 'parliament', etc. |

*Exemplar response*

[One way in which the Australian Constitution acts as a check on the law-making power of parliament is through the bicameral structure of parliament.[1]]

[The Constitution provides a significant check on the law-making ability of parliament by ensuring the existence of a bicameral Commonwealth Parliament. However, this check may be limited in some situations.[2]]

[The inclusion of a second house of parliament (the Senate) ensures all bills are reviewed and debated, to prevent the government of the day from altering the law dramatically without sufficient scrutiny.[3]] [Furthermore, the requirement for a bicameral structure in the Commonwealth Parliament is specifically stated in the Constitution (Section1), preventing parliament from passing legislation which abolishes either house. Thus, the bicameral structure will continue to act as a check on parliament unless the wording of the constitution is successfully changed through a referendum.[4]]

[However, it is possible in some cases for one political party to hold a majority of seats in both the upper and lower houses of parliament. This allows for government legislation to be easily passed through both houses with little debate or review, limiting the ability of the bicameral structure to act as a check on parliament.[5]] [Moreover, the Constitution does not require that state parliaments in Australia be bicameral, only the Commonwealth. Thus, this check on parliamentary law-making does not extend to the states.[6]]

[Another way in which the Constitution acts as a check on parliamentary law-making is through the double majority requirement for a successful referendum.[7]]

[The requirement for a double majority referendum places a significant limitation on the ability of parliament to change the wording of the constitution, however, it does not extend to other areas of parliamentary law-making and is therefore limited in its ability to act as a check.[8]]

[The referendum process (set out in Section 128 of the Constitution) acts as a check on parliament by preventing the Commonwealth Parliament from changing the division of powers, express rights and all other aspects of our system of government laid out in the Constitution, unless such change also has the consent of the voters in a compulsory yes/no vote. This enables Australian voters to veto any constitutional change the Commonwealth Parliament approves of.[9]] [Furthermore, the limitation is more significant because the double majority provision is so difficult to achieve – particularly the need to have support from the majority of voters in the majority of states.[10]]

[On the other hand, the double-majority requirement does not really limit parliamentary power, because it applies only to constitutional change. The Commonwealth Parliament is free to legislate on all other matters within its jurisdiction without needing to put a proposal to the voters and gain the required double majority.[11]] [Additionally, even though the double majority limits the ability of the Commonwealth Parliament to change the words of the Australian Constitution, the day-to-day operation of the Constitution (especially the division of law-making powers) has been changed significantly through High Court interpretation of those words.[12]]

*Possible points to include:*

Other possible ways in which the Australian Constitution acts as a check on the law-making power of parliament:

**Separation of powers.**

- Strengths:
  - Judiciary is independent of parliament and executive, ensuring that judges can determine whether legislation breaches the constitution, based on law not politics.
  - Separation of powers is enshrined in the Constitution and cannot be changed without a referendum.

- Weaknesses:
  - In practice, the legislative and executive powers overlap.
  - The Constitution does not require a separation of powers at state level.

**Express protection of rights.**

- Strengths:
  - Laws breaching these express rights will be declared invalid when challenged in the High Court of Australia.
  - Express rights are enshrined in the Constitution and can only be changed through referendum.
- Weaknesses:
  - Express rights are relatively limited and narrow in scope.
  - A law breaching an express right operates until it is challenged in the High Court; this is time-consuming and expensive.

# 4.2.1 Parliamentary law-making

LEVEL 1

**1.** C **2.** D **3.** B **4.** B

LEVEL 2

**5.**

| | |
|---|---|
| ✓ ✗ | I have described when a 'hostile Senate' occurs.[1] |
| ✓ ✗ | I have defined what a 'hostile Senate' is.[2] |
| ✓ ✗ | I have detailed the impact that a 'hostile Senate' generally has on law-making.[3] |
| ✓ ✗ | I have used a linking word to demonstrate contrast such as: 'however', 'whereas', 'in contrast' etc.[4] |
| ✓ ✗ | I have described when a 'rubber-stamp Senate' occurs.[5] |
| ✓ ✗ | I have defined what a 'rubber-stamp Senate' is.[6] |
| ✓ ✗ | I have detailed the impact that a 'rubber-stamp Senate' generally has on law-making.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'bill', etc. |

*Exemplar response*

[A hostile Senate often occurs when government does not hold the majority of seats in the upper house.[1]][A hostile Senate often serves an obstructive function, limiting the ability of the government (and hence Parliament) to pass laws.[2]][While this undermines the supremacy of Parliament as a law-making body, it also leads to greater scrutiny of proposed bills to ensure that due consideration is given before bills become laws.[3]][In contrast,[4]][a rubber-stamp Senate often occurs when the government holds the majority of seats in both the lower and upper houses.[5]][Unlike a hostile Senate, this situation greatly facilitates the ease with which the government can create laws to implement its policies that are likely to reflect the views of the majority of the public.[6]][Although this aids the efficiency of Parliament as a law-making body, it also limits the potential for the opposition to provide a check and balance on the government.[7]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have described the representative nature of Parliament.[1] |
| ✓ ✗ | I have described why it is necessary to have a representative Parliament, so that laws created are consistent with the current views of the majority.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Parliament', 'democracy', etc. |

*Exemplar response*

[Within a representative democracy it is necessary to uphold the representative nature of Parliament, ensuring Australian people maintain involvement in the governing of their country.[1]][This helps to ensure that laws created by elected representatives are consistent with the views, values and interests of the Australian people who must abide by them. If elected representatives fail to represent the views of the majority of voters they risk losing their seat at the next election.[2]]

**7.**

- ✓ ✗ I have defined 'political pressures'.[1]
- ✓ ✗ I have detailed how political pressures can aid in the process of parliamentary law-making.[2]
- ✓ ✗ I have used a linking word/phrase to transition into the next part of my analysis: 'however', 'whereas' etc.[3]
- ✓ ✗ I have detailed how political pressures can inhibit the process of parliamentary law-making.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'parliament', 'voters', etc.

*Exemplar response*

[Political pressures are the actions of political parties, Australian organisations (such as business groups, trade unions or religious bodies) and international bodies (like the United Nations) that seek to influence how laws are changed in Australia.[1]][Political pressures can assist in the process of law-making as they ensure that politicians remain representative of the people and hence that laws passed by Parliament reflect current community standards, not just the opinions of those in power.[2]][However,[3]][it can also be said that political pressures can inhibit the efficiency of law-making as the fear of losing voters can lead politicians to be reluctant to take action on controversial issues.[4]]

**8.**

- ✓ ✗ I have stated that the bill would not be passed.[1]
- ✓ ✗ I have justified this conclusion by stating education is a residual power, so the power to make law in this area rests with the states.[2]
- ✓ ✗ I have noted that as education is a residual power it's vested with the states and as such Federal Parliament cannot legislate in areas of residual power.[3]
- ✓ ✗ I have stated that the House of Representatives could therefore not initiate this bill.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'parliament', 'ultra vires', etc.

*Exemplar response*

[This bill would not be valid.[1]][According to the division of powers as prescribed by the Commonwealth Constitution, residual powers belong to the states[2]][and hence Federal Parliament is restricted from making laws in this area (such as in education).[3]][Therefore the House of Representatives could not initiate this bill as it would be deemed ultra vires.[4]]

LEVEL 3

**9.**

- ✓ ✗ I have identified one error in the scenario.[1]
- ✓ ✗ I have provided a correction for the first error.[2]
- ✓ ✗ I have identified a second error in the scenario.[3]
- ✓ ✗ I have provided a correction for the second error.[4]
- ✓ ✗ I have identified a third error in the scenario.[5]
- ✓ ✗ I have provided a correction for the third error.[6]
- ✓ ✗ I have identified a fourth error in the scenario.[7]
- ✓ ✗ I have provided a correction for the fourth error.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'government bill', 'private member's bill', 'Constitution', 'ultra vires', etc.

*Exemplar response*

[The first error is the Commonwealth Parliament is restricted from passing legislation that would impose a national religion.[1]] [Section 116 of the Constitution states the Commonwealth is unable to establish a religion, impose religious observance, prohibit free exercise of religion or impose a religious test as a requirement for public office.[2]]

[The second error is that the bill was a government bill introduced by an independent member.[3]] [If a bill is a government bill it is introduced by the government while if it is introduced by an independent member it is referred to as a private member's bill.[4]]

[The third error is the Commonwealth Parliament is restricted from passing legislation in areas of residual powers such as education.[5]] [Residual powers were those not outlined in the Constitution and consequently remained with the states at Federation. Education is a residual power and the Commonwealth cannot pass legislation in that area.[6]]

[This fourth and final error is that Sally is challenging the legislation through the Victorian Supreme Court.[7]] [If a Commonwealth law is to be challenged it is done so through the High Court. The High Court determines if legislation is ultra vires, that is outside the law-making power of Parliament.[8]]

**10.**

| | |
|---|---|
| ✓ ✗ | I have described one domestic pressure and included an example.[1] |
| ✓ ✗ | I have used a contrasting word to show the point of difference.[2] |
| ✓ ✗ | I have described one international pressure and included an example.[3] |
| ✓ ✗ | I have described a second domestic pressure and included an example.[4] |
| ✓ ✗ | I have used a contrasting word to show the point of difference.[5] |
| ✓ ✗ | I have described a second international pressure and included a difference.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'lobby', 'legislative change', 'treaties', etc. |

*Exemplar response*

[One difference between domestic and international political pressures is that domestic pressures may include individuals or groups who can adopt a method of influencing legislative change such as demonstrations, signing petitions and lobbying the government for law reform. For example, the Australian Marriage Equality campaign advocated for marriage equality within Australia, through demonstrations and raising public awareness of the issue.[1]] [While[2]] [international pressures can include influences from more formal organisations such as the United Nations. As outlined above, an example of this is the United Nations condemnation on Australia's offshore processing system which they believe to be cruel and inhumane.[3]]

[A second difference between these political pressures is that domestic pressures can come in the form of financial donations. Whilst not guaranteeing legislative change in favour of the benefactor it is likely to persuade law reform. For example, in the lead up to the 2016 Federal election nearly $1 million was donated to political parties from fossil fuel donors.[4]] [On the other hand[5]], [international pressures can include more formal structures such as international law, rather than money. International treaties to which Australia is a signatory can impact on the development of domestic law such as Convention on the Rights of the Child (1989) which prompted the release of the children from offshore detention centres in 2016.[6]]

*Possible points to include:*

Domestic pressures:

- Government may be reluctant to pass legislation in areas that are considered controversial such as voluntary euthanasia.
- Government may pass laws to ensure they receive votes at the next election such as abolishing the carbon tax and providing tax cuts in the lead up to an election.

International pressures:

- Interactions with other countries, particularly in the area of trade can influence law-making to ensure trading partners are fostered.
- Global events such as the Global Financial Crisis can impact on the development of laws domestically.

LEVEL 4

**11.**

| | |
|---|---|
| ✓ ✗ | I have stated a contention indicating whether the Senate is effective in the law-making process.[1] |
| ✓ ✗ | I have described one way in which the Senate is effective in law-making.[2] |
| ✓ ✗ | I have included an example to support my reasoning.[3] |
| ✓ ✗ | I have included a contrasting linking word.[4] |
| ✓ ✗ | I have described the corresponding way in which the Senate is limited in law-making.[5] |
| ✓ ✗ | I have included an example to support my reasoning.[6] |
| ✓ ✗ | I have described a second way in which the Senate is effective in law-making.[7] |
| ✓ ✗ | I have included an example to support my reasoning.[8] |
| ✓ ✗ | I have included a contrasting linking word.[9] |
| ✓ ✗ | I have described the corresponding way in which the Senate is limited in law-making.[10] |
| ✓ ✗ | I have included an example to support my reasoning.[11] |
| ✓ ✗ | I have included a conclusion weighing up the strengths against the weaknesses.[12] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'rubber stamp', 'hostile Senate', 'States House', etc. |

*Exemplar response*

[The Senate is limited in its effectiveness in the law-making process as there could be a hostile Senate, the opposition could have the majority and it no longer acts as a 'States House'.[1]]

[The Senate is effective in law-making as they can act as a house of review, meaning when the opposition holds the majority in the Senate they are likely to more effectively critique the bill seeking to ensure it is in the best interest of the people.[2]][For example the Senate may make amendments and convey to the House of Representatives that they won't pass a bills unless the amendments are agreed to.[3]][However[4]][the Senate may not be effective in law-making if they act as a 'rubber stamp', that is, if the government holds the majority of seats in the Senate, although this is not commonplace, or if they are 'hostile', that is, if the opposition has the majority in the Senate and they refuse to pass legislation.[5]][It may be argued the Senate acted as a 'rubber stamp' in 2004–2007 when the Liberal government held the majority in the Senate and there was recently a hostile Senate which blocked the ABCC reforms which prompted Turnbull to call an election in 2016.[6]]

[A second reason the Senate is effective in law-making is that it acts as the 'states' house', composed of 12 Senators from each state and two from each of the territories.[7]][The states are equally represented and the role of the Senators is to represent the interests of the states. This is Constitutionally recognised and provided protections at the time of Federation to overcome the concern that the more populated states would dominate law-making.[8]]

[In reality however,[9]][the Senate is made up of various smaller parties and independents, who tend to vote along party lines, as do Senators from the major parties, rather than in the in accordance with the states.[10]][For example the proportional voting system enables smaller parties and independents to be elected who tend to focus on more narrow policy issues, although this does enable a broad range of perspectives to be considered when debating legislation.[11]]

[While the Senate can act as a house of review and be a 'States House' it's effectiveness is limited if there is a hostile Senate, if the government has a majority in the Senate and as the 'States House' because most members tend to vote along party lines. Therefore, it is limited in its effectiveness in law-making process.[12]]

*Possible points to include:*

Effectiveness:

- Can also initiate bills

Weakness:

- Cannot introduce appropriation bills

**12.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent to which a minority government is effective.[1] |
| ✓ ✗ | I have described one way in which a minority government can effectively govern.[2] |
| ✓ ✗ | I have used a contrasting linking word.[3] |
| ✓ ✗ | I have described the corresponding way in which a minority government is less able to effectively govern.[4] |
| ✓ ✗ | I have described a second way in which a minority government can effectively govern.[5] |
| ✓ ✗ | I have used a contrasting linking word.[6] |
| ✓ ✗ | I have described the corresponding way in which a minority government is less able to effectively govern.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'minority government', 'govern', 'legislation', etc. |

*Exemplar response*

[A minority government can be effective to a great extent, as evident through the Gillard minority government.[1]]

[A minority government, for example, the Gillard government, can effectively govern and this can be seen through the significant amount of legislation that was passed while she was in government, for example 432 bills were passed while she held the minority government.[2]] [On the other hand,[3]] [minority governments can be challenging to manage in that there needs to be strong negotiation skills between the minority parties, independents and the Prime Minister. This can be time-consuming which can limit the effectiveness of parliament in responding to social issues.[4]]

[A second way in which a minority government if effective is that is enabled greater collaboration with different parties and independents. This would ensure there is greater debate and more thorough discussion surrounding the bills which means they essentially would be better for the people.[5]] [However,[6]] [while legislation may still pass it might be watered down in order to appease the independents or minority parties and therefore not fully reflect the broader needs or interests of the people such as the diluted pokie reform legislation, instead focusing on the narrow section of society represented by independents and minor parties.[7]]

# 4.2.2 Roles of the Victorian Courts and the High Court in law-making

LEVEL 1

**1.** D **2.** A

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated that the County Court judge will be able to avoid applying the precedent.[1] |
| ✓ ✗ | I have referenced the fact that the County Court judge is presiding over a Victorian Court.[2] |
| ✓ ✗ | I have referenced the fact that the precedent is not binding on the Victorian County Court as it was established in a different court hierarchy.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'binding', 'court hierarchy', etc. |

*Exemplar response*

[The County Court judge will be able to successfully avoid applying this precedent because it is not binding on this court.[1]][As the judge is presiding over a case in Melbourne, and therefore over a court within the Victorian court hierarchy,[2]][the precedent is not binding on the Victorian County Court as it was established in a different court hierarchy.[3]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated whether I agree or disagree with the statement.[1] |
| ✓ ✗ | I have justified this conclusion by stating that we can learn about distinguishing in Victorian courts but not the High Court.[2] |
| ✓ ✗ | I have explained that the High Court does not need to distinguish the facts of one case from another, as it is free to reverse and overrule precedents.[3] |
| ✓ ✗ | I have explained that Victorian courts may be bound to follow precedents from earlier decisions in higher courts, unless judges can distinguish facts in the present case and the earlier case in which the precedent was established.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'High Court', 'precedent', etc. |

*Exemplar response*

[I agree with this statement.[1]][This is because Victorian courts may need to distinguish the facts of current and earlier cases to avoid following a precedent, which the High Court does not need to do.[2]]

[This is because the High Court is not bound to follow any previous decisions, it does not need to distinguish between the facts of one case and an earlier case to avoid applying precedent, it can reverse and overrule precedents set in earlier cases, even if the facts are the same.[3]]

[By contrast, Victorian courts may be bound to follow precedents from earlier decisions in higher courts, unless judges can distinguish facts in the present case and the earlier case in which the precedent was established.[4]]

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have identified one error in the scenario.[1] |
| ✓ ✗ | I have provided a correction for the first error.[2] |
| ✓ ✗ | I have identified a second error in the scenario.[3] |

| | |
|---|---|
| ✓ ✗ | I have provided a correction for the second error.[4] |
| ✓ ✗ | I have identified a third error in the scenario.[5] |
| ✓ ✗ | I have provided a correction for the third error.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'overruling', 'reversing', 'ratio decidendi', 'obiter dictum', 'binding precedent', etc. |

*Exemplar response*

[The first error is the decision was overruled on appeal to the Victorian Supreme Court of Appeal.[1]][Overruling is when a court changes a principle of law made in a decision by a lower court, from an earlier case to the one before them. If it is the same case on appeal then the court changing the decision is referred to a reversing.[2]]

[The second error is that the High Court of Australia is bound by a decision of the English House of Lords.[3]][Precedent from different jurisdictions, such as overseas or interstate, are not binding on the High Court. The High Court is the highest court in the land and it not even bound by its own decisions.[4]]

[The third error is the Supreme Court of Victoria follows every part of the High Court decision.[5]][Throughout a High Court judgement will be the ratio decidendi, reason for the decision, and obiter dictum, comments made by the way. Only the ratio decidendi is the binding part of the decision and must be followed.[6]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have described binding precedent, including the circumstances in which a precedent is binding.[1] |
| ✓ ✗ | I have used a contrasting word like 'however' or 'unlike'.[2] |
| ✓ ✗ | I have described persuasive precedent, including sources of persuasive precedents.[3] |
| ✓ ✗ | I have included a sentence stating the difference between both persuasive and binding precedent regarding which must be followed and which are only influential.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'ratio decidendi', 'obiter dictum', 'precedent', etc. |

*Exemplar response*

[Binding precedent, ratio decidendi, is the reason for the decision by the judge, which is then regarded as a statement of law to be followed by all judges in lower courts in the same court hierarchy in the future for cases with similar material facts.[1]][Persuasive precedent however,[2]][does not have to be followed. Persuasive precedent is considered a guiding principle the courts can choose to apply but doesn't have to be followed. Persuasive precedent can come from courts on the same level or lower in the court hierarchy, from other court hierarchies such as interstate or international or be obiter dictum. Obiter dictum is a statement made by the judge, a comment made 'by the way' that is persuasive, that is, it can be a guiding principle in later cases.[3]][The difference between them is the ratio decidendi is binding and must be followed in cases with similar material facts by all lower courts in the same hierarchy while the obiter dictum is persuasive and doesn't have to be followed.[4]]

LEVEL 4

**7.**

| | |
|---|---|
| ✓ ✗ | I have explained one way the courts are able to provide consistency.[1] |
| ✓ ✗ | I have included an example how the courts provide consistency.[2] |
| ✓ ✗ | I have used a contrasting word.[3] |
| ✓ ✗ | I have explained how the courts are unable to provide consistency.[4] |
| ✓ ✗ | I have included an example of how the courts are unable to provide consistency.[5] |
| ✓ ✗ | I have explained a second way the courts are able to provide consistency.[6] |

| | |
|---|---|
| ✓ ✗ | I have included an example of how the courts provide consistency.[7] |
| ✓ ✗ | I have used a linking word to demonstrate contrast.[8] |
| ✓ ✗ | I have explained a second way the courts are unable to provide consistency.[9] |
| ✓ ✗ | I have included an example of how the courts provide consistency.[10] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'litigants', 'precedent', 'overruling', etc. |

*Exemplar response*

[The courts are able to provide consistency because all litigants are treated the same way by the courts. Courts are bound to follow established legal precedents and therefore if a case comes before them with a similar fact pattern precedent is followed and consistent decisions are made.[1]] [For example, decisions made in the Court of Appeal must be followed by the lower courts in the Victorian court hierarchy.[2]] [On the other hand,[3]] [consistent outcomes may not always be possible through the process of overruling, whereby a superior court decides not to follow a decision from an earlier case.[4]] [This occurred in *Imbree v McNeilly* where the High Court overruled their previous decision, finding the standard of care owed by an inexperienced learner drive was the same as all other road used.[5]]

[The courts are able to provide consistency also through judicial conservatism. It can be an inflexible system when judges are reluctant to depart from out-dated or inappropriate precedent.[6]] [For example, in the Trigwell case the courts upheld an old British common law where the landowner is not responsible for straying livestock. This ensured there was consistency.[7]]

[However,[8]] [judges can exercise judicial creativity and change the law where it becomes outdated. They can demonstrate a willingness to make laws in areas through a progressive interpretation.[9]] [An example of this is the development of Aboriginal Land Rights through the High Court's decision to find terra nullius a legal fiction and the establishment of Native Title in the 1992 case of Mabo.[10]]

# 4.2.3 Statutory interpretation

LEVEL 1

**1.** A **2.** D

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated that the reason why the studded belt case required interpretation was due to the legislation being written in broad terms, but the court had to apply the broad words to a specific set of facts.[1] |
| ✓ ✗ | I have referred to the facts of the studded belt case when describing the reason why the statute in question needed to be interpreted.[2] |
| ✓ ✗ | I have identified another reason why legislation may need to be interpreted.[3] |
| ✓ ✗ | I have explained this reason for statutory interpretation, using an example.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'statute', 'legislation', 'parliament', etc. |

Exemplar response

[The studded belt case highlights why the courts may need to interpret a statute, due to legislation being drafted in broad and general terms, but needing to be applied to very specific sets of facts.[1]][In this case, the broad word 'weapon' had to be defined to determine whether it applied to a belt with raised studs.[2]]

[Another reason why the courts may need to interpret legislation is because parliament may fail to foresee future issues when writing legislation.[3]][For example in the Kevin and Jennifer case the court had to interpret marriage legislation and give meaning to the word 'man' as parliament, at the time the law was written, failed to foresee the possibility of people changing their gender then marrying and so this issue was not covered in the statute.[4]]

*Possible points to include:*

Other reasons for statutory interpretation include but are not limited to:

- The meaning of words changing over time.

**4.**

| | |
|---|---|
| ✓ ✗ | I have identified one effect of statutory interpretation.[1] |
| ✓ ✗ | I have identified a second effect of statutory interpretation.[2] |
| ✓ ✗ | I have provided a case example supporting one effect I have identified.[3] |
| ✓ ✗ | I have detailed how the case I have chosen demonstrates this effect of statutory interpretation.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Act', 'law', etc. |

*Exemplar response*

[An effect of statutory interpretation can be that the way that the Act is interpreted and applied in particular circumstances creates precedent for lower courts in the same hierarchy to be bound to follow when interpreting that specific part of the Act in the future.[1]]

[Another effect is that a particular word or phrase within the Act being interpreted is given a wider interpretation. This means that the range of circumstances the Act can apply to increases.[2]][For example, in the case of *Carr v Western Australia*[3]][the High Court gave a wide interpretation to the word 'interview', expanding the range of video-recorded conversations that will be admitted as evidence under that law.[4]]

*Possible points to include:*

Other effects of statutory interpretation may include but are not limited to:

- Words or phrases within the statute are given meaning.
- Narrowing the scope of circumstances the law applies to.

LEVEL 3

**5.**

- ✓ ✗ I have stated why the High Court had to interpret statute.[1]
- ✓ ✗ I have linked my answer back to the prompt.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'statute', 'interpretation', etc.

*Exemplar response*

[In this case, the High Court was required to interpret the statute because it was unclear whether a wireless set was included as part of s.51(v) because of the advances in technology that were not foreseen.[1]]

[When drafting legislation it is not always possible to predict future technology. At the time of drafting the Commonwealth Constitution the only forms of technology were telegraphic, telephonic and the postal service. With the development of technology such as the wireless it was up to the High Court to interpret whether the writers of the Constitution intended wireless sets to be included because it was unclear. The words 'other like services' were interpreted to include other forms of communication such as wireless sets.[2]]

*Possible points to include:*

Students could have also included:

- The words are unclear.
- Meaning of the words can change over time.
- The phrase 'other like services' is a broad term that needs to be applied to a specific set of circumstances.

**6.**

- ✓ ✗ I have indicated whether Dion would be in breach of the Act.[1]
- ✓ ✗ I have included reasons to justify my decision, linking the facts to the court's interpretation in *Deing v Tarola*.[2]
- ✓ ✗ I have indicated whether Michael would be in breach of the Act.[3]
- ✓ ✗ I have included reasons to justify my decision, linking the facts to the court's interpretation in *Deing v Tarola*.[4]
- ✓ ✗ I have described one way the interpretation of 'weapon' may be changed.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'weapon', precident', 'evidence', etc.

*Exemplar response*

[Dion is likely to be in breach of the Act[1]][because the machete has a main purpose of use as a weapon and therefore it is likely the police would have a case against Dion.[2]][Michael is unlikely to be in breach of the Act[3]][because he would be able to argue that the kitchen knife has a common purpose other than that of a weapon.[4]]

[One way this interpretation of the word 'weapon' may be changed is if one of the parties to this case appeals to a higher court and the precedent set in *Deing v Tarola* is overruled, with a new meaning given to 'weapon' and therefore a new precedent set in this superior court.[5]]

*Possible points to include:*

The precedent defining 'weapon' in *Deing v Tarola* may be changed if the Parliament passes legislation abrogating this precedent and creating a different definition for 'weapon'.

LEVEL 4

**7.**

- ✓ ✗ I have stated how effective statutory interpretation can be.[1]
- ✓ ✗ I have described a first benefit of statutory interpretation.[2]
- ✓ ✗ I have described a matching limitation of statutory interpretation.[3]

| | |
|---|---|
| ✓ ✗ | I have described a second benefit of statutory interpretation.[4] |
| ✓ ✗ | I have described a matching limitation of statutory interpretation.[5] |
| ✓ ✗ | I have referred to the case in the question (the Kevin and Jennifer case) in my answer. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislation', etc. |

*Exemplar response*

[I agree to a large extent that statutory interpretation is effective.[1]]

[One of the benefits of statutory interpretation is the ability for the courts to fill gaps in the legislation. Sometimes when legislation is drafted the writers may not anticipate particular situations – for example, it wasn't predicted that the *Marriage Act 1961* would need to consider whether transgender men could be considered man within the definition of the legislation as occurred in the Kevin and Jennifer case.[2]][Although a weakness of judges being able to fill gaps in the legislation is that through statutory interpretation they may broaden or restrict the intended meaning of the legislation.[3]]

[A second benefit of statutory interpretation is that is enables the courts to keep the legislation relevant and up to date as evident in the case of Kevin and Jennifer. In the 60's when the Marriage Act was written it unlikely the drafters would have considered transgender people while the recent interpretation ensures the legislation is up to date with current social standards and medical procedures.[4]][However, a weaknesses of the judges being able to keep the legislation up to date is that it is undertaken by the judiciary who are not elected representatives and it could be argued this is a job better left with Parliament.[5]]

# 4.2.4 Factors that affect the ability of courts to make law

LEVEL 1

**1.** C **2.** B **3.** A **4.** B **5.** D

LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have stated distinguishing is one method by which judges can avoid existing precedent and develop new precedent.[1] |
| ✓ ✗ | I have described the process of distinguishing.[2] |
| ✓ ✗ | I have explained that by distinguishing a judge is now free to create a new principle of law to resolve the dispute in this new fact situation, allowing common law to develop.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'precedent', 'binding', 'common law', etc. |

Exemplar response

[One way in which the doctrine of precedent may contribute to the development of the common law is through methods of avoiding applying it, such as distinguishing.[1]][A judge may find that the facts of a past case from which a precedent was set are significantly different to those of the current case before the court. In this situation, the judge does not need to follow the earlier decision.[2]][The consequence of distinguishing is that the court is now facing a new set of facts, a dispute that has not arisen before. The court is then able to create a new precedent to resolve this case, developing the common law.[3]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have defined judicial conservatism using key terms such as 'reluctance', 'see their role as secondary law-makers' or similar.[1] |
| ✓ ✗ | I have detailed how judicial conservatism is reflected in the Trigwell case by stating the court chose to follow a previous precedent than create a precedent that is more up to date (or similar).[2] |
| ✓ ✗ | I have detailed how this judicially conservative decision limited development of the common law.[3] |
| ✓ ✗ | I have made explicit reference to the facts of the Trigwell case. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'common law', 'conservatism', etc. |

*Exemplar response*

[Judicial conservatism occurs when judges are reluctant to develop precedent and hence create common law, preferring to leave this law-making role up to parliamentarians.[1]][In this case, the court demonstrated conservatism as an outdated precedent was followed rather than creating a new precedent that reflects current community standards on duty of care.[2]][The implication of this is that the common law did not change, despite the High Court's ability to overrule old precedents and create new law.[3]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have stated one way in which the common law may be developed by judicial activism.[1] |
| ✓ ✗ | I have detailed how judicial activism serves to develop the common law.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'values', 'holistic', etc. |

*Exemplar response*

[One way in which judicial activism contributes to the development of the common law is through considering a wider range of factors – including social, political and community values.[1]][This more holistic approach to judicial decision making allows the common law to develop in line with current community values and standards.[2]]

**9.**

| | |
|---|---|
| ✓ ✗ | I have stated that retrospective law-makers which depend upon test cases to change the law.[1] |
| ✓ ✗ | I have explained that the time-consuming nature and cost of court proceedings restricts the law making of courts.[2] |
| ✓ ✗ | I have explained how the time-consuming nature and cost of court proceedings does not aid in the development of the common law.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'test cases', 'court proceedings', etc. |

*Exemplar response*

[Courts make laws *ex post facto*, and therefore rely upon appropriate test cases being brought before the court in order to exercise their role as law-makers.[1]][The lengthy duration of court proceedings and the high costs associated further restricts the opportunity for courts to create common law[2]][by deterring individuals from taking disputes to court and thus limiting the number of cases that are actually heard before the court.[3]]

*Possible points to include:*

- Even if parties are not deterred from pursuing cases that lead to a change in the law by the delays and costs associated, the process of changing the common law can still be very slow as it takes time to appeal to superior courts that may change precedents.

**10.**

| | |
|---|---|
| ✓ ✗ | I have identified what 'standing' is.[1] |
| ✓ ✗ | I have described in detail the requirement for standing.[2] |
| ✓ ✗ | I have explained how the requirement for standing impacts on the development of the common law.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'locus standi', 'special interest', etc. |

*Exemplar response*

['Standing' refers to the ability of a party to appear before and be heard by the court.[1]][It is based upon locus standi, meaning 'place to stand'. A party must show the courts they are an aggrieved party, that their private rights have been directly affected by a law or the action of another party.[2]]

[The requirement for standing affects the development of the common law as cases that may lead to the development of new precedents can only be pursued by those with standing, not by any party that is keen to influence what the law should be.[3]]

LEVEL 3

**11.**

| | |
|---|---|
| ✓ ✗ | I have described one factor that can affect the ability of the courts to make law.[1] |
| ✓ ✗ | I have linked my answer back to the case study.[2] |
| ✓ ✗ | I have described a second factor that can affect the ability of the courts to make law.[3] |
| ✓ ✗ | I have linked my answer back to the case study.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'standing – locus standi', 'disbursements', etc. |

*Exemplar response*

[One factor that may have prevented the High Court, in this decision, from making a law would have been the cost involved in pursuing the matter through the courts. Costs associated with pursuing a matter through the courts include legal representation, disbursements and court fees.[1]][An example of this is an experienced barrister can cost up to $5,000 a day, while simply lodging commencement of proceedings through the courts may be in excess of $1,000. While Isbester was fortunate to have a barrister working pro bono, there were still costs of $600,000 and this can limit matters being taken through the courts and therefore the court's ability to make laws.[2]]

[A second factor that may have affected the ability of the courts to make law is the time it took to pursue the matter through to the higher courts where the law is made. It took over two years to resolve the matter, a significant period of time, sometimes preventing people from pursuing litigation.[3]][In this case the decision by the Magistrates' Court first occurred in 2013. Isbester appealed to two courts in 2014 and then the final decision by the High Court occurred in 2015. Whilst she continued to fight through the legal system, this can sometimes be a limiting factor in the ability of the courts to make laws as litigants are reluctant to pursue the matter further.[4]]

*Possible points to include:*

Students could have included:

- Judicial conservatism
- Judicial activism
- The doctrine of precedent
- The requirement for standing

**12.**

| | |
|---|---|
| ✓ ✗ | I have described the standing requirement.[1] |
| ✓ ✗ | I have also described the 'special interest' requirement'.[2] |
| ✓ ✗ | I have linked the answer to the case study and advised Kirby.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'standing – locus standi', 'litigation', etc. |

*Exemplar response*

[The standing requirement (locus standi) outlines the right of a party to pursue a matter through the courts. Generally, to pursue a matter of litigation one must show that their rights are directly affected by the action which would continue unless relief is granted.[1]]

[Furthermore, one can also demonstrate a 'special interest'. A 'special interest' can include; a public interest group challenging a government decision, a trade union challenging a government decision that impacts their members or a commercial entity challenging a government decision that may benefit a commercial rival.[2]]

[In the above case I would advise Kirby that she would have standing given her rights are being infringed. That is, her enjoyment of her land has been infringed. She is likely to have standing to pursue the matter and appeal the council's decision.[3]]

LEVEL 4

**13.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent of law-making by the courts can be flexible.[1] |
| ✓ ✗ | I have described one way that law-making by the courts can be inflexible.[2] |
| ✓ ✗ | I have included an example to illustrate my answer.[3] |
| ✓ ✗ | I have included a contrasting word such as: 'while', 'however or 'although'.[4] |
| ✓ ✗ | I have described the corresponding way that law-making by the courts can be flexible.[5] |
| ✓ ✗ | I have included an example to illustrate my answer.[6] |
| ✓ ✗ | I have described a second way that law-making by the courts can be inflexible.[7] |
| ✓ ✗ | I have included an example to illustrate my answer.[8] |
| ✓ ✗ | I have included a contrasting word such as: 'although', 'however' or 'while'.[9] |
| ✓ ✗ | I have described the corresponding way that law-making by the courts can be flexible.[10] |

| | |
|---|---|
| ✓ ✗ | I have included an example to illustrate my answer.[11] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'stare decisis', 'doctrine of precedent', 'distinguish', 'judicial activisim', 'judicial conversatism', etc. |

*Exemplar response*

[Law-making by the courts is flexible and able to change as society changes to a limited extent.[1]][One limitation on the court's ability to make laws is the doctrine of precedent, 'stare decisis' to stand by what has been decided. This principle outlines that courts must follow the decisions of courts of superior record when a case with similar material facts comes before them which ensures consistency and fairness.[2]][An example of this is the Trigwell case where the High Court followed an old British common law principle where farmers were not responsible for their straying livestock.[3]]

[While[4]][the doctrine of precedent provides consistency, courts do have an opportunity to be flexible in their application of the law if they can distinguish the facts of the case before them from the facts in which the precedent was established, allowing the court to make new law or by reversing a precedent set by a lower court.[5]][An example of this was in *Google v Trkulja* in 2018 when the High Court altered the law created lower in the hierarchy about defamation and the result of a Google search.[6]]

[A second limitation on the court's ability to make laws is judicial conservatism. This is an approach adopted by judges who strictly adhere to the 'stare decisis' principle, that is, they believe it is the role of Parliament to make laws and judges to simply follow the precedent and not consider community views/values in their decision.[7]][An example of this is *de Sales v Ingrilli* case in which the High Court upheld a widows discount of 5% should exist in compensation provided to a widow because of her prospect of remarriage, based on an old English common law.[8]]

[However,[9]][judicial conservatism can be contrasted by judicial activism. Judicial activism is a law-making approach where the judges will seek to develop new precedent they believe is necessary to fill gaps in legislation and to take into account, as stated above, 'legal, social or other policies', allowing common law to change as society changes, however such activism is not common.[10]] [The Mabo case is an example of a progressive interpretation which developed a significant change in property law in Australian. The High Court determined terra nullius as legal fiction thereby enabling the development of Native Title.[11]]

**14.**

| | |
|---|---|
| ✓ ✗ | I have described one strength of judicial activism.[1] |
| ✓ ✗ | I have included an example to illustrate my answer.[2] |
| ✓ ✗ | I have included a contrasting word such as: 'however', 'although' or 'while'.[3] |
| ✓ ✗ | I have described a corresponding weakness of the judicial activism.[4] |
| ✓ ✗ | I have included an example to illustrate my answer.[5] |
| ✓ ✗ | I have described a second strength of judicial activism.[6] |
| ✓ ✗ | I have included an example to illustrate my answer.[7] |
| ✓ ✗ | I have included a contrasting word such as: 'on the other hand', 'although' or 'while'.[8] |
| ✓ ✗ | I have described a corresponding weakness of judicial activism.[9] |
| ✓ ✗ | I have included an example to illustrate my answer.[10] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judicial activisim', 'representative government', 'codified', 'abrogated', etc. |

*Exemplar response*

[One strength of judicial activism is that is can ensure legal precedents reflect community values. Furthermore, because they are not re-elected judges can make decisions in the best interest of the people in the case before them, rather than concern themselves with political matters.[1]][An example of that is the Mabo case, as indicated above. In this case the High Court determine terra nullius was a legal fiction and indicating Native Title could exist in certain situations, changing Australian property law significantly.[2]]

[A weakness however,[3]][is that judges are not elected representatives and therefore should not be making laws based on changing values.[4]][For example, representative government ensures members are elected to reflect the views of the people. Members of Parliament are elected and communicate with their constituents to ensure they accurately reflect their views and desires for legislative change in Parliament.[5]]

[A second strength of judicial activism is that it can put pressure on Parliament to make legislative changes in areas they had previously been reluctant to do so, despite it not currently reflecting human rights and just principles.[6]][An example of this is the *Native Title Act 1992*. This legislation codified the common law, thus establishing the Native Title Tribunal and means by which other Aboriginal People could make Native Title claims.[7]]

[On the other hand,[8]][a weakness of judicial activism is that if Parliament does have concerns with any decision made by the courts it can pass legislation abrogating the common law which can be costly and time consuming.[9]][For example, following the *de Sales v Ingrilli* case the Victorian government passed the *Wrongs (Remarriage Discount) Act 2004*, to prevent the application of the Widows Discount.[10]]

# 4.2.5 Relationship between courts and Parliament in law-making

LEVEL 1

**1.** A **2.** C **3.** B **4.** B **5.** A

LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined what is meant by 'supremacy of parliament' with some variation on that parliament has absolute sovereignty.[1] |
| ✓ ✗ | I have noted the exception to this principle – that parliament cannot override the High Court when it comes to constitutional matters.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'sovereignty', 'parliament', etc. |

*Exemplar response*

[Parliament's supremacy refers to the principle that parliament has absolute sovereignty and the ability to change the law as the need arises and override laws made by other law-making bodies such as the courts,[1]][except for the High Court with regards to constitutional matters.[2]]

**7.**

| | |
|---|---|
| ✓ ✗ | I have defined what obiter dicta means.[1] |
| ✓ ✗ | I have noted that judges may express their disapproval of a law obiter dicta.[2] |
| ✓ ✗ | I have linked how the fact that judges may express their disapproval of a law obiter dicta may encourage parliament to review the law.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'obiter ditca', 'parliament', etc. |

*Exemplar response*

[Obiter dicta refers to statements made 'by the way' that do not form a part of the ratio decidendi of a judgement.[1]][These statements can influence parliament to change the law as they are a way in which a judge can express their disapproval of existing legislation/common law[2]][which may prompt parliament to investigate and determine whether they should reform or abrogate the law in question.[3]]

**8.**

| | |
|---|---|
| ✓ ✗ | I have stated that this is an example of statutory interpretation.[1] |
| ✓ ✗ | I have justified this conclusion by stating that in this case the words contained in the legislation had to be given meaning to resolve the dispute (or similar).[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'legislation', etc. |

*Exemplar response*

[The decision in *Deing v Tarola* is an example of statutory interpretation, which is one feature of the relationship between the courts and parliament.[1]][This is because it is a case in which the words in a statute had to be given meaning in order to resolve the dispute, creating a precedent for future cases in which the same legislation is being applied.[2]]

**9.**

| | |
|---|---|
| ✓ ✗ | I have defined codification as 'incorporating common law principles into legislation' (or similar).[1] |
| ✓ ✗ | I have identified a reason why codification occurs: to demonstrate that parliament endorses the law established in a court's decision.[2] |
| ✓ ✗ | I have identified an appropriate case involving codification.[3] |
| ✓ ✗ | I have briefly detailed the decision made and resulting legislation in the case I have chosen.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'common law', etc. |

*Exemplar response*

[The codification of common law refers to process whereby parliament passes legislation that incorporates common law principles.[1]] [One reason parliament may do this it to demonstrate support of a set of common law principles reflected in a precedent.[2]]

[This was seen in the 1982 Mabo case.[3]] [In this instance, the High Court found that indigenous Australians had traditional land rights that survived after British settlement. parliament later codified this decision and principle of law in the *Native Title Act 1993*.[4]]

**10.**

| | |
|---|---|
| ✓ ✗ | I have defined 'parliamentary supremacy' as parliament having absolute law-making power (or similar).[1] |
| ✓ ✗ | I have noted the exception to this principle, that parliament cannot override the High Court when it comes to constitutional matters.[2] |
| ✓ ✗ | I have stated that in abrogating the common law parliament is exercising their role as the supreme law-making body.[3] |
| ✓ ✗ | I have identified an appropriate case involving abrogation.[4] |
| ✓ ✗ | I have briefly detailed the decision that was made in the case I have chosen.[5] |
| ✓ ✗ | I have briefly detailed the legislation that replaced the common law decision (if applicable).[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'common law', etc. |

*Exemplar response*

['Parliament supremacy' refers to the principle that parliament has absolute sovereignty and the ability to override existing legislation and laws made by other law-making bodies[1]] [(with the exception of the High Court's decisions about constitutional matters).[2]]

[Therefore, the ability of parliament to abrogate the common law is a way in which they exercise their role as the supreme law-making body.[3]] [This occurred in the Trigwell case[4]] [where the court decided the defendant was not liable for damages caused by their wandering livestock,[5]] [a principle of law the Victorian parliament abrogated by passing the *Wrongs (Animals Straying on Highways) Act 1984* (Vic.).[6]]

LEVEL 3

**11.**

| | |
|---|---|
| ✓ ✗ | I have stated the difference between codification and abrogation.[1] |
| ✓ ✗ | I have described codification.[2] |
| ✓ ✗ | I have included an example of codification.[3] |
| ✓ ✗ | I have included a contrasting word such as 'on the other hand', 'however' or 'although'.[4] |
| ✓ ✗ | I have described abrogation.[5] |
| ✓ ✗ | I have included an example of abrogation.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'codification', 'abrogration', 'legislation', 'common law', etc. |

*Exemplar response*

[The difference between codification and abrogation is the impact they can have on common law.[1]][Codification is the process that involves parliament passing legislation that incorporates common law principles'.[2]][This occurred in 1992 Mabo decision where the High Court, established the principle of Native Title. In 1993 the Commonwealth Parliament passed the *Native Title Act* which not only confirmed the principles of Native Title in the legislation but also established the Native Title Tribunal, providing a process whereby Aboriginal Australians could pursue land claims.[3]]

[Abrogation, on the other hand,[4]][is a process where parliament passes legislation to override judge made law.[5]][An example of this was in *De Sales v Ingrilli* [2002] where the High Court upheld a reduced amount of damages De Sales was awarded for the negligent death of her husband as she may have a good chance of remarriage. The Victorian government felt the law was discriminatory and consequently enacted the *Wrongs (Remarriage Discount) Act 2004* to prevent reduced awards of damages based on any prospect of marriage.[6]]

*Possible points to include:*

Other cases could include:

- *State Government Insurance Commission v Trigwell* [1979] and the *Wrong (Animals Straying on Highways) Act 1984* (Vic) which represents abrogation.

**12.**

| | |
|---|---|
| ✓ ✗ | I have stated a case that influenced law-making in parliament.[1] |
| ✓ ✗ | I have described the facts of the case.[2] |
| ✓ ✗ | I have described the parliamentary changes that were made.[3] |
| ✓ ✗ | I have stated one reason why parliament cannot influence the decision of the courts.[4] |
| ✓ ✗ | I have described one reason why parliament cannot influence the decision of the courts.[5] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judiciary', 'separation of powers', 'abrogation', 'codification', etc. |

*Exemplar response*

[One case which influenced parliament to take legislative action was the Trigwell case.[1]][In this case the High Court felt compelled to uphold an ancient common law precedent whereby farmers were not held to be responsible for their roaming livestock. The Justices didn't agree with the decision but felt it wasn't their position to develop a new law but rather the role of parliament.[2]][The Victorian Parliament was prompted by the decision to change the *Wrongs Act* in 1984 to make farmers liable for roaming livestock, thereby abrogating the common law.[3]]

[The reverse however, cannot occur. Parliament cannot influence the decisions of the courts because of the separation of powers.[4]]
[The judiciary must remain independent to the legislative and executive in order to provide checks and balances and prevent abuses of power.[5]]

*Possible points to include:*

Other cases students could include are:

- Mabo. This case prompted parliament to create the *Native Title Act 1993*, thereby codifying the common law.
- *De Sales v Ingrilli*. This case prompted parliament action to abrogate the common law by abolishing the remarriage discount through the *Wrongs Act 1958* (Vic).

Other reasons students could have included for parliament not being able to influence the courts include:

- Judges need to remain impartial adjudicators in order to uphold the principles of justice of fairness and equality and, in accordance with the law.
- It is important that judges uphold the rule of law and ensure public confidence in the legal system.

LEVEL 4

**13.**

| | |
|---|---|
| ✓ ✗ | I have included the definition of parliamentary sovereignty.[1] |
| ✓ ✗ | I have unpacked the practical impact of parliamentary sovereignty.[2] |
| ✓ ✗ | I have stated the extent to which the courts can change laws.[3] |
| ✓ ✗ | I have stated a limitation of the courts' ability to change the operation of the law.[4] |
| ✓ ✗ | I have identified the first way that courts can change the operation of the law.[5] |
| ✓ ✗ | I have described this first way the courts can change the law in detail.[6] |
| ✓ ✗ | I have included an example to support how the courts can change the operation of the law.[7] |
| ✓ ✗ | I have identified a second way the courts can change the operation of the law.[8] |
| ✓ ✗ | I have described this second way the courts can change the law in detail.[9] |
| ✓ ✗ | I have included an example to support how the courts can change the operation of the law.[10] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'jurisdiction', 'precedent', 'ultra vires', etc. |

*Exemplar response*

[Parliamentary sovereignty refers to the fact that parliament is the supreme law-making power.[1]][That is, they are able to make laws at any time about any matter that is within their jurisdiction, as defined in the Constitution. Unlike the courts, they don't have to wait for a case to come before them or be bound by precedent.[2]]

[The courts can change laws made by parliament to a limited extent.[3]][While the courts cannot change the actual wording of the legislation[4]][they are able to interpret the legislation thereby providing meaning to the words and change their day-to-day operation.[5]][The judges can, through statutory interpretation, bring the words of the legislation to life.[6]][For example in *Deing v Tarola*, the judges had to interpret whether a studded belt was a weapon according to the *Control of Weapons Act*. Through this interpretation they determined the studded belt was not a weapon thereby changing the meaning of the words.[7]]

[The courts can also declare a law invalid if is ultra vires.[8]][This is when the courts declare the legislation is outside the law-making power of the parliament.[9]][An example of this was the Malaysia Solution where the Gillard government passed legislation to send 4,000 asylum seekers to Malaysia. The High Court found this legislation was invalid as it breached the Migration Act because the asylum seekers couldn't be provided legal protection from further persecution in Malaysia.[10]]

*Possible points to include:*

Students could have also included:

Role of the courts:

- Enable legislation to have real life application
- Fill gaps in legislation

Role of parliament:

- Judges are appointed by the Crown on the advice of the government
- Parliament can codify common law

# 4.2.6 Reasons for law reform

## LEVEL 1

**1.** D

## LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have identified one reason for law reform that is not changing expectations of the legal system.[1] |
| ✓ ✗ | I have described why it is important that the law respond to the reason for law reform I have identified.[2] |
| ✓ ✗ | I have provided an appropriate example to support my analysis.[3] |
| ✓ ✗ | I have linked the example I have chosen to the reason for law reform I have identified.[4] |
| ✓ ✗ | I have identified a second reason for law reform.[5] |
| ✓ ✗ | I have described why it is important that the law respond to the reason for law reform I have identified.[6] |
| ✓ ✗ | I have provided an appropriate example to support my analysis.[7] |
| ✓ ✗ | I have linked the example I have chosen to the reason for law reform I have identified.[8] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'For example', 'can also change', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'reform', etc. |

*Exemplar response*

[Laws can change due to the changing attitudes of the community.[1]][As community values are constantly changing laws should be changed in order for them to reflect the current views of the community.[2]][For example, in 2017 there was a change in the *Marriage Act 1961* that enabled same sex couples to marry[3]][which, with majority pubic support, reflected current community values.[4]]

[Laws can also change due to changes in technology.[5]][Technology develops rapidly and as such laws must be reviewed/introduced to ensure that social problems created by new technologies are accounted for.[6]][For example, in 2018 new Victorian laws created a licensing arrangement for those who own and operate driverless cars on Victorian roads to ensure they are used safely[7]][in response to advancements in technology that created risks of injury caused by driverless cars.[8]]

## LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have described one reason why the law must change.[1] |
| ✓ ✗ | I have included an example to support the reason I have described.[2] |
| ✓ ✗ | I have described a second reason why the law must change.[3] |
| ✓ ✗ | I have included an example to support the reason I have described.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislative change', 'law reform', etc. |

*Exemplar response*

[One reason why it is necessary for legislation to change is that technology advances quickly and the law must change to encompass new technology and respond to new and unforeseen social issues. In particular with advances in biotechnology issues such as gene ownership and genetically modified food have arisen and legislative change occurs to ensure these issues are regulated.[1]][This has led to the recent amendment to the *Gene Technology Amendment Act 2016* to ensure Victoria's legislation is in line with the Commonwealth and other states and territories as part of the national gene technology scheme.[2]]

[A second reason is that there is a need to protect society. One of the roles of parliament is to ensure the protection of society from harm whether that be physical, sexual, emotional or economic. Therefore law reform occurs in order to provide protection.[3]][An example of this would be the recent changes to the *Crimes Act 1958* (Vic) which sought to protect children from sexual offences, by making it an offence for an adult to fail to report and fail to protect a child from sexual abuse.[4]]

*Possible points to include:*

Students could also include:

- Updates to the legal system to provide greater access to the legal system such as the expansion of the Koori County Court.
- The need to protect people's rights and ensure equality such as the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017.*
- Changing social conditions such as the response to alcohol fuelled violence and the implementation of the one-punch laws.

**4.**

| | | |
|---|---|---|
| ✓ | ✗ | I have identified one reason why the parliaments legalised access to medicinal marijuana.[1] |
| ✓ | ✗ | I have described this reason to change the law.[2] |
| ✓ | ✗ | I have identified a second reason why the parliaments legalised access to medicinal marijuana.[3] |
| ✓ | ✗ | I have described this reason to change the law.[4] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'legislation change', etc. |

*Exemplar response*

[The decision by both parliaments to legalise access to medicinal marijuana would be predominantly in response to changing social attitudes towards the use of marijuana.[1]][While the use of marijuana had previously been frowned upon by society there has been recent changes of attitudes and beliefs towards its application in medical situations. This is evident, through the VLRC investigation into medicinal marijuana and the 99 submissions they received from the community.[2]]

[A second reason for this new legislation would have been the government's obligation to protect people.[3]][There is evidence to suggest medicinal cannabis can help protect people from chronic pain, nausea and seizures that other drugs have not been able to, as publicised through numerous stories in the media of the drug being able to provide relief to patients.[4]]

*Possible points to include:*

Students could also include:

- Advances in technology, in particular medical technology to provide pharmaceutical cannabis with strictly regulated chemical composition.
- In response to the investigation by the VLRC and the push from the community for change.

LEVEL 4

**5.**

| | | |
|---|---|---|
| ✓ | ✗ | I have stated the extent to which parliament should response to changing attitudes.[1] |
| ✓ | ✗ | I have described a reason for parliament to respond to changing attitudes in society.[2] |
| ✓ | ✗ | I have described a reason for parliament not to respond changing attitudes in society.[3] |
| ✓ | ✗ | I have described a second reason for parliament to respond to changing attitudes in society.[4] |
| ✓ | ✗ | I have described a second reason for parliament not to respond to changing attitudes in society.[5] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'legislation change', 'legislature', 'legislative reform', 'representative democracy', etc. |

*Exemplar response*

[Parliament should, to a large extent, respond to changing societal attitudes by amending the law.[1]]

[They should respond because a law is only effective if it is reflective of the views of society, and laws that do not match society's values won't be accepted or followed. For example in the marriage equality debate there was a significant push from the community for legislative change to respond to changes in society that not only acknowledged and celebrated same sex relationships but also demanded for equality before the law.[2]]

[On the other hand, the legislature shouldn't always respond to changing values as it may be necessary for parliament to ensure there is consistency within the law and it is not changed too frequently. Reforming the law too often may be confusing and one element of an effective law is that is known and understood and therefore, parliament shouldn't always respond to changing values too quickly.[3]]

[Parliament should respond to changing attitudes in society as our system of government is a representative democracy and politicians are elected to represent the views of the people from their electorate. Elected representatives should be canvassing their electorates to determine what the people want and initiating legislative reform accordingly.[4]]

[However, parliament may also be limited in their ability to change laws to reflect the community's changing attitudes as they can encompass a wide variety of differing opinions. Given the multicultural nature of our community it may be nearly impossible for parliament to pass laws that are representative of the whole community's opinions. Consequently, they must pass laws that they believe reflect the values of the majority.[5]]

*Possible points to include:*

Students could also include:

- While politicians are representative they also have an extensive ability to research legislative change and it could be argued are in a better position to know what is in the best interest for the people.

# 4.2.7 Role of individuals in law reform

LEVEL 1

**1.** C **2.** B **3.** B **4.** A **5.** C

LEVEL 2

**6.**

| | |
|---|---|
| ✓ ✗ | I have defined what a petition is.[1] |
| ✓ ✗ | I have noted the process through which petitions enable public opinion to be heard in parliament.[2] |
| ✓ ✗ | I have identified one strength of petitions.[3] |
| ✓ ✗ | I described this strength of petitions as a means of influencing law reform.[4] |
| ✓ ✗ | I have identified a weakness of petitions.[5] |
| ✓ ✗ | I described this weakness of petitions as a means of influencing law reform.[6] |
| ✓ ✗ | I have signposted my response appropriately using terms such as: 'A strength is...', 'however' etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'reform', etc. |

*Exemplar response*

[Petitions are a written request for parliament to take action on a particular issue, signed by members of the public who support the proposed change in the law.[1]][Petitions are presented in parliament, on behalf of the members of the community who signed it. Through this, the petition which voices the community's opinion is directly communicated to the members of parliament when it is tabled in parliament.[2]]

[A strength of petitions is that they are received directly by the parliament,[3]][so it provides the opportunity for all individuals to have their views heard in parliament, as anyone may submit and/or sign a petition.[4]]

[However, although it is tabled in parliament it is unclear how effective they are in influencing the members of parliament,[5]][as they may choose to simply ignore any proposed change in the law outlined in a petition as not being representative of the wider community's opinion on law reform.[6]]

*Possible points to include:*

Other strengths of petitions include:

- A large amount of signatures can be very persuasive.
- Parliaments now have processes to accept e-petitions, providing a more efficient way to gather a significant amount of support.

Other weaknesses of petitions include:

- Time-consuming to gain the support of large number of individuals.
- No guarantee of publicity.
- Influence of counter-petitions can diminish the impact of a proposal in a petition.

**7.**

| | |
|---|---|
| ✓ ✗ | I have correctly identified the method used as a demonstration.[1] |
| ✓ ✗ | I have briefly described what a demonstration is in the context of the scenario.[2] |
| ✓ ✗ | I have identified a strength of demonstrations.[3] |
| ✓ ✗ | I described this strength of demonstrations as a means of influencing law reform.[4] |
| ✓ ✗ | I have used a linking word to transition from the analysis of the advantage to the analysis of the disadvantage such as: 'however', 'whereas', 'on the other hand' etc.[5] |

- ✓ ✗ I have identified a weakness of demonstrations.[6]
- ✓ ✗ I described this weakness of demonstrations as a means of influencing law reform.[7]
- ✓ ✗ I have referred explicitly to the scenario throughout my answer.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'parliament', 'reform', etc.

*Exemplar response*

[Jenny and her colleagues used a demonstration as an informal pressure to influence law reform.[1]][The demonstration was a gathering of a group of people (the staff of the local primary school) voicing their support for change in the wages of primary school teachers by going on strike to attract the attention of parliament.[2]]

[Demonstrations can be very effective, as they are likely to raise a lot of media attention through the actions of the group and their supporters.[3]][Through this media attention, it can attract more attention from other members of the community to also support the change in the law, and members of parliament who may acknowledge the need for the law to change and attempt to change the law.[4]][On the other hand,[5]][it relies on the support of a large number of people to participate if a protest is to indicate that a lot of the community wants the law to change,[6]][therefore is not effective if there are only a small number of people demonstrating, and will not raise the media's attention.[7]]

*Possible points to include:*

Other strengths of demonstrations include:

- Ability to influence election policies.
- Generate support from influential people/MPs.

Other weaknesses of demonstrations include:

- Time-consuming to organise.
- Low support can diminish the significance of an issue.
- If violence occurs can result in wider public rejecting the proposal to change the law.

**8.**

- ✓ ✗ I have identified the method used to influence law reform as use of the courts.[1]
- ✓ ✗ I have described one strength of using the courts to influence law reform.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'law reform', 'courts', etc.

*Exemplar response*

[Mabo's case is an example of individuals seeking to change the law by starting legal action in the courts.[1]]

[A strength of using the courts to influence law reform is the public nature of the courts may create media attention, highlighting the issue to parliament which can influence election policies and legislative changes.[2]]

*Possible points to include:*

Strengths include:

- While the individual starting legal action would prefer a decision in their favour even a finding against them can still bring the matter to the attention of parliament and they can act to abrogate the common law.
- Litigation can bring matters to the attention of the broader community who may lobby the government for a change in the law.

**9.**

- ✓ ✗ I have identified the use of the courts as one means of influencing law reform.[1]
- ✓ ✗ I have outlined how use of the court system may influence law reform.[2]
- ✓ ✗ I have identified one strength of using the court system to influence law reform.[3]
- ✓ ✗ I have described this strength of court action in influencing law reform.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'law reform', 'courts', etc.

*Exemplar response*

[Another means of influencing law reform is through the use of the courts.[1]][The courts may do this in response to a party bringing a case, by giving an interpretation of the law in a particular case that parliament does not agree with, hence influencing them to change the law to override the court's decision, or by disapproving of the law in their judgement which may be seen by parliament.[2]]

[Taking action in the courts is effective at influencing law reform as when resolving the disputes before them, they determine how the law will be applied in real scenarios.[3]][Therefore, the courts' decisions can change the day-to-day operation of the law through their interpretation of legislation.[4]]

**10.**

- ✓ ✗ I have briefly described my chosen method.[1]
- ✓ ✗ I have used a linking word/phrase to transition into my description of the weaknesses of petitions.[2]
- ✓ ✗ I have identified one weakness of petitions.[3]
- ✓ ✗ I have described this weakness of petitions in influencing law reform.[4]
- ✓ ✗ I have referred explicitly to the scenario in my response.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'law reform', 'parliament', etc.

*Exemplar response*

[Petitions are written requests for parliament to take action on a particular issue, signed by members of the public who support the proposed change in the law.[2]]

[However, petitions are limited in their ability to influence law reform.[2]][As petitions are tabled in parliament, it means that they are less likely to draw the media's attention than a demonstration or the use of social media.[3]][This may mean that the proposed change will not reach the broader community and therefore may not garner greater support to place greater pressure on parliament and as a result increase the likelihood that the law will be reformed.[4]]

LEVEL 3

**11.**

- ✓ ✗ I have identified one method individuals can use to influence law reform.[1]
- ✓ ✗ I have described how it might (or might not) be a good option for Sally.[2]
- ✓ ✗ I have identified a second method individuals can use to influence law reform.[3]
- ✓ ✗ I have described how it might (or might not) be good for Sally.[4]
- ✓ ✗ I have identified a third method individuals can use to influence law reform.[5]
- ✓ ✗ I have described how it might (or might not) be good for Sally.[6]
- ✓ ✗ I have included a final statement suggesting what might be the best option for Sally given her circumstances.[7]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'standing – locus standi', 'legislative change', 'demonstration', 'petition', 'minister', etc.

*Exemplar response*

[As Sally has identified she doesn't have a lot of money then pursuing the matter through the courts[1]][is not a viable option given the significant costs for taking a test case through the courts such as solicitor/barrister and courts fees. Furthermore, it might be hard for Sally to establish that she has standing to challenge a particular common law principle if she has not been directly injured or suffered loss.[2]]

[One method that may be an option is a demonstration.[3]][Demonstrations don't cost any money and don't require permission from the City of Melbourne, although it is advisable you let them know. A demonstration would be a highly visible method of requesting legislative change. It could be organised to coincide with IDAOHOBIT day and could use the publicity from that day to further fuel public awareness for the issue. One downside however, may be it might be hard to organise enough people to attend in a short amount of time. In order for it to be highly visible and therefore attract the use of the media there will need to be a large number of people attending.[4]]

[Finally, while a petition[5]][is a great way of bringing a matter directly to the attention of the minister responsible for that area of the law, it may take a longer time to gather a large number of signatures and it is not as visible as other methods that request law reform.[6]]

[Given, Sally's circumstances, I would recommend she organise a demonstration, using social media to advertise the event and hoping to use the traditional media such as television to cover the story.[7]]

**12.**

| | | |
|---|---|---|
| ✓ | ✗ | I have described a demonstration.[1] |
| ✓ | ✗ | I have included an example.[2] |
| ✓ | ✗ | I have described its purpose.[3] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'demonstration', 'legislative change', etc. |

*Exemplar response*

[A demonstration is an example of a method used to prompt legislative reform where a large amount of people gather in a public place to show support for an issue. Demonstrations can take the form of people simply gathering in an area and listening to speeches, holding placards and chanting or marching through public streets.[1]][An example of a demonstration has been those marches by the Unions for minimum wages.[2]][A purpose of a demonstration is to use the visible show of public support to put pressure on parliament to create legislative change.[3]]

LEVEL 4

**13.**

| | | |
|---|---|---|
| ✓ | ✗ | I have described one strength of petitions.[1] |
| ✓ | ✗ | I have included a contrasting word to show 'both sides' in the discussion.[2] |
| ✓ | ✗ | I have described the corresponding weakness of petitions.[3] |
| ✓ | ✗ | I have described a second strength of petitions.[4] |
| ✓ | ✗ | I have included a contrasting word to show 'both sides' in the discussion.[5] |
| ✓ | ✗ | I have described the corresponding weakness of petitions.[6] |
| ✓ | ✗ | I have included a conclusion weighing up the strengths and weaknesses.[7] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'Petitions Committee', 'minister', 'political agenda', 'law reform', etc. |

*Exemplar response*

[One strength of petitions is that they are able to make direct contact with parliament and bring the matter to the attention of the relevant minister. The Petitions Committee of the Commonwealth Parliament present the details to parliament, and the details and the issue of concern is published on the Petitions Committee's website. Furthermore, the minister will provide a response from their department and this will also be published on the Petitions Committee's website.[1]][However,[2]][while the petition can bring attention to an issue of the minister if it is not on the political agenda it may be unlikely to create legislative change. As illustrated in the above prompt, petitions can make broad requests of varying levels of importance and while they may be significant to those requesting change it needs to be weighed up against the government's informed understanding of the needs of the community.[3]]

[A second strength is that with the recent acceptance of e-petitions it is a lot easier to gather a large number of signatures and this may be more persuasive, as indicating more support for change in the law. Signing an e-petition can be as simple as providing your name and email address and undergoing an authentication process of receiving a link on your email and following it.[4]] [However,[5]] [for an e-petition to be accepted by the Victoria and Commonwealth Parliament they must be made through the parliaments' sites. E- petitions hosted on external sites as Change.org cannot be accepted. The Senate will accept e-petitions only once they have been printed out.[6]]

[In conclusion, even though petitions can bring a matter to the attention of parliament and e-petitions have made it easier to gather signatures, petitions are not a very effective method of effecting legislative change because for e-petitions to be accepted they must come through parliament sites and the issue of concern may not be on the political agenda and therefore not create law reform.[7]]

*Possible points to include:*

Strengths:

- Demonstrate a high degree of support.
- Can arouse public awareness.

Weaknesses:

- Not as visual as other methods of used by individuals such as demonstrations and the media.
- It may be hard to acquire a large number of signatures.
- So many petitions are presented to Australian parliaments it can be difficult for it to effectively respond to or consider all petitions.

**14.**

| | | |
|---|---|---|
| ✓ | ✗ | I have stated to what extent the courts can be effective in law reform.[1] |
| ✓ | ✗ | I have described one strength of using the courts to influence law reform.[2] |
| ✓ | ✗ | I have included an example to illustrate my point.[3] |
| ✓ | ✗ | I have included a contrasting word such as: 'on the other hand', 'although' or 'in contrast'.[4] |
| ✓ | ✗ | I have described the corresponding weakness of the courts ability to influence law reform.[5] |
| ✓ | ✗ | I have included an example to illustrate my point.[6] |
| ✓ | ✗ | I have described a second strength of using the courts to influence law reform.[7] |
| ✓ | ✗ | I have included an example to illustrate my point.[8] |
| ✓ | ✗ | I have included a contrasting word such as: 'however', 'although' or 'in comparison'.[9] |
| ✓ | ✗ | I have described the corresponding weakness of the courts ability to influence law reform.[10] |
| ✓ | ✗ | I have included an example to illustrate my point.[11] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'litigants', 'standing (locus standi)', etc. |

*Exemplar response*

[Pursuing a matter through the courts can be effective in creating legislative change to a limited extent.[1]]

[One strength of taking a matter through the court is that it can bring the matter to the attention of the parliament. Even when the court challenge is unsuccessful the matter has still been brought to the attention of the courts and the public and this can put pressure on parliament to make legislative changes.[2]] [For example the *De Sales v Ingrilli* case prompted the Victorian parliament to pass the *Wrongs (Remarriage Discount) Act 2004*.[3]] [On the other hand,[4]] [a weakness is significant costs involved in taking a matter before the courts. [Litigants must retain legal representation including a solicitor and barrister.[5]] [A barristers can cost approximately $4,000 a day. Furthermore, there would be courts costs so a case can cost approximately $30,000 a day depending on the court in which is the matter is heard.[6]]

[Another strength of pursuing a matter through the courts is judges are politically independent and can make decisions on controversial matters without fear of needing to be re-elected.[7]][For example, in the Kevin and Jennifer case the Federal Court determined a transgender male marriage to his wife valid.[8]][A weakness however,[9]][of taking the matter through the courts is that a litigant is required to have standing (locus standi). This means someone has to show that they have been directly impacted by the law.[10]][For example, simply because you disagree with law doesn't man you can bring an action on behalf of another person.[11]]

*Possible points to include:*

Strengths:

- Public awareness of an issue.
- Pressure on government to make legislative change.
- Judge rule that law was ultra vires and therefore provides a check on the law-making of Parliament.

Weaknesses:

- Time consuming to take a matter through the courts.
- Courts may not find in your favour.

# 4.2.8 Role of the media in law reform

LEVEL 1

**1.** A

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have identified one limitation of using social media to influence law reform.[1] |
| ✓ ✗ | I have described this weakness of social media in influencing law reform.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'social media', 'law reform', etc. |

*Exemplar response*

[One limitation of using social media to influence law reform is that some individuals use social media to promote extreme views.[1]] [As a result law-makers may ignore altogether social media pushes to change the law.[2]]

*Possible points to include:*

Other risks of using social media include but are not limited to:

- The issue may be oversimplified.
- As social media is somewhat unregulated, discussion of law-reform often becomes abusive and personal, rather than a discussion of the social issue itself.

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have described the first similarity between demonstrations and the use of social media.[1] |
| ✓ ✗ | I have described the first difference between demonstrations and the use of social media.[2] |
| ✓ ✗ | I have described the second similarity between demonstrations and the use of social media.[3] |
| ✓ ✗ | I have described the second difference between demonstrations and the use of social media.[4] |
| ✓ ✗ | I have used linking words to demonstrate difference such as: 'however', 'in contrast', 'on the other hand', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'demonstration', 'law reform', etc. |

*Exemplar response*

[A similarity between the use of demonstrations and the use of social media influencing law reform is that they have the greatest impact when supported by a large number of people, for example demonstrations with thousands of people will cause the most impact and social media, once gone viral causes can cause a big impact.[1]] [However a difference between demonstrations and the use of social media is the effort involved in participating in the event. Whilst demonstrations require people to physically attend, social media simply requires people to show support through liking a page or forwarding to friends.[2]]

[The second similarity is that both demonstrations and social media have a greater impact if used in conjunction with other forms of media. For example demonstrations that have been reported in the media and via social media platforms can garner greater awareness of an issue.[3]] [However, a difference between them is that demonstrations require far greater coordination required given the need to apply for permits while the use of social media can be used by anyone with no administrative coordination.[4]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have described one way in which the use of media can prompt legislative change.[1] |
| ✓ ✗ | I have included an example of media prompting law reform.[2] |
| ✓ ✗ | I have described a second way in which the use of the media can be effective.[3] |
| ✓ ✗ | I have included a second example of media prompting law reform.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislative change', 'law reform', etc. |

*Exemplar response*

[One way in which the media can prompt legislative change is through informing the public and generating public concern. This can occur through a number of different platforms including social media such as Facebook, Instagram and Twitter, and traditional methods such as television, newspapers and radio.[1]] [An example is the use of television which can communicate to a significant number of people a particular issue which in turn can cause an outcry for legislative change. Four Corners has a history of bringing such issues to the community such as greyhound live baiting, underpayment of 7-Eleven workers and the children in youth detention centres.[2]]

[Furthermore, whilst traditional methods require the decision of broadcasters or editors to publish the story, social media has provided a platform for anybody to draw attention to particular issues.[3]] [For example in the marriage equality debate individuals imported the rainbow overlay onto their pictures and both the Marriage Alliance and Marriage Equality have Facebook pages. This broadened the ability of the general public to influence law reform.[4]]

LEVEL 4

**5.**

| | |
|---|---|
| ✓ ✗ | I have explained one way the media can influence legislative change.[1] |
| ✓ ✗ | I have linked my answer to the prompt.[2] |
| ✓ ✗ | I have included an example of how the media can influence legislative change.[3] |
| ✓ ✗ | I have explained a limitation of the ability of the media to influence law reform.[4] |
| ✓ ✗ | I have included an example of this limitation of the media in influencing legislative change.[5] |
| ✓ ✗ | I have explained a second way the media can influence legislative change.[6] |
| ✓ ✗ | I have included an example of how the media can influence legislative change.[7] |
| ✓ ✗ | I have explained a second limitation of the ability of the media to influence law reform.[8] |
| ✓ ✗ | I have included an example of this second limitation of the media in influencing legislative change.[9] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'political pressures', 'legislative action', etc. |

*Exemplar response*

[The media is able to influence legislative change through the use of social media platforms such as Facebook as groups or individuals are able to promote their opinion on a political issue and seek support for legislative change,[1]] [as outlined in the prompt.[2]] [An example of this was the marriage equality debate where Marriage Equality Australia, who advocated for legislative change, created a Facebook page to promote their position, with over 250,000 followers.[3]]

[While this can effectively promote a political position and put pressure on parliament to change the law it must be acknowledged that opposing views can be equally represented through the same medium,[4]] [such as Marriage Alliance Australia who also has a Facebook page. This conflict of opinions can limit the media's ability to influence change as equally publicised views can make parliament reluctant to take legislative action.[5]]

Furthermore, the media is able to influence legislative change through social media as the politicians and political parties also use this platform more extensively.[6] Politicians use Twitter and Facebook to inform the public about law reform, generate support and also to gauge the community's feelings on issues and expectations surrounding law reform. For example, Malcolm Turnbull has both a Facebook and Twitter account. Social media has made it significantly easier for politicians to be informed about community standards and feelings.[7]

However, a limitation of this method is that the social media platforms are limited to visual or short written content which may not adequately describe the broader issues.[8] This may prevent the media from acquiring a sufficient understanding of the issue and, in turn, advocating for change. For example, anti-asylum seeker Facebook pages with 'stop the boats' slogans without delving into the deeper political, social and ethical obligations surrounding this issue.[9]

*Possible points to include:*

Strengths could also include:

- Traditional media platforms also provide feedback from the community which politicians can use to gauge public support. For example, talk back radio, newspaper and television polls.
- Social media can be a very effective low cost and timely way to bring a matter to the attention of the community. Issues and proposals to change the law can go viral and reach a large number of people by simply making a post.
- There is no cost for the use of social media and therefore people can exploit this platform irrespective of their financial situation. It can also take very little time or effort for a social media campaign to go viral online yet it can reach a significant number of people.

Limitations could also include:

- Social media enables anyone to make comments and are not restricted to the same laws surrounding ethical standards as traditional methods. Individuals and groups can therefore publish incorrect and offensive material.
- Traditional media platforms are limited as they require the editor or producer to agree to publish/broadcast the story and therefore not all issues can be made public.
- Social media however, many not be as effective as a multi platform campaign or traditional methods and therefore to affect legislative change may require money and significant effort to organise, for example, a demonstration.

# 4.2.9 Role of the Victorian Law Reform Commission in law reform

LEVEL 1

**1.** D

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have described how the VLRC's role leads to more effective laws in Victoria.[1] |
| ✓ ✗ | I have described that only the parliament can change the law, not independent law reform bodies such as the VLRC.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'representative government', etc. |

*Exemplar response*

[The role of the VLRC as described in the prompt leads to more effective law-making as the subsequence changes in the law – if the parliament acts on their recommendations – will be based on expert opinion on how to solve social problems, and therefore be more effective.[1]]

[The Victorian parliament is the only body able to change legislation in Victoria, the VLRC is only able to make recommendations for change.[2]]

*Possible points to include:*

An alternative explanation of this strength of the VLRC is that laws enacted in response to their recommendations will reflect the values of the community and therefore be more likely to be accepted and followed.

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have identified the first error in the scenario.[1] |
| ✓ ✗ | I have provided a correction for the first error.[2] |
| ✓ ✗ | I have identified a second error in the scenario.[3] |
| ✓ ✗ | I have provided a correction for the second error.[4] |
| ✓ ✗ | I have identified a third error in the scenario.[5] |
| ✓ ✗ | I have provided a correction for the third error.[6] |
| ✓ ✗ | I have signposted my response with terms such as: 'One error is' and 'The correct fact is that', etc. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Attorney-General', 'community law reform projects', 'statutory changes', 'legislation', etc. |

*Exemplar response*

[The first error is that the VLRC did not independently decide to investigate this area of law reform.[1]][In most cases, including this one, the VLRC must wait for the Attorney-General to refer a matter to them which will include a terms of reference, outlining the scope of the investigation. While the VLRC can independently investigate community law reform projects, these are limited in scope and the VLRC must be satisfied that the project will not require a significant use of their resources. Review and reform of an issue as significant as contempt law does not fall into this category.[2]]

[The second error is submissions were only accepted by those people who work outside the legal profession.[3]][An integral part of the VLRC is its consultative nature which is why submissions are welcomed from individuals and organisations, particularly those with expertise in the law being reviewed. Such consultation ensures recommendations to change the law will be more likely to resolve the issues identified by the Attorney-General when referring a matter to the VLRC.[4]]

[Finally, the third error is the VLRC passed the *Contempt of Court Act 2020* (Vic).[5]][The VLRC cannot change the law, only parliament has the ability to make statutory changes. The VLRC can only make recommendations to the Parliament of Victoria, which can then chose to adopt some, all or none of these recommendations and develop or change legislation.[6]]

**4.**

- ✓ ✗ I have identified one recently-completed (within the past 4 years) VLRC project.[1]
- ✓ ✗ I have described the legal issues identified in the VLRC project (the reasons for law reform).[2]
- ✓ ✗ I have described the VLRC's recommendations in this project.[3]
- ✓ ✗ I have stated the role of the VLRC in developing law reform.[4]
- ✓ ✗ I have included further details of the role of the VLRC.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Attorney-General', 'parliament', 'law reform', etc.

*Exemplar response*

[One recent example of a VLRC project is the investigation into Victoria's contempt of court laws and proceedings.[1]]

[In 2018 the Attorney-General provided a terms of reference to the VLRC, which identified the existing mix of common law decisions regarding contempt of court as unclear, difficult to access and outdated.[2]][In 2020, following extensive consultation with the courts, legal experts and the community, the VLRC recommended the parliament legislate to create the Contempt of Court Act to clarify which conduct is and is not a contempt of court, to ensure those charged with the offence are tried in a fair manner and also to set clear maximum penalties for those found to be in contempt.[3]]

[The purpose of the VLRC, as outlined in the Victorian Law Reform Commission Act 2000 is to develop law reform in Victoria.[4]]
[This occurs through the Commission making recommendations of law reform on matters referred by the Attorney-General. These projects involve consulting with experts and the wider community when reviewing existing law and recommending changes to the law.[5]]

LEVEL 4

**5.**

- ✓ ✗ I have stated the extent the VLRC can influence law reform.[1]
- ✓ ✗ I have described how the VLRC can influence law reform.[2]
- ✓ ✗ I have included an example to support my reasoning.[3]
- ✓ ✗ I have described the corresponding limitation of VLRC in influencing law reform.[4]
- ✓ ✗ I have included an example to support my reasoning.[5]
- ✓ ✗ I have described a second way in which the VLRC can influence law reform.[6]
- ✓ ✗ I have included an example to support my reasoning.[7]
- ✓ ✗ I have described the corresponding limitation of VLRC in influencing law reform.[8]
- ✓ ✗ I have included an example to support my reasoning.[9]
- ✓ ✗ I have included a concluding statement, weighing up the strengths against the weaknesses.[10]
- ✓ ✗ I have used key legal studies terms effectively such as: 'legislative', 'political agenda', 'statutory reform', etc.

*Exemplar response*

[The VLRC is able to influence law reform to a significant extent.[1]][This is because the VLRC is consultative in nature and therefore provides an indication of the community's support for legislative change. This also ensures reform is based society's needs, as the assessment of existing laws and proposals for change are based on experts' opinions and experiences.[2]][For example in the investigation into contempt laws many written submissions were received and extensive consultations with legal experts and interested parties were conducted, so the recommendations reflect the experiences of those participating in and affected by contempt proceedings.[3]]

[While there is extensive consultation with the community, this comes at a cost as the projects can take years to complete. The cost of the creation of the expert panel, staff to consult with the community, the development of research and reports can be significant. This cost (in money and time) can limit the more extensive use of the VLRC in law reform.[4]][A particularly time-consuming project was review of contempt laws, which took 1.5 years to complete and a further 6 months to be tabled in parliament and published.[5]]

[Secondly, the VLRC can be influential in law reform as it is the government who asks the VLRC to investigate the area of law reform in the first place. This indicates the issue is on the political agenda and that they may be more inclined to implement changes.[6]][Historically, the parliament has tended to adopt the vast majority of recommendations made in each VLRC report.[7]]

[However, parliament is under no obligation to create any statutory reform. Parliament may, in theory, choose to ignore the recommendations or only implement a limited number.[8]][Furthermore, this implementation may occur years after the project completion as was the case in the 2008 Jury Directions Project. It took six years to implement the main recommendation and then another two years to legislate with regards to the other recommendations.[9]]

[Therefore, while the work of the VLRC can be both costly, time consuming and the parliament is under no obligation to implement the recommended changes, it can influence legislative reform to a great extent because it consults with the community therefore being representative and government requests the VLRC to investigate in the first place, therefore indicating a willingness to reform the law.[10]]

*Possible points to include:*

Students could also include:

The VLRC can influence law reform:

- The VLRC is able to initiate Community Law Reform Projects without a reference from the Attorney-General. An example of this is the investigation into Birth Registration and Birth Certificates.
- The VLRC is independent which adds greater weight to their work and recommendations. Such independence ensures recommendations are based on expert opinion and community expectations rather than ideology or political considerations.

The VLRC is limited in influencing law reform:

- The VLRC may be limited in their resources to investigate areas of the law more broadly. While they can initiate Community Law Reform Projects these are limited in their scope and can only be initiated if the VLRC believes they will not use significant resources.
- The scope of their ability to research broadly is limited in that they must wait for the Attorney-General to refer the matter to them and provide terms of reference.

# 4.2.10 Role of Royal Commissions in law reform

LEVEL 1

**1.** D **2.** C

LEVEL 2

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated that a Royal Commission is a public inquiry on an issue set out in the terms of reference.[1] |
| ✓ ✗ | I have described how a Royal Commission can uncover the whole truth of the issue it is investigating.[2] |
| ✓ ✗ | I have described how the findings of a Royal Commission influence law reform.[3] |
| ✓ ✗ | I have identified one example of a recent Royal Commission.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Royal Commission', 'government', etc. |

*Exemplar response*

[A Royal Commision is a major public inquiry to investigate an issue of public interest, outlined in its terms of reference.[1]][It can seek submissions from the public and expert parties and can compel witnesses to give evidence and produce documents, to uncover the whole truth of a particular issue.[2]]

[A Royal Commission influences law reform as its conclusion, a report including findings about the issue is published and presented to parliament, including recommendations for law reform and reasons for these recommendations, usually to avoid the same issue investigated in the Royal Commission from arising again.[3]]

[A recent example is the Victorian Royal Commission into better tackling family violence.[4]]

**4.**

| | |
|---|---|
| ✓ ✗ | I have identified a limitation of Royal Commissions in infleuncing law reform.[1] |
| ✓ ✗ | I have described this weakness of Royal Commissions in influencing law reform.[2] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Royal Commission', 'parliament', law reform', etc. |

*Exemplar response*

[A limitation of Royal Commissions in influencing a change in the law is that the government of the day doesn't have to follow the suggested recommendations[1]][which can mean the inquiry could be considered a waste of time/money, as it ultimately the responsibility of the parliament to change the law and some proposals could be too politically controversial.[2]]

*Possible points to include:*

- Royal Commissions can be very expensive because of the considerable staff required and the use of experts. As a result the government isn't able to establish a Royal Commission to propose law reform for all social issues.
- Royal Commissions can be time consuming due to the extensive use of experts, hearings, examination of witnesses and consulting with the community (and the time taken to finalise all evidence presented and make recommendations). As such, law reform can be slow to respond to issues in society.

LEVEL 3

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated the extent of the similarity between Royal Commissions and Victorian Law Reform Commission.[1] |
| ✓ ✗ | I have described one similarity between Royal Commissions and Law Reform Bodies.[2] |
| ✓ ✗ | I have included a contrasting word such as: 'however', 'although' or 'while'.[3] |
| ✓ ✗ | I have described a corresponding difference between Royal Commissions and Law Reform Bodies.[4] |
| ✓ ✗ | I have described a second similarity between Royal Commissions and Law Reform Bodies.[5] |
| ✓ ✗ | I have included a contrasting word such as: 'while', 'however' or 'on the other hand'.[6] |
| ✓ ✗ | I have described the corresponding difference between Royal Commissions and Law Reform Bodies.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Attorney-General', 'Governor', 'Governor-General', etc. |

*Exemplar response*

[Royal Commissions and Law Reform Bodies are similar to a limited extent.[1]]

[Both Royal Commissions and Law Reform Bodies are independent bodies that investigate areas of law reform, funded through the government. They both research extensively into the area of concern, collect information, consult with the community and make recommendations through the publication of a report which is tabled in parliament.[2]] [A difference however,[3]] [is the Royal Commissions also hold public hearings and have coercive powers of investigation such as the ability to summons witnesses to give evidence under oath.[4]]

[While they are both provided with a Terms of Reference indicating the parameters of the research, the Attorney-General provides the Terms of Reference to a Law Reform body[5]] [while[6]] [the Crown, the Governor at the state level and the Governor-General at the Federal level, provides the Terms of Reference for a Royal Commission.[7]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have explained the role of a Royal Commission.[1] |
| ✓ ✗ | I have used an example to help explain the role of a Royal Commission.[2] |
| ✓ ✗ | I have made a judgement on the success of the Royal Commission into Family Violence.[3] |
| ✓ ✗ | I provided evidence to support my judgement of the Royal Commission into Family Violence.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislative change', 'law reform', 'tabling of a report', etc. |

*Exemplar response*

[The role of Royal Commissions are to use expert opinion, consultation with the public and use public hearings to hear evidence from witnesses to investigate an issue, in sometimes potentially controversial areas. The Royal Commission makes recommendations through the tabling of a report in parliament and parliament may choose to adopt the changes.[1]]

[A recent example was the Victorian Royal Commission into Family Violence. The role was to investigate how to better support victims, hold perpetrators more accountable and prevent family violence. The Commission had 25 days of hearings and received 1000 written submissions and made 227 recommendations. Some of the recommendations included an increase in funding to support services, extensive education program in schools surrounding respectful relationships and greater training for those of work in these areas.[2]]

[The success of the Royal Commission into Family Violence can be judged on the government's decision to adopt the recommendations and implement legislative change, which I believe is positive.[3]] [Of the 227 recommendations 63 have been implemented such as developing a family violence information sharing scheme and additional funding for specialist family violence support services, while 164 are in progress of being introduced. Therefore, it is successful at creating law reform.[4]]

*Possible points to include:*

Students could have also included:

- Royal Commission into Trade Union Governance and Corruption (Cth)
- Royal Commission into Institutional Responses to Child Sexual Abuse (Cth)
- Victorian Bushfires Royal Commission (Vic)

LEVEL 4

**7.**

- ✓ ✗ I have included a judgement about Royal Commissions.[1]
- ✓ ✗ I have described a strength of Royal Commissions.[2]
- ✓ ✗ I have included an example to illustrate my point.[3]
- ✓ ✗ I have used a contrasting word such as: 'however', 'although' or 'while'.[4]
- ✓ ✗ I have described the corresponding weakness of Royal Commissions.[5]
- ✓ ✗ I have included an example to illustrate my point.[6]
- ✓ ✗ I have described a second strength of Royal Commissions.[7]
- ✓ ✗ I have included an example to illustrate my point.[8]
- ✓ ✗ I have used a contrasting word such as: 'although', 'however', or 'on the other hand'.[9]
- ✓ ✗ I have described the corresponding weakness of Royal Commissions.[10]
- ✓ ✗ I have included an example to illustrate my point.[11]
- ✓ ✗ I have included a conclusion weighing up the strengths against the weaknesses.[12]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'coercive powers of investigation', 'submissions', etc.

*Exemplar response*

[Royal Commissions are very effective as they have coercive powers of investigation and consult broadly with the community ensuring their recommendations are reflective of the needs of the community.[1]]

[A strength of Royal Commissions is their coercive powers of investigation. This means they can compel an individual to participate in an inquiry such as summonsing a witness who gives evidence under oath and producing documents. Failure to do so can result in up to two years imprisonment.[2]] [For example, in the Banking Royal Commission the banks were immediately invited to make submissions and then more coercive methods could be used including requests for particular documentation or summonsing key personnel from the banks to give evidence.[3]] [However,[4]] [this extensive power comes at a cost. A weakness of Royal Commission is the significant costs they attract. Appointing former judges to these investigations, staffing hearings and researching issues through consultation with the public can be costly.[5]] [For example, the costs associated with the Banking Royal Commission are estimated to be approximately $65 million.[6]]

[A second strength of Royal Commissions are the broad range of opinions and expert advice they can seek. In addition, to welcoming of submissions they are able to garner significant voice from the community.[7]] [For example, the Banking Royal Commissions has received 6761 submissions.[8]] [Although,[9]] [a weakness of this is the significant time Royal Commissions can take because of the extensive hearings, cross-examinations, and receipt of submissions.[10]] [A particular criticism regarding delays was the Royal Commission into Aboriginal Deaths in Custody which spanned 1987–1989 and the report wasn't published until 1991.[11]]

[While Royal Commissions can be considerably expensive and time-consuming they are effective due to their coercive powers of investigation and broad consultation with the public and expert opinions. This ensures that law reform will be informed by community opinion and expert opinion.[12]]

*Possible points to include:*

Students could have also made the following points:

Strengths:

- The Commission is independent of parliament.
- Can be established at any time.

Weaknesses:

- Lack of power to investigate breaches of the *Royal Commissions Act 1902* (Cth).
- Government doesn't have to follow the recommendations however, failure to legislate may attract public pressure given the hearings, findings and recommendations are all public.

# 4.2.11 Role of parliamentary committee in law reform

LEVEL 1

**1.** D **2.** C **3.** B

LEVEL 2

**4.**

| | |
|---|---|
| ✓ ✗ | I have described the role of a parliamentary committee.[1] |
| ✓ ✗ | I have detailed the first step of the process: establishment of the inquiry's terms of reference.[2] |
| ✓ ✗ | I have detailed the second step of the process: gathering information.[3] |
| ✓ ✗ | I have detailed the third/final step of the process: report is written and it is tabled in parliament.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliamentary committee', 'parliament', etc. |

*Exemplar response*

[Parliamentary committees investigate the need for law reform and report to parliament recommendations for change in the law, based on expert opinion and community input.[1]]

[The process of investigation starts with establishing the terms of reference which specifies the purpose of the inquiry.[2]][Information is gathered by using the media to publicise the investigation, seeking input from the community via written submissions and holding formal public or private hearings.[3]][Lastly, once all submissions and expert evidence have been received and considered the committee will prepare a written report with recommendations for law reform to be tabled in parliament.[4]]

**5.**

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|---|---|
| ✓ ✗ | I have described parliamentary committee's ability to receive submissions from interested and expert bodies.[1] |
| ✓ ✗ | I have described parliamentary committee's ability to receive submissions from the general public.[2] |
| ✓ ✗ | I have described parliamentary committee's ability to compel witnesses to give evidence and provide documents.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliamentary committee', 'reform', etc. |

*Exemplar response*

[Firstly, parliamentary committees can uncover the whole truth about an issue they are researching, because they can take submissions on the existing law and what the law should be from expert groups.[1]]

[Further, parliamentary committees can uncover the truth about an issue including community opinions, as members of the public can make submissions as to what the law should be.[2]][Finally, parliamentary committees have the ability to compel witnesses to give evidence and produce documentation, further ensuring the whole truth about a complex social issue is uncovered.[3]]

**6.**

| | |
|---|---|
| ✓ ✗ | I have described how parliamentary committees can be informed about community opinions and expectations.[1] |
| ✓ ✗ | I have identified an appropriate example from within the last four years.[2] |
| ✓ ✗ | I have included specific details of the public consultation the committee conducted in this example.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliamentary committee', 'community values', etc. |

*Exemplar response*

[Parliamentary committees have the ability to accept submissions from individuals in society and community groups such as religious organisations or trade unions. Therefore, recommendations for change in the law will reflect community opinions on the issue.[1]][For example, the recent inquiry into end of life choices by a Victorian parliamentary committee[2]][included taking written submissions from the public and public hearings being conducted in Melbourne and rural parts of Victoria.[3]]

LEVEL 3

**7.**

| | |
|---|---|
| ✓ ✗ | I have described a parliamentary committee.[1] |
| ✓ ✗ | I have used an example to illustrate a parliamentary committee.[2] |
| ✓ ✗ | I have outlined the purpose of the parliamentary committee in the example.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Scrutiny of Bills Committee', 'Selection of Bills Committee', 'Estimates Committee', 'Legislative Council', etc. |

*Exemplar response*

[A parliamentary committee is a group of government and non-government members from either one or both houses appointed to undertake a specific task including investigating a particular policy or area of potential law reform. There are a number of types of committees including standing committees which operate continuously and investigate bill such as the Senate's Scrutiny of Bills Committee and the Selection of Bills Committee, Select Committees, established for a specific purpose and Estimates Committee who critique government spending.[1]]

[An example of a recent committee has been the Victorian parliament's End of Life Choices undertaken by a committee formed by the Legislative Council. The Committee's final report made 49 recommendations of which 44 were supported by the government and the *Voluntary Assisted Dying Act* (Vic) was passed in late 2017; voluntary assisted dying then became available in Victoria from mid-2019.[2]]

[The purpose of this committee, as indicated by the terms of reference included to assess current practices within the medical community surrounding patients' preferences at end of life, review of the current legislative framework and consideration of required legislative change.[3]]

*Possible points to include:*

Students could have also included:

- Inquiry into NBN rollout in Victoria (Vic)
- Inquiry into the external oversight of police corruption and misconduct in Victoria (Vic)
- Senate Select Committee of Stillbirth Research and Education (Cth)
- Selection of Bills (Cth)
- Scrutiny of Bills (Cth)
- Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (Cth).

**8.**

| | |
|---|---|
| ✓ ✗ | I have described parliamentary committees.[1] |
| ✓ ✗ | I have used a contrasting word such as: 'on the other hand', 'while' or 'however'.[2] |
| ✓ ✗ | I have described Royal Commissions.[3] |
| ✓ ✗ | I have outlined the differences between parliamentary committees and Royal Commissions.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Scrutiny of Bills', 'government policy', etc. |

*Exemplar response*

[A parliamentary committee is a group of government and non-government members appointed by one or both houses of parliament to undertake a specific task. The area of investigation can include scrutiny of bills, government spending or an extended investigation into government policy.[1]]

[On the other hand,[2]][Royal Commissions is an advisory body appointed by the Crown to investigate a particular issue. The Royal Commission is chaired by a retired or serving judge and the body uses expert opinion and consultation with the community to develop a report which makes recommendations to parliament.[3]]

[The distinguishing factor is the composition of the bodies. While parliamentary committees are composed of members of parliament, Royal Commissions are composed of judges, legal counsel and staff. Therefore, Royal Commissions are independent of the government while parliamentary committees are not.[4]]

LEVEL 4

**9.**

| | |
|---|---|
| ✓ ✗ | I have described one way parliamentary committees are able to change to law.[1] |
| ✓ ✗ | I have included an example to illustrate this point.[2] |
| ✓ ✗ | I have used a contrasting word such as: 'however', 'although' or 'on the other hand'.[3] |
| ✓ ✗ | I have described the corresponding limitation of parliamentary committees' ability to change the law.[4] |
| ✓ ✗ | I have included an example to illustrate this point.[5] |
| ✓ ✗ | I have described a second way parliamentary committees are able to change the law.[6] |
| ✓ ✗ | I have included an example to illustrate this point.[7] |
| ✓ ✗ | I have included a contrasting word such as: 'although', 'despite this' or 'conversely'.[8] |
| ✓ ✗ | I have described the corresponding limitation of parliamentary committees' ability to change the law.[9] |
| ✓ ✗ | I have included an example to illustrate this point.[10] |
| ✓ ✗ | I have included a conclusion weighing up the strengths against the weaknesses.[11] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliamentary committees', 'law-reform', 'legislative change', etc. |

*Exemplar response*

[One way parliamentary committees are able to influence change in the law is through an extended investigation and use of expert opinion to investigate an area of law comprehensively and make recommendations to parliament. This provides an opportunity for parliament to adopt some or all of the changes.[1]] [An example of this is the recent Victorian End of Life Choices Inquiry in which 49 recommendations were made and parliament adopted 44 and enacted the *Voluntary Assisted Dying Act* (Vic) in 2017; voluntary assisted dying then became available in Victoria from mid-2019.[2]]

[However,[3]] [a limitation of parliamentary committees' ability to change the law is that law-making can only be undertaken by parliament and parliament is under no obligation to act on any of the recommendations.[4]] [As indicated in the above example of the five recommendations not adopted, two were not supported and parliament felt the other three required further investigation.[5]]

[A second way in which parliamentary committees are able to change the law is through greater consultation with the public. In determining what a community values through these investigations parliamentary committees ensure parliament can pass legislation that is reflective of social values and desires.[6]] [For example, a government is unlikely to legislate in areas of controversial matters without strong consultation with the community which was evident through the Victorian End of Life Choices Inquiry.[7]]

[Although,[8]] [a limitation of parliamentary committees' ability to change the law can be the time constraints. Significant time is required to undertake the parliamentary committee duties which may deter members from their predominant role of law-makers. If it doesn't prevent law-reform it can certainly delay it.[9]] [For example, in 2018 there were 67 current committees and 38 public hearings in the Commonwealth Parliament requiring extensive time.[10]]

[Though unable to actually change the law and despite some limitations, committees make a significant contribution to more effective law-making by parliament.[11]]

# 4.2.12 Ability of parliament and the courts to respond to the need for law reform

LEVEL 1

**1.** C

LEVEL 2

**2.**

| | |
|---|---|
| ✓ ✗ | I have identified a strength of parliament's ability to respond to the need for law reform.[1] |
| ✓ ✗ | I have described this strength in detail and explained how this strength better equips parliament to respond to the need for law reform.[2] |
| ✓ ✗ | I have identified a weakness of parliament to respond to the need for law reform.[3] |
| ✓ ✗ | I have described this weakness in detail and explained how this weakness negatively affects parliament's ability to respond to the need for law reform.[4] |
| ✓ ✗ | I have referred to the scenario explicitly throughout my answer. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'bill', etc. |

*Exemplar response*

[One strength of parliament is that it is able to initiate legislation to amend, repeal or pass laws reasonably quickly.[1]][As the supreme law-making body and unlike courts, the parliament does not have to wait until a dispute arises (in this case, around the issue of domestic violence) to change the law[2]]

[A weakness of parliament is that there can also be delays associated with actually passing a bill through parliament, which can mean the need for reform may not be met and responded to quickly and effectively.[3]][These delays may be due to the lengthy legislative process of debates and allowing for public scrutiny combined with parliament's limited sitting days within the year. This can mean it takes a long time for law reform to actually occur, and for Stewart's and the community's views to be reflected in the law accurately.[4]]

*Possible points to include:*

Other strengths for parliament's ability to respond to the need for law reform include but are not limited to:

- Parliament is not bound by previous acts/laws and change and amend these laws.
- Parliament is the supreme law-making body and can override court-made law that may be in conflict with society's views.
- Parliament is elected and the public can pressure parliament to change the law, which ensures laws change to reflect the view of the majority.

Other weaknesses for parliament's ability to respond to the need for law reform include but are not limited to:

- Parliament cannot create/amend laws that are not within their jurisdiction to do so, as stated in the Constitution.
- Members of parliament may be less inclined to change controversial laws for fear of electoral backlash and loss of voters.

LEVEL 3

**3.**

| | |
|---|---|
| ✓ ✗ | I have stated one reason the courts are unsuccessful in responding to the need for law reform.[1] |
| ✓ ✗ | I have described how this can make the courts reluctant or less able to respond to the need for law reform.[2] |
| ✓ ✗ | I have used a case study to illustrate my point.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'judicial conservatism', 'law reform', 'supreme law-making power', etc. |

*Exemplar response*

[The courts are unsuccessful in responding to law reform because of judicial conservatism.[1]][This means that judges are reluctant to develop common law through their decisions as they feel this is best left to parliament who is the supreme law-making power.[2]][An example of this is the *De Sales v Ingrilli* case where the court upheld an old precedent of a 'widow's discount' where compensation is reduced to a woman based upon her ability to remarry. While not reflective of current day views the judges continued to uphold the precedent as they didn't feel it was their position to change the law.[3]]

*Possible points to include:*

Courts have to wait for matter to come before them, and this can be limited by any of the following:

- time to pursue a case
- money required to pursue a case through the courts
- standing requirement.

**4.**

| | |
|---|---|
| ✓ ✗ | I have stated why parliament was effective at responding to the need to law reform.[1] |
| ✓ ✗ | I have described how they have been effective at responding to the need for law reform.[2] |
| ✓ ✗ | I have linked my answer to the prompt.[3] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'legislative change', 'law reform', 'plebiscite', etc. |

*Exemplar response*

[Parliament is effective at responding to the need for law reform because it is representative, as outlined in sections 7 & 24 of the Constitution, stating that both houses of parliament shall be directly elected by the people. In the course of representing the views of the people parliament can respond to changes in community values and attitudes.[1]]

[In this instance, the Federal Parliament passed marriage equality legislation to ensure people of the same sex could marry. This is evidence of parliament's ability to respond to the need for law reform as there had been considerable push from the community for a number of years seeking legislative change. Given the controversial nature of the reform parliament had been hesitant to act and there had not been any change to the law since 2004. Consequently, the government introduced a plebiscite where all people of voting age were able to indicate whether they supported or didn't support marriage equality.[2]]

[The outcome of the plebiscite indicated that 62% of the votes supported marriage equality and, as a result, the government passed legislation in early December 2017 to reflect the will of the people. This illustrates the effectiveness of parliament's ability to respond to the need for law reform.[3]]

LEVEL 4

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated how effective parliament is in responding to law reform.[1] |
| ✓ ✗ | I have described the first reason why I think parliament is able to respond to the need for law reform. I have referred to the prompt in my answer.[2] |
| ✓ ✗ | I have used a contrasting word such as: 'however', 'although' or 'while'.[3] |
| ✓ ✗ | I have described the matching limitation of parliament being able to respond to the need for law reform.[4] |
| ✓ ✗ | I have described the second reason parliament is able to respond to the need for law reform.[5] |
| ✓ ✗ | I have used a contrasting phrase/word such as: 'on the other hand', although, or 'however'.[6] |
| ✓ ✗ | I have described the matching limitation of parliament being able to respond to the need for law reform.[7] |
| ✓ ✗ | I have included a statement weighing up the strengths against the weaknesses.[8] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'bipartisan support', etc. |

*Exemplar response*

[Parliament can be very effective in responding to legislative change.[1]][Parliament is able to respond effectively to the need for law reform as they are the supreme law-making power. This means they have the power to make and change laws at any time as long as the law-making area is within their jurisdiction. For example, the Victorian Government was able to respond in a timely manner to the report from the VLRC and pass the *Access to Medicinal Cannabis Act 2016*. This legislation adopted 40 of the 42 recommendations illustrating how effective the parliament can be in responding to the expectations of society.[2]]

[However,[3]][sometimes parliament may be hesitant to legislate in areas of law that may be seen as controversial. Fearing voter backlash, parliament may remain reluctant to legislate. This was seen in 2017 where the Commonwealth Parliament instead preferred to create a plebiscite for Marriage Equality to determine the views of the community rather than simply legislate. This was costly ($122 millon) and time consuming.[4]]

[Another reason parliament is able to respond effectively due to its ability to pass legislation quickly when required. This is evident when the proposed change has bipartisan support. For example, the *Marriage Amendment (Definition and Religions Freedom) Act 2017* took less than a month to pass, once introduced into parliament.[5]][On the other hand,[6]][parliament is sometimes limited in its ability to respond to legislative change due to the considerable time it takes to pass some legislation because parliament is not always sitting, usually only sitting approximately 20 weeks of the year. Furthermore, the long legislative process includes extensive debates which further add to the length of the legislative change.[7]]

[While parliament can sometimes be reluctant to enact legislative change and the process can be time consuming, when required they can act quickly and make sufficient use of law reform bodies to determine the need for legislative change and ensure laws are just and inclusive of the views of members of the community.[8]]

*Possible points to include:*

Parliament is representative as the members are elected and the people can be involved in the decision.

- However, may be unable to act due to the fear of voter backlash on controversial issues; unable to represent the views of all of society.

Parliament is able to research extensively using resources such as the VLRC and Royal Commissions.

- However, these can be both costly and time consuming.

**6.**

| | | |
|---|---|---|
| ✓ | ✗ | I have indicated the extent to which courts are able to respond to the need for law reform.[1] |
| ✓ | ✗ | I have described a limitation of the court's ability to respond to law reform.[2] |
| ✓ | ✗ | I have included an example to illustrate this point.[3] |
| ✓ | ✗ | I have used a contrasting word such as: 'while, 'although' or 'however'.[4] |
| ✓ | ✗ | I have described the corresponding strength of the court's ability to respond to law reform.[5] |
| ✓ | ✗ | I have included an example to illustrate this point.[6] |
| ✓ | ✗ | I have described a second limitation of the court's ability to respond to law reform.[7] |
| ✓ | ✗ | I have included an example to illustrate this point.[8] |
| ✓ | ✗ | I have used a contrasting word such as: 'yet, 'although' or 'however'.[9] |
| ✓ | ✗ | I have described the corresponding strength of the court's ability to respond to law reform.[10] |
| ✓ | ✗ | I have included an example to illustrate this point.[11] |
| ✓ | ✗ | I have included a conclusion weighing up the weaknesses and strengths.[12] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'litigation' and 'judicial conservatism', 'judicial activism', etc. |

*Exemplar response*

The courts are limited in the extent to which they are able to effectively respond to the need for law reform.[1]

A limitation of the court's ability to respond to law reform is that the courts must wait for a case to come before them. This requires someone with standing, time and money to pursue the matter through the courts. Litigation can take years and cost in the tens of thousands of dollars, therefore many people may be reluctant to do so.[2] For example Eddie Mabo asserted his claim for land rights through the courts for 10 years before a final decision was reached.[3]

While[4] litigation is time-consuming and costly, individuals are still able to pursue their rights through the courts and prompt changes in common law. This can occur in the High Court as they are not bound by previous decision and through judicial activism new laws can develop.[5] As indicated above, Mabo fought for land rights through the courts and his claim was eventually upheld. Through this ability to individually pursue the matter through the courts he was able to assert his legal property rights as the High Court found that 'terra nullius' was a legal fiction and that Native Title could exist, thereby responding to the need for law reform.[6]

A second limitation to the court's ability to effectively respond to law reform is judicial conservatism. A judge's reluctance to develop new law has caused judges to uphold outdated precedent, not reflective of community values.[7] For example the decision of the court in *De Sales v Ingrilli* to uphold the 'widows discount' based upon an old common law decision.[8]

Yet,[9] this is not always the case. Judges can be progressive and make reasonable attempts to 'delivers judgements that support the outcome they believe is just', that is, to interpret the law in a modern day context.[10] An example is the 1992 Mabo decision where the court held indigenous Australians had property rights that continued after British settlement.[11]

While individuals are able to pursue their rights through the courts and judicial activism can lead to new laws, the high cost, time and standing requirement is particularly onerous on individuals. Furthermore, judicial conservatism is a significant limiting factor on the ability of the courts to respond to the need for law reform.[12]

*Possible points to include:*

Limitations:

- not elected representatives
- may be bound by precedent.

Ability:

- no fear of voter backlash
- can change the law quickly once the matter comes to them.

# AOS Questions: Unit 4 AOS 2

LEVEL 5

**1.**

| | |
|---|---|
| ✓ ✗ | I have defined judicial conservatism.[1] |
| ✓ ✗ | I have described how judicial conservatism can limit the courts' ability to change the law.[2] |
| ✓ ✗ | I have used an example to illustrate the impact of judicial conservatism.[3] |
| ✓ ✗ | I have defined judicial activism.[4] |
| ✓ ✗ | I have described how judicial activism can enhance the courts' ability to change the law.[5] |
| ✓ ✗ | I have used an example to illustrate the impact of judicial activism.[6] |
| ✓ ✗ | I have identified a strength of courts as law-makers.[7] |
| ✓ ✗ | I have described how this strength of courts as law-makers, overcomes a matching weakness of parliament.[8] |
| ✓ ✗ | I have used an example to illustrate this strength.[9] |
| ✓ ✗ | I have signposted my answer with links to the prompt such as: 'A reason courts can overcome the weaknesses of parliament is'. |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'courts', 'precedent', etc. |

*Exemplar response*

[Judicial conservatism occurs when judges are reluctant to develop precedent and hence create common law, preferring to leave this law-making role up to parliamentarians. It refers to judges' tendency to not change the law radically,[1]][and therefore limits the extent to which courts are able to change the law.[2]][An example is the High Court's unwillingness to change an outdated common law principle in the Trigwell case.[3]]

[Judicial activism is an approach to law-making in which courts are prepared to make significant changes to the law to reflect changes in social values.[4]][Although such activism isn't common, it can lead to big changes in the law,[5]][such as when the High Court created native title in Mabo's case.[6]]

[A strength of the courts as law-makers is that they are independent and as a result of this they in a position to make laws objectively on controversial issues.[7]][Unlike members of parliament, the courts cannot be subjected to political pressures and don't fear being voted out when making law. The courts can make laws in sensitive and controversial areas the parliament is unwilling to, because of their concern about of voter dissatisfaction, a concern that can prevent needed changes to the law.[8]][For example, High Court's decision in Mabo creating native title was a controversial precedent the Court was able to set because it is independent.[9]]

*Possible points to include:*

Other strengths of courts as law-makers, overcoming weaknesses of parliaments:

- Courts can 'fill the gaps' in the law when resolving disputes; new issue arises for which there is no law, can create precedent to resolve the dispute and set law for the future (for example, the Kevin and Jennifer case). This overcomes the limitation of parliament which, making laws in futuro, is not able to foresee all future issues as society's values, technology and social issues are always changing.
- Courts can make the law relatively quickly when a new dispute arises and it is clear there is no relevant law; in such a case the dispute must be resolved, so the courts must create a precedent. This overcomes the limitation of parliament that is not always sitting, law-making process of passing a bill is slow and as such may be slow to respond to new social issues.

**2.**

| | |
|---|---|
| ✓ ✗ | I have stated whether I agree with the prompt.[1] |
| ✓ ✗ | I have stated that the double majority provision impacts on Commonwealth law-making by limiting its power.[2] |
| ✓ ✗ | I have described in detail how the double majority provision impacts on Commonwealth law-making.[3] |

| | |
|---|---|
| ✓ ✗ | I have stated that political pressures impact on law-making by the Commonwealth.[4] |
| ✓ ✗ | I have described in detail how political pressures impact on Commonwealth law-making.[5] |
| ✓ ✗ | I have explained an example to illustrate the impact of political pressures on law-making.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'double majority', 'legislation', etc. |

*Exemplar response*

[I agree that both the double majority requirement and political pressures impact on the power of the Commonwealth to change the law.[1]]

[Firstly, the double majority provision impacts the Commonwealth when making laws by acting as a check on its power.[2]] [It ensures the Constitution cannot be altered without public knowledge and consent of the majority of voters in Australia and the majority of voters at least four states, therefore impacting on any efforts by the Commonwealth to amend the Constitution.[3]]

[Secondly, political pressures impact law-making by influencing which laws are introduced and passed by the Commonwealth parliament.[4]] [Political pressures are the actions of organisations in Australia and overseas, including within political parties themselves, that influence which laws are debated and passed. International events such as terrorism and internal party disputes can impact on which laws governments seek to introduce and pass through the parliament.[5]]

[An example of political pressures impacting on law-making by the Commonwealth is the 2018 leadership battle in the Liberal/National government that resulted in the laws creating the National Energy Guarantee being drafted but then not introduced into the parliament.[6]]

*Possible points to include:*

- Political pressures could also be described as lobbying by groups such as business organisations, trade unions and consumer groups to influence law-making.
- Examples of political pressures could include business groups publicly opposing laws reducing carbon pollution or lobbying by consumer groups and the opposition/Greens for a Royal Commission into the banking sector (which will result in law-reform by the Commonwealth Parliament in future).

**3.**

| | |
|---|---|
| ✓ ✗ | I have identified one way the people can influence a change in the law by parliament.[1] |
| ✓ ✗ | I have described in detail this first way the people can influence a change in the law by parliament.[2] |
| ✓ ✗ | I have identified a second way the people can influence a change in the law by parliament.[3] |
| ✓ ✗ | I have described in detail this second way the people can influence a change in the law by parliament.[4] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'ultra vires', 'bill', 'separation of powers', etc. |

*Exemplar response*

[One way the people may have influenced this change in the law is through the representative nature of parliament.[1]] [As the members of the Commonwealth Parliament are directly chosen by the people at regular elections, the voters may have elected representatives who promised to introduce and pass this new law.[2]]

[A second way the people may have influenced this change in the law is through giving evidence at a Royal Commission.[3]] [A Royal Commission is an investigation into a particular issue which often results in recommended changes to the law. The public can make submissions to a Royal Commission and individuals may also be required to give evidence at the Royal Commission, therefore influencing the Royal Commission's recommendations for law reform and indirectly impacting on new laws made by the Commonwealth.[4]]

*Possible points to include:*

Ways for the people to influence law-making:

- Using media, demonstrations or petitions to influence law-reform.
- Using the courts to influence a change in precedent or statutory interpretation, which the Commonwealth Parliament then responds to by abrogating/codifying the law the court makes.
- Giving evidence/making a submission to a parliamentary inquiry.

Note: Not the VLRC as it informs law-making in Victoria, not in the Commonwealth Parliament.

**4.**

| | |
|---|---|
| ✓ ✗ | I have described one reason for change in the law.[1] |
| ✓ ✗ | I have described a recent example of such a change in the law.[2] |
| ✓ ✗ | I have identified one strength of the VLRC in leading to more effective law-making by parliament.[3] |
| ✓ ✗ | I have described this first way the role of the VLRC leads to more effective law-making by parliament.[4] |
| ✓ ✗ | I have identified a second strength of the VLRC in leading to more effective law-making by parliament.[5] |
| ✓ ✗ | I have described this second way the role of the VLRC leads to more effective law-making by parliament.[6] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'terms of reference', 'law reform', 'parliament', etc. |

*Exemplar response*

[A reason why laws need to change is due to changes in technology. As technology evolves new social issues can arise, and parliament must pass laws to ensure society remains protected from such problems.[1]][For example, in 2018 the Victorian parliament passed laws regarding permits to own and manage driverless cars, now that technology has developed and such cars are on the roads.[2]]

[Firstly, it is the role of the VLRC to be independent[3]][which adds greater weight to their work and recommendations, particularly regarding changes to the law on controversial issues such as access to medicinal cannabis. The VLRC can more objectively recommend what the law should be without fear of political pressures.[4]]

[Further, the VLRC's process involves community consultations, taking submissions from the public and engaging with experts in the area under review.[5]][This means laws proposed by the VLRC will be likely to be more effective and will reflect the values of society, so are likely to be accepted and followed.[6]]

*Possible points to include:*

Other reasons for change in the law are

- Change in society's values; laws must change to reflect changes in society's attitudes, otherwise laws will not be accepted and followed
- To protect members of society from harm, particularly those who cannot protect themselves

**5.**

| | |
|---|---|
| ✓ ✗ | I have stated whether I agree with the prompt.[1] |
| ✓ ✗ | I have described one way the courts can influence law-making by parliament – recommendations for law reform by the Coroner's Court.[2] |
| ✓ ✗ | I have described a second way the courts can influence law-making by parliament – judges' comments encouraging law reform when delivering a judgement.[3] |
| ✓ ✗ | I have outlined a supporting example of courts influencing law-reform by parliament.[4] |
| ✓ ✗ | I have stated the High Court as guardian of the Constitution is a check on the law-making power of state and Commonwealth Parliaments.[5] |
| ✓ ✗ | I have described the role of the High Court in limiting parliaments' law-making powers.[6] |
| ✓ ✗ | I have outlined a supporting example of the Court acting as a check on the power of the state or Commonwealth Parliaments.[7] |
| ✓ ✗ | I have signposted my answer with 'the statement is correct because..', 'secondly' (or similar). |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'law reform, 'High Court', 'guardian', 'statute', etc. |

*Exemplar response*

[Although these statements look inconsistent I agree that the courts can both influence law-making by parliament and act as a check on the parliaments' powers.[1]]

[Firstly, the statement is correct because courts can influence law-making by parliament, as the Coroner's Court can make recommendations for a change in the law when investigating a death or fire.[2]][Furthermore, when making a decision judges can make obiter dictum comments about what the law should be and whether the parliament should change the law.[3]][An example of this was the comments of the High Court in the Trigwell case in which an old precedent was followed but parliament was encouraged to change the law.[4]]

[Secondly, the statement is correct because the High Court is able to act as a check on the law-making powers of parliaments because it is the guardian of the Constitution.[5]][This means the High Court can strike down any legislation that breaches any aspect of the Constitution such as the division of powers or an express right in the Constitution.[6]][An example is the Court's decision in the Australian Capital Television case in which Commonwealth legislation was declared invalid as it breached the implied right to free political communication.[7]]

*Possible points to include:*

- An alternative example of law reform influenced by the courts is the Coroner's Court recommending safe injecting rooms in Victoria
- Other examples of the High Court acting as a check on the power of parliaments include the decisions in the *Roach and Communist Party* cases

**6.**

| | |
|---|---|
| ✓ ✗ | I have identified one check on parliamentary law-making power.[1] |
| ✓ ✗ | I have described in detail how this check limits law-making power of parliament.[2] |
| ✓ ✗ | I have identified one reason why parliament is effective in responding to the need for law reform.[3] |
| ✓ ✗ | I have described in detail how this first strength of parliament leads to effective law-making.[4] |
| ✓ ✗ | I have used a contrasting word such as 'however', 'although' or 'while'.[5] |
| ✓ ✗ | I have described the matching limitation of parliament being able to respond to the need for law reform.[6] |
| ✓ ✗ | I have identified a second reason why parliament is effective in responding to the need for law reform.[7] |
| ✓ ✗ | I have described in detail how this second strength of parliament leads to effective law-making.[8] |
| ✓ ✗ | I have used a contrasting word such as: 'however', 'although' or 'while'.[9] |
| ✓ ✗ | I have described the matching limitation of parliament being able to respond to the need for law reform.[10] |
| ✓ ✗ | I have identified a third reason why parliament is effective in responding to the need for law reform.[11] |
| ✓ ✗ | I have described in detail how this third strength of parliament leads to effective law-making.[12] |
| ✓ ✗ | I have used a contrasting word such as: 'however', 'although' or 'while'.[13] |
| ✓ ✗ | I have described the matching limitation of parliament being able to respond to the need for law reform.[14] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'common law', 'precedent', 'judges', 'statute', etc. |

*Exemplar response*

[One check on the law-making powers of the Commonwealth Parliament is its bicameral structure.[1]][This acts as a check on parliamentary law-making as it ensures that bills passed by the House of Representatives are reviewed by the Senate before becoming law, meaning radical changes to the law cannot be rushed without debate and scrutiny.[2]]

[One reason parliament is able to respond effectively to the need for law reform as they are the supreme law-making power.[3]][This means they have the power to make and change laws at any time in response to new social issues.[4]]

[However,[5]] [the division of powers and the express rights in the Constitution can both limit the ability of the Commonwealth to respond to some social issues, particularly on matters that are the responsibility of the states.[6]]

[A second reason the parliament is able to respond effectively to the need to change the law is because it is representative.[7]] [Members of parliament are elected and the people can be involved in law-making by submitting petitions or using social media, therefore new laws should match changes in society's values and should be accepted and followed.[8]]

[But on the other hand,[9]] [in a few cases parliament may be unable to act due to fear of voter backlash on controversial issues and so avoid law-making on some topics such as reducing carbon emissions. In addition, given the diversity in the Australian community the Commonwealth will not be able to pass legislation accepted by all members of society.[10]]

[Finally, the Commonwealth Parliament can respond to the need to change the law because it can benefit from research done by external bodies.[11]] [Royal Commissions and parliamentary committees can extensively review an area of law and particular social problems and make recommendations for change, ensuring new laws are more likely to be effective.[12]]

[However,[13]] [these processes can be both costly and time consuming, meaning only some law reform issues can be referred to such bodies and when they are, it slows down parliament's response to new social problems.[14]]

*Possible points to include:*

Other checks on law-making power of parliament include:

- separation of powers
- express rights
- role of the High Court of Australia
- the double majority provision.

**7.** **a)**

| | | |
|---|---|---|
| ✓ | ✗ | I have identified one other factor that affects the ability of parliament to make law.[1] |
| ✓ | ✗ | I have explained this factor in greater detail.[2] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'representative', 'election', etc. |

*Exemplar response*

[One other factor that affects the ability of parliament to make law is the representative nature of parliament.[1]]

[The democratic practices of the Commonwealth and Victorian Parliaments have a significant impact on law-making. The government are elected based on their promise to enact certain changes in the law which reflect the wishes of a majority of people. Thus, legislation enacted by the government will be representative of the values of the people. Furthermore, regular elections ensure the government is mindful to act in the best interests of the people or risk being voted out of office at the next election.[2]]

*Possible points to include:*

Other possible factors that affect the ability of parliament to make law:

- Political pressures – there are a variety of internal, external and international political pressures which can influence parliamentary law-making.
- Restrictions on the law-making power of parliament – including jurisdictional and constitutional restrictions, such as the constitutional division of powers.

**b)**

| | | |
|---|---|---|
| ✓ | ✗ | I have identified one way in which individuals may have influenced parliament to introduce this Bill.[1] |
| ✓ | ✗ | I have described how individuals can influence parliament in this way.[2] |
| ✓ | ✗ | I have provided a statement of evaluation.[3] |
| ✓ | ✗ | I have explained how this way might have been influential in this case.[4] |
| ✓ | ✗ | I have described one strength of the chosen method for influencing parliament.[5] |
| ✓ | ✗ | I have described a second strength of the chosen method for influencing parliament.[6] |

| | |
|---|---|
| ✓ ✗ | I have described one weakness of the chosen method for influencing parliament.[7] |
| ✓ ✗ | I have described a second weakness of the chosen method for influencing parliament.[8] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'parliament', 'bill', etc. |

*Exemplar response*

[One way in which individuals might have influenced parliament to introduce this Bill is through a petition.[1]]

[A petition is a formal written request to parliament seeking legislative change and includes a collection of signatures. Petitions can influence law-making by bringing issues to the attention of parliament or the relevant minister and may accelerate a change in the law that is already on the political agenda of parliament.[2]]

[Petitions can be somewhat successful in influencing law reform as they draw attention to an issue and ensure that it is tabled in parliament, however, this ability is limited in a number of ways.[3]]

[A petition may have influenced the Live Animal Export (Slaughter) Prohibition Bill 2019 by demonstrating a high degree of support for an end to live animal export, bringing this to the attention of the Australian Greens Party.[4]]

[Petitions can be successful in influencing law reform as they allow individuals and groups in society to make direct contact with parliament and the relevant minister.[5]] [Additionally, petitions with a large number of signatures can demonstrate significant support for the issue and emphasise the need for a change in the law.[6]]

[On the other hand, the minister tabling the petition may have little influence over government policy and therefore be unable to initiate legislation in response to a petition, limiting its ability to influence law reform.[7]] [Furthermore, petitions are not as visual as other methods of pursuing legislative change such as demonstrations and the use of social media, and therefore draw less attention to the need for law reform.[8]]

*Possible points to include:*

Other possible strengths of petitions:

- As a petition is tabled in parliament it can raise public awareness of an issue. Even if there isn't legislative change it can bring attention to a possible need to change the law to the minister and the general public.
- E-petitions have made it much easier to gather a lot of support for an issue.

Other possible weaknesses of petitions:

- It can sometimes be hard to obtain a large number of signatures. Petitions with few signatures may minimise the issue or petitions from opposing views can highlight con ict of opinions.
- E-petitions can only be accepted through parliament's website and not other pressure groups' sites.

Other possible methods of influencing law reform:

- demonstrations
- use of the courts
- use of the media, including social media

**c)**

| | |
|---|---|
| ✓ ✗ | I have identified one factor that enables parliament to pass this Bill – supremacy of parliament.[1] |
| ✓ ✗ | I have described this factor affecting parliament's ability to change the law, linked to this proposed law.[2] |
| ✓ ✗ | I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[3] |
| ✓ ✗ | I have identified one factor that limits parliament's power to pass this Bill – need to pass through both houses.[4] |
| ✓ ✗ | I have described this factor affecting parliament's ability to change the law, linked to this proposed law.[5] |
| ✓ ✗ | I have identified a second factor that limits parliament's power to pass this Bill – the composition of the Senate.[6] |
| ✓ ✗ | I have described this factor affecting parliament's ability to change the law, linked to this proposed law.[7] |
| ✓ ✗ | I have used key legal studies terminology effectively such as: 'Bill', 'Senate', etc. |

*Exemplar response*

[One factor that makes the parliament more able to change the law in this case is the supremacy of parliament.[1]][The Commonwealth Parliament is the supreme law-making body in Australia and therefore has the ability to change the law where necessary on matters such as this.[2]]

[However,[3]][there are a number of factors which limit the ability of parliament to make and change laws, including the need to pass legislation through both houses.[4]]

[In order for a Bill to become law, it must first achieve a majority and be passed through both the Senate and the House of Representatives. This may be a difficult and time-consuming process in some cases, particularly when the Bill is introduced by a party other than the government, as was the case with the Live Animal Export (Slaughter) Prohibition Bill 2019.[5]]

[A second factor that limits parliament's ability to pass this law is the current composition of the Senate.[6]][Since this Bill was introduced by a Greens member and they do not have a majority in the Senate, and no party has a majority, it will require significant support from the opposition and the minor parties or the government in order for the Bill to be passed through the Senate.[7]]

**8.**

| | | |
|---|---|---|
| ✓ | ✗ | I have described the way in which individuals can influence law reform through the appeals process.[1] |
| ✓ | ✗ | I have explained this process in further detail, linking the method to how laws are changed.[2] |
| ✓ | ✗ | I have used an example to illustrate this method of influencing law-reform.[3] |
| ✓ | ✗ | I have described a second way in which individuals can influence law reform.[4] |
| ✓ | ✗ | I have explained this process in further detail, linking the method to how laws are changed.[5] |
| ✓ | ✗ | I have used an example to illustrate this method of influencing law-reform.[6] |
| ✓ | ✗ | I have identified a recommended reform to the criminal justice system.[7] |
| ✓ | ✗ | I have explained this recommended reform in further detail.[8] |
| ✓ | ✗ | I have described one way in which the recommended reform achieves justice.[9] |
| ✓ | ✗ | I have described a second way in which the recommended reform achieves justice.[10] |
| ✓ | ✗ | I have used a linking word to distinguish, such as 'however', 'on the other hand', 'whereas', (or similar).[11] |
| ✓ | ✗ | I have described one way in which the recommended reform may not achieve justice.[12] |
| ✓ | ✗ | I have described a second way in which the recommended reform may not achieve justice.[13] |
| ✓ | ✗ | I have used key legal studies terminology effectively such as: 'common law', 'statutory law', 'peremptory challenge', 'accused', etc. |

*Exemplar response*

[Individuals can influence law reform in the criminal justice system through the courts when they appeal a case. A party to a criminal case who believes the law (either a common law principle or statutory interpretation) is inappropriate may appeal to a superior court seeking earlier precedent to be overruled and the law to be changed.[1]][If a superior court finds in favour of the individual appealing the case they will change the common law to reflect this. A successful appeal could also result in a change to statutory law if parliament decides to codify the new common law principle created by the courts,[2]][as occurred in the case of *Mabo v Queensland* (No 2) [1992], when parliament passed the *Native Title Act 1993*.[3]]

[One other way in which individuals can influence law reform is through demonstrations. A demonstration is a rally or protest that is undertaken by a large group of people to bring an issue to the attention of parliament in an attempt to prompt legislative change.[4]][Demonstrations can influence law-making by bringing the issue to the attention of the community to garner further support and persuade more members of the community of the need for law reform. They may also draw the attention of legislators and demand that the law be changed to reflect the wishes of the community.[5]][Consider, for example, recent protests in favour of same-sex marriage and the subsequent change to marriage laws to allow for this.[6]]

One recommended reform to the criminal justice system is to abolish peremptory challenges/prosecution stand-asides in the process of empanelling a jury.[7] Currently an accused person can challenge (and the prosecution can stand-aside) a small number of prospective jurors during the empanelment process. The parties know very little about the potential jurors at this point and they do not need to give reasons for the challenge/ stand-aside. This proposal would prevent parties 'skewing' the representativeness of a jury (for example, an accused person might challenge the women who are randomly selected to be on their jury, making it more male-dominated and therefore not representative of the wider community) and reduce the time taken to empanel a jury.[8]

This recommended reform would achieve fairness in the criminal justice system by ensuring that the jury is a true cross-section of society, and preventing the parties from influencing the jury to make it younger/older/less diverse than the general population. This is fair because the jury will not have been manipulated in a way that may advantage one party or the other.[9] This reform also achieves equality in the criminal justice system as some accused persons may currently understand their right to challenge better than others; this reform would ensure all accused persons are tried by a genuinely randomly-selected jury, which promotes equality before the law.[10]

However,[11] this recommended reform is somewhat limited in its ability to achieve justice. The reform may reduce fairness as participation in jury selection helps an accused person feel more confident in the trial process and the outcome, which is fair – this reform removes that involvement.[12] Additionally, although the reform intends to reduce delays, jury trials only occur in a small number of cases, so this proposed reform does not reduce delays for the large number of accused persons awaiting a hearing in the Magistrates' Court – it therefore has a limited impact on delays across the justice system as a whole.[13]

*Possible points to include:*

Other possible ways for individuals to influence law reform:

- Petitions – a petition is a formal written request to parliament seeking legislative change and includes a collection of signatures from those who support such a change in the law. The petition will contain a request for parliamentary action and will make direct contact with the relevant minister and be tabled in parliament.

Other possible reforms to the criminal justice system that could be discussed:

- Boost in Legal Aid and CLC funding – August 2018 the Law Council of Australia's The Justice Project recommended a $390 million per year increase in legal aid funding across Australia.
- Ensure the new Sentencing Guidelines Council includes experts on how indigenous Victorians interact with the legal system – In 2017 the Victorian Government announced it would create (in 2018/19) the Sentencing Guidelines Council, to provide guidance to the courts about sentencing for crimes, so sentences reflect with community expectations about crime, punishment and rehabilitation. Due to the over-representation of Indigenous Australians in Victorian prisons, VLA suggested that the council should include representatives from within the Indigenous community and people would have expert knowledge or association with the Indigneous community.

# GLOSSARY

**Abrogation** When parliament disagrees with a legal principle developed by a court and renders the law invalid by passing legislation.

**Access** Individuals in society having an understanding of legal rights and an ability to pursue their case.

**Administrative convenience** The benefit derived from organising cases according to how serious or complex the matters are.

**Aggravating factor** Aspects of an offence or the offender that render the offending more serious.

**Appeal** When a matter is heard for a second (or third) time.

**Appellate jurisdiction** A court's power to hear a case on appeal.

**Arbitration** A non-judicial resolution process involving an independent third party (arbitrator) who listens to parties present evidence and makes a binding decision.

**Bicameral parliament** A parliament consisting of two houses and the Crown.

**Binding precedent** A precedent that must be followed by all lower courts in the same hierarchy when the facts of the case before them are similar to the facts of the case where the precedent was established.

**Burden of proof** The responsibility of proving the facts of a case.

**Civil jury** A collection of six individuals randomly selected from the electoral roll who decide questions of fact and reach a decision in a case.

**Codification** The classifying, restating and incorporation of case law into legislation.

**Committal proceedings** Pre-trial proceedings conducted in the Magistrates' Court for indictable offences where the accused person has pleaded 'not guilty' or has not yet entered a plea.

**Community correction order** A sanction that is served by the offender while remaining in the community, with specific conditions that the offender must follow.

**Community Legal Centres (CLCs)** Not-for-profit, community-based organisations that provide free legal advice, casework and information and a range of community development services to their local communities.

**Compensatory damages** The most common damages sought; aim to restore the plaintiff, as much as possible, to the position that they were in prior to the infringement of rights.

**Conciliation** A non-judicial resolution process involving an independent third party (conciliator) with specialist knowledge about the type of dispute in question.

**Concurrent powers** Law-making powers granted to Commonwealth Parliament that are shared with the state parliaments.

**Consumer Affairs Victoria (CAV)** A civil complaint body, providing legal information and some civil dispute resolution services regarding the buying and selling of consumer items and residential tenancies.

**Costs** The amount of money that has to be paid (usually to the courts and legal representatives) to resolve a legal dispute.

**Court hierarchy** The arrangement of courts in order from least to most formal and superior.

**Court jurisdiction** The boundaries of power a particular court has to hear and determine disputes.

**Criminal jury** A group of 12 people representing a cross-section of the community, randomly selected from the electoral roll to deliver a verdict in a trials for indictable offences.

**Damages** An award of monetary compensation to the plaintiff, against the defendant.

**Demonstration** A rally or protest that is undertaken by a large group of people to bring an issue to the attention of parliament in an attempt to prompt legislative change.

**Denunciation** To publicly condemn (or criticise) the offender's criminal behaviour.

**Deterrence** To 'make an example' of the offender in an effort to sway the offender and/or would-be offenders away from committing similar crimes through the imposition of a criminal sanction.

**Disapproving** When a judge shows their disapproval for a precedent through their written judgment.

**Discovery** The process in which parties establish the facts of the case and the evidence that will be used to prove those facts.

**Distinguishing** When a judge avoids applying a precedent by showing that the case before them has different material facts to the case in which the precedent was established.

**Doctrine of precedent** Based upon the principle of 'stare decisis' which means 'to stand by what has been decided'; the doctrine of precedent requires that lower courts must follow the decisions of the higher courts in the same hierarchy, when resolving disputes with facts that are similar to cases resolved higher in the hierarchy.

**Equality** All people treated the same before the law, with a like opportunity to present their case (irrespective of personal characteristics such as wealth, language background and so on).

**Exclusive powers** Law-making powers granted only to the Commonwealth Parliament.

**Executive power** The ability to administer laws and 'conduct the business of government'.

**Exemplary damages** A large sum of money that seeks to punish a defendant for an extreme infringement of rights and, to some extent, deter others from undertaking similar actions.

**Express rights** Human rights (or legal entitlements) explicitly stated in the Australian Constitution.

**Fairness** Legal processes are unbiased and impartial, and all parties receive a hearing without discrimination.

**Fine** A monetary payment the court will order an offender to make, as a penalty for a criminal offence.

**General deterrence** Occurs when individuals other than the offender (the public at large) are discouraged from committing offences of the same or similar character through the provision of a sanction.

**Governor** The representative of the Crown in the Victorian Parliament.

**Governor-General** The representative of the Crown in the Commonwealth Parliament.

**Guilty plea** A full admission by an accused person of an offence for which they have been charged.

**House of Representatives** The Lower House of the Commonwealth Parliament.

**Imprisonment** When an offender is held in custody for a given period of time; the most severe penalty a court can impose.

**Indictable offence** A serious criminal offence, heard by a judge and a jury (if the accused pleads 'not guilty') in a higher court.

**Indictable offence triable summarily** An indictable offence that may be heard like a summary offence, by a single magistrate instead of a judge and jury in a higher court.

**Injunction** A court order compelling a party to do something, or preventing a party from doing something.

**International declaration** A statement of principles that is not legally binding.

**Judge** An individual appointed to conduct trials/hearings and resolve legal disputes in court.

**Judicial activism** An approach to law-making where judges will consider a number of factors in their decision making and, where necessary, undertake a role in developing the common law.

**Judicial conservatism** An approach to law-making where a judge is reluctant to develop new law as they feel that is the role of parliament, as elected representatives, to develop law.

**Judicial power** The ability to resolve criminal and civil disputes, sometimes imposing sanctions and awarding damages.

**Legal practitioner** An individual with legal training, qualified to give advice and appear in court.

**Legislative Assembly** The Lower House of the Victorian Parliament.

**Legislative Council** The Upper House of the Victorian Parliament.

**Legislative power** The ability to make laws.

**Limitation of actions** The legal time-frame in which a plaintiff needs to bring their civil action.

**Mediation** A cooperative, non-judicial dispute resolution process involving an independent third party (mediator).

**Mitigating factor** Aspects of the crime and/or the offender that make the offending less serious.

**Negotiation** When the parties to a civil dispute (with or without lawyers) discuss ways to resolve the dispute by agreement.

**Nominal damages** A small amount of money awarded to show that the plaintiff was legally right.

**Obiter dictum** Comments made by the way; these are comments made by the judge to provide context to the judgement or legal suggestions. Does not form a binding part of the judgement, but may be persuasive in future matters.

**Original jurisdiction** A court's power to hear a case 'at first instance'.

**Overruling** When a judge in a superior court chooses not to follow the decision of a lower court from an earlier, different case, and therefore creates a new precedent.

**Parliament** The supreme law-making power of the Commonwealth and the states.

**Parliamentary committee** A group of government and non-government members who undertake work on behalf of the parliament to investigate policy and government administration.

**Parliamentary sovereignty** The fact that parliament is the supreme law-making body, with the ability to make, repeal and change any laws they wish, within their jurisdiction, whenever they wish.

**Parties (civil)** The plaintiff and the defendant.

**Parties (criminal)** The prosecution and the accused.

**Persuasive precedent** A precedent that can act as a point of reference for judges though they are not obliged to follow such precedents.

**Petition** A formal written request to parliament seeking legislative change and includes a collection of signatures.

**Plea negotiations** Discussions between the prosecution and an accused person, in which the accused may agree to plead guilty to a charge(s) against them, in exchange for the withdrawal of some charges or a lesser charge.

**Pleadings** A series of documents lodged in court by both parties that outline each party's claim.

**Political pressures** The actions of political parties, Australian organisations and international bodies that seek to influence how laws are changed in Australia.

**Presumption of innocence** A guarantee made to all accused persons that they are innocent until it is proven, beyond reasonable doubt, that they are guilty.

**Protection** To ensure that offenders do not pose a significant risk to the welfare of society (and/or their victims).

**Punishment** To ensure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.

**Ratio decidendi** Reason for the decision; this is the legal reason for the decision and is the binding part of the judgement.

**Referendum** A compulsory yes/no vote which must succeed before any changes can be made to the Australian Constitution.

**Rehabilitation** To sentence criminal offenders in a manner that aims to break the cycle of the criminal behaviour so that criminal offending may be prevented or stopped, by addressing the underlying reasons for criminal behaviour (such as drug addiction).

**Remedy** An order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief for the loss or injury they have suffered.

**Representative proceedings** When a group of plaintiffs come together to lodge a single civil action against the same defendant, for losses arising from the same set of facts and legal issues.

**Residual powers** All law-making powers not granted to the Commonwealth Parliament in the Australian Constitution, that are the responsibility of the state parliaments.

**Reversing** When a judge in a superior court changes the decision of a court lower in the hierarchy when the case is brought to them on appeal.

**Right to a fair hearing** The right of an accused person to have their case heard fairly, publicly and presided over by a competent, unbiased and independent court

**Right to a trial by jury** The right to be tried by an unbiased jury comprising the accused person's peers who have been randomly selected from the electoral roll.

**Right to be informed about the proceedings** Provides that victims of crime should be knowledgeable about the case in which they are involved.

**Right to be informed of the likely release date of the accused** Provides that victims of some crimes will be notified about the likely release date of the offender, including whether they apply for (and are granted) parole.

**Right to be tried without unreasonable delay** The right of an accused person to have their case heard/decided in a timely fashion unless there is a justified reason why their case should be delayed.

**Right to give evidence as a vulnerable witness** Provides for certain arrangements to be made to accommodate witnesses that are considered 'vulnerable', when giving evidence in court.

**Royal Commission** The highest form of inquiry, which investigates a particular issue through consultation with experts and the community, then develops a final report of recommendations for law reform which is tabled in parliament.

**Scope of liability** Who/how many defendants are liable for harm caused to the plaintiff and how responsible that party is/those parties are.

**Senate** The Upper House of the Commonwealth Parliament.

**Sentence indication** A statement by the court about whether a guilty plea will or will not result in an immediate prison term.

**Separation of powers** A principle established by the Constitution, separating the executive, legislative and judicial powers, to ensure there is no abuse of power by those bodies involved in the creation of laws and the administration of justice.

**Specialisation** The expertise of each of the courts in hearing certain types of cases.

**Specific deterrence** Occurs when the offender themselves is discouraged from committing offences of the same or similar character through the provision of a sanction.

**Standard of proof** The strength of evidence or level of confidence required to support a case.

**Standing** The ability of a party to appear before and be heard by a court.

**Statutory interpretation** The courts giving meaning to the words in legislation when resolving a dispute.

**Summary offence** A minor criminal offence, usually resolved in the Magistrates' Court by a single magistrate (or by infringement notice).

**Treaty** An agreement between two or more nations to do/not do certain things. Also known as a 'covenant' or 'convention'.

**Victim impact statement (VIS)** A written and/or verbal statement to the court about the physical, emotional and financial impact of an offence upon the victim (and/or their family).

**Victoria Legal Aid (VLA)** A government-funded agency that provides free legal advice and information regarding a range of legal disputes

**Victorian Civil and Administrative Tribunal (VCAT)** A tribunal with the power to hear a range of (often minor) civil and administrative disputes.

**Victorian Law Reform Commission (VLRC)** An independent, government-funded organisation that investigates and recommends law reform in Victoria.