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VCE LEGAL STUDIES

Units 1 & 2

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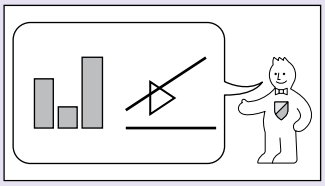
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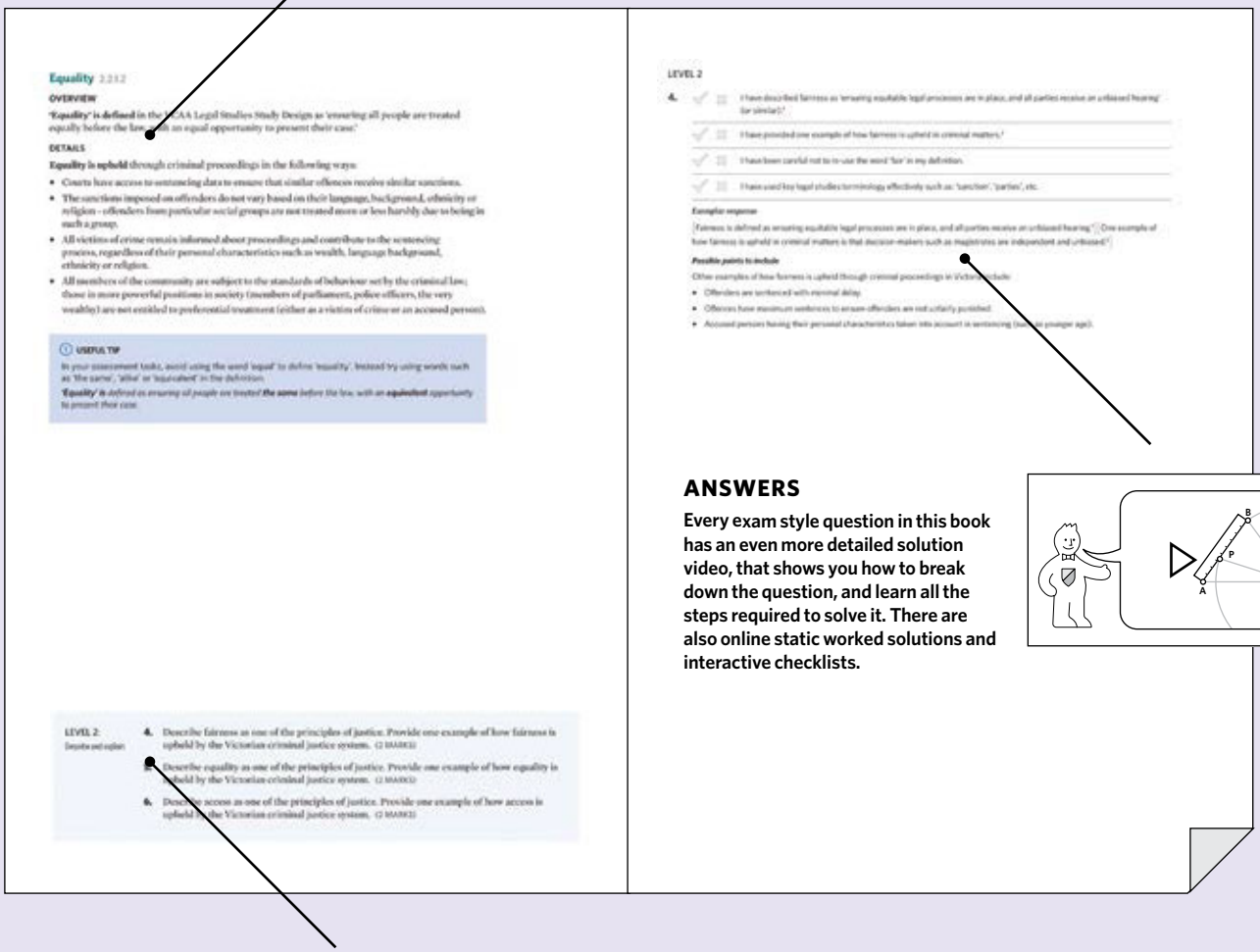
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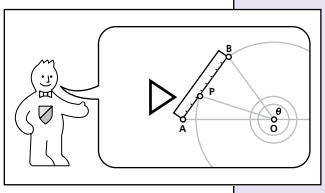
Each lesson in this book has a corresponding online video that further unpacks each and every concept.





ANSWERS

Every exam style question in this book has an even more detailed solution video, that shows you how to break down the question, and learn all the steps required to solve it. There are also online static worked solutions and interactive checklists.

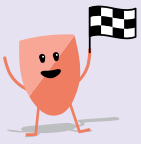


QUESTIONS

There are hundreds of questions in this book, and these questions can also be found and completed online. Answering your textbook questions online will enable you to better track your progress, and will enable your teacher to engage with your responses – so they support you even further.



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Unit 1, Area of study 1

CHAPTER 1

LEGAL FOUNDATIONS

01

The Australian community is peaceful and prosperous. In general, our society is a safe place in which all individuals and families are able to pursue work, travel and study free from discrimination and mistreatment. There are laws that guide our conduct, informing every aspect of each individual's life: from the age you start school, to how to drive and what can be posted online. Members of society choose who makes these rules and there are consequences for those who break the rules.

By the end of this chapter, you will know:

- What makes a 'good' law, and how laws are made.
- The types of laws we follow. If you steal another person's property, attack a person's reputation or buy a product that's faulty, the legal consequences vary.
- The role of the Victorian courts to resolve legal disputes.

UNIT 1 AOS 1 – KEY KNOWLEDGE

- the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- the principles of justice: fairness, equality and access
- characteristics of an effective law, such as it reflects society's values; is enforceable; is known; is clear and understood; and is stable
- sources of law such as common law and statute law
- an overview of the relationship between parliament and the courts
- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law
- an overview of, and reasons for, the Victorian court hierarchy.

UNIT 1 AOS 1 – KEY SKILLS

- define key legal terminology
- research and analyse relevant information about the sources and types of laws
- explain the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- classify a law according to its source and type
- assess whether a law is effective
- explain the relationship between parliament and the courts, using examples
- justify the existence of the Victorian court hierarchy.

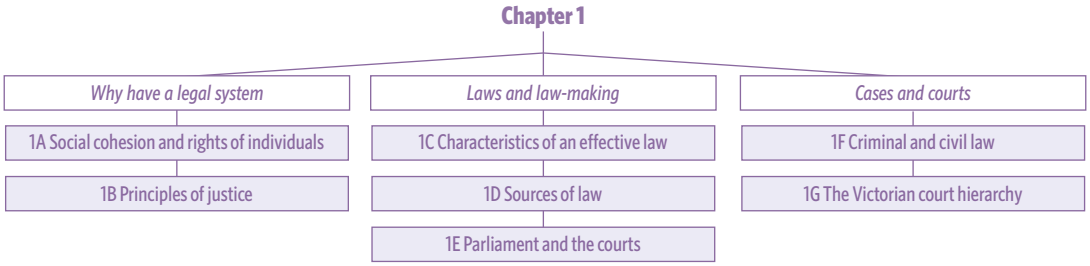


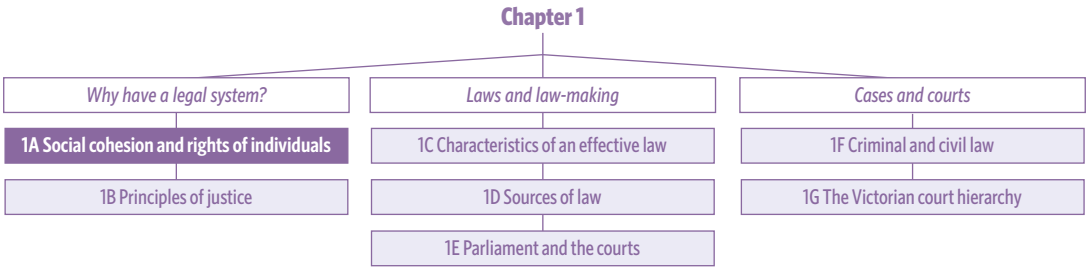
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1A Social cohesion and rights of individuals

According to the Australian Human Rights Commission:

> **A socially cohesive society is one which works towards the wellbeing of all its members, fights exclusion and marginalisation, creates a sense of belonging, promotes trust and offers its members the opportunity of upward mobility.**
>
> *Source:* OECD, Perspectives on Global Development 2012: Social Cohesion in a Shifting World: Executive Summary (2011)

Maintaining cohesion in society can be a difficult task. Constant social and economic change, immigration and political concerns are just some of the many factors that challenge the ability of society to operate harmoniously and be inclusive of the needs and values of all individuals.



To help achieve social cohesion and protect the rights of individuals, rules are needed to regulate behaviour within society and establish a set of societal norms that allow different groups within society to coexist. These rules may be legal rules (known as laws), or non-legal rules such as those you follow in school. You will learn more about the difference between legal and non-legal rules throughout this lesson.

In this lesson you will be learning about the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals.

Study design dot point

- The role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals.

Key knowledge units

Role of individuals in achieving social cohesion and protecting the rights of individuals	1.1.1.1
Role of laws in achieving social cohesion and protecting the rights of individuals	1.1.1.2
Role of legal systems in achieving social cohesion and protecting the rights of individuals	1.1.1.3

Role of individuals in achieving social cohesion and protecting the rights of individuals 1.1.1.1

OVERVIEW

Individuals are ultimately responsible for obeying their own moral values and guidelines to contribute to a society where all people are free from harm and can live their best life.

DETAILS

Social cohesion is achieved by individuals acting in a way that is moral and respectful of the needs of others. Beyond this, it is the responsibility of individuals to be aware of the law and to follow it. Most individuals and businesses choose to follow the law for reasons including (but not limited to):

- A fear of being caught breaking the law and having to face the consequences associated with prosecution, such as fines or imprisonment.
- Personal morals and values governing beliefs about the right way to behave and interact with others, such as not wanting to cause someone harm.
- Personal reputation, including how others perceive and interact with you. This could be in a social setting, with family members or even in the workforce.

The risk of hurting another person or causing unnecessary harm or damage is usually enough incentive for an individual to respect and follow the law, allowing for the rights of other citizens to be realised and social cohesion to be achieved.

Role of laws in achieving social cohesion and protecting the rights of individuals 1.1.1.2

OVERVIEW

Laws exist to promote community safety and protect the rights of individuals within society. These laws are made by a democratically elected parliament and applied in a similar way to all persons and businesses.

Criminal law in particular offers a strong deterrent against people acting out of self-interest or to harm others, because of the threat of punishment. Our elected law-makers are constantly working to ensure that our laws are effective, which is covered in greater detail in Lesson 1C.

DETAILS

Non-legal rules are rules that are made privately by individuals or groups in society and are not enforceable by the courts. These may be rules created by your family at home, by your school or perhaps by your sporting club. For example, maybe your football team expects players to arrive 45 minutes before the start of a match. These non-legal rules only apply to members of that specific group and serve as a way of defining acceptable behaviour for that group.

Legal rules (also known as laws) are rules created by law-making bodies such as parliament and are enforceable by the courts. They generally apply to all members of a society (including individuals and businesses) and are created to regulate behaviour and protect the rights of each individual member in that society. You will learn more about the sources of law and the different types of law in Lessons 1D and 1F respectively.

Whilst non-legal rules aim to regulate and create social cohesion within smaller groups in our society, legal rules (laws) serve to maximise social cohesion across the entire community. Laws do so by:

- Discouraging dangerous behaviour – this is a key purpose of criminal laws.
- Encouraging positive behaviour – consider laws that require businesses to provide a safe workplace for all staff and laws that require workers to pay income tax (which then allows governments to build roads, schools and so on).

Role of legal system in achieving social cohesion and protecting the rights of individuals 1.1.1.3

OVERVIEW

The legal system is made up of the institutions, organisations, rules, procedures and people tasked with maintaining order in society through creating and enforcing laws. This includes parliaments (who create laws); judges (who interpret and apply laws to resolve disputes); and the police and other organisations such as prisons (who enforce the law).

DETAILS

Two key features of the legal system are consistency and transparency. For the system to promote social cohesion, members of the community must trust and accept that it is fair, just and reliable.

For example, as part of a representative democracy, parliament will aim to represent the interests of the public when making laws and the courts will aim to interpret and apply the law in a way that is fair and equitable. You will learn more about the relationship between parliament and the courts in Lesson 1E.

LEGISLATION

On 29 November 2017, the Victorian Parliament passed the *Voluntary Assisted Dying Act 2017.* This new law allows terminally-ill Australian's in specific circumstances to voluntarily end their own life, provided that two medical professionals have signed their application and a given period has passed to ensure that the patient is sure of their decision.

The Victorian Government describes the reasoning behind the new law: 'The Victorian Government believes all Victorians are entitled to quality end of life care, which relieves pain and suffering, and provides compassionate support to family, friends and carers.'

This new law upholds the rights of individuals to a dignified end to their life, free from pain and suffering. It is an example of law-making that is designed to promote the rights of individuals in Victoria; the law also promotes social cohesion by providing rules for how doctors and terminally ill individuals can (and cannot) interact.

Source: Voluntary Assisted Dying – Victorian State Government

CASE STUDY

Discriminating against mental illness

In late 2015, a 21 year old named Ella Ingram won a significant discrimination case in the Victorian Civil and Administrative Tribunal (VCAT) against global insurance corporation, QBE.

It was found that QBE (Australia) had discriminated against Ella by excluding all claims related to mental illness in a travel insurance policy they had provided her for an overseas school trip. Despite being diagnosed with major depression and having to cancel her overseas trip, QBE had rejected her claim to reimburse travel expenses of $4,292.48.

This case is an example of the legal system working to protect the rights of individuals and apply the law in a way that is fair and equitable.

Source: Ella Ingram wins discrimination case against insurance giant, Victoria Legal Aid.

QUESTIONS

1A Social cohesion and rights of individuals

LEVEL 1:
Define and understand

1. Which of the following statements most accurately describes the role of individuals in achieving social cohesion and protecting the rights of individuals?

- **A.** Individuals ought to disobey those laws in society that they believe foster exclusion, such as the sending of asylum seekers to offshore detention centers.
- **B.** Individuals ought to publicly call out any and all instances of individuals having their personal rights infringed.
- **C.** Individuals are ultimately responsible for obeying their own internal moral values and the laws that govern society, including those laws that they disagree with.
- **D.** Individuals should be guided only by their own internal moral values.

2. Which of the following statements accurately describes the role of the legal system in achieving social cohesion and protecting the rights of individuals?

- **A.** The police force are responsible for working alongside the courts and other organisations such as prisons to enforce the laws in our communities.
- **B.** All institutions, organisations, rules, procedures and people involved in our legal system are tasked with maintaining order in society through creating and enforcing laws.
- **C.** The legal system must aim to be consistent and transparent at all times. This includes parliament, who is part of a representative democracy and is responsible for representing the interests of the public when making laws.
- **D.** All of the above accurately describe the role of the legal system in achieving social cohesion and protecting the rights of individuals.

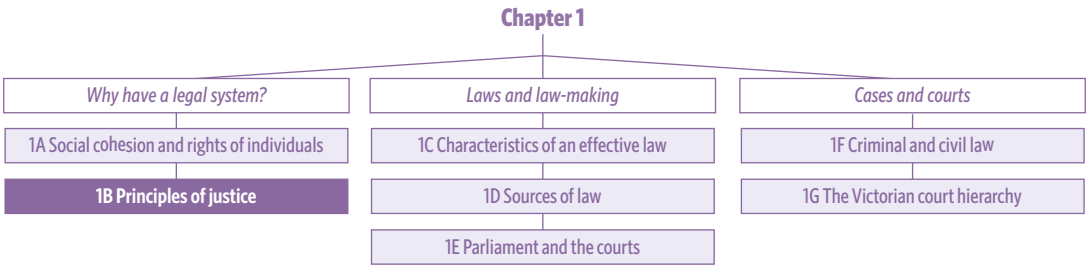
LEVEL 2:
Describe and explain

3. Distinguish between legal and non legal rules. (3 MARKS)

1B Principles of justice

What is justice? Justice is difficult to measure as individuals may have opposing views on whether an outcome is 'just'. The key reason the law operates is to achieve justice, but given how difficult it is to measure, it will often be unclear if justice has been achieved in a given case.

The principles of justice act as guidelines to determine the extent to which the legal system upholds the core values and morals of society. Differing values in society mean that members of the community will reach different conclusions about whether justice has been achieved, when looking at the outcomes of some cases.



In this lesson you will be learning about the principles of justice: fairness, equality and access. These are fundamental or basic ideas and values that aim to promote just treatment and outcomes in our legal system.

Justice is difficult to measure; consider the following:

- A man convicted of culpable driving is imprisoned for five years, after he chose not to answer questions in court. The victim's family, witnesses, the offender's family and the police will all have varying perspectives as to whether this is 'just' or not.
- A woman injured at work and unable to work again is awarded $500,000 compensation. Is this the 'right' amount of compensation? Will her former employer feel the same way as she does? What if she had to spend $10,000 in legal fees when pursuing this claim – given she didn't cause the situation, is that expense 'fair'?

Study design dot point

- The principles of justice

Key knowledge units

Fairness	1.1.2.1
Equality	1.1.2.2
Access	1.1.2.3

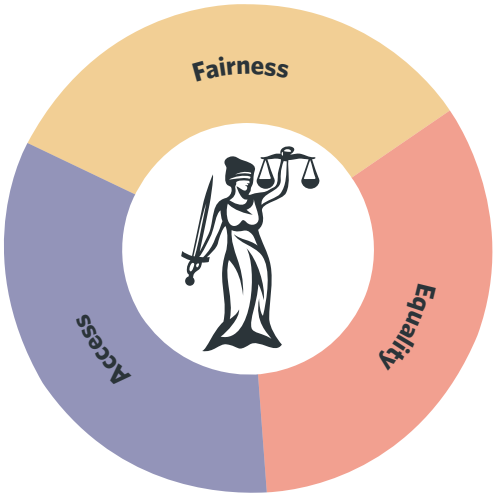


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Figure 1 The principles of justice

Fairness 1.1.2.1

OVERVIEW

'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.'

DETAILS

Fairness in the legal system is centred around the idea that all individuals have the right to a fair trial. This provides individuals and businesses in legal disputes with the right to have their case heard by an unbiased third party.

Fairness is promoted in the Victorian legal system in a variety of ways, including (but not limited to):

- All individuals and businesses in a legal dispute are entitled to a hearing by an impartial third party.
- Both parties have an opportunity to present their case in its best light.
- Both parties are entitled to a legal representative to present their case.
- Trial processes facilitate a fair hearing, such as strict rules of evidence and procedure. These ensure decisions are based on evidence that is reliable and accurate.
- Those charged with a criminal offence have the opportunity to be informed of all charges against them.
- In some criminal trials the accused has the right to have their case determined by a jury consisting of their peers (members of the community).

USEFUL TIP

In your assessment tasks/SACs, 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 equitable legal processes are in place, and all parties receive an unbiased hearing.

CASE STUDY

When fairness is absent

Consider the following hypothetical examples in which fairness is not achieved:

- Adam is charged with drink-driving. After he is found guilty in the Magistrates' Court, he learns that the magistrate and the police officer investigating his conduct are brothers. Was the 'guilty' verdict based on the law and the facts, or prejudice?
- Sophie is sentenced to four years' imprisonment for drug-trafficking. She confessed to the crime when interviewed by the police, but Sophie was not given a chance to tell the court she confessed because she was threatened with physical harm. Is that fair or right?
- Rex and Pamela are both found guilty of driving without a licence. Pamela is fined $1500 but Rex is only given a warning, because his dad is a well-known politician. Does that seem fair?
- Jeremy takes legal action against Duncan, claiming that Duncan published untrue and damaging comments about Jeremy on Twitter. The judge accepts Jeremy's claim and orders Duncan to pay $50,000 in compensation to Jeremy, but didn't give Duncan the chance to present any evidence in his own defence. Is that fair?

Equality 1.1.2.2

OVERVIEW

'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.'

DETAILS

The rule of law dictates that all persons, businesses and governments are equal before the law, and no one is above the law. But what is meant by the phrase 'equal before the law'? Does this mean that the law must treat all citizens the same, regardless of any differences and diversity among them? Instead, there must be some healthy 'discrimination' in order to protect certain groups within the community from inequitable treatment, such as children.



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Image: Pavel L Photo and Video/Shutterstock.com

Figure 2 Balancing equality and justice

Equality is promoted in the Victorian legal system in a variety of ways, including (but not limited to):

- The state is more powerful than individuals in criminal cases in terms of money, resources and expertise. To balance this inequity in resources, certain rights exist for the accused, such as:
  - the right to silence
  - the burden of proof resting on the prosecution
  - the standard of proof (beyond a reasonable doubt).
- Sentencing guidelines exist to ensure that the courts impose similar sanctions for similar offences. These guidelines often establish sentencing parameters, including a minimum and maximum sentence for a certain type of crime.
- The compensation for injured parties or sanctions imposed on offenders are based upon the law and the facts. Decisions are not based on bias (prejudice) for or against individuals due to their race, gender, age or political beliefs.
- The existence of specialist courts such as the Children's Court and the Koori Courts allow those groups within society who may have certain needs or requirements to have their case heard in a court specialised to handle those needs.

USEFUL TIP

In your assessment tasks/SACs, avoid using the word 'equal' to define 'equality'. Instead try using words such as 'the same', 'alike' or 'equivalent' in the definition.

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

CASE STUDY

When equality is absent

Consider the following hypothetical examples in which equality is not achieved:

- A bushfire is caused by faulty electricity lines and many homes are destroyed. Only rich families can afford to seek compensation from the electricity company that caused these losses. Is this equality before the law?
- Over a few months, a lot of young men – who happen to be international students – are issued fines for drink-driving. Australian-born men convicted of drink-driving in the same court tend to be given only a warning. Is this equality?

Access 1.1.2.3

OVERVIEW

'Access' is defined in the VCAA Legal Studies Study Design as 'ensuring individuals in society have an 'understanding of legal rights and ability to pursue their case.'

DETAILS

It is a requirement in our society that individuals and businesses inform themselves of, and understand, the law. If a person is charged with drink-driving or a business is accused of underpaying its workers, claiming they were unaware of the law is no excuse. However, not everyone has the same opportunity to understand and pursue their rights. To counter this, many bodies and groups publish information about the law and how to resolve legal disputes, and provide support to disadvantaged individuals to ensure they have the same ability to access the legal system.

Access is promoted in the Victorian legal system in a variety of ways. Some examples are listed below.

- Legal Aid funds legal representation in many serious criminal cases for those who cannot afford a lawyer.
- Court Services Victoria provides translators and other support for individuals attending court.
- Community legal centres and not-for-profit groups publish resources and provide information to people of all ages, cultures and languages to understand the law and how to protect themselves.
- Government advertising campaigns, government departments and the courts provide information across many platforms about legal rights, responsibilities and how legal disputes are resolved.

CASE STUDY

When access is absent

Consider the following hypothetical examples in which access is not achieved:

- Kathryn rents a house in Hopetoun (near the Victoria-SA border) that is owned by Hannah. Hannah has given Kathryn only 7 days' notice to move out. Kathryn knows that under the law she is entitled to a much longer notice period, but the tribunal that resolves disputes between landlords and tenants only hears cases in Melbourne. Is this sufficient access to the legal system?
- Tara was prescribed the incorrect medication by her doctor, who was not taking enough care when reviewing the results of Tara's blood tests. As a result she becomes very ill, enduring physical pain for many weeks. Tara knows she's probably entitled to compensation for this suffering, but because Tara is unemployed she can't afford to meet with a lawyer and find out more about her legal rights. Is the legal system accessible to Tara?
- Brooke was sentenced to 4 years' imprisonment for assault. Because Brooke is homeless, she was not able to pay a lawyer to represent her in court. As a result, she did not understand the court proceedings and did not know she was allowed to ask witnesses questions to clarify their evidence. She thinks the sentence seems too long, but can't afford to see a lawyer for advice about how to have this sentence reviewed. Is the legal system accessible to Brooke?
- Xue buys a TV that is faulty. She's told by a friend that a government body called 'Consumer Affairs Victoria' can tell her whether she's entitled to a refund or replacement TV, but Xue doesn't speak much English – she can't read the information on the Consumer Affairs website and can't follow what they're saying when she calls them. She thinks she'll be stuck with the faulty TV. Can Xue access justice in this case?

USEFUL TIP

Looking at how criminal and civil cases are heard in later chapters will also include focusing on whether these processes always achieve fairness, equality and access. It is possible that the principles of justice are not always achieved.

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 fairness is upheld through the legal system, it will be coloured yellow.

When considering whether equality is upheld through the legal system, it will be coloured orange.

When considering whether access is upheld through the legal system, it will be coloured purple.

Keen to learn more?

The County Court of Victoria, https://www.countycourt.vic.gov.au/files/documents/2018-08/factsheet-5-processes-and-principles-justice.pdf

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

VGSO – Right to a fair hearing, http://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, http://classic.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf

QUESTIONS 1B Principles of justice

LEVEL 1:
Define and understand

1. Which of the following is the best example of how fairness is upheld through the Victorian legal system?

- **A.** Legal Aid funds legal representation in many serious criminal cases for those who cannot afford a lawyer, unless a person has a criminal record.
- **B.** All traffic offences have the same consequence.
- **C.** Both parties are entitled to legal representation.
- **D.** Some accused persons are entitled to remain silent, but not those charged with really serious crimes. This is fair on victims of serious crimes.

2. Which of the following is the best example of how equality is upheld through the Victorian legal system?

- **A.** Court Services Victoria providing translators and other support.
- **B.** Sentencing guidelines that ensure the courts impose similar sanctions for similar offences.
- **C.** Those charged with a criminal offence have the opportunity to be informed of all charges against them.
- **D.** Government advertising campaigns, government departments and the courts provide information across many platforms about legal rights, responsibilities and how legal disputes are resolved.

3. Which of the following is the best example of how access is upheld through the Victorian legal system?

- **A.** Certain rights existing for the accused, such as the burden of proof resting with the prosecution.
- **B.** All individuals and businesses are entitled to have their case heard by an impartial third party.
- **C.** Both parties have an opportunity to present their case in its best light.
- **D.** Community legal centres and not-for-profit groups publish resources and provide information for all individuals to understand the law and how to protect themselves.

4. Jason's employment is terminated as his employer has decided to only hire individuals who were born in Australia. Jason believes that he is entitled to compensation for unlawful termination, but can't afford to meet with a lawyer and find out more about his legal rights. Jason also is unable to afford the costs associated with taking the matter to the courts and is unaware that there are other institutions that are able to hear his case.

Which of the principles of justice has not been upheld?

- **A.** Fairness.
- **B.** Equality.
- **C.** Access.
- **D.** The principles of justice have been upheld.

5. Rebecca has been charged with multiple criminal offences after being suspected of killing and stealing from her co-worker Alison. When Rebecca is arrested, the police inform Rebecca that she has been charged with the murder of Alison and that she has also been charged with theft.

Which of the principles of justice has been upheld?

A. Fairness.

B. Equality.

C. Access.

D. None of the above.

6. Josh (15) and Harry (16) were both separately charged with assault. As they were underage at the time of the offence, the trials are expected to occur in the Children's Court of Victoria. However, Josh has been informed that his case will be heard in the Magistrates' Court of Victoria instead.

Which of the principles of justice has not been upheld?

A. Fairness.

B. Equality.

C. Access.

D. The principles of justice have been upheld.

LEVEL 2:
Describe and explain

7. Describe fairness as one of the principles of justice. Provide one example of how fairness is upheld by the Victorian legal system. (2 MARKS)

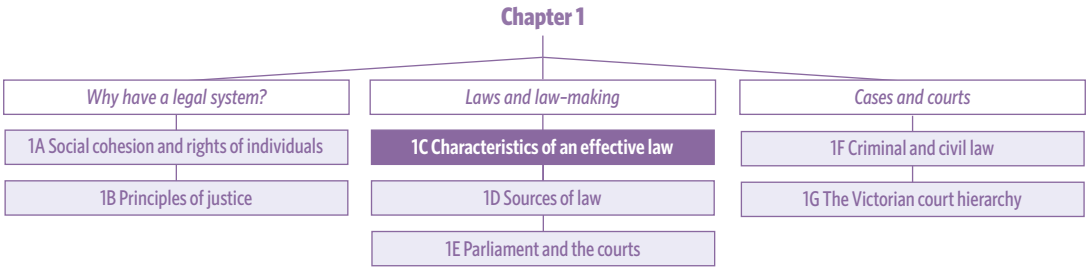
8. Describe equality as one of the principles of justice. Provide one example of how equality is upheld by the Victorian legal system. (2 MARKS)

9. Describe access as one of the principles of justice. Provide one example of how access is upheld by the Victorian legal system. (2 MARKS)

1C Characteristics of an effective law

Laws exist to protect the safety of individuals within the broader community. They are designed to uphold the personal rights of members within society and to protect against possible abuses from individuals, organisations and even the government.

Laws exist to discourage unsafe conduct and to encourage positive behaviour; for a law to achieve these aims it must possess particular characteristics that ensure it is effective.



In this lesson you will be learning about the different characteristics of an effective law, such as reflecting society's values, being enforceable, known, understood and stable. You will consider why these characteristics are necessary in ensuring that a law is followed by the majority of society and the rule of law respected and upheld.

Study design dot point

- Characteristics of an effective law, such as it reflects society's values; is enforceable; is known; is clear and understood; and is stable

Key knowledge units

Characteristics of an effective law	1.1.3.1
Reflects society's values	1.1.3.1.1
Is enforceable	1.1.3.1.2
Is known	1.1.3.1.3
Is clear and understood	1.1.3.1.4
Is stable	1.1.3.1.5

Characteristics of an effective law 1.1.3.1

Reflect society's values 1.1.3.1.1

For a law to be effective, it must **reflect society's values**. That is, reflect what the majority of society accepts and believes in.

Since Australia has a representative government who are elected to represent the interests of the voters, it is necessary for laws to reflect what society believes in and values. If a law is passed by parliament which offends against commonly held and recognised beliefs and standards, it is unlikely to be supported by the community (and may not be abided by).

CASE STUDY

The *Litter Act 1987* serves 'to prohibit and regulate the deposit of litter in the environment of Victoria' (s. 1(a)). This reflects a common societal belief regarding the importance of taking care of the environment.

Is enforceable 1.1.3.1.2

For a law to be effective, it must be **enforceable**. This means that it must be possible to monitor whether people follow the law, and provide consequences for people who do not.

It seems obvious that if a law is not able to be enforced, then people are less likely to abide by it. For example, have you ever consumed alcohol underage? What about jaywalked? While there are laws prohibiting these behaviours, they may not always be followed because they are difficult to enforce.

CASE STUDY

Consider Victoria's tough drink–driving laws and the associated penalties. Since 1997, Victoria Police have caught more than 75,000 drink drivers through random breath test operations, where consequences range from large fines to cancellation of driver's licence. These laws are regularly enforced.

Source: Drink Driving Statistics, Transport Accident Commission.

Is known 1.1.3.1.3

For a law to be effective, it must be **known**. This means making sure that changes are clearly communicated, and that people are given time to become familiar with any new law. This is one responsibility of a representative government – to ensure that the public are aware of any new laws that are passed.

Ignorance of the law is not an excuse. However, if people are unaware of a change to the law, they are unlikely to abide by it. For example, if a new law was imposed that prohibited mobile phones being used in cars via Bluetooth connection, then a large advertising campaign would be necessary to ensure all motorists were made aware of the change.

CASE STUDY

As of 1 July 2017, a new road rule was established in Victoria that requires motorists to abide by the speed limit of 40km/h when passing a stationary police vehicle or emergency vehicle with flashing lights or sounding alarms. This new law was published on the VicRoads website and was well publicised to ensure awareness.

Source: Recent changes to road rules, VicRoads (2018).

Is clear and understood 1.1.3.1.4

For a law to be effective, it must be **clearly and easily understood** by the community.

If a law is overly complex or lacking in clarity then it will be difficult for people to understand and follow. Because laws are drafted in parliament 'in futuro' (ahead of time), they are often written very broadly to try and capture unforeseen circumstances. This can sometimes make them quite long and complex, meaning that the government will often attempt to clearly explain the law to the community.

CASE STUDY

Consider the example below from the *Crimes Act 1958*. This example refers to engaging in a suicide pact, and is quite complex in its definition. A law such as this may be quite difficult to read and understand, and may need to be explained to the public in simpler terms.

Section 6B – Survivor of suicide pact who kills deceased party is guilty of manslaughter

(1) Where upon the trial of a person for the murder of another person the jury are satisfied that the accused caused or was a party to causing the death of that other person by a wilful act or omission but are satisfied on the balance of probabilities that the act was done or the omission made in pursuance of a suicide pact then the jury shall, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return a verdict of manslaughter in lieu thereof.

Is stable 1.1.3.1.5

For a law to be effective, it must be **stable**. That is, it should not change so frequently that it is difficult to keep up with.

Continuous changes and updates to a law may make it difficult to be known and understood by society. Therefore, laws are often only effective if they are implemented for a reasonable period of time and the community are given time to become familiar with it.

CASE STUDY

Consider the *Marine and Coastal Act 2018*, which was passed in efforts to better regulate and protect the use of important marine and coastal land.

A particular extract from the Act has been included below. Imagine a scenario where the government passed a law overturning this requirement, allowing work on marine and coastal land to proceed without consent. Changes to laws often take time to become common practice within industries, so how might the marine industry keep up with these changes?

Section 65 – A person must obtain consent to use or develop marine and coastal Crown land

(1) Subject to this Part, a person must not use or develop, or undertake works on, marine and coastal Crown land without a consent. Penalty: In the case of a natural person, 60 penalty units; In the case of a body corporate, 300 penalty units.

QUESTIONS 1C Characteristics of an effective law

LEVEL 1:
Define and understand

1. Which of the following options correctly matches the statements with the corresponding characteristic of an effective law?

I) If a law is overly complex or lacking in clarity then it will be difficult for people to understand and follow.

II) Continuous changes and updates to a law may make it difficult to be known and understood by society.

III) If a law is passed by parliament which offends against commonly held and widely recognised beliefs and standards, it is unlikely to be supported by the community.

A. I) is known; II) is clear and understood; III) reflects society's values

B. I) reflects society's values; II) is stable; III) is clear and understood

C. I) is clear and understood; II) is stable; III) reflects society's values

D. I) is known; II) is stable; III) is clear and understood

2. Which of the following statements describes why an effective law must be 'known'?

A. Ignorance of the law is no excuse.

B. An effective law must be known as this is part of our representative government.

C. An effective law must be known as people who are unaware of a law are unlikely to abide by it.

D. All of the above.

3. Consider the following hypothetical scenario.

The Prime Minister, Scott Morrison, has recently discussed the possibility of a new law which says that everybody under the age of 21 must have a note from their parents when buying alcohol in a bar or nightclub. In a recent press conference, the Prime Minister had this to say about the proposed new law:

> After countless opinion polls and nationwide studies, it is clear that the majority of society is concerned with the high levels of alcohol consumption by young adults in our community. Parents want more control over the amount of alcohol their children are consuming at night, particularly in their first few years of adulthood. This law addresses these concerns, while being simple and easy to follow: 'No note equals no drink'.

With these comments in mind, many of those in favour of the new law believe that it will be effective. Those who oppose this new law argue that no bar or nightclub is going to consistently check whether a younger patron has a 'note from their parents' to purchase alcohol. Which of the following characteristics of an effective law is this proposed law unlikely to satisfy?

A. An effective law must reflect society's values.

B. An effective law must be clear and understood.

C. An effective law must be enforceable.

D. None of the above, this law would be effective.

LEVEL 2:
Describe and explain

4. Explain why an effective law must be stable. (2 MARKS)

5. Why might writing a law *in futuro* (ahead of time) influence the effectiveness of that law? (2 MARKS)

LEVEL 3:
Apply and compare

6. Following recommended changes to animal–welfare legislation in Victoria aimed at minimising cruelty to animals, the Victorian Government in 2017 updated the *Prevention of Cruelty to Animals Act 1986* to better reflect community values and protect livestock from harm.

Premier Daniel Andrews had this to say to those handling or transporting livestock:

> Livestock should not be handled or transported during extreme heat. If this is unavoidable, people should plan ahead to avoid handling or transporting their livestock during the hottest times of day, and must schedule access to water and frequent, shady rest stops. Heat–stressed horses should be fed electrolytes and cooled down by hosing with cool water or placing wet towels over them.
>
> *Source:* Tougher Animal–Welfare Legislation Introduced in Victoria. PETA Australia (2017).

Under these laws, being found guilty of cruelty to animals in Victoria can result in a fine of up to $77,730 or up to two years in prison.

Discuss the effectiveness of these new laws in terms of their enforceability. (4 MARKS)

7. A large increase in rental costs in recent years has not been accompanied by a similar increase in wage growth that is necessary to maintain affordability of housing. As a result, renting is now much more difficult than it has been in the past, stirring anxieties and widespread political pressure to address the issue.

In response, the Victorian Government has recently conducted a review of the state's property and residential laws, in particular the *Residential Tenancies Act 1997.* The review recommended many changes aimed at improving affordability, which will begin to be introduced across 2020 as the Government continues to discuss the views and needs of the community.

The Government had this to say of their planned rental reforms for Victorians:

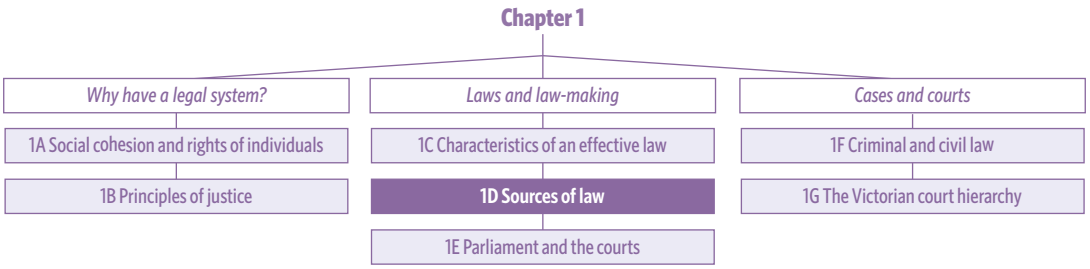
> Only 7.6% of new lettings in Melbourne were 'affordable' – compared to 30% a decade ago. Also, more Victorians are renting than ever before. Our current rental laws are over 20 years old. So we're reviewing the laws and standards for renting.
>
> *Source:* Rent Fair – rental reforms for Victorians. Vic.gov.au.

Based on the scenario, explain how this proposed change to the law might better reflect society's values. (4 MARKS)

1D Sources of law

The legal system is a complex network of laws and regulations. These laws stem from a variety of sources, including legislation created by parliament as well as in the courtroom through the operation of judge-made law. For example, according to legislation (Section 3 of the *Crimes Act 1958)* any person convicted of murder is liable to a sentence of life imprisonment, while it is judge-made law (and not legislation) that defines what murder is.

Where do our laws come from and what process have they gone through to become laws that society must follow?



The law-making process in Australia is a two-way relationship between parliaments and the courts. In this lesson you will be learning about the two main types of law in the Australian legal system:

- **Statute Law –** laws that are made by parliament.
- **Common law –** laws that are made by the courts.

Study design dot point

- Sources of law such as common law and statute law

Key knowledge units

Statute law	1.1.4.1
Common law	1.1.4.2

Statute law 1.1.4.1

OVERVIEW

Our system of government was founded as a representative democracy, where members of parliament are elected to represent and make laws on behalf of the people.

DETAILS

The Commonwealth Parliament is based on the British Westminster system, meaning that it consists of two houses and a representative of the Crown (the Queen). This is known as a **bicameral legislature,** which refers to having a parliament made of two separate houses that are responsible for law-making.

The Crown – The Governor-General

The Upper House – The Senate
Made up of 76 senators: 12 from each of the six states and 2 from each of the territories. Senators are elected every 6 years (every 3 years in the territories).

The Lower House – The House of Representatives
Made up of 151 members: each elected by the public every 3 years to represent an electorate (voters in a particular geographical area).

Figure 1 The Commonwealth Parliament

The same is true of the Victorian Parliament, which is also a bicameral legislature consisting of an upper house, a lower house and a representative of the Crown (Queen).

The Crown – The Governor

The Upper House – The Legislative Council
Made up of 40 Members, each elected every 4 years.

The Lower House – The Legislative Assembly
Made up of 88 members, each elected every 4 years.

Figure 2 The Victorian Parliament

One of the main responsibilities of parliament is to pass laws, known as **legislation.** Another name for law made by parliament is **statute.** As representatives of the will of the people, parliament must pass legislation that reflects the interests and views of the voters.

Most ideas for new laws will often start off as a conversation or debate within society, perhaps coming from a particular politician, a pressure group or even individual members within the community. How do these discussions and desires progress to become an enforceable law that regulates the behaviour of the community?

CASE STUDY

In 2017, the Australian Government passed the *Marriage Amendment (Definition and Religious Freedoms) Act* to legalise same-sex marriages in Australia. This made Australia the 26th country to recognise same-sex marriages in law.

Consider the long journey to get to these marriage equality laws in Australia. What began as a gradual shift in beliefs and attitudes towards same-sex relationships over many decades officially culminated in a nation-wide postal vote in 2017. The result of this vote was that 61.6% of those who voted were in favour of legalising same-sex marriages, which demonstrated to the government that there was great public support for a change to the law. In response the parliament passed legislation to change the definition of 'marriage' in the *Marriage Act 1961* (Cth).

Malcolm Turnbull, who was prime minister at the time, described the postal survey as a 'game changer' helping to resolve the issue after decades of debate. In an interview with channel 7, Mr. Turnbull said that the new law 'is a big Australian hug for all same-sex couples, saying we love and respect you, now go out there and get married'.

Source: Same-sex marriage is now legal in Australia, New.com.au. Chang, C (2017).

The Legislative Process

How does legislation progress through parliament and become law? The following step by step process outlines how a proposed law (a bill) progresses to become enacted legislation.

Lower House

Step 1: Initiation

- The minister responsible for the new Bill will request approval from the house to introduce it for the first time.

Step 2: First Reading

- If approval is given, the minister will formally introduce the Bill, which involves reading its title and distributing copies of it to other members to read. At this point, a date for the second reading will be set.

Step 3: Second Reading

- Debate of the Bill takes place for the first time. The minister responsible for the Bill will explain its purpose and distribute a full explanatory memorandum to the house.
- A Statement of Compatibility is established that determines if the Bill conforms to the Victorian Charter of Human Rights and Responsibilities (VCHRR).
- The opposition party will then decide whether they intend to support the Bill as it has been presented, or if they wish to reject or seek amendments to it. Long debate and scrutiny takes place at this stage until the house votes on whether the Bill should progress.

Optional Step: Consideration in detail (called the 'Committee of the whole' in the upper house)

- This is an optional stage where the Bill is considered in much closer detail, clause by clause. Detailed discussions and amendments may result.

Step 4: Third Reading

- Any final amendments are proposed and considered. The Bill is then officially voted on by the house. If successful, it will pass on to the Second House for consideration.

Upper House

The Bill will progress through the upper house via the same process that occurred in the lower house.

While most Bills are initiated in the lower house of Parliament, it is also possible for the upper house to initiate a Bill. In this case, the Bill will progress through the same process and then, once voted on in the Third Reading, progress to the lower house to continue the process.

Royal Assent

Once a Bill has been passed by both houses and has reached its final form, it will then be presented to the Governor of Victoria (representative of the Crown) for Royal Assent (formal approval).

Commencement

A Bill will rarely become an enforceable law on the same day of receiving formal approval via Royal Assent.

A new law will take effect on the date stated within the Act itself; if no date is included, it takes effect 28 days after receiving Royal Assent.

Figure 3 The process of a bill through the Victorian Parliament

USEFUL TIP

Figure 3 demonstrates the process of a bill through the Victorian Parliament. While not identical, the process of a bill through the Commonwealth Parliament is very similar – though the process of considering legislation in light of the human rights charter occurs in Victoria, but not in the Commonwealth Parliament.

USEFUL TIP

While most legislation starts in the lower house, many students mistakenly believe that a bill may **only** be introduced in the lower house. This is incorrect, as the upper house of parliament may also initiate any bill (with the exception of some bills pertaining to taxation and spending government funds). Instead of thinking of the process as moving from the lower house to the upper house, it is helpful to think of it instead as moving from **'the house of origin'** to the **'second house'**.

Delegated Legislation

Parliament also has the power to **delegate** (give over) its law-making power in certain areas to other bodies, including (but not limited to):

- Local councils, such as the City of Melbourne.
- Government agencies, such as the Australian Securities & Investments Commission (ASIC) and VicRoads.

These bodies may have more expertise in a particular area of law, or may have greater local knowledge of how an effective law would function in certain communities. Consider laws relating to rubbish collection and disposal in your town or suburb, which are usually established by the local council. The product of this is known as **delegated legislation,** which refers to laws or regulations that are passed by these bodies after power to do so is granted to them by an Act of parliament.

Common Law 1.1.4.2

OVERVIEW

The main role of courts is to uphold the rule of law by determining disputes between parties. Judges will do this by interpreting statutes and applying legal principles established in earlier cases to the facts of the case before them.

In some cases a legal issue or dispute arises for which there is no law – a scenario the courts have not needed to resolve before. In this situation a court creates a principle of law to resolve the dispute, which will then be followed in future cases of a similar nature.

DETAILS

CASE STUDY

Consider the following hypothetical situation as an analogy to the operation of common law:

Assume Stephanie is hungry and has decided to start eating her lunch in class. Her teacher, Mrs. Robinson, believes this is distracting to other students (who are complaining that 'it's not fair Stephanie can eat'), and that Stephanie should wait until lunchtime. Mrs. Robinson realises there has never been rules about students eating in class so she decides to make a rule to resolve the issue – she determines that Stephanie is not allowed to eat during class and tells all students about her new rule.

Later in the week, Stephanie complains to Mrs. Robinson that one of her classmates – Giao – is eating a packet of chips at the back of the classroom. Mrs. Robinson reprimands Giao and reminds him that, according to the new class rule, he is not allowed to do so.

In all future cases of students eating during class, Mrs. Robinson knows she should apply the same rule and prohibit students from eating during class time. Why? Because not to do so would be unfair on Stephanie and Giao. All students ought to be treated equally by the rules in Mrs. Robinson's classroom – they must know and understand that they are not to eat during class.

Common law (sometimes called case law, or judge-made law) operates through a process called the **doctrine of precedent,** which is the practice of deciding 'like cases in a like manner'. This means that when a similar case comes before a court, the precedent (decision) established in the previous case is to be applied so that similar cases are decided in the same way. In applying the doctrine of precedent, judge's continually reaffirm the way laws are to be applied – creating what we call 'common law' in the process.

In this hypothetical scenario above, Mrs. Robinson has set a 'precedent' for her classroom: a principle/rule that will be applied in future cases of students eating in the classroom. Just as in this case, laws within society must also be applied equally to all citizens, ensuring that there is predictability and equality within our legal system.

Features of the doctrine of precedent

As you will learn in Lesson 1G, the Victorian courts are organised into a hierarchy (a structure in which courts are ranked from inferior to superior; courts further up the hierarchy resolve more complex cases and appeals).

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:

- Magistrates' Court
- County Court
- Supreme Court – Trial Division
- Supreme Court – Court of Appeal
- High Court of Australia

When and how do courts make law?

- When resolving a dispute, the court will apply the existing law to the facts presented.
- If the fact scenario in a dispute gives rise to new legal issues the court has not considered, the court will be required to create a legal principle to resolve this dispute:
  - If such a case arises in which there is no law or the law is unclear, then 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 these when deciding the case before them.
  - When resolving a case, judges in superior courts provide written reasons for their decision. The written reason includes the new principle of law.
- When required to give meaning to the words in legislation, judges are making law. This is described in greater detail in Lesson 1E.

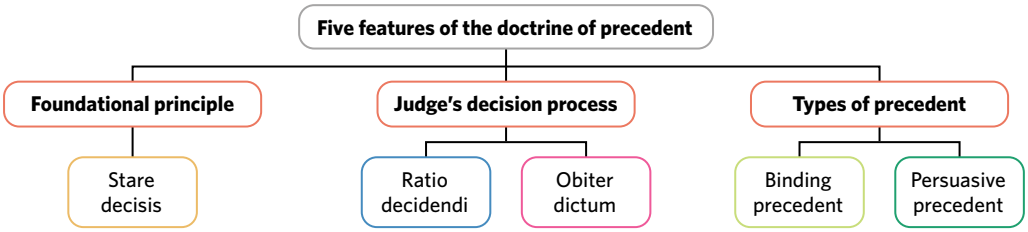


Figure 4 Five features of the doctrine of precedent

The operation of precedent consists of five key features:

1. **Stare decisis** – translating to mean **'stand by what has been decided',** stare decisis is the foundational principle of the doctrine of precedent and refers to the practice of following the decisions of past cases in future cases of a similar nature.
2. **Ratio decidendi** – translating to mean **'the reason for the decision',** the ratio decidendi of a case refers to the legal reasoning given by the judge in reaching their decision. The ratio is the principle of law that becomes binding and must be followed by courts lower in that same hierarchy.
3. **Obiter dictum** – translating to mean comments made **'by the way'**, the obiter dictum of a judge's decision refers to any comment made in the judgement of a court which does not form the key reason for the decision. For example comments about how the decision might be different if certain facts were different is obiter dictum. This is the persuasive part of the judgement, that is, it does not have to be followed but can provide guiding principles for judges in future cases.

USEFUL TIP

A judge's written reasons for their decision is divided into two parts – the ratio decidendi and obiter dictum. It is helpful to think of both of these as being part of the judge's overall decision making process. Ratio decidendi forms the binding part of the decision for future cases, while obiter dictum statements may form a persuasive precedent.

4. **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.
5. **Persuasive precedent** – a precedent that can act as a **point of reference** for judges developing principles of law, even though they are not bound to follow it. 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 to the case will often 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.

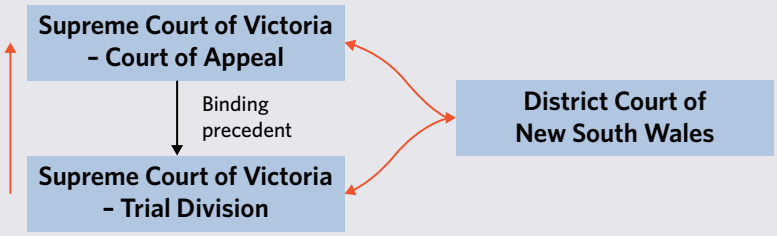
USEFUL TIP

Remember that 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.
- Decision made by a court in a different hierarchy (such as in other Australian jurisdictions or internationally).

CASE STUDY

Consider the courts illustrated below as an example of the operation of binding and persuasive precedents. As you know, lower courts must follow the precedent that is established by superior courts in the same hierarchy, where the facts of the case are similar.



In this example, **red** multi-directional arrows show how persuasive precedent may be used to help inform cases across multiple courts. Persuasive precedent is seen as an example of legal reasoning and can always be referenced when reaching a decision.

Conversely, **black** arrows show which courts are obliged to follow the binding precedent of other courts. As you can see, decisions made in the Court of Appeal form **binding precedent** over similar matters in the Supreme Court – Trial Division.

Decisions made in the District Court of New South Wales may only be used as **persuasive precedent** in cases heard in the other courts. This is because the District Court is part of a different court hierarchy (NSW) and is not a member of the Victorian court hierarchy. In addition, obiter dictum comments made in Court of Appeal judgements may persuade judges in future Supreme Court (Trial Division) cases, but are not binding.

USEFUL TIP

Only superior courts of record **in the same court hierarchy** can establish binding precedent over a lower court. A precedent coming from a superior court in another hierarchy (perhaps a foreign court or another state) can be deemed as persuasive precedent if the facts of the case are similar, but is not binding over the presiding judge.

In practice, if a judge is facing a totally novel scenario with no precedent applicable within their own court hierarchy they are likely to be persuaded by decisions made by superior courts in comparable jurisdictions like other states of Australia or similar countries.

USEFUL TIP

It is important to note that the Magistrates' Court and County Court are not superior courts of record and therefore can not establish binding or persuasive precedents.

Precedent in action

For 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, but in some special cases a new fact scenario arose which called into question whether the accused actually 'caused' the victim's death or not. In these new/novel cases, it was the role of the courts to establish a new precedent to resolve the dispute (setting a new legal rule to apply in future cases).

Consider the following cases, which show the development of a legal principle called the **'substantial and operating cause test'** in Victorian Law. You will learn more about this test in Lesson 3A.

CASE STUDY

***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. He appealed the decision, arguing that it was the poor medical treatment that caused the death of the victim and not the stabbing.
- The court rejected Smith's argument. The Court held that the stab wound was a significant cause of the death and that 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 substantial and operating cause test formed the ratio decidendi in Smith's case and is an example of the courts creating a new law to resolve a dispute in which there is no existing law** (that is, when a new fact scenario has arisen for which there is no applicable legislation or precedent to be applied).

CASE STUDY

***R v Evans and Gardiner (No. 2)* [1976] VR 523**

- Evans and Gardiner stabbed their victim in the stomach during a fight in prison. The victim was treated and survived, but fell seriously ill 11 months later.
- The victim sought medical treatment, but ultimately 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. Both appealed the decision, arguing that 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 court referred to the 'substantial and operating cause test' established in *R v Smith* [1959] (UK) and **used this as persuasive precedent to reach the decision that the stabbing was a substantial and operating cause of the victim's death (despite the failure of the doctor to diagnose the scar tissue).**

This is an example of judges in the Victorian hierarchy creating a new principle of law, based on persuasive precedent established in another court (here – a persuasive precedent from a different court hierarchy). The 'substantial and operating cause test' is now part of Victorian law and is to be applied in all similar cases in lower courts in the Victorian hierarchy.

CASE STUDY

***DPP v Robb* [2016] VSCA 125**

- Robb bashed the victim (Mitchell) in his home. Mitchell called 000 40 minutes later but was found dead by police. An autopsy found that he had died of a heart attack.
- Mitchell had a pre-existing heart disease, and the injuries he had sustained as a result of Robb's actions had caused such stress on his heart that 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 and not the assault.
- 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, even though another cause of death was also operating at the same time (Mitchell's existing ill health).

Robb's case is an example of the Victorian courts applying the 'substantial and operating cause test' established in *Evans and Gardiner* in 1976.

Statutory interpretation

The doctrine of precedent is one key aspect of judges' law-making. As you will learn in Lesson 1E, judges give meaning to the words in legislation when resolving disputes. This also forms part of the common law created by courts.

Keen to learn more?

Parliament of Australia, https://www.aph.gov.au/

Parliament of Victoria, https://www.parliament.vic.gov.au/

Court Services Victoria, https://www.courts.vic.gov.au/

QUESTIONS 1D Sources of law

LEVEL 1:
Define and understand

1. Which of the following statements regarding the legislative process is incorrect?

A. If a bill progresses to the second house, it will undergo the same process as what it did in the house of origin.

B. A bill will rarely become enforceable on the same day that it receives Royal Assent.

C. Debate of the bill will not take place until that bill reaches its second reading stage.

D. A bill must pass through what is known as 'consideration in detail' before being passed on to the second house.

2. Match each of the following terms to the correct definition.

- Stare decisis
- Ratio decidendi
- Obiter dictum
- Binding precedent
- Persuasive precedent

a) _____ Statements made 'by the way', which do not form the binding part of a decision but may be used as persuasive precedent in future decisions.

b) _____ A previous decision from a superior court in the same hierarchy which a presiding judge is obliged to follow.

c) _____ Standing by what has been decided.

d) _____ The legal reasoning for a decision which is treated as binding on similar cases in the future.

e) _____ A previous decision which a judge is not obliged to follow but may hold some importance in assisting a judge to determine a case.

3. Which of the following options most accurately describes the difference between binding and persuasive precedent?

A. Binding precedent is a decision that a judge says by the way, and must be followed as it highlights a judge's true opinion of a case. On the other hand, persuasive precedent does not need to be followed but can be used as assistance for a future judge.

B. Binding precedent refers to precedent which a judge is obliged to follow, as it comes from a decision of a superior court in the same hierarchy in which the facts of the cases were materially similar. On the other hand, a judge is not obliged to follow persuasive precedent, which might come from a previous decision of a lower court.

C. Obiter dictum statements form binding precedent, whereas the ratio decidendi informs persuasive precedent.

D. Binding precedent is given only by highly experienced judges, whereas persuasive precedent comes from legislation passed by parliament.

4. Which of the following options provides the most accurate explanation of the sources of law in Australia?

A. Decisions coming from senior judges contribute to law known as 'case law', while legislation is law that passes through parliament.

B. Parliament may only pass a new law if the public agrees with the new law via a vote.

C. Parliament may only pass a new law if all members of parliament agree (provided they are present to vote).

D. A judge may only make a law if they think the current law is inappropriate in the circumstances of their case. When doing so, the judge must have her new law peer-reviewed by other experienced judges.

5. Select the best answer from the following options:

A. An example of common law is the Australian Constitution, which is common to all Australians. An example of statute law is the *Equal Opportunity Act 2010* (Vic).

B. An example of statute law is the *Crimes Act 1958* (Vic). An example of common law is the outcome of a decision in a case, such as *Anderson v Gates* (2018).

C. An example of statute law is a law that is passed by parliament. An example of common law is the common rule of opening the door for someone behind you.

D. All of the above are correct.

6. Select the correct answer from the following options:

A. Statute law does not require the support of the majority of parliament for it to become enacted, provided that the public see the issue as being of major importance.

B. Statute law cannot change over time.

C. Statute law passed in federal and state parliaments in Australia is technically approved by the Queen.

D. None of the above.

LEVEL 2:
Describe and explain

7. Define the term 'statute law'. In your answer, explain what occurs in the 'initiation stage' of the legislative process. (2 MARKS)

8. Distinguish between persuasive and binding precedent. (2 MARKS)

9. Consider the following case:

> *Ewins v State of Victoria* [2019] VSC 129.
>
> Ewins brought a claim in the Supreme Court for defamation against the State of Victoria in relation to comments made by a superintendent of Victoria Police at a press conference held outside popular Melbourne nightclub 'Inflation'. According to Ewins, the words said by the police officer to the media were understood to mean that Ewins had deliberately pointed an imitation firearm at a group of police officers in a way that caused the officers to fear death or serious injury.
>
> While Ewins agreed that the words spoken by the superintendent at the press conference were not directly capable of identifying her, she argued that her identity could be inferred from what the police officer had said and that therefore the comments made by the officer were 'of and concerning' her.
>
> During deliberations, the presiding judge referred to the facts in *Pedavoli*, a previous case from the New South Wales Court of Appeal which had found that:
>
> > a news article which had only identified a teacher who engaged in sexual relationships with students by the subjects she taught at the school (and not by name) had implicitly invited readers to determine the actual identity of the teacher from the school website.
>
> The presiding judge decided that while there was no express invitation to the media to make their own enquiries as to the identity of the plaintiff, the fact that they are news reporters means that 'no express invitation is needed to excite the interest of the media representatives present to take further steps to ascertain the identity'. Therefore, the court found in favour of Ewins and concluded that the comments made by the superintendent were 'of and concerning her'.

a) The case of *Pedavoli* is an example of what type of precedent? Justify your response. (2 MARKS)

b) When will judges in future cases be bound to follow the precedent established in this case? Justify your answer. (2 MARKS)

Adapted from 2011 VCAA Exam Question 8b

10. In a recent trial in the Supreme Court of Victoria, company 'Best-Bikes' was deemed to be negligent after the brakes of one of their best bicycles proved faulty, causing a cyclist to crash into the side of a church and break their leg.

In giving his decision, the judge made the following two statements:

I) 'As the manufacturer of this bicycle, Best-Bikes had a direct and undeniable responsibility to ensure the safety and quality of their product. It is clear that the company has caused injury to one of its customers due to its own negligence.'

II) 'What's more, while not necessary for my decision, I note that the particular bike in question was marketed as being top of the range. I would suggest that this brings along with it an extra sense of quality and safety far beyond what a customer would usually expect of an inferior or cheaper bicycle.'

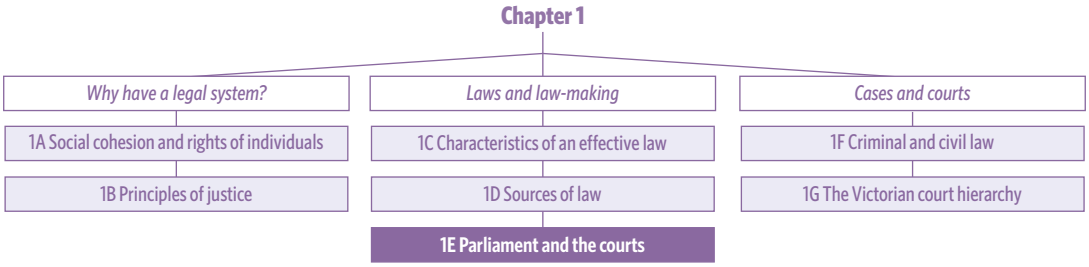
a) Distinguish between the ratio decidendi and the obiter dictum of the two statements. Justify your answer. (3 MARKS)

b) Which part of the judge's decision will form binding precedent on lower Victorian courts in similar cases in the future? (2 MARKS)

1E Parliament and the courts

The two main bodies that make law in Australia are parliament and the courts. As the supreme law-making body, parliaments create statute law, and the courts create common law through decisions that they make in cases which come before them.

Having learned about the different sources of law in Victoria, you will now look at the relationship between these bodies.



In this lesson you will be learning about the different features of the relationship between parliaments and the courts. Although the Victorian and Commonwealth Parliaments and the courts must remain independent to ensure a fair and democratic government and legal system, they do share a relationship and can influence each other in law-making.

Study design dot point

- An overview of the relationship between parliament and the courts

Key knowledge units

How does parliament affect courts?	1.1.5.1
How do courts affect parliament?	1.1.5.2

How does parliament affect courts? 1.1.5.1

OVERVIEW

Parliament influences the courts in three distinct ways:

1. Parliamentary supremacy
2. Establishing the courts
3. Statutory interpretation

DETAILS

Parliamentary Supremacy

Parliamentary supremacy refers to the fact that parliament is the supreme law-making body. This means that parliament has absolute sovereignty and can make, repeal and change any laws whenever they wish, provided that the law is about a matter within their jurisdiction. This will sometimes include overriding the laws of other law-making bodies such as the courts.

The primary role of parliament is to create legislation that promotes social cohesion, while the courts' primary role is to apply legislation to resolve disputes before them (and through this process they may develop common law).

Establishing the courts

The courts are established by parliament. Each court that exists was created by an Act of parliament. Each of these Acts establishes a particular court and sets out its particular jurisdiction (that is, which cases each court will be responsible for resolving). Parliament can change these Acts at any time, and add to or take away from a particular court's jurisdiction.

For example:

LEGISLATION

The ***County Court Act 1958*** **(Vic)** is an act of parliament which establishes the County Court of Victoria.

Section 4 – ESTABLISHMENT OF THE COUNTY COURT

A court shall be held in and for the State of Victoria styled 'The County Court' for the trial of offences and the trial and determination of all appeals, applications, claims, disputes and other proceedings both criminal and civil both at law and in equity as are by this or any other Act enacted to fall into and be within the jurisdiction of the court.

Statutory interpretation

Statutory interpretation is the courts giving meaning to the words in legislation when resolving a dispute.

This requires the courts to uphold the intentions of Parliament when interpreting statutes and applying the law to cases that come before them.

Reasons for statutory interpretation

Whilst parliament uses 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** (that is, for the future), they may be **unable to foresee a particular situation** and the courts must step in to clarify the law so it is applicable to the case before them.

Table 1 Reasons for statutory interpretation

Reasons	Case studies
Broad words applied to a specific set of facts	***Deing v Tarola*** **[1993] 2VR 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 to the Supreme Court. 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). 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.
Changing nature of words	***The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission*** **[2003] FamCA 94** Kevin was born biologically female but identified as a male and as an adult underwent gender reassignment surgery. Kevin married Jennifer in 1999 and they applied for a declaration of the 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. 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? 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'. The Family Court held the marriage was valid as Kevin was considered a man 'in the everyday sense'. The Court decided that the word 'man' should be given a contemporary, everyday meaning (which in the 21st century was held to include those who had changed their gender to male during their lives). *cont'd*

Reasons	Case studies
Unforeseen circumstances	***R v Brislan* [1935] 54 CLR 262** The defendant was charged under the *Wireless Telegraphy Act 1905* (Cth) for being in possession of a wireless radio without a valid licence. She was charged and fined. The defendant challenged the validity of the Commonwealth legislation, arguing that the Commonwealth did not have the power to make the *Wireless Telegraphy Act 1905* (Cth). Although section 51(v) of the Constitution gives the Commonwealth Parliament the power to make laws about 'postal, telegraphic, telephonic and other like services', the defendant argued s. 51(v) didn't include wireless radios, therefore the Commonwealth law was invalid and she should not have to pay the fine. The High Court interpreted the term 'other like services' in s. 51(v) to include broadcasting to wireless radios. This ultimately expanded the law-making power of the Commonwealth Parliament. 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.

Effects of statutory interpretation

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 courts' interpretations of a statute.

Table 2 Effects of statutory interpretation

Effects of statutory interpretation	Case studies
Create precedent	***Deing v Tarola* [1993] 2VR 163 The Studded Belt Case** 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. In later cases in the Magistrates' Court and County Court the legislation and this precedent defining 'weapon' were read together to determine whether those charged with carrying a regulated weapon have an item that breaches the law. Whether such a definition of the words in legislation forms a binding or persuasive precedent is dictated by the rules outlined in Lesson 1D – the precedent will be binding upon lower courts in the same hierarchy, in future cases with similar facts. *cont'd*

Effects of statutory interpretation	Case studies
Broadening of the application of a law	***Carr v Western Australia* [2007] 232 CLR 138** Carr was suspected of armed robbery and questioned by police. During the formal interview he made no admission 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. 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. WA's *Criminal Code* s. 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. 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. 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. The broad interpretation of 'interview' in this example means that 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** 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. Had the majority of the Court given 'interview' the same, more narrow interpretation as Justice Kirby, the video of Carr's admission would not have been permitted as evidence in his trial. 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 engaging in statutory interpretation.
Parliament may amend legislation in response to statutory interpretation, abrogating interpretations of legislation	**The meaning of 'persecution' in Australian refugee law** 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 or political activities. (*Migration Act 1958* (Cth).) 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. The impact of these cases was to significantly increase the number of people who fit within the definition of being 'persecuted' and were therefore entitled to protection in Australia. 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). It wasn't enough to show that a person would have greater opportunities in Australia, compared to their home country. Persecution means 'serious harm', and this includes torture, threats to one's life, significant physical harm or denial of basic services so severe it threatens a person's ability to survive. The impact of this new legislation was to make it 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.* This is an example of parliament passing legislation in response to the court's interpretation of a statute over time. Parliament cancelled the courts' earlier interpretations of 'persecuted'.

How do courts affect parliament? 1.1.5.2

OVERVIEW

Although judges can comment on social issues and describe the social impact of crime when resolving cases that come before them, the courts are not a political body and should not express public opinions on political matters. However, through their application and interpretation of statute law and the decisions that judges make in certain cases, the courts can influence the law-making activities of parliament.

The courts influence parliament in the following ways:

1. Comments on existing statutes and common law
2. High profile cases
3. Parliament codifying common law
4. Parliament abrogating common law
5. Invalidation of statute law

DETAILS

Comments on existing statute and common law

Through the process of statutory interpretation, judges may comment on whether particular legislation is appropriate to the cases being presented in the courts or difficult to apply.

A court may remark that a particular legal principle is confusing when interpreting or applying a statute. A court may also remark that a common law principle needs to be changed but, it is up to parliament to do it. See the *Trigwell* example below.

High profile cases

Decisions of courts often attract public attention; in particular, serious criminal cases are commonly reported in the media. This can lead to political pressure on the parliament to change statute law.

CASE STUDY ***DPP v Gargasoulas* [2019] VSC 87**

Following the Bourke Street tragedy in January 2017 (which resulted in Gargasoulas being convicted and sentenced in the Supreme Court), there was significant public outcry when it became known that Gargasoulas was on bail at the time of the offence. This resulted in calls for stricter bail laws in Victoria.

The Victorian government responded by initiating a review of bail laws, which ultimately resulted in legislative change. From 1 July 2018, the law changed to allow senior police officers to remand a person in custody for up to 48 hours before presenting them to a court to hear their application for bail; the law also increased the range of offences for which the presumption is that bail will not be granted.

Codification of common law

The codification of common law is the classifying, restating and incorporation of common law into legislation. This occurs when parliament agrees with a principle of common law established by judges from a particular case and creates legislation to enshrine the legal principle so that it becomes statute law.

This legislation usually clarifies the operation of the law for the future, beyond the parties to the dispute in which the common law principle was developed.

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'* – the land of no-one and therefore was automatically owned by the British Crown. Mabo challenged this principle of law, claiming ownership of land in the Murray Islands (in the Torres Strait).

In 1992 the High Court held that *'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 that the High Court established, by also creating the Native Title Tribunal where claimants can pursue their land rights.

Abrogation of common law

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.

As parliament is the supreme law-making body, it has the ability to abrogate common law, with the exception of decisions made by the High Court relating to the Constitution.

In some cases, a judge may indicate in their written judgement that they think the common law established in this area should be changed, but leave it to parliament to abrogate the law (rather than the court changing the common law principle).

This occurs because judges are often reluctant to change a common law principle that has been in place for a long time.

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 for negligence.

The High Court decided to follow an old common law principle where a landowner didn't owe a duty of care to prevent injury caused by 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 are not decided in a similar manner.

USEFUL TIP

It is important to remember that parliament cannot abrogate common law in cases where the High Court has ruled on a matter relating to the Australian Constitution (the document which sets out how the country is to be governed). The High Court has ultimate authority regarding the interpretation of the Constitution.

Invalidation of statute law

Courts enforce the division of law-making powers between the states and the Commonwealth Parliament.

The High Court can hear applications where a party is claiming that a parliament has made a law that it is not in their power to make. For example:

- Assume the Victorian Parliament made a law on a matter that is the responsibility of the Commonwealth Parliament, such as a law imposing a new tax on goods purchased from overseas.
- It is unlawful for a state to make laws on this topic under the Constitution (the law which sets out how the country is to be governed).

- The High Court would declare this legislation invalid.

In this case, the decision made by the High Court is final and binding, meaning parliament would not be able to abrogate it.

Keen to learn more?

Parliament of Victoria, https://www.parliament.vic.gov.au/

Parliament of Australia, https://www.aph.gov.au/

High Court of Australia, http://www.hcourt.gov.au/

Supreme Court of Victoria, https://www.supremecourt.vic.gov.au/

QUESTIONS 1E Parliament and the courts

LEVEL 1:
Define and understand

1. Match each of the following terms to the corresponding definitions.

- Parliamentary sovereignty
- Codification
- Statutory interpretation
- Abrogation

a) _____ the courts giving meaning to the words in legislation when resolving a dispute

b) _____ when parliament disagrees with a legal principle developed by a court and renders the law invalid by passing legislation

c) _____ 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

d) _____ the classifying, restating and incorporation of common law into legislation

2. Which of the following is not a way in which the courts can influence the law-making activities of parliament?

A. Decisions of courts often attract public attention; in particular, serious criminal cases are often reported in the media. This can lead to political pressure on parliament to change statute law.

B. Judges can make *obiter dictum* (comments made 'by the way') which provide insight into the real-life application of legislation and may encourage parliament to change statute law.

C. Judges can change statute law when it is confusing or cannot be easily applied to a case.

D. The High Court can declare legislation invalid if it violates the Constitution or falls outside of the law-making powers of parliament.

3. The case of *Deing v Tarola* [1993] 2VR 163 is an example of which of the following?

A. Codification of common law

B. Statutory interpretation

C. Abrogation of common law

D. The courts disapproving of legislation

LEVEL 2:
Describe and explain

4. Using an example, describe statutory interpretation and provide one reason why the courts may need to interpret statutes. (4 MARKS)

5. Using an example, explain the relationship between parliamentary supremacy and the abrogation of common law. (3 MARKS)

6. Describe codification and, using an example, explain why parliament might codify the common law. (4 MARKS)

7. One feature of the relationship between parliament and the courts is the establishment of the courts by Acts of parliament. Describe one other feature of the relationship between parliament and the courts. (2 MARKS)

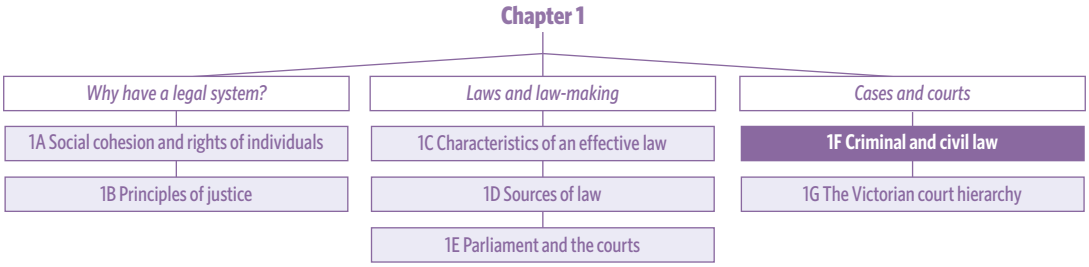
LEVEL 3:
Apply and compare

8. The aftermath of the Trigwell case (*State Government Insurance Commission v Trigwell* [1979] HCA 40) is an example of parliament abrogating the common law by passing new legislation. Using examples, distinguish between codification and abrogation. (6 MARKS)

9. Using a case as an example, explain one effect of statutory interpretation. (4 MARKS)

1F Criminal and civil law

In order to understand the way that the justice system operates, you must first learn about the different types of law that exist. Certain types of behaviour are regulated by different laws in Australia. The consequences for breaking the law will vary depending on the type of law that has been broken. Laws which govern behaviour in Victoria can be classified as criminal law or civil law.



In this lesson you will learn about the objectives and features of criminal law and civil law. You will also learn about the differences and relationship between these two types of law.

Study design dot point

- Types of law such as criminal law and civil law
- The distinction and relationship between criminal law and civil law

Key knowledge units

Criminal law	1.1.6.1
Civil law	1.1.6.2
Distinction and relationship between criminal law and civil law	1.1.6.3

Criminal law 1.1.6.1

OVERVIEW

Have you ever wondered why some people end up going to prison or having to pay a fine because they have acted in a certain way? This is because these people have done something to break a criminal law; in other words, they have committed a crime.

Criminal law refers to the laws that aim to protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another.

A crime is an act or omission which constitutes an offence and is punishable under the criminal law.

DETAILS

Key features of criminal law

The key features of criminal law are:

- The parties involved are the prosecution (the police or the Director of Public Prosecutions) and the accused person (sometimes referred to as the 'defendant').
- The law usually requires the prosecution to prove the accused person is guilty.
- A guilty offender will face sentencing, where a criminal sanction will be imposed to punish them and protect society.
- The severity of the crime will determine how harsh a sanction is imposed. Some offenders may only be punished with a small fine, while other offenders are sentenced to a period of imprisonment.

Some **examples** of criminal law offences include, but are not limited to:

- Murder
- Manslaughter
- Theft
- Assault.

LEGISLATION

Most criminal offences in Victoria are set out in the ***Crimes Act 1958* (Vic)**, such as culpable driving, manslaughter and assault. For example:

Section 75A Armed robbery

(1) A person is guilty of armed robbery if he commits any robbery and at the time has with him a firearm, imitation firearm, offensive weapon, explosive or imitation explosive within the meaning assigned to those terms for the purposes of section 77(1).

The following case study is an example of **criminal law**.

CASE STUDY

***DPP v Ristevski* [2019] VSC 253**

Offender Borce Ristevski pleaded 'guilty' to manslaughter by unlawful and dangerous act after killing his wife, Karen Ristevski, in their family home and disposing of the remains in Macedon Regional Park on 29 June 2016.

Ristevski denied having any involvement in his wife's death in the eight months that it took for Victorian police to locate her remains, and continued to do so up until the beginning of 2019, when he finally pleaded 'guilty' to manslaughter.

Ristevski was sentenced to nine years' imprisonment, with a non-parole period of six years.

This decision was appealed by the Director of Public Prosecutions in May 2019 on the basis that the sentence and non-parole period are manifestly inadequate.

USEFUL TIP

The title 'DPP' (Director of Public Prosecutions) refers to the head of Victoria's public prosecutions service and is responsible for instituting, preparing and conducting serious criminal matters in the High Court, Supreme Court and County Court on behalf of the Crown (and the Victorian community).

Civil law 1.1.6.2

OVERVIEW

Criminal laws are not the only type of laws in society. What about laws relating to the private rights of an individual or a business? For example, when a married couple decides to divorce and cannot agree on how to separate their assets, what type of laws would govern this dispute if not criminal laws?

The private rights of individuals and the rights of businesses in society are regulated by civil law.

Civil law refers to the laws that aim to provide individuals and organisations the right to seek a remedy if another party infringes their rights, and this causes injury or loss.

A civil dispute is a dispute between two parties where one party feels that their rights have been infringed by the actions of the other party and is seeking compensation.

DETAILS

Key features of civil law

The key features of civil law are:

- The parties involved are the injured party who brings the action (the plaintiff) and the party the action has been brought against (the defendant), who is believed to have caused the plaintiff's loss or suffering.
- The aim of civil law is to return the party who has suffered loss or injury to their original position.
- The plaintiff will usually be pursuing a claim of financial compensation.
- The outcome in a civil case is not 'guilty'/'not guilty' – instead the judge or jury will decide whether the defendant is liable/not liable for the plaintiff's suffering.
- If the defendant is liable and the rights of the plaintiff have been infringed, the courts will usually award a remedy to the plaintiff as compensation for their loss (this will often take the form of a sum of money paid by the defendant to the plaintiff – known as 'damages').

Some **examples** of civil law include, but are not limited to:

- Family law
- Contract law
- Property law
- Intellectual property law.

LEGISLATION

The ***Wrongs Act 1958* (Vic)** sets out a number of instances where a person may be liable for infringing the individual rights of another. For example:

- Section 16 outlines liability for a death caused wrongfully.
- Section 91 describes an organisation's legal liability for child abuse that takes place when a child is within the care of an organisation.

The ***Australian Consumer Law and Fair Trading Act 2012* (Vic)** creates civil law rights to recover compensation from a business if an individual purchased goods or services, but was misled about the quality of the product they purchased.

The ***Residential Tenancies Act 1997* (Vic)** creates civil law rights for those who rent a house or apartment. For example:

- Section 48 outlines a tenant's right to be refunded rent if they were charged rent that was excessive.

The following case study is an example of **civil law.**

CASE STUDY

***Hale v Bellvoir Football Club and Ors* [2016] VCC 0222**

Hale, the plaintiff, played junior football. During the first quarter of the game, the plaintiff was running fast towards the forward pocket and leapt in the air to mark the football. He caught the ball and as he landed his left boot got caught in the wire fence outside the boundary line. He crashed to the ground and badly injured his left knee.

The plaintiff sued the football club, the football league that organised the competition he was playing in and the local council (all three organisations comprised the defendants in this case). He wanted to be paid compensation for the consequences of his knee injury. He argued his injury was the defendants' fault – that by having the wire fence too close to the boundary line, they failed to exercise enough care toward those playing in the match and this negligence caused his knee injury.

The judge decided that the plaintiff should be paid $375,000 and that his past medical expenses, earnings and care should also be paid back to him. The judge also ordered the defendants pay the plaintiff $150,000 to compensate for a potential loss of ability to earn income in the future because of the injury, and $46,500 for future medical expenses.

Distinction and relationship between criminal law and civil law 1.1.6.3

Table 1 The distinction between criminal and civil law

	Criminal law	Civil law
Purpose	To protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another.	To provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.
Party bringing the case	Prosecution (the police or the DPP)	Plaintiff
Party defending the case	Accused	Defendant
Party responsible for proving the case (burden of proof)	Prosecution	Plaintiff

cont'd

	Criminal law	Civil law
Outcome of the action	Sanction – if an accused is found guilty (or pleads guilty to an offence), the judge will impose a sentence in accordance with the severity of the crime.	Remedy – if a defendant is found to be liable for infringing on the rights of the plaintiff, the plaintiff will be awarded a remedy as compensation.
Examples of this type of law	• Murder • Manslaughter • Assault • Theft • Culpable driving.	• Negligence law • Family law • Contract law • Property law • Intellectual property law.

The relationship between criminal and civil law

In some cases, a particular fact scenario or series of actions by an individual may lead to both criminal law and civil law being applicable. Often when a person commits a crime, this will involve causing harm to another person – this may infringe upon the rights of that victim that are protected under civil law, and result in the victim initiating a civil case to gain compensation for their loss. Thus, while the offender is prosecuted by the state, convicted of a crime and sentenced accordingly under criminal law, they may also be found liable for loss suffered by the victim under civil law and have to provide compensation to the victim/plaintiff.

Consider the following hypothetical scenario to assist in your understanding of the relationship between criminal and civil law:

CASE STUDY

Sarah was driving along a country road at night-time. When going around a corner, she was surprised by another vehicle driving on the wrong side of the road and speeding excessively. Before Sarah could react, the other car crashed into her vehicle, causing Sarah to sustain very serious injuries. Sarah's car was also severely damaged.

Greg (the driver of the other car), was intoxicated at the time of the crash and is convicted of dangerous driving causing serious injury. He was sentenced to 12 months' imprisonment and his licence was disqualified.

Sarah was glad that Greg was punished for his actions, however she suffered significant financial, physical and emotional loss as a result of the crash and decided to initiate a civil claim against Greg. Sarah was successful in her claim and was awarded $80,000 in damages (monetary compensation) for her medical bills, the damage to her car, and the pain and suffering that she has sustained. (You will learn more about civil remedies, such as damages, in lesson 8F.)

Although a particular event can result in both criminal and civil cases, in Victoria the **victim of a crime will often not be required to take legal action directly against an offender** to obtain compensation for an injury.

Instead, the Victorian Parliament has passed legislation to set up other civil law mechanisms for compensating people who have suffered injury:

- The Transport Accident Commission (TAC) provides financial compensation to all persons injured in car accidents (including lost wages and medical expenses). This compensation is provided irrespective of whether anyone involved in a car accident has been found guilty of a driving offence under criminal law.
- The Victims of Crime Assistance Tribunal (VOCAT) provides financial compensation to victims of crimes committed in Victoria (including compensation for pain and suffering), meaning a victim does not need to take legal action directly against the offender who caused them harm.
- The *Sentencing Act 1991* (Vic) gives judges the power to order offenders to return stolen goods (a restitution order, see s. 84) and/or to pay compensation to a victim of crime (a compensation order made under ss. 85 – 87 of the *Sentencing Act 1991* (Vic)), as part of the court's sentencing of an offender. As stated by the Court of Appeal in *DPP v Energy Brix* [2006] these powers under the *Sentencing Act* provide 'a means by which a victim of a crime may obtain compensation more quickly, efficiently and cheaply than by instituting civil proceedings against the wrongdoer'.

Keen to learn more?

County Court of Victoria, https://www.countycourt.vic.gov.au/files/documents/2018-08/factsheet-12-protection-right.pdf

QUESTIONS 1F Criminal and civil law

LEVEL 1:
Define and understand

1. Which of the following is not true of criminal law?

A. Manslaughter is an example of criminal law.

B. The parties involved in a criminal trial are the plaintiff and the defendant.

C. Criminal law aims to protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another.

D. When a person is found guilty of a crime, the courts will impose a criminal sanction.

2. Which of the following is the best definition of civil law?

A. Laws that assist couples who are getting divorced in dividing up their belongings.

B. Laws that are made by judges or by parliament.

C. Laws that are made by judges or made by parliament that aim to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.

D. A dispute between two parties where one party feels that their rights have been infringed by the actions of the other party, and is seeking compensation.

3. Sue is in a civil dispute with her neighbour Adam. Sue wants to have the dispute settled by the courts, but is unfamiliar with the features of civil law and does not know who is responsible for initiating a civil claim. Who is responsible for bringing the action in a civil case?

A. The prosecution (the police).

B. The defendant (Adam).

C. The accused (the person charged with an offence).

D. The plaintiff (Sue).

4. The following passage contains errors.

Elaine has been charged with a criminal offence and is now facing a trial in the County Court of Victoria. Elaine will be the prosecution in this case because she is the party that has been accused of an offence, and the police will be the accused. Elaine has pleaded 'not guilty' to the offence and will therefore have to prove her innocence in front of the judge and the jury. If Elaine is found to be guilty of committing the offence, the judge will impose a remedy which acts as compensation.

Which of the following options does **not** correct an error in the passage?

A. Elaine could not have pleaded 'not guilty' to the offence because criminal cases deal with 'liability' rather than 'guilt'; she would have claimed to be 'not liable' for the offence.

B. Elaine will not be the prosecution in this case; the police will be the prosecution because this is a criminal case.

C. The police will not be the accused person in this case; Elaine will be the accused because she is the party that has been charged with an offence.

D. Elaine does not need to prove her innocence in court; it is up to the prosecution to prove that Elaine is guilty.

E. The judge will not impose a remedy as this is not a civil case; if Elaine is found guilty, a criminal sanction will be imposed to protect the community and punish Elaine for her actions.

5. Wesley has been charged with the murder of Tina's husband. Wesley is alleged to have owed Tina's husband a significant amount of money and, unable to pay the money back, broke into Tina's house and shot her husband multiple times, causing his immediate death. Wesley has now been arrested and awaits trial in the Supreme Court of Victoria.
Tina has two small children and has been severely affected by the death of her husband. She has suffered extreme pain and suffering, having lost both her husband and the father of her children, and has been forced to quit her job as she is now the sole caregiver for the children. Tina feels that her personal rights have been infringed as a result of the trauma that Wesley has caused.

Is this case governed by criminal law or civil law?

A. Criminal law.

B. Civil law.

C. Both criminal and civil law.

D. None of the above.

LEVEL 2:
Describe and explain

6. Describe criminal law and provide two examples of offences that are governed by criminal law. (3 MARKS)

7. Outline the aim of civil law and provide one example of an area of civil law. (2 MARKS)

8. Explain two differences between criminal and civil law. (4 MARKS)

LEVEL 3:
Apply and compare

9. Read the case *DPP v Ristevski* [2019] VSC 253.

a) Identify the accused and the prosecution in this case. (2 MARKS)

b) Using this case as an example, explain the relationship between criminal and civil law. (4 MARKS).

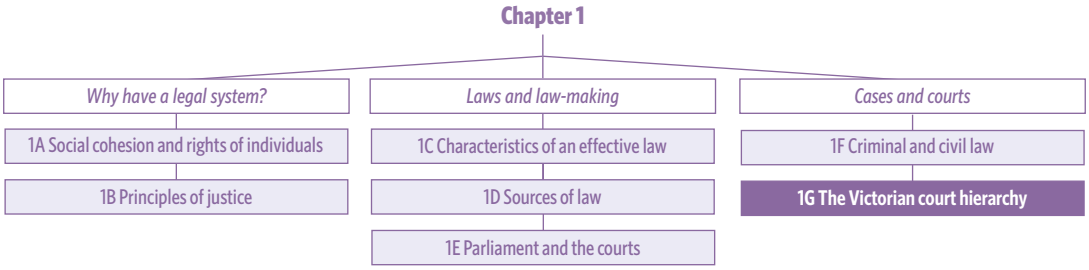
10. Tristan and Zara are in a civil dispute over a contract between the two of them that has been breached. In the contract, Zara promised to pay Tristan $200 for a smartphone that he sold to her. Zara has breached the contract by failing to pay Tristan any money. Tristan feels that his rights have been infringed and wants to take Zara to court so that she will be found guilty and have a criminal sanction imposed on her as punishment. Zara is worried about having to prove to the courts that she did not breach the contract as she is the defendant in the dispute and therefore bears the burden of proof.

Identify and correct two errors in the passage. (4 MARKS)

11. Compare criminal and civil law. (6 MARKS)

1G The Victorian court hierarchy

Within the Victorian justice system there is a range of different courts, hearing different criminal and civil disputes. These courts are arranged into a complex system, each having different areas of expertise, specialty and formality. Each court has its own place in the court hierarchy and its own jurisdiction to hear certain types of cases.



In this lesson you will be learning about the different jurisdictions of the courts, as well as the reasons for organising the courts into a hierarchy.

Study design dot point

- An overview of, and reasons for, the Victorian court hierarchy.

Key knowledge units

An overview of the Victorian court hierarchy	1.1.7.1
The reasons for the Victorian court hierarchy	1.1.7.2

An overview of the Victorian court hierarchy 1.1.7.1

OVERVIEW

The court hierarchy refers to how the courts in Victoria are arranged, from least to most formal and superior.

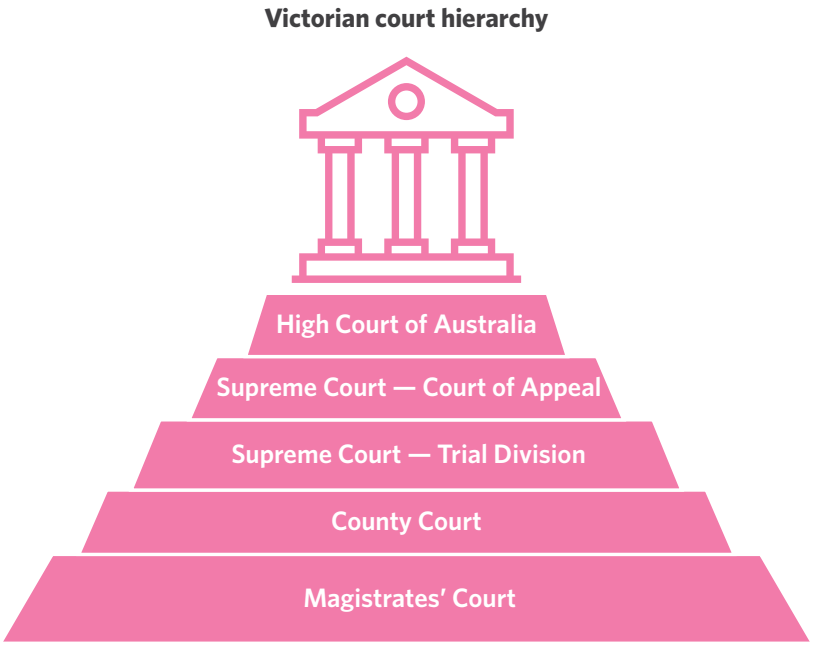


Figure 1 The Victorian court hierarchy

DETAILS

What is the court hierarchy?

- **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 under law to hear and determine particular types of matters.

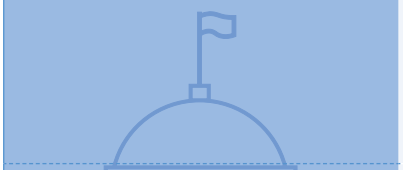
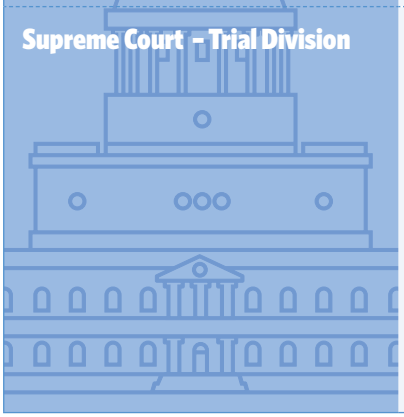
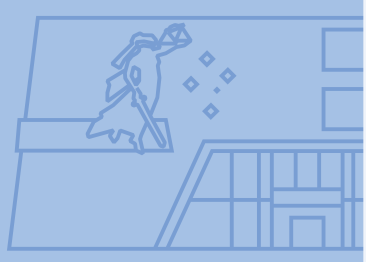
- The **lowest court** (the Magistrates' Court) hears a high volume of less serious, less complex matters, which are resolved relatively quickly.
- The **further up the hierarchy** you look, the fewer cases each court resolves, but the more complex and time–consuming such cases are.

Jurisdiction

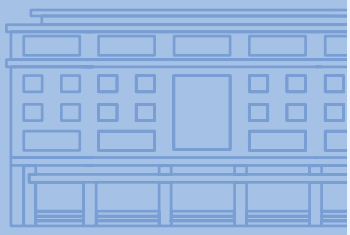
A court's 'jurisdiction' refers to the boundaries of power a particular court has to hear and determine disputes:

- **Original jurisdiction:** the court's power to hear a case 'at first instance' (that is, when a case has never been heard in any other court before).
- **Appellate jurisdiction:** 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).
- **Criminal jurisdiction:** a court's power to hear criminal matters (the prosecution of criminal offences by the police and the Office of Public Prosecutions).
- **Civil jurisdiction:** a court's power to hear civil matters (disputes between two parties concerning an infringement on the rights of one party).

Table 1 Jurisdiction of Victorian courts

	Original jurisdiction	Appellate jurisdiction
High Court of Australia 	A national court, jurisdiction not divided into criminal/civil matters; rather: • Constitutional matters. • Disputes between states. • Disputes in which the Commonwealth is a party.	**CRIMINAL** Appeals from the Supreme Court – Court of Appeal. **CIVIL** Appeals from the Supreme Court – Court of Appeal.
Supreme Court – Court of Appeal 	**CRIMINAL** *No original jurisdiction.* **CIVIL** *No original jurisdiction.*	**CRIMINAL** Appeals from the County Court and Supreme Court – Trial Division. **CIVIL** Appeals from the County Court and Supreme Court – Trial Division.
Supreme Court – Trial Division 	**CRIMINAL** Unlimited – usually conducts trials for only the most serious indictable offences. For example, murder, attempted murder, terrorism offences. **CIVIL** Unlimited – usually hears claims greater than $100,000. Also hears representative proceedings, in which large groups of injured persons seek a remedy from a particular defendant.	**CRIMINAL** Appeals from the Magistrates' Court on questions of law. **CIVIL** Appeals from VCAT and Magistrates' Court on questions of law. (See Lesson 8C for further information about VCAT.)
County Court 	**CRIMINAL** Trials for most indictable offences, such as rape, armed robbery, serious drug offences, manslaughter. **CIVIL** Unlimited – can hear claims of any amount, though in practice usually only hears claims greater than $100,000. For example, defamation claims, workplace injury claims, serious injury applications.	**CRIMINAL** Appeals from the Magistrates' Court: • Offenders appealing against the conviction as a question of fact. • Appeals by offenders/prosecution on the sanction imposed. **CIVIL** *No appellate jurisdiction.*

cont'd

Magistrates' Court	Original jurisdiction	Appellate jurisdiction
	**CRIMINAL** • Summary offences (minor criminal offences such as speeding, petty theft). • Indictable offences tried summarily (More serious offences that may be tried like a summary offence – refer to Lesson 6D for further details on indictable offences tried summarily.) • Some pre-trial hearings for more serious matters, such as committal proceedings and bail hearings. **CIVIL** Claims up to $100,000 For example, negligence claims, contract disputes and claims for repairs and compensation for injury from car accidents.	**CRIMINAL** *No appellate jurisdiction.* **CIVIL** *No appellate jurisdiction.*

USEFUL TIP

The Supreme Court – Trial Division and the Supreme Court – Court of Appeal are two divisions of the same court. The Supreme Court – Trial Division has unlimited original jurisdiction in both criminal and civil matters, while the Supreme Court – Court of Appeal (as the name suggests!) conducts only appeals.

USEFUL TIP

Types of criminal offences (including summary and indictable offences) will be explained further in Lesson 2E.

The reasons for the Victorian court hierarchy 1.1.7.2

OVERVIEW

There are a number of reasons for the existence of a court hierarchy, including:

- specialisation
- administrative convenience
- appeals
- the doctrine of precedent.

DETAILS

Specialisation

Specialisation refers to the expertise of each of the courts in hearing certain types of cases. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction – a set of criminal or civil matters that each court hears regularly.

What is the benefit?

- The court hierarchy allows court staff to specialise in providing particular services or hearing particular cases.
- For example, the Supreme Court has judges who specialise in hearing serious indictable offences, such as murder cases, as well as large and complex civil disputes, such as class actions, whereas the Magistrates' Court specialises in hearing minor offences, such as traffic offences, or minor civil disputes.
- The skill and expertise developed by regularly conducting similar cases allows for more just and accurate outcomes and a more timely resolution of cases.

Administrative convenience

Administrative convenience comes from separating minor offences and disputes that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts.

Benefits of administrative convenience:

- The superior courts (such as the Supreme Court) are able to devote more time and resources to long, complex disputes without the court being 'clogged up' by also resolving minor disputes.
- The lowest court (the Magistrates' Court) can quickly resolve a large number of relatively minor disputes, minimising delays for parties to such disputes.

Appeals

An appeal is a request made to a superior court, to review and (if successful) alter a previous decision made by a lower court. Thus, when a matter is heard for a second or third time, it is being heard 'on appeal'.

- Typically an applicant (the party to a case that is seeking an appeal) needs to prove that they have 'grounds' (reasons) as to why they deserve to have their appeal heard. In many instances there is no automatic right to have one court's decision reviewed by a higher court – in superior courts such as the Court of Appeal and the High Court, a dissatisfied party to a civil or criminal matter must be given leave (permission) to appeal.
- Appeals may be made on a point of law, a question of fact, or on the sanction (criminal) or remedy (civil) imposed by the court.
- 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.

Benefits of an appeals process:

- The ability for a party to appeal the outcome of a case promotes fairness in the justice system by allowing for a case to be reheard if there are sufficient grounds.

The doctrine of precedent

The doctrine of precedent is the legal mechanism by which decisions made in higher courts are followed in future, similar cases that arise in lower courts.

- As you learned in Lesson 1D, the doctrine of precedent is based upon the principle of 'stare decisis' – to stand by what has been decided in the past.
- This means that cases with similar facts will be decided in a similar manner to ensure consistency, predictability and justice.
- Courts lower in the hierarchy must follow the decisions of superior courts in the hierarchy when resolving cases that have similar facts.
- To uphold this principle, the courts must be ranked in a system of superior courts and lower courts.

Benefits of the doctrine of precedent:

- The doctrine of precedent promotes fairness in the justice system by ensuring that like cases are decided in a similar way.
- This provides some certainty and predictability for parties to civil and criminal cases, as to what the outcome may be in their case and ensures consistency in decisions made by judges.

USEFUL TIP

It is important to remember that **specialisation** 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.

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, this question appeared in the 2017 VCAA Exam:

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. (3 MARKS)

- Give only one reason. There are no bonus marks for going beyond what you're asked to do. In a Year 12 exam, the examiner will only read your first answer.
- Link to the case – the VCAA examiners' 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.'

Keen to learn more?

Magistrates' Court of Victoria, https://www.mcv.vic.gov.au/

County Court of Victoria, https://www.countycourt.vic.gov.au/

Supreme Court of Victoria, https://www.supremecourt.vic.gov.au/

QUESTIONS

1G The Victorian court hierarchy

LEVEL 1:
Define and understand

1. Which of the following is not true of the Victorian court hierarchy?

A. The courts within the hierarchy are ranked based on their 'status' and 'authority' to hear different types of matters.

B. The court hierarchy refers to the courts in Victoria being arranged in an order, from least formal and superior to most formal and superior.

C. The lowest court in the hierarchy, the Supreme Court, hears a high volume of less serious, less complex matters.

D. Courts that are higher up in the hierarchy hear fewer, but more complex and time–consuming, cases.

2. Match each of the following terms to the corresponding definitions.

- appellate jurisdiction
- civil jurisdiction
- original jurisdiction
- criminal jurisdiction

a) _____ the power of a court to hear criminal matters (the prosecution of criminal offences by the police and the Office of Public Prosecutions)

b) _____ the power of a court 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)

c) _____ the power of a court to hear civil matters (disputes between two parties)

d) _____ the power of a court to hear a case 'at first instance' (that is, when a case has never been tried before)

3. Sarah has initiated a civil claim against her former employer and is seeking $80,000 in damages. Sarah's claim will most likely be heard in:

A. The Supreme Court (Trial Division).

B. The County Court.

C. The Supreme Court (Court of Appeal).

D. The Magistrates' Court.

4. Ben is a criminal offender who was found guilty of minor assault in the Magistrates' Court and sentenced to a term of 12 months' imprisonment. Ben wishes to appeal the sanction that was imposed on him by the Magistrates' Court. His appeal will be heard in:

A. The County Court.

B. The Supreme Court (Trial Division).

C. The Supreme Court (Court of Appeal).

D. The High Court of Australia.

5. Fill in the blank spaces:

A court _____ facilitates the _____ by ensuring that the courts are arranged according to their _____, and enabling lower courts to follow the decisions of _____.

A. system; doctrine of precedent; power; lower courts

B. hierarchy; doctrine of precedent; jurisdiction; higher courts

C. hierarchy; appeals process; jurisdiction; higher courts

D. system; appeals process; power; lower courts

6. Which of the following statements does not accurately reflect 'specialisation' as a reason for the court hierarchy in Victoria?

A. The Supreme Court has judges who have expertise in hearing serious indictable offences, such as murder cases, as well as large and complex civil disputes, such as class actions.

B. The Magistrates' Court is practised in hearing minor offences, such as traffic offences and minor civil disputes, developing knowledge about the legal and factual issues that arise in these cases.

C. Minor offences and disputes are heard by lower courts while more serious, complex and time–consuming cases can be heard in higher courts, preventing a backlog of cases in any one particular court.

D. None of the above.

7. Liam has been charged with murder and will have his case heard in the Supreme Court (Trial Division). How does the existence of a court hierarchy benefit Liam?

A. The court hierarchy facilitates the doctrine of precedent which will give Liam more certainty about the outcome of his case, based on decisions made in previous murder cases.

B. The Supreme Court has judges who specialise in hearing murder cases.

C. The court hierarchy will enable Liam to appeal a decision that he believes is unfair in a higher court.

D. All of the above.

LEVEL 2:
Describe and explain

8. Describe the term 'court hierarchy'. (2 MARKS)

9. Recently a critic of the Australian legal system commented that a hierarchy of courts is not necessary. Explain one reason to justify the existence of the court hierarchy. (3 MARKS)

LEVEL 3:
Apply and compare

10. Distinguish between specialisation and administrative convenience as reasons for the court hierarchy. (3 MARKS)

11. Paul was charged with armed robbery. His trial was heard in the County Court of Victoria and he was found guilty and sentenced. Paul intends to appeal.

a) Identify the court that would hear Paul's appeal and outline its criminal appellate jurisdiction. (2 MARKS)

b) Other than appeals, explain one reason why a court hierarchy is beneficial in this case. (3 MARKS)

REVIEW QUESTIONS

01 Legal foundations

LEVEL 5:
Bringing it all together

1. Consider the following hypothetical scenario.

In a recent case in the Supreme Court, a new precedent was created when the court interpreted a statute which regulated the use of electronic equipment in public places. In deciding the case at hand, the court needed to define the word 'device' in an outdated Act of parliament, to determine which new technology was and was not included in the definition. Following the decision, the Victorian Parliament wants to codify this decision to show its support for this legal decision. However, members of parliament also want to expand on this decision and create a new law, making it illegal to use certain electronic devices such as smartphones in schools.

a) Describe what is meant by the term 'precedent'. How will the creation of a precedent in this case affect future cases in the Victorian court system? (2 MARKS)

b) What is statutory interpretation? Provide one reason why statutory interpretation may have been necessary in this case. (3 MARKS)

c) Explain 'codification' and suggest one reason why parliament may see the need to codify a decision. (3 MARKS)

d) Discuss whether the new law proposed in this scenario would be effective. (4 MARKS)

2. Trish was in a car accident with Greg because Greg was travelling at extreme speeds and lost control of his vehicle. Greg was charged with dangerous driving and found guilty in the County Court. In accordance with current sentencing statistics and trends, he was sentenced to 1 year and 6 months' imprisonment. However, Trish suffered a number of injuries as a result of the accident and is now faced with expensive medical bills. She also experienced much pain and suffering and will have a permanent disability due to her injuries. Trish is glad to see Greg convicted and sentenced for his offence, but she would also like compensation for her loss. Trish initiates a case against Greg in the County Court. Trish hires her own private lawyer and Greg, who cannot afford legal representation, is provided assistance by Victoria Legal Aid. The parties present their cases in accordance with rules of evidence and procedure and the court ultimately finds in favour of Trish.

a) Is this an example of criminal or civil law? Justify you answer. (3 MARKS)

b) If Greg wanted to appeal the decision made in the County Court in relation to the dangerous driving charge, which court would hear the appeal? Outline the original and appellate jurisdiction of this court. (3 MARKS)

c) Describe one benefit of a court hierarchy in this case. (3 MARKS)

d) Identify and describe two ways in which the principles of justice were upheld in this case. (4 MARKS)

Unit 1, Area of study 2

CHAPTER 2

THE PRESUMPTION OF INNOCENCE

02

The criminal laws that apply in society describe the behaviour the community considers unacceptable. From relatively minor wrongdoing (such as vandalism) to very serious conduct (such as violent assaults and selling illicit drugs), the criminal law discourages behaviour that breaches the community's values and imposes consequences for those who behave in a dangerous or offensive manner.

Most crimes committed in Victoria are relatively minor; examples of very serious criminal conduct dominate the news and media, but such crimes account for only a tiny portion of all criminal activity in Victoria.

By the end of this chapter, you will know:

- What the law defines as 'a crime'.
- Who can be found guilty of a crime.
- How the law categorises criminal offences.

UNIT 1, AOS 2 – KEY KNOWLEDGE
the purposes of criminal law
the presumption of innocence
key concepts of criminal law, including:
– the elements of a crime: actus reus and mens rea
– strict liability
– the age of criminal responsibility
– the burden of proof
– the standard of proof
types of crime such as crimes against the person and crimes against property
the distinction between summary offences and indictable offences
possible participants in a crime such as principal offenders and accessories
two criminal offences and for each offence:
– the elements of the offence
– possible defences
– the role of statute law and common law in developing the elements of the offence and the defences
– trends and statistics in relation to the offence in Victoria and in one other jurisdiction
– the possible impact of the offence on individuals and society.

UNIT 1, AOS 2 – KEY SKILLS
define and use legal terminology
research and analyse relevant information about criminal law and offences
explain the purposes and key concepts of criminal law
distinguish between types of crime, and indictable offences and summary offences, using examples
synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios

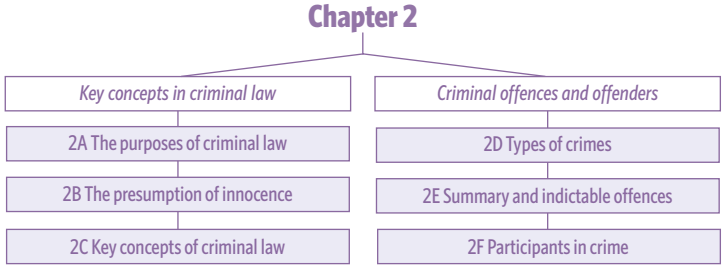
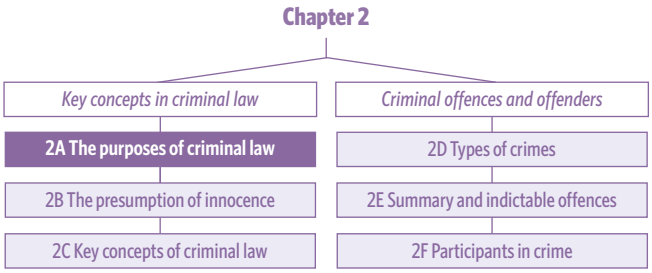


Image: Freedomz/Shutterstock.com

2A The purposes of criminal law

'Almost everybody would be inclined to agree that the law has immense practical importance. It deals in a very immediate and emphatic way with the relations of men.'

Source: William Seagle, The history of law (1946)



In this lesson you will be learning about the purposes of criminal law. These include the protection of society, the deterrence of crime and setting minimum standards of acceptable behaviour.

Study design dot point

- The purposes of criminal law

Key knowledge units

What is criminal law	1.2.1.1
Protection of society	1.2.1.2
Deterrence of crime	1.2.1.3
To set minimum standards of behaviour	1.2.1.4

What is criminal law 1.2.1.1

OVERVIEW

Criminal law refers to laws made by judges (common law) and made by parliament (statute law/legislation) that aim to protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another.

DETAILS

Criminal laws describe behaviours that violate community expectations, and breaching such laws results in a punishment (a **sanction**). (See Lesson 1F.)

Protection of society 1.2.1.2

OVERVIEW

Society is reliant on criminal law to enforce and maintain social cohesion and order. Could you imagine a scenario where all laws were discontinued, all prisons and police forces were disbanded, and citizens were allowed to freely behave as they desire? Such a prospect seems impossible. Without criminal law, society could become chaotic and dangerous.

DETAILS

Criminal law serves to **avoid such danger and chaos by protecting individuals from harm** and assisting them to live peacefully within the community. For example, without drink driving laws and speed limits, driving to school or work would be a much more dangerous activity and our road toll might rise. Similarly, if people were allowed to freely enter property and take whatever goods they please, you would not feel as safe in your own home.

Deterrence of crime 1.2.1.3

OVERVIEW

A crime is any act or omission that violates an existing law and is punishable under criminal law. Criminal behaviour threatens the safety of individuals and is detrimental to society as a whole. You will learn more about the different types of crimes in Lesson 2D. One reason for having criminal laws is to discourage such behaviour before it occurs.

DETAILS

A major purpose of criminal law (and its enforcement by the police, courts and prisons) has always been to **deter criminal behaviour**. This means to discourage people from engaging in crime through clearly defining punishment and enforcing consequences to ensure that 'crime doesn't pay'. Offenders who have entered a guilty plea or been found guilty of a crime are punished and sentenced to a sanction. The threat of this sanction will often deter criminal activity (and discourage repeat criminal activity). You will learn more about the purposes of sanctions (including the use of punishments to deter crime) in Lesson 6G.

To set minimum standards of behaviour 1.2.1.4

OVERVIEW

Criminal law is also necessary to set standards of acceptable behaviour for our society. That is, the criminal law serves to define minimum expectations of all individuals within society to adhere to and promote pro-social behaviour that does not negatively affect other people.

DETAILS

The minimum standards of behaviour are codified through laws and upheld by the punishment of offenders who transgress these behavioural expectations. Consider the example below as an example of criminal law regulating behaviour in the community.

LEGISLATION

There exists an expectation within society that it is the responsibility of adults in the community to protect children. As such, in 2017 the *Crimes Act 1958* (Vic) was amended to create an offence of failing to disclose incidents of child abuse.

It is now a criminal offence for any adult to fail to report information that leads them to form a belief that a sexual offence has been committed against a child in Victoria. Individuals who hold a reasonable belief that child abuse has occurred/will occur are required to report this concern to Victoria Police as soon as practicable. This is an example of the criminal law setting a minimum expectation for how teachers, sports coaches and other adults behave when children are in their care.

USEFUL TIP

Be sure you can apply these purposes of criminal law when considering actual recent changes to the law. The VCAA exam requires you to explicitly link your description of legal studies concepts to actual scenarios - the answers throughout this textbook will show you how to signpost these links.

Keen to learn more?

Criminal Law, Victoria State Government, https://www.justice.vic.gov.au/justice-system/laws-and-regulation/criminal-law

The Judicial College of Victoria, https://www.judicialcollege.vic.edu.au/

QUESTIONS 2A The purposes of criminal law

LEVEL 1:
Define and understand

1. Which of the following scenarios least represents a purpose of criminal law?

A. Georgie heard about a friend who had been selling drugs in nightclubs and had been making a lot of money. She considered giving it a go, and had organised to buy a large amount of MDMA to sell this weekend. However, on Friday afternoon Georgie began to feel hesitant. She remembered someone from her town who had been caught by an undercover police officer while selling drugs and had been arrested. She decided not to sell the drugs due to fear of the same consequence.

B. Ashmal recently got his licence and has been driving to and from work every day. He has only had his licence for a week and is still feeling nervous about being on the roads. Ashmal feels safer knowing that there are strict speed limit laws and constant police presence on his route to work that make driving safer.

C. Ryan has worked at his company for 15 years. After severely injuring his knee in a water-skiing accident, his workplace says that it is forced to dismiss him.

Ryan feels relieved that there are legal avenues for him to explore that can help him in this situation and protect his rights as an employee.

D. Isabel was concerned about recent reports she saw in the news about a rise in drink-spiking incidents in Melbourne. She was relieved to learn that law-makers regard this behaviour as a serious criminal offence, and the police have announced a task-force to investigate incidents of this happening at music festivals.

2. Which of the following statements regarding the purposes of criminal law is most correct?

A. Criminal law exists to set minimum standards of behaviour, such as governing how many hours an individual must work and how they are to communicate with one another in the workplace.

B. Criminal law exists to protect society from harm, such as ensuring that if an individual suffers a physical injury in places like the sporting field or the workplace, they are entitled to receive money and assistance to reduce the harm they suffer and avoid future harm.

C. Criminal law exists to deter crime through discouraging people from criminal behaviour by defining punishments and enforcing consequences.

D. None of the above.

3. Match the examples with the corresponding purpose of criminal law.

- Protection of society
- Deterrence of crime
- Set minimum standards of behaviour

a) _____ The *Summary Offences Act 1966* describes acting disorderly in a public place as behaviour 'that disturbs the peace or interferes with the comfort of others'. Behaving in this way offends against society's general understanding of acceptable behaviour and warrants police intervention.

b) _____ It is law in Victoria that motorists must drive at a maximum speed of 40km/h when travelling through school zones during designated times. Disobeying this rule could seriously endanger the safety of students and families moving in and out of the school property.

c) _____ Pursuant to the *Sentencing Act 1991*, any individual who causes the death of another person as a result of their own careless/culpable driving is liable for a term of up to 20 years imprisonment. Such a serious punishment will hopefully cause drivers to think before they behave recklessly and be wary of the consequences of their actions.

LEVEL 2:
Describe and explain

4. Describe the protection of society as one purpose of criminal law. (2 MARKS)

5. Distinguish between deterrence of crime and setting minimum standards of behaviour as two of the purposes of criminal law. (3 MARKS)

LEVEL 3:
Apply and compare

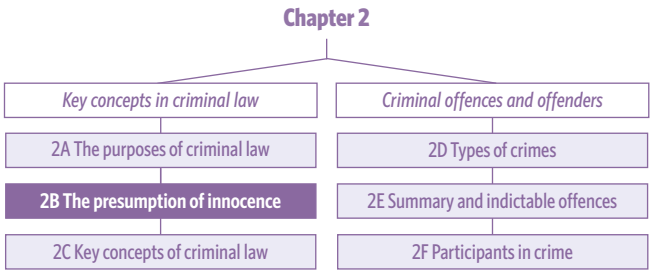
6. As of 1 August 2017, the Victorian Government banned smoking in all commercial outdoor dining areas throughout the state. This includes all restaurants, cafes, take-away shops and any other licensed dining premise. The change arose as a result of public pressure to minimise the discomfort of non-smokers exposed to second-hand smoke. The Victorian Government said that one reason why smoke-free areas are important is that they 'make smoking in the community less acceptable - the less people see smoking in public places the less they will tend to think it is okay, rather than harmful'.

Source: Smoke-free areas, Victoria State Government.

Other than protection of society, which purpose of criminal law does this example most exemplify? In your answer, describe how the criminal law works to achieve this purpose. (3 MARKS)

2B The presumption of innocence

If someone is suspected of committing a crime, who is responsible for proving whether or not they are guilty? Could justice ever be achieved if an accused person always had to prove their own innocence? In Victoria, the criminal justice system operates on the presumption of innocence which is a key principle that determines how an accused person must be treated throughout the criminal justice system.



In this lesson you will be learning about the presumption of innocence in the criminal justice system, including its impact on police investigations and criminal trials. This principle, which requires that an accused be treated as an innocent person until they are proven to be guilty of a criminal offence, influences many aspects of the justice system.

Study design dot point

- The presumption of innocence

Key knowledge units

Legal basis for presumption of innocence	1.2.2.1
Impact on police investigations	1.2.2.2
Impact on trial	1.2.2.3

Legal basis for presumption of innocence 1.2.2.1

OVERVIEW

In 1765, Sir William Blackstone stated that it is 'better that 10 guilty people escape than one innocent suffer'. The presumption of innocence upholds this idea and suggests that it is more important in a just society to protect the innocent than strive to punish the guilty at all costs.

DETAILS

The presumption of innocence refers to a guarantee made to all accused persons that they are to be treated as innocent until it is proven, beyond a reasonable doubt, that they are guilty of a criminal offence. This guarantee is afforded to all accused persons, regardless of their personal situation or the circumstances of the case in which they are implicated - a demonstration of the principle of equality before the law.

This principle guards against **self-incrimination** (the act of exposing oneself as being implicated in a crime) by providing the following protections:

- An accused person does not need to/cannot be pressured to give evidence to prove their guilt; and
- Accused persons can (in general) remain silent when asked questions during a police investigation or trial.

The presumption of innocence is enshrined in legislation and common law.

LEGISLATION

***Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 25**

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

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(k) not to be compelled to testify against himself or herself or to confess guilt.

In Victoria, the presumption of innocence is closely linked to the **burden of proof** (the responsibility of proving the facts of a case). **The burden of proof in criminal cases rests with the police and the prosecution**. In other words, it is up to the prosecution to prove that the accused is guilty, rather than the accused having to prove their innocence. See Lesson 2C for further details.

Impact on police investigations 1.2.2.2

OVERVIEW

When investigating a suspected offence, the police tend to be in a position of greater authority than the individuals they are investigating. For example:

- Simply being questioned by the police can be intimidating, given the severity of the outcomes that await those who are found guilty of a crime;
- Members of Victoria Police are trained in how to investigate crimes, including how to interrogate suspects to reveal information regarding a crime; and
- The police force has access to forensic experts who are able to collect evidence that may connect an individual to an offence.

This power imbalance could potentially lead to a miscarriage of justice if police powers were not restricted by certain principles of law.

DETAILS

Victorian legislation **upholds the presumption of innocence and attempts to address any power imbalances by limiting police powers during the investigation process**. Some examples of how the presumption of innocence impacts police investigations include:

- Each person's right to not be wrongfully arrested; the police need reasonable grounds to arrest a person.
- The right to silence; a person suspected of committing an offence usually does not need to answer police questions (other than providing their name and address).
  - Section 464A(3) of the *Crimes Act 1958* (Vic) states:
    - Before any questioning (other than a request for the person's name and address) or investigation commences, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence.
- Police officers can only collect forensic evidence (such as fingerprints or blood samples) from a person when they reasonably suspect that the person has committed a serious offence, and must inform the suspect of the offence that they are believed to have committed.

Impact on trial 1.2.2.3

OVERVIEW

The presumption of innocence is reflected in the processes used to determine whether a suspect is guilty of a crime.

DETAILS

Pre-trial and trial procedures operate in a way that upholds the presumption of innocence. There are various rights provided to an individual suspected of committing a crime to ensure they are treated as innocent throughout the entire criminal justice process.

Table 1 How the presumption of innocence impacts a trial

Criminal pre-trial/trial procedure	How it upholds the presumption of innocence
The right to apply for bail. A person charged with a crime can apply for bail, and if granted, can await their trial in the community. This can only be refused if the accused poses a serious risk of not appearing in court, interfering with witnesses or endangering society.	The presumption of innocence requires there to be no punishment before a person is found guilty of a crime – the right to apply for bail ensures in most cases that those individuals merely suspected of a crime are not punished (by being imprisoned) prior to their trial.
The right to seek legal representation.	An accused person is able to have a legal expert present their defence in its best light and challenge the accuracy of the evidence presented by the prosecution.
Accused persons only face a trial for serious offences if the police have collected a significant amount of evidence that suggests he/she is guilty.	Being an accused person in a trial can be a very stressful and intimidating experience for a person charged with a serious criminal offence. To avoid unnecessary stress for accused persons, the law ensures that only strong cases proceed to trial using a legal procedure known as a 'committal proceeding'. You will learn more about committal proceedings in lesson 6D.
The right to not have prior convictions considered during trial.	Prior criminal offences cannot be considered in determining whether the accused is guilty, this can only be considered during sentencing if the accused has been found guilty. To have a court decide a person's guilt based on past conduct (rather than evidence) would be unfair.
The presumption of innocence is explained to a jury before it considers its verdict in a criminal matter.	A judge must explain the presumption of innocence to a jury. The jury will be instructed that the burden of proof rests with the prosecution, they must assume the accused is innocent and can only return a 'guilty' verdict if the evidence presented by the prosecution is reliable and very persuasive. (The burden and standard of proof are explained in greater detail in Lesson 2C).

CASE STUDY

Jury Charge: Onus and Standard of Proof

The criminal charge book outlines the way a judge should explain the presumption of innocence to a jury:

> It is a critical part of our justice system that people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question.
>
> As the prosecution brings the charge[s] against the accused, it is for the prosecution to prove that/those charge[s]. The accused does/do not have to prove anything. That never changes from start to finish. It is not for the accused to demonstrate his/her/their innocence, but for the prosecution to prove the charge[s] they have brought against him/her/them.

Source: Judicial College of Victoria (2019)

USEFUL TIP

Some of these concepts may sound familiar from the media or from your general knowledge of a criminal trial. Don't worry if you have never heard of them or if you don't completely understand them yet, you will explore these concepts in more detail later in the course. If you are familiar with these concepts from TV produced in the USA or other countries - be careful to only use Victorian/Australian law and legal terminology in your assessment tasks!

Exceptions to the presumption of innocence

As parliament is the supreme law-maker, it is **able to pass legislation that operates in a way that is contrary to the presumption of innocence** enshrined in the Victorian *Charter of Human Rights and Responsibilities*. This is rare, but examples of such laws include:

- The *Bail Act 1977* (Vic) states that individuals charged with particular offences (including murder, aggravated car jacking and home invasions) will be presumed not to be entitled to bail, unless they can prove that exceptional circumstances apply. That is, the onus is on some accused persons to prove they should not be imprisoned, despite not yet being convicted of a crime. Proving these exceptional circumstances is difficult, and the court will decide on a case-by-case basis whether a particular accused person meets this requirement. 'Exceptional circumstances' may include (but are not limited to) the accused person:
  - Being a child.
  - Suffering serious, repeated violence whilst remanded in custody.
  - Having significant physical, psychological and cognitive problems.
  - Facing a term of imprisonment - if found guilty - that would probably be less than the time they are likely to spend on remand awaiting trial.
- Under the *Drugs, Poisons and Controlled Substances Act 1985* (Vic) it is an offence to possess illicit drugs (such as cannabis or heroin). According to s. 5 of this legislation, a court will conclude that a person 'possesses' such drugs if they are found to be upon any land or property that person owns or occupies. The onus is then upon an accused person to prove they did not know the drugs were there or did not intend to possess the drugs.

Keen to learn more?

Attorney-General's Department, https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Presumptionofinnocence.aspx/

Australia's Magna Carta Institute, https://www.ruleoflaw.org.au/beyond-reasonable-doubt/

Judicial College Victoria, http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57445.htm

QUESTIONS 2B The presumption of innocence

LEVEL 1:
Define and understand

1. Which of the following is a legal basis for the presumption of innocence?

A. Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) s. 25.

B. The burden of proof.

C. The standard of proof.

D. Guarding against self-incrimination.

2. Which of the following is the best example of how the presumption of innocence impacts a criminal trial?

A. Accused people having the right to not have prior convictions considered during trial.

B. Accused people having the right to not be wrongly arrested.

C. Accused people having the right to remain silent during police questioning.

D. None of the above.

3. The presumption of innocence is important during police investigations to balance against the state being more powerful than individuals. Which of the following is not an aspect that makes police more powerful in relation to the presumption of innocence?

A. Victoria Police are trained in how to investigate crimes.

B. Police questioning is intimidating, considering the seriousness of the outcomes for criminal offences.

C. Police having to inform an accused about their rights.

D. The police force has access to forensic experts.

LEVEL 2:
Describe and explain

4. Describe two ways the presumption of innocence impacts a criminal trial. (4 MARKS)

5. Following police investigations, Jasmine has been charged with manslaughter. Jasmine has pleaded 'not guilty' and refuses to answer any police questions out of fear that she may say something that unintentionally implicates herself.

a) Explain the relationship between the burden of proof and the presumption of innocence. (2 MARKS)

Adapted from VCAA 2018 sample Exam Section B Q2a

b) Describe the reason the presumption of innocence needs to impact police investigations. Provide an example of how the presumption of innocence may have assisted Jasmine during police investigations. (3 MARKS)

LEVEL 3:
Apply and compare

6. Max, 19, has pleaded 'not guilty' to a charge of shoplifting at trial. The judge directed the jury to not rule out the possibility that Max could be guilty, especially considering his two prior convictions for shoplifting, which indicate his guilt in this instance. Max is ultimately found guilty as he was unable to prove his innocence to the jury.

Identify three errors with the scenario and provide the correct procedure for each. (6 MARKS)

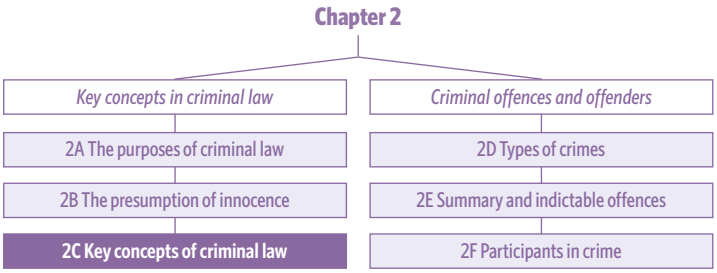
LEVEL 4:
Discuss and evauate

7. In *Carr v Western Australia* (2007) 232 CLR 138, Justice Kirby explained that a key feature of the Australian criminal justice system is that 'Ordinarily... the accused does not need to prove his or her innocence'. In this statement, Justice Kirby is referring to the burden of proof.

Explain the significance of Justice Kirby's comment with reference to bail and drug possession laws in Victoria. (4 MARKS)

2C Key concepts of criminal law

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



In this lesson you will be learning about key concepts within the criminal justice system identified in Figure 1.

Study design dot point

- Key concepts of criminal law, including:
  - The elements of a crime: actus reus and mens rea
  - Strict liability
  - The age of criminal responsibility
  - The burden of proof
  - The standard of proof

Key knowledge units

The elements of crime	1.2.3.1
Actus reus	1.2.3.1.1
Mens rea	1.2.3.1.2
Strict liability	1.2.3.2
The age of criminal responsibility	1.2.3.3
The burden of proof	1.2.3.4
The standard of proof	1.2.3.5

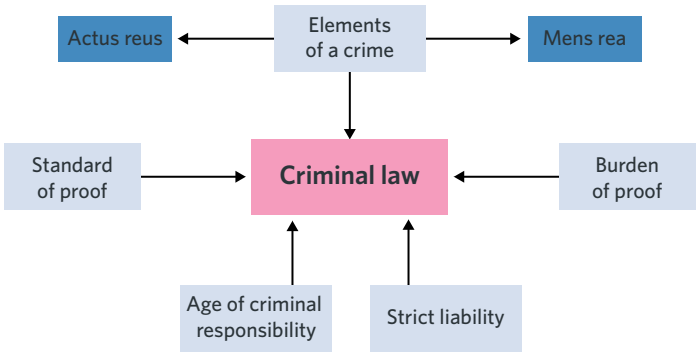


Figure 1 Key concepts within criminal law

The elements of crime 1.2.3.1

OVERVIEW

There are two elements that must be proven before an accused person can be found guilty of committing most crimes:

1. **Actus reus** (the wrongful act), and
2. **Mens rea** (the guilty mind).

Usually, both of these elements must be proven beyond reasonable doubt in order for an accused person to be found guilty of a crime (with the exception of strict liability crimes, which you will learn about later in this lesson).

DETAILS

Actus reus 1.2.3.1.1

'Actus reus' is a Latin term that translates to **'guilty act'**. In criminal law, actus reus refers to the element of the crime where the accused person acted, or failed to act, resulting in criminal consequences.

Mens rea 1.2.3.1.2

'Mens rea' is a Latin term that translates to **'guilty mind'**. In criminal law, mens rea refers to the mental element of the crime: the state of mind which must be proven before the judge/jury can find the accused guilty of the crime.

For many offences, the mens rea element requires one of the following mental states to be proven:

- Intention
- Recklessness
- Negligence.

Law	Actus reus & mens rea elements
Culpable driving causing death CRIMES ACT 1958 SECTION 318 (1) Any person who by the **culpable driving of a motor vehicle causes the death of another person** shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both. (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle— (a) **recklessly**, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or (b) **negligently**, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case.	**Driving the vehicle** and **causing death** are the actus reus elements. • This could include evidence that the impact of the vehicle on a pedestrian or another motorist caused injuries from which they died, and evidence the accused person was driving the vehicle at the time. The driving being **culpable** is the mens rea element. This means the accused person was either **reckless** in their driving or **negligent** (as defined in the legislation). • Evidence that proves driving was culpable (that is, reckless or negligent) might include proof the driver was speeding, was under the influence of alcohol or was using a mobile phone while driving. These are acts that indicate the driver: – Knew they were likely to cause injury, but drove that way anyway; or – Exercised far too little care (that is, he or she was very negligent in how they drove).
Murder The offence of murder is defined in the law as **voluntarily causing the death of another person** with **malice aforethought**, and without lawful excuse. You will learn more about the elements of murder in Lesson 3A.	**Causing** the **death of another person (voluntarily)** are the actus reus elements in this offence. • In a criminal trial, this would include evidence the accused person hit, shot, stabbed or poisoned the victim (for example) and the victim died as a consequence of the injury these acts caused. **Malice aforethought** is the mens rea element. An accused person having 'malice aforethought' means either **intending** to kill or cause really serious injury, or being **reckless** as to whether they would kill/cause really serious injury. Evidence of this intention or recklessness might include: • Verbal threats of violence toward the victim. • The act itself; if an accused person has shot or stabbed a victim multiple times, the court can conclude that killing the victim was what the accused intended to do. • The accused knowing that his or her conduct would be likely to kill the victim, but they did so anyway. For example, deliberately driving a truck or car into a building or street crowded with people would constitute 'being reckless as to whether their conduct would kill or cause really serious injury.

Figure 2 Actus reus and mens rea in criminal offences

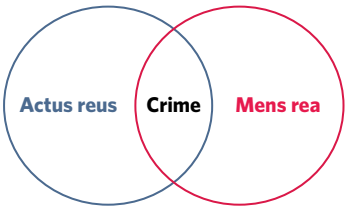


Figure 3 Actus reus and mens rea

USEFUL TIP

A 'lawful excuse' is a defence to a crime. For example, a lawful excuse for the crime of intentionally causing serious injury might be acting in self-defence.

Consider the following criminal offences:

For a better understanding of **mens rea**, consider the following:

The different types of mens rea required to constitute **murder** and **manslaughter** are examples of how the intent or mental state of the accused can impact the severity of a crime. Both of these homicide crimes (where the accused has caused the death of another person) have the same actus reus, but they have different mens rea elements:

- To be found guilty of **murder,** an accused person needs to have 'malice aforethought': either an intention to cause death or grievous bodily harm, or being reckless as to whether their actions would cause death or really serious harm.
  - For example, Stacey owes Tina a large amount of money which she cannot afford to pay back. Tina demands that Stacey pay her debt and threatens to harm her if she is unable to do so. Stacey arranges to meet with Tina at nighttime in a secluded location. Before the meeting, she places a large kitchen knife in her bag. She also purchases a movie ticket online to ensure that she has an alibi. Stacey and Tina meet, Tina demands her money and Stacey stabs Tina multiple times causing her death. Stacey will likely be charged with murder because her actions prior to the offence (setting up the meeting in a secluded place, carrying a weapon and creating an alibi) indicate that she had an intention to kill Tina.
- **Manslaughter,** however, is a homicide offence where the accused person did not intend to cause death or grievous bodily harm. A homicide will be considered manslaughter if the offender caused death by an unlawful and dangerous act or by criminal negligence.
  - For example, Bob punches George, George hits his head on the ground and dies as a result. Bob therefore caused George's death. Bob did not intend to kill or grievously injure George, but did so due to an unlawful and dangerous act and can be charged with manslaughter.
  - For example, Ashley is a heroin addict who fails to take any action to protect her 1-year-old child from harm when her husband shakes their baby, and the baby dies. Ashley did not intend the child's death so will not be charged with murder, but demonstrated so little care that she will be charged with manslaughter by criminal negligence.

Strict liability 1.2.3.2

OVERVIEW

Strict liability offences are offences where there is no need to prove any mental element of the crime (mens rea) for a person to be found guilty. It is enough for the person to have committed an act that is against the law (actus reus) for them to be found guilty and punished.

DETAILS

In making criminal laws the parliament has believed that, at times, it is justifiable to create a criminal offence that does not require proof of intention to commit a crime. Of course, the accused can still raise arguments to defeat the actus reus (for example, arguing the act was involuntary or proving they did not perform the guilty act), though the prosecution will not have to prove that the accused had a guilty mind for the accused to be found guilty of the crime.

Why do strict liability offences exist?

- Strict liability offences allow offenders to be charged for the simple act of committing the offence and therefore aim to protect society from these types of crimes. Some conduct is dangerous regardless of whether an offender intends it to be so (such as speeding) and therefore must be discouraged.
- Because it is easier to convict a person of a strict liability offence, it is thought that strict liability offences are a more effective deterrent to criminal conduct.
- The inquiry into a mens rea element would exhaust the courts and create a backlog of cases. Strict liability offences prevent this by enabling an accused to be found guilty without mens rea being proven.

Examples of strict liability offences include:

- Speeding or running through a red light.
- An underage person being served alcohol in a bar.
- Refusing a breath test.
- Environmental pollution by a corporation.

Below is an **example** of a strict liability offence:

LEGISLATION

***Liquor Control Reform Act 1998* (Vic)**

Section 119 – SUPPLYING LIQUOR TO MINORS

(2) If liquor is supplied to a person under the age of 18 years on the licensed premises or any authorised premises of a licensee or permittee, the licensee or permittee is guilty of an offence.

Penalty: 120 penalty units.

USEFUL TIP

As of 1 July 2019 120 penalty units = $19,826.40

You will learn more about fines and penalty units in Lesson 6F.

The age of criminal responsibility 1.2.3.3

OVERVIEW

The age of criminal responsibility is the required age of an offender in order for them to be prosecuted for a criminal offence.

DETAILS

The age of criminal responsibility in Victoria

Under 10 years

- In Victoria, a child less than 10 years cannot be charged with committing a crime.
- It is presumed that a child under the age of 10 years cannot form the intention to commit a crime.
- Therefore only those over the age of 10 are considered capable of being found to be criminally liable.

LEGISLATION

***Children, Youth and Families Act 2005* (Vic)**

Section 344 – CHILDREN UNDER 10 YEARS OF AGE

It is conclusively presumed that a child under the age of 10 years cannot commit an offence.

10-14 years

- There is a presumption (in other words, the law's 'starting point' is) that a child between the ages of 10 and 14 is incapable of forming the mens rea to commit a crime because they do not know the difference between right and wrong (in the same way an adult does).
- This is known as the legal principle of **doli incapax.**

Doli incapax

- **Doli incapax is a rebuttable presumption:** it can be overturned if the prosecution can show that the child knew, at the time of committing a crime, that his or her actions were wrong. It puts an extra layer of evidentiary burden onto the prosecution.
- Whether a court is prepared to accept that a particular child between 10 and 14 is responsible for a crime will depend on the child's personal upbringing, prior history, medical reports, psychological reports, and so on:
  - This is more than just proving the mens rea of the relevant crime.
  - To rebut the presumption, the prosecution has sometimes been permitted to use highly prejudicial evidence that would ordinarily be inadmissible. For example:

- The most common factor used to rebut the presumption is what the child says when interviewed by the police. This could be viewed as unfair or prejudicial, considering the huge imbalance of power between the child and the police officer that is interrogating the child.
- This evidence may be used when deciding whether the presumption of doli incapax is to be rebutted.
- This evidence may not be permitted when the young accused person stands trial.

Over 14 years

- Offenders over the age of 14 are able to be found to be criminally liable.

The burden of proof 1.2.3.4

OVERVIEW

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 – see below).

DETAILS

The burden of proof in criminal trials

- In a criminal trial, the **prosecution** has the burden of proving that the accused is guilty beyond reasonable doubt.
- The prosecution must gather evidence to support all the elements of the crime, which usually include the actus reus elements and the mens rea element.

The burden of proof and the presumption of innocence

- The burden of proof upholds the presumption of innocence by requiring the prosecution, the party bringing the case, to prove that the accused committed the crime for which they have been charged.
- The accused does not need to prove that they are innocent, because they are presumed innocent until proven guilty by the prosecution:
  - In general, an accused person does not need to answer questions during a trial, and cannot be compelled to give evidence; and
  - A court is not permitted to view such silence as an admission of wrongdoing.
- In practice however, many accused persons will do everything possible to defend their innocence, such as:
  - Presenting evidence that casts doubt on the prosecution's case; and/or
  - Questioning prosecution witnesses (or having their legal representative do so), to test the reliability and accuracy of the evidence presented against them.

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, in 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.

The standard of proof 1.2.3.5

OVERVIEW

The standard of proof refers to the strength of evidence required for the decision maker to reach a verdict in a case.

DETAILS

Standard of proof in criminal trials

In criminal trials the prosecution must prove that the alleged offender is guilty of a crime **'beyond reasonable doubt'**. This is the highest standard of proof possible: it means a very strong case must be presented to obtain a conviction. The standard of proof in civil trials ('on the balance of probabilities') is less strict (you will learn about this in Lesson 4B).

LEGISLATION

***Evidence Act 2008* (Vic)**

Section 141 – CRIMINAL PROCEEDINGS—STANDARD OF PROOF

(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

Meaning of 'beyond reasonable doubt'

- This standard of proof means that if there is any reasonable doubt as to the guilt of the accused, then the verdict should be 'not guilty'.
- 'Reasonable' means logical or rational.

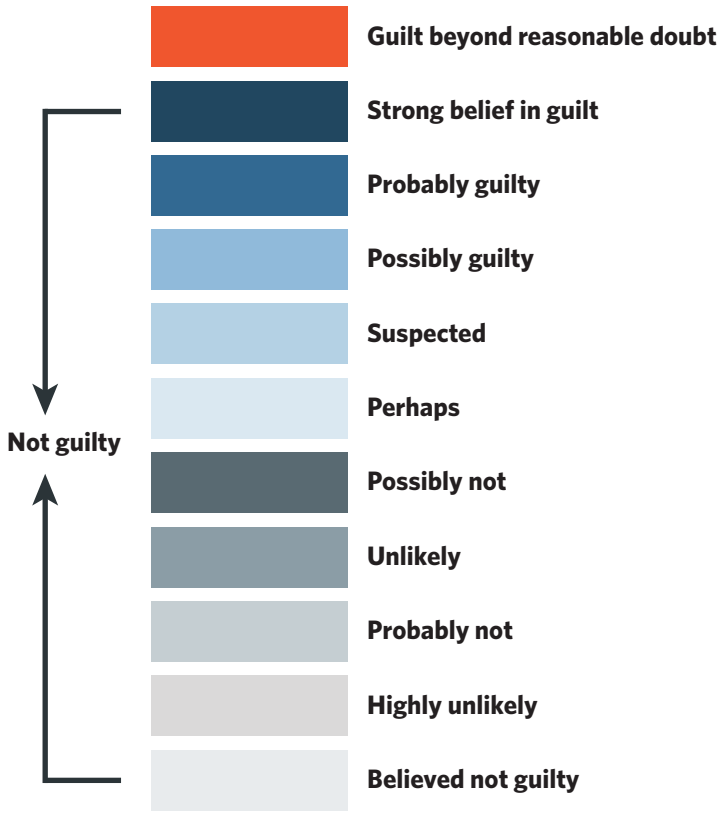


Figure 4 The standard of proof in criminal cases

Who decides whether or not an accused is guilty beyond reasonable doubt?

- In the Magistrates' Court, a magistrate decides on the verdict.
- In the County Court and Supreme Court, a jury of 12 will decide and the judge will make a decision regarding the type of sanction to impose.

CASE STUDY

***The Queen v Dookheea* [2017] HCA 36**

Dookheea was found guilty and convicted of beating and strangling Zazai to death. Dookheea appealed this conviction in the High Court of Australia on the grounds that the judge in the original trial had incorrectly advised the jury of the meaning of 'beyond reasonable doubt'. See comments from the High 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.'

Keen to learn more?

Judicial College of Victoria – Criminal Charge Book: 1.7 Onus and Standard of Proof, http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm

Judicial College of Victoria – Sentencing Manual: 10.7.1.1 – Jurisdiction over child offenders, http://www.judicialcollege.vic.edu.au/eManuals/VSM/6076.htm

Australia's Magna Carta Institute, https://www.ruleoflaw.org.au/beyond-reasonable-doubt/

QUESTIONS 2C Key concepts of criminal law

LEVEL 1:
Define and understand

1. Fill in the blank spaces:

There are _____ elements that must be proven before a person can be found guilty of most crimes. The physical act of committing a crime is known as _____, and needs to have been a conscious decision made by the accused person. It is also necessary to prove that the accused had an intent to commit the crime, or knowledge that their actions would cause a crime to be committed. This is the mental element of a crime, known as _____.
Some types of offences do not require that the mental element be proven in order for the accused to be guilty. If an accused has committed a _____, they can be found guilty simply by undertaking the act itself.

A. three; actus reus; mens rea; summary offence

B. four; mens rea; actus reus; strict liability offence

C. two; actus reus; mens rea; strict liability offence

D. two; actus reus; mens rea; indictable offence

2. The following is an extract from the *Crimes Act 1958* (Vic), relating to the offence of causing serious injury intentionally (Section 16):

> **Causing serious injury intentionally**
>
> A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.

Which of these options correctly identifies the relevant actus reus and mens rea in the offence?

A. Actus reus: intending to cause injury; mens rea: wanting to cause serious injury.

B. Actus reus: causing serious injury; mens rea: intending to cause serious injury.

C. Actus reus: causing serious injury; mens rea: not having a lawful excuse for causing serious injury.

D. Actus reus: planning to cause serious injury; mens rea; stating that one wants to cause serious injury.

3. What is the age of criminal responsibility in Victoria?

A. 18 years old.

B. 10 years old.

C. 14 years old.

D. 20 years old.

4. Which of the following is not true of the standard of proof?

A. The standard of proof in criminal trials is beyond reasonable doubt.

B. The standard of proof refers to the strength of evidence needed to prove a case.

C. The standard of proof in civil trials is higher than that in criminal trials.

D. Depending on the court, a magistrate, judge or jury will determine whether or not the standard of proof has been met.

5. Patrick has been charged with manslaughter and is facing trial in the County Court. Patrick is not familiar with the law and is worried about having to prove his innocence in court. Who has the burden of proof in Patrick's case?

A. The prosecution.

B. The judge.

C. Patrick.

D. The jury.

6. Bailey, 18, got into an argument with his father and pushed him without intending to cause serious injury. His father fell and hit his head very hard on a rock. He later died as a result of the injuries that he sustained. Choose the response that best describes the legal reasoning which may be followed to determine whether or not Bailey is guilty of murder.

A. Bailey is under the age of criminal responsibility, and therefore cannot be found guilty of a crime.

B. Bailey did not intend to cause the death of his father, and therefore did not have the relevant mens rea at the time of committing the crime to be found guilty of murder.

C. Even though Bailey did not intend to cause the death of his father, his actions were a direct cause of the death and he is therefore guilty of murder.

D. Murder is a strict liability offence and it is therefore unnecessary for the mens rea to be proven in order for Bailey to be guilty of committing the crime.

7. Sarah has been charged with multiple counts of armed robbery and is standing trial in the County Court. While the jury members feel that it is probable that Sarah committed the crimes that she has been accused of, Sarah has an alibi which explains her whereabouts for several of the nights when she was alleged to have robbed neighbourhood houses, leading some jurors to doubt Sarah's guilt. In light of this information, determine whether the standard of proof has been met in this case?

A. The standard of proof in a criminal case is 'on the balance of probabilities'. Therefore, given that it is more probable than not that Sarah committed these crimes the jury would have met the standard of proof in this case.

B. The standard of proof for armed robbery is higher than it is for other indictable offences, requiring proof 'beyond justifiable doubt'. Therefore, the standard of proof has not been met in this case because the jury do have doubts as to the guilt of the accused.

C. It does not matter if the jury have doubts about the guilt of the accused because it is the judge that makes the final decision. Therefore, the standard of proof will be met if the judge thinks that the accused is guilty 'beyond reasonable doubt.

D. The standard of proof in a criminal case is 'beyond reasonable doubt'. Given that the jury only think that the accused is 'probably' guilty and retain doubts in relation to this, the standard of proof has not been met.

LEVEL 2:
Describe and explain

8. Describe the term 'actus reus' and provide an example. (2 MARKS)

9. Sunitha walked into an expensive cosmetics store and deliberately distracted the shop assistant by asking her to check if a product was in stock on the store's online database. While the shop assistant was busy looking up the product, Sunitha snuck two lipsticks and a bottle of perfume into her bag. She then thanked the assistant for her help and left the store. Sunitha was caught on the CCTV camera in the store and is now facing charges of theft.

Define the term 'mens rea' and identify the mens rea in the case. (2 MARKS)

10. Outline strict liability offences. In your answer, explain one reason for the existence of strict liability offences. (2 MARKS)

11. Thomas, 9, is the child of a police officer. Thomas found his father's gun and while playing with it accidentally shot his mother, who had suddenly walked into the room. Thomas' mother later died as a result of the injury.

Is Thomas liable to be charged with a criminal offence? Provide one reason for your answer. (2 MARKS)

12. Explain the relationship between the burden of proof and the presumption of innocence. (2 MARKS)

Adapted from 2018 VCAA Sample Exam Section B Q 2A

13. Describe the term 'standard of proof' and outline the standard of proof required in criminal cases. (2 MARKS)

LEVEL 3:
Apply and compare

14. The following information relates to David's trial in the Supreme Court:

- David has been charged with murder.
- David believes that the standard of proof is more strict in murder cases.
- The jury are 'sure beyond doubt' that David committed an act which caused the death of another person, but only think that he 'might' have had an actual intention to do so, since he was intoxicated at the time of the offence.

Based on the information provided:

- Who has the burden of proof in this case?
- Is it true that the standard of proof is more strict in murder cases?
- Is it likely that David will be convicted of murder, based on the jury's comments?

Justify your determinations. (6 MARKS)

15. The case *DPP v Martin (a pseudonym)* [2016] involved a 16 year-old accused, Peter Martin, facing two charges of incest. The indictment, as originally filed, contained five charges (four of incest, and one of an indecent act with a child under 16). Three of those five charges related to conduct attributed to Martin when he was aged between 11 and 13. In May 2016, the prosecution decided not to proceed with the charges that related to the respondent's conduct at the time when he was aged less than 14.

a) At 16 years old, is Martin liable to be charged with a criminal offence? Justify your answer. (2 MARKS)

b) With reference to the principle of doli incapax, explain whether or not the prosecution could have proceeded with all five charges, including those that related to the respondent's conduct at the time when he was aged less than 14. (3 MARKS)

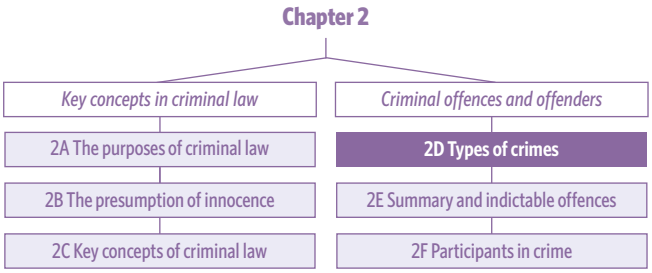
16. Your friend Lisa has been charged with murder and is awaiting trial in the Supreme Court. She thinks that:

- She can be charged with murder even if she had no intention to cause the victim's death and only did so accidentally.
- She will only be acquitted if she can prove her innocence to the jury.
- The prosecution will only have to show that she 'most likely' committed a murder in order for her to be found guilty.

Outline why each of these statements is incorrect and provide the correct definition, process or procedure. (6 MARKS)

2D Types of crimes

A crime is an act or omission that violates an existing law, causes harm to an individual (or society as a whole) and is punishable by law. Criminal activity can be categorised by the type of crime (such as crimes against the person or crimes against property), the type of offence under law (such as summary or indictable offences) or the participants involved (such as a principal offender or an accessory).



In this lesson you will be learning about two types of crimes: crimes against the person and crimes against property. These are the two most common categories of crimes committed in Victoria and include a range of offences.

Study design dot point

- Types of crime such as crimes against the person and crimes against property

Key knowledge units

Crimes against the person	1.2.4.1
Crimes against property	1.2.4.2

Crimes against the person 1.2.4.1

OVERVIEW

Crimes against the person are criminal offences where a person is harmed.

DETAILS

Most crimes against the person involve causing harm to another person or a threat to cause harm to another person.

Some examples of crimes against the person include (but are not limited to):

- Murder
- Attempted murder
- Manslaughter
- Culpable driving
- Assault
- Kidnapping.

From April 2018 to March 2019, crimes against the person were the second most common Victorian offence.

Table 1 Victorian statistics for crimes against the person

Crimes against the person	Apr–Jun 18	Jul–Sep 18	Oct–Dec 18	Jan–Mar 18	Total Apr 18 – Mar 19
Number	19,097	19,539	21,004	21,533	81,173
Proportion of all Victorian offences	14.75%	15.71%	16.25%	16.24%	15.74%

Source: Adapted from Crime Statistics Agency (2019)

CASE STUDY

Consider the following hypothetical scenario.

Julia has been found guilty of kidnapping Zoe. Julia enticed Zoe into her car and demanded from her family $25,000 for her safe return. If the $25,000 was not paid within 3 days, Julia threatened to cause Zoe serious injury.

Section 63A of the *Crimes Act 1958* (Vic) defines kidnapping as when a person 'leads, takes or entices away or detains any person with intent to demand from that person or any other person any payment by way of ransom for the return or release of that person or with intent to gain for himself or any other person any advantage (however arising) from the detention of that person'.

Julia has committed a crime against the person as her actions involved causing harm to Zoe (by holding her in detention for ransom) in conjunction with a threat to cause harm (the threat to cause serious injury).

Crimes against property 1.2.4.2

OVERVIEW

Crimes against property are criminal offences that involve using force or deception to obtain, damage or destroy property.

DETAILS

Crimes against property may involve money, personal property or land.

Some examples of crimes against property include (but are not limited to):

- Burglary
- Theft
- Fraud
- Identify theft
- Arson
- Shoplifting
- Trespass
- Vandalism
- Obtaining property by deception
- Obtaining financial advantage by deception
- Motor vehicle theft.

CASE STUDY

Consider the following hypothetical scenario.

Tom has been charged with arson. Tom was angry at his local pub after they banned him from entering due to his repeated poor behaviour. To get revenge, Tom thought it would be a good idea to start a fire inside the local pub the following day.

Section 197(6) of the *Crimes Act 1958* (Vic) defines arson as: 'destroying or damaging property by fire'.

Tom has committed a crime against property as it involved using force (the fire) to damage property (the pub).

From April 2018 to March 2019, crimes against property were the most common Victorian offence.

Table 2 Victorian statistics for crimes against property

Crimes against property	Apr–Jun 18	Jul–Sep 18	Oct–Dec 18	Jan–Mar 18	Total Apr 18 – Mar 19
Number	73,788	69,604	72,426	72,673	288,491
Proportion of all Victorian offences	56.99%	55.95%	56.03%	54.82%	55.94%

Source: Adapted from Crime Statistics Agency (2019)

USEFUL TIP

In some situations a person can commit a crime against the person and against property simultaneously. For example, consider the following hypothetical scenario:

Jack is found guilty of robbery, after threatening to punch Ash if he didn't hand over his iPhone. Robbery is defined by s. 75 (1) of the *Crimes Act 1958* (Vic): 'A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force.'

The Victorian Crimes Statistics Agency would regard this as a crime against the person, however it also has an impact on Ash's property by depriving him of his iPhone.

Keen to learn more?

Crimes Statistics Agency, https://www.crimestatistics.vic.gov.au/about-the-dataclassifications-and-victorian-map-boundaries/offence-classification

QUESTIONS 2D Types of crimes

LEVEL 1:
Define and understand

1. Which of the following is not an example of a crime against the person?

A. Assault
B. Kidnapping
C. Culpable driving
D. Arson

2. Which of the following is not an example of a crime against property?

A. Vandalism
B. Culpable driving
C. Trespass
D. Shoplifting

LEVEL 2:
Describe and explain

3. Describe the term 'crimes against the person'. Provide two examples of a crime against the person. (3 MARKS)

4. Using an example, describe the term 'crimes against property'. (2 MARKS)

LEVEL 3:
Apply and compare

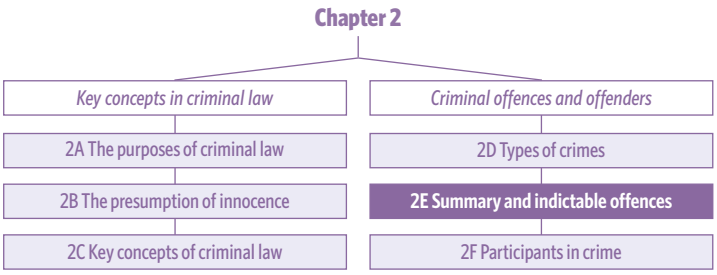
5. Louis has been convicted of a criminal offence after he broke the window of a service station to illegally enter and steal $10,000. What type of crime was Louis convicted of? Provide reasons for your response. (3 MARKS)

6. Samantha has been charged with a criminal offence after she hit Amanda with her car. Explain the type of crime that Samantha committed. Justify your response. (3 MARKS)

7. Distinguish between crimes against the person and crimes against property. Provide an example of each. (4 MARKS)

2E Summary and indictable offences

Are all criminal offences the same? Consider a person who has received a speeding fine compared to a person who has murdered someone: clearly these offences are not equally serious in their impact on the community. In Victoria, offences are separated into two main categories: summary offences and indictable offences. The classification of a criminal offence as being a summary or indictable offence determines which court it will be heard in, the trial procedures undertaken and the sanction imposed.



In this lesson you will be learning about the classification of criminal offences as summary offences, indictable offences and indictable offences triable summarily.

Study design dot point

- The distinction between summary offences and indictable offences

Key knowledge units

Summary offences	1.2.5.1
Indictable offences	1.2.5.2

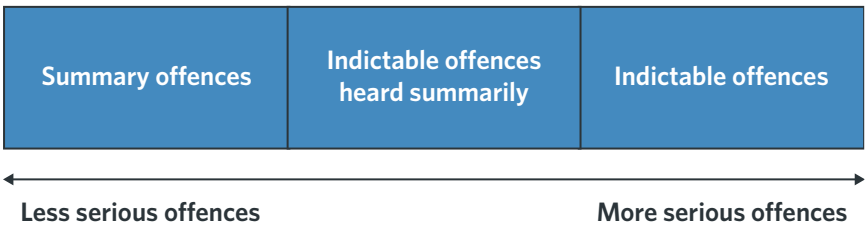


Figure 1 Severity of criminal offences

Summary offences 1.2.5.1

OVERVIEW

Summary offences are less serious or 'minor' criminal offences where the impact on society is relatively small and the matter is resolved by a single magistrate in the Magistrates' Court.

DETAILS

Summary offences are usually resolved in the Magistrates' Court by a single magistrate (or by infringement notice). Sanctions imposed for summary offences are usually less severe (such as small fines or short terms of imprisonment).

Examples of summary offences

Most summary offences are set out in the *Summary Offences Act 1966* (Vic), including:

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

USEFUL TIP

When providing examples of summary offences, you are not necessarily required to refer to the *Summary Offences Act 1966* (Vic) or any specific sections of this statute. However, doing so can be a great way to demonstrate the depth of your knowledge.

USEFUL TIP

Police often exercise their own discretion (judgment) when responding to summary offences. This means they might choose to simply warn the offender or deal with the matter informally rather than charging the offender.

Indictable offences 1.2.5.2

OVERVIEW

Indictable offences are more serious criminal offences where the impact on society is significant and the matter is resolved by a judge and jury in higher courts.

DETAILS

Indictable offences are heard by a judge and a jury (if the accused pleads 'not guilty') in a higher court. Sanctions imposed for indictable offences are usually much more severe than those imposed for summary offences (such as larger fines and extended terms of imprisonment).

Examples of indictable offences

Most offences in the *Crimes Act 1958* (Vic) are indictable offences, including:

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

USEFUL TIP

When providing examples of indictable offences, you are not necessarily required to refer to the *Crimes Act 1958* (Vic) or any specific sections of this legislation. However, doing so can be a great way to demonstrate the depth of your knowledge.

Indictable offences triable summarily

Indictable offences triable summarily are a small subset of indictable offences. These are less serious indictable offences that may be heard like a summary offence (by a single magistrate in the Magistrates' Court, instead of a judge and jury in a higher court).

Eligibility for an indictable offence to be tried summarily

Pursuant to ss. 28 and 29 of the *Criminal Procedure Act 2009* (Vic) an indictable offence may be heard summarily in the Magistrates' Court if:

- The indictable offence is punishable by a term not exceeding 10 years imprisonment; and
- The accused agrees; and
- The court determines it appropriate:
  - The court must be satisfied the matter is suitable to be heard summarily (that is, it is not too serious or complicated).
  - When deciding whether or not the matter is appropriate to be tried summarily, the magistrate will consider the nature of the offence, the adequacy of sentences that would be available if the case were heard summarily, the accused's criminal record (if any), and any other relevant matters.

Advantages to having an indictable offence tried summarily

- There are lower maximum sentences that the magistrate can impose, compared to those available to a judge in the County Court or the Supreme Court.

- It is quicker to have a case heard in the Magistrates' Court.
- It is cheaper to have a case heard in the Magistrates' Court compared to an accused person paying a legal team to represent them in a jury trial in a higher court.

Examples of indictable offences triable summarily

- Obtaining property or financial advantage by deception (if the value of the property/financial gain does not exceed $100,000).
- Theft, robbery and burglary (if the value of the property stolen does not exceed $100,000).

Table 1 Distinction between summary offences, indictable offences and indictable offences triable summarily

	Summary offences	Indictable offences triable summarily	Indictable offences
Heard in	The Magistrates' Court (or resolved by the payment of a fine in response to an infringement notice).	The Magistrates' Court.	Higher Courts (County Court or Supreme Court – Trial Division).
Heard by	A single magistrate.	A single magistrate.	A judge and jury.
Severity of the crime	Less severe criminal offences (such as a minor assault).	Less severe indictable offences (such as theft of property under the value of $100,000).	More severe crimes (such as murder or kidnapping).
Severity of the sanction	Less severe sanctions (such as a small fine or a shorter term of imprisonment).	Less severe sanctions (such as a small fine or a shorter term of imprisonment).	More severe sanctions (such as larger fines or longer term of imprisonment).
Timeliness	Faster to have a case heard in the Magistrates' Court (due to fewer pre-trial procedures and a single magistrate determining the outcome).	Faster to have a case heard in the Magistrates' Court. However, still takes longer than a summary offence due to committal hearing and determining whether the offence may be heard summarily.	Takes longer to have a case heard in a higher court (due to first facing a committal hearing, then jury empanelment and jury deliberations).
Cost	It is cheaper to have a case heard in the Magistrates' Court as the cost of a legal team to represent individuals for summary offences is less expensive. Individuals are able to self-represent for minor charges which can reduce costs.	It is cheaper to have a case heard in the Magistrates' Court, compared to an accused person paying a legal team to represent them in a jury trial in a higher court.	It is more expensive to have a case heard in higher courts and involves the costs of paying a legal team to represent them in a lengthy jury trial.

Keen to learn more?

Legal Aid, https://www.legalaid.vic.gov.au/find-legal-answers/criminal-offences

Victims of Crime, https://www.victimsofcrime.vic.gov.au/charges-laid/types-of-offences

QUESTIONS 2E Summary and indictable offences

LEVEL 1:
Define and understand

1. Which of the following is an example of a summary offence?

A. Theft.

B. Murder.

C. Drink spiking.

D. Stalking.

2. Which of the following is an example of an indictable offence?

A. Tattooing juveniles.

B. Murder.

C. Disorderly conduct.

D. Common assault.

3. Which of the following is an example of an indictable offence triable summarily?

A. Manslaughter.

B. Kidnapping.

C. Common assault.

D. Recklessly causing serious injury.

4. Justin was at a bar when he got into an altercation with Josh over a sporting match. Josh pushed Justin and in retaliation, Justin punched Josh in the head. Later, Justin found out that Josh had died as a result of his contact. What type of criminal offence did Justin commit?

A. Summary offence.

B. Indictable offence.

C. Indictable offence triable summarily.

D. This is not a criminal offence.

5. Sally is the owner of a tattoo store. Erin enters the store and asks for a tattoo she can easily hide. Sally asks for Erin's ID, to which Erin responds that she forgot to bring it. Sally proceeds to give her a tattoo of a small flower on her left hip and later finds out that Erin was only 16. What type of criminal offence did Sally commit?

A. Summary offence.

B. Indictable offence.

C. Indictable offence triable summarily.

D. This is not a criminal offence.

LEVEL 2:
Describe and explain

6. Describe summary offences. Provide two examples of summary offences. (3 MARKS)

7. Describe indictable offences. Provide two examples of indictable offences. (3 MARKS)

LEVEL 3:
Apply and compare

8. When Jimmy is leaving school he notices a man pulled over on the side of the road. Jimmy approaches the man (Nick), who explains that his van has broken down and he is unable to contact anyone. Nick asks Jimmy if he can get his tools from the back of his van to assist. While Jimmy is looking for the tools in the back of the van, Nick locks him inside and drives away with Jimmy still inside.

Did Nick commit a summary offence or an indictable offence? Justify your response. (3 MARKS)

9. Daniel is about to appear before the Magistrates' Court of Victoria in relation to a criminal offence he has been charged with. If Daniel is found guilty, the maximum penalty that can be imposed upon him is a small fine.

Identify the type of criminal offence that Daniel was charged with. Provide two reasons for your response. (3 MARKS)

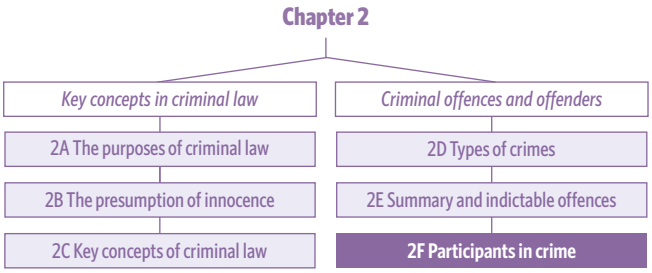
10. Compare indictable offences and indictable offences triable summarily. (3 MARKS)

11. Jacob has been charged with theft after posing as a famous painter to steal a piece of artwork valued at $50,000. Jacob's lawyer has informed him that this indictable offence could be heard summarily, but Jacob is unsure if this is correct and if doing so will disadvantage him.

Explain two benefits of having this indictable offence heard summarily. (4 MARKS)

2F Participants in crime

In addition to the different types of criminal offences, there are also different types of participants involved in a crime. It is not uncommon for a criminal act to result in more than one person being investigated and charged by the police. However, not everyone involved in a crime participates to the same degree; participants in a crime are often charged or sentenced differently depending upon their level of involvement.



In this lesson you will be learning about the different types of offenders involved in a crime, such as principal offenders and accessories. In every offence there will be a principal offender who directly takes part in the criminal activity. However, sometimes there will be people who assist to commit a crime, are aware a crime is going to occur and/or interfere with Victoria Police efforts to investigate a crime. How does the law treat these individuals?

Study design dot point

- Possible participants in a crime such as principal offenders and accessories

Key knowledge units

Principal offenders	1.2.6.1
Accessories	1.2.6.2

Principal offenders 1.2.6.1

OVERVIEW

A principal offender is an offender that is considered to be immediately linked to the crime. There may be more than one principal offender when a crime is committed, including those who perform the actus reus elements of the crime and those who assist or encourage a person to commit a crime.

DETAILS

A person could be accused of being a principal offender to a crime if they committed the offence or were involved with the offence directly. Generally, a principal offender will be the person who actually committed the actus reus (wrongful act or omission), whilst holding the relevant mens rea (guilty mental state). For example:

- A man who stabs another individual would be regarded as a principal offender if charged with intentionally causing serious injury.
- A woman who hits a pedestrian whilst driving under the influence of alcohol and using her mobile phone would be regarded as the principal offender if charged with culpable driving causing death.

However, a person could also be considered a principal offender, even if they are less directly involved in the commission of the offence. To be 'involved in the commission of an offence', a person may:

- assist, encourage or direct the commission of an indictable offence by another person - *Crimes Act 1958* (Vic) s. 323(a)(b); or
- enter into an agreement, arrangement or understanding with another person to commit an offence - *Crimes Act 1958* (Vic) s. 323(c)(d).

In these situations, the person does not have to be physically present when the offence (or any aspect of the offence) is committed.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 323 – INTERPRETATION

(1) For the purposes of this Subdivision, a person is involved in the commission of an offence if the person—

(a) intentionally assists, encourages or directs the commission of the offence; or

(b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or

(c) enters into an agreement, arrangement or understanding with another person to commit the offence; or

(d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence.

(2) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the person who committed the offence in fact was encouraged to commit the offence.

(3) A person may be involved in the commission of an offence, by act or omission—

(a) even if the person is not physically present when the offence, or an element of the offence, is committed; and

(b) whether or not the person realises that the facts constitute an offence.

CASE STUDY

Consider the following hypothetical scenario.

Alexandra, Rebecca, Judy and Trish all want new expensive earrings but cannot afford to purchase any. Judy suggests that Alexandra and Rebecca steal from their local jewelry store and devises a plan so that they will not get caught. The group agrees that they will split the jewelry equally, but Alexandra and Rebecca will get the first choice from their theft. On the night of the offence, Alexandra and Rebecca are caught and arrested. During police questioning, it is found that Judy encouraged the offence and Trish entered into an agreement to commit the offence. Judy and Trish are then also arrested.

In this situation, Alexandra and Rebecca are principal offenders as they committed the wrongful act. Judy and Trish are also principal offenders who are involved in the commission of the offence.

Penalties for principal offenders

A principal offender can be subject to the maximum penalty for the offence. This is regardless of whether they committed the actus reus elements of the offence. Section 324 of the *Crimes Act 1958* (Vic) outlines that a person involved in the commission of an offence is taken to have committed the offence and can be liable to the maximum penalty.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 324 – PERSON INVOLVED IN COMMISSION OF OFFENCE TAKEN TO HAVE COMMITTED THE OFFENCE

(1) Subject to subsection (3), if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty for that offence.

(2) Despite subsection (1), a person is not taken to have committed an offence if the person withdraws from the offence.

(3) Nothing in this section imposes liability on a person for an offence that, as a matter of policy, is intended to benefit or protect that person.

Accessories 1.2.6.2

OVERVIEW

An accessory is any person who knows or believes that a person is guilty of a serious indictable offence who acts to prevent the arrest, prosecution, conviction or punishment of that person.

DETAILS

Individuals who know about the crime and/or provide certain assistance to a principal offender can also face charges as an accessory to a crime. An accessory to a crime can be found guilty of an offence even where the principal offender is found not guilty.

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 325 – ACCESSORY

(1) Where a person... has committed a serious indictable offence... any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

Examples of ways an individual can be an accessory to a crime include:

- A person who hides a principal offender.
- A person who hides, destroys or tampers with evidence.

Penalties for accessories

Section 325(4) of the *Crimes Act 1958* (Vic) outlines the penalties that can be imposed on an accessory to a crime. The penalty imposed on an accessory will vary dependent upon the crime the principal offender committed.

- Where the maximum penalty is life imprisonment, an accessory can be sentenced to a maximum of 20 years imprisonment.
  - For example, the maximum penalty for murder is life imprisonment. An accessory to a murder case could be liable to a maximum of 20 years imprisonment.
- In all other cases, the penalty cannot exceed 5 years imprisonment or be more than half of the maximum penalty that could be imposed on the principal offender.
  - For example, the maximum penalty for theft is 10 years imprisonment. An accessory in a theft case could be liable to a maximum of 5 years imprisonment.
  - For example, the maximum penalty for graffitiing a private property without consent is 2 years imprisonment. An accessory to this offence could be liable to a maximum penalty of 1 year imprisonment.

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 325 – ACCESSORY

(4) A person convicted of an offence against subsection (1) shall be liable—

(a) if the principal offence is one for which the penalty is level 1 imprisonment (life) to level 3 imprisonment (20 years maximum); or

(b) in any other case, to imprisonment for a term which is neither—

(i) more than 5 years in length; nor

(ii) more than one-half the length of the longest term which may be imposed on first conviction for the principal offence.

CASE STUDY

Consider the following hypothetical scenario.

Kale accidentally hit and killed a pedestrian with his car after failing to stop at a pedestrian crossing. In a panic, Kale put the body in his car and drove to Vickie's house. Kale explained the incident to Vickie and was extremely unsettled about the prospect of being caught and going to prison. Kale insisted that they hide the body and clean the car to remove all traces of the accident, to which Vickie reluctantly agreed. The next day police arrest Kale as there was video footage of the incident. During investigations prior to Kale's trial, it is discovered that Vickie assisted Kale in disposing of the evidence following the event. Vickie is then arrested for her involvement.

In this situation, Vickie is an accessory. She knew that Kale had likely committed a serious indictable offence and destroyed evidence to help Kale avoid criminal charges. Vickie can be found guilty for her involvement regardless of the outcome of Kale's trial.

Keen to learn more?

Judicial College of Victoria, Victorian Criminal Charge Book, Ch 5.6 Assist Offender, http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4416.htm

QUESTIONS 2F Participants in crime

LEVEL 1:
Define and understand

1. Jasmine is a well-known gang leader who the police have been closely monitoring after suspicions of her involvement in serious criminal activity. She plans a large-scale bank robbery which requires the involvement of other gang members. During the offence, Jasmine directs each person through a WhatsApp group to ensure that the robbery progresses smoothly. However, unknown to Jasmine, one of the gang members has been working with the police. While Jasmine is not physically present at the crime scene, she is still arrested following the incident. What type of participant in a crime is Jasmine?

- **A.** Jasmine is a principal offender as she committed all actus reus elements of a criminal offence.
- **B.** Jasmine is a principal offender as she directed the commission of a criminal offence.
- **C.** Jasmine is an accessory because, although she was not involved in the criminal act, she had some involvement in planning the offence.
- **D.** Jasmine could not be charged with a criminal offence as she had no physical involvement and was not at the crime scene.

2. Which of the following is not an example of how an individual can be an accessory to a crime?

- **A.** Encouraging another person to commit a criminal offence.
- **B.** Dishonestly telling the police that a suspect was with you at the time he had committed a crime.
- **C.** Destroying evidence to cover up an offence (such as burning the clothing an offender was wearing at the time of the offence).
- **D.** Hiding an offender in your house knowing that police are looking for her.

3. Felix and Michael are fed up with their co-worker David carelessly smoking in the factory, despite this being against company policy. They decide to take matters into their own hands after efforts to inform their manager prove unsuccessful. Michael encourages Felix to pour a small quantity of petrol into David's workspace in the factory.

Unfortunately, Michael and Felix did not realise how much petrol was in the fuel tin (which Felix left behind after pouring some petrol on the ground) and their actions result in a large explosion, causing the death of David and second-degree burns to another 6 of their co-workers. Surveillance footage shows Felix pouring petrol in the factory and he is arrested. During police investigations, Felix confirms that Michael helped him plan the incident and encouraged him, resulting in Michael's arrest.

What type of participants in a crime are Felix and Michael?

A. Felix is an accessory and Michael is a principal offender.

B. Michael is an accessory and Felix is a principal offender.

C. Both Michael and Felix are accessories.

D. Both Michael and Felix are principal offenders.

LEVEL 2:
Describe and explain

4. Describe the term 'accessory'. Provide two examples of ways an individual can be an accessory to a crime. (3 MARKS)

5. Explain why an individual involved in the commission of an offence can be sentenced to the maximum penalty for the crime, even if they do not carry out the actus reus component of the offence. (2 MARKS)

LEVEL 3:
Apply and compare

6. Following a series of violent arguments, Piper killed her boyfriend by stabbing him in the chest with a knife that she found in the kitchen. After fleeing the scene, Piper went to her friend Minnie's apartment and asked for help in cleaning the weapon. Police followed Piper to Minnie's apartment and started knocking on the door. In the heat of the moment Minnie panicked and told Piper to hide in her garage, and told the police that Piper had already left the premises. After the police left, Minnie washed the knife while Piper returned to the crime scene to move the body. Piper was found by police removing the body, arrested and charged with murder. During police investigations Minnie's involvement following the incident was discovered and she was also arrested.

a) Explain what type of participant Piper is to the crime. (2 MARKS)

b) What type of participant is Minnie to the crime? Justify your response. (2 MARKS)

c) Identify the maximum penalty Minnie may be liable for due to her involvement in the offence. Explain the legal basis for this. (3 MARKS)

7. The following scenario contains errors.

The police allege that Harry had an agreement with his girlfriend, Lucy, to commit a large robbery and share the money. According to police, on the day of the offence, Harry entered a local grocery store and demanded $5,000 from the cashier. Police then allege that Harry drove to the home of his friend, Luke, and described what he had done. The police believe that Luke advised Harry on how to dispose of his clothing so he's not recognised by police.

In Harry's trial the jury (to the surprise of the police and the prosecuting barrister) delivers a 'not guilty' verdict, which means that Luke's trial cannot proceed - he cannot be an accessory to an offence where the principal offender is acquitted. However, Lucy is found guilty as an accessory because she was in an agreement to commit an offence.

Identify two errors in the scenario and provide the correct procedure. (4 MARKS)

8. Jenny, Harold and Robert are siblings who need to buy their parents a Christmas gift. Jenny explains that the car dealership down the road is poorly managed and all the vehicles are left unattended with the keys in the ignition. Jenny devises a plan for Harold and Robert to pretend to buy a car, and Robert to cause a diversion so that Harold can drive away. Harold and Robert are reluctant, but after Jenny informs them that selling the stolen car will make them $7,000 each, they both agree. On the day of the offence, Jenny communicates to Robert and Harold via ear-piece. After finding the car they want, Harold pretends to choke which causes the staff to panic and take him inside for water. Robert then drives away with the car and takes it back to their house. Later that night the police find the car in their driveway and Jenny, Harold and Robert are arrested for their involvement in the crime.

a) Identify the type of participant in the crime Robert is. Provide a reason for your response. (2 MARKS)

b) Explain the type of participant in the crime Harold is. Justify your response. (2 MARKS)

c) Identify the type of participant in the crime Jenny is. What is the maximum penalty Jenny is liable for due to her involvement in the offence? (3 MARKS)

REVIEW QUESTIONS

02 The presumption of innocence

LEVEL 5:
Bringing it all together

1. Read the following case:

> *The Queen v Karatzas* [2019] VSC 658
>
> Anastasios Karatzas, 70, was convicted of murder in the Supreme Court of Victoria, after strangling his wife, Georgia Karatzas, to death with an extension cord. Karatzas was suffering a major depressive episode at the time of the offence and there was unchallenged evidence that Karatzas loved his wife and had never acted violently towards her in the past. The jury in this case was therefore required to determine whether Karatzas killed her with murderous intent, that is, with an intention to kill or to cause really serious injury.
>
> Ultimately, the jury decided that when Karatzas strangled his wife he at least intended to inflict really serious injury. Thus, he was found guilty of murder and sentenced, in light of his age, mental illness and good prospects of rehabilitation, to 16 years' imprisonment (with a non-parole period of 11 years).

a) Outline the burden and standard of proof in this case. (2 MARKS)

b) State whether the offence committed by Karatzas was a summary or indictable offence. Give reasons for your answer. (3 MARKS)

c) Manslaughter and murder are both homicide offence. With reference to 'mens rea', explain why Karatzas was convicted of murder and not manslaughter. (4 MARKS)

2. Read the following case:

> *The Queen v Novakovic & Ors* [2019] VSC 339
>
> Milos Novakovic, Milan Jovic and his brother Sasa Jovic were tried jointly in the Supreme Court on a range of charges, including aggravated burglary and murder. These charges arose after all three accused were involved in a fight inside a restaurant and consequently ejected from the restaurant. The accused then entered the rear of the premises intending to commit an assault. Once inside, Novakovic spontaneously grabbed a knife and stabbed Deni Dimovski twice – once to the chest (which killed him), and once to the arm (which did not contribute to his death).
>
> The charge of murder was put against Novakovic as a principal offender who deliberately stabbed and killed Dimovski. It was alleged that the Jovic brothers were beside Novakovic, assisting or encouraging him to stab Dimovski. The murder charge and the alternative of manslaughter were put against them as persons involved in the commission of the offence. The charges of aggravated burglary were put against each accused on the basis of individual liability.
>
> Following submissions from legal practitioners, Justice Croucher of the Supreme Court directed the jury to return a verdict of 'not guilty' on the charges of murder and manslaughter against Sasa Jovic. All other charges were put to the jury to decide.
>
> On 5 June 2019, the jury returned its verdict:
>
> - Milan Jovic and Sasa Jovic were found guilty of aggravated burglary. Novakovic had pleaded 'guilty' to that charge.
> - Novakovic was found guilty of murder.
> - Milan Jovic was found not guilty of both murder and manslaughter.

Milan Jovic was sentenced to 18 months imprisonment with a non-parole period of 9 months for aggravated burglary.
Sasa Jovic was sentenced to 16 months imprisonment with a non-parole period of 8 months for aggravated burglary. Milos Novakovic was sentenced to 20 years and 6 months imprisonment with a non-parole period of 15 years for murder and aggravated burglary.

a) State who would have had the burden of proof in this case and describe the relationship between the burden of proof and the presumption of innocence. (3 MARKS)

b) Describe two pre-trial/trial procedures that would have been followed in this case to uphold the presumption of innocence. (4 MARKS)

c) Identify the two types of crimes the accused men in this case have committed. Justify your answer. (4 MARKS)

d) Define a 'principal offender' and explain why all three accused were tried as principal offenders in this case. (4 MARKS)

Unit 1, Area of study 2

CHAPTER 3

CRIMINAL OFFENCES

03

Murder, cuplable driving and assault are serious criminal offences. There is extensive media coverage of such crimes when they are investigated by police and during trials of accused persons. But how often do these crimes actually occur in the community?

Some deaths occur in an unprovoked attack, others in a fight, and some in a car accident. Are all such deaths punishable by the law? Are all unlawful deaths classified as 'murder'? To answer these questions, the law defines what must be proven to classify a death as a murder or culpable driving (or some other offence). What does Victorian law require to be proven beyond reasonable doubt for a jury to return a 'guilty' verdict when a person is tried for culpable driving, murder or assault? Can accused persons lawfully justify a death or assault, and avoid punishment by the courts?

By the end of this chapter, you will know:

- What the law requires to be proven to convict a person of murder, culpable driving or assault.
- The defences an accused person can raise to prevent a jury reaching a 'guilty' verdict.
- The trends for murder, assault and culpable driving in Victoria and NSW, and the impact these crimes have.
- How to apply your knowledge of each offence to case studies.

UNIT 1 AOS 2 – KEY KNOWLEDGE

the purposes of criminal law
the presumption of innocence
key concepts of criminal law, including:
the elements of a crime: actus reus and mens rea
strict liability
the age of criminal responsibility
the burden of proof
the standard of proof
types of crime such as crimes against the person and crimes against property
the distinction between summary offences and indictable offences
possible participants in a crime such as principal offenders and accessories
two criminal offences and for each offence:
the elements of the offence
possible defences
the role of statute law and common law in developing the elements of the offence and the defences
trends and statistics in relation to the offence in Victoria and in one other jurisdiction
the possible impact of the offence on individuals and society.

UNIT 1 AOS 2 – KEY SKILLS

define and use legal terminology
research and analyse relevant information about criminal law and offences
explain the purposes and key concepts of criminal law
distinguish between types of crime, and indictable offences and summary offences, using examples
synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios.

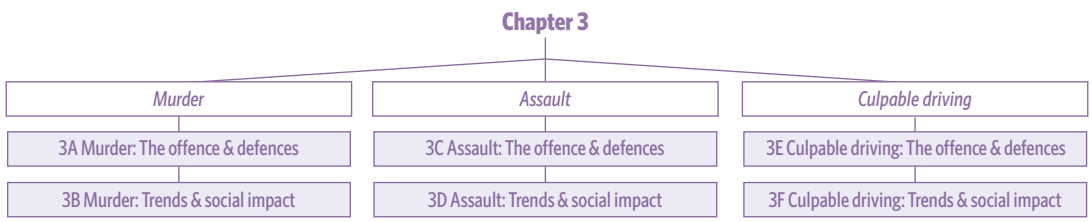
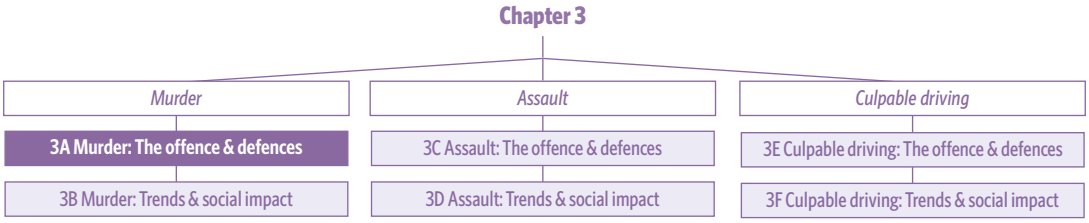


Image: Dan Henson/Shutterstock.com

3A Murder: The offence & defences

The term 'murder' is not specifically defined in the *Crimes Act 1958* (Vic). However, derived from common law, murder is generally defined as voluntarily causing the death of another person with malice aforethought (intent to kill or cause harm), and without lawful excuse.

Murder is a serious indictable offence punishable by a maximum sentence of life imprisonment and is deemed to be one of the most severe criminal offences in terms of its impact on the victim and society.



In this lesson you will be learning about the elements of murder, the possible defences for murder and the role of statute law and common law in developing these.

Study design dot point

- Two criminal offences and for each offence:
  - the elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

The elements of offence (Murder)	1.2.7.1
Mens rea	1.2.7.1.1
Actus reus	1.2.7.1.2
Comparison with manslaughter	1.2.7.1.3
Possible defences (Murder)	1.2.7.2
Self defence	1.2.7.2.1
Duress	1.2.7.2.2
Penalties (Murder)	1.2.7.3

USEFUL TIP

The VCAA study design states that you must know the role of statute law and common law in developing the elements of this offence and the defences.

Throughout this lesson, the elements of the offence and the defences have been described by reference to the relevant statutory and common law principles.

The elements of the offence (Murder) 1.2.7.1

Mens rea 1.2.7.1.1

OVERVIEW

Mens rea is a Latin term that refers to the **mental element** of the crime: the state of mind which must be proven to the judge/jury that the accused held, beyond reasonable doubt.

DETAILS

The specific mens rea that must be proven to find someone guilty of murder is known as '**malice aforethought**'. To establish whether an accused person demonstrated malice aforethought, it must be proven that they either intended to kill or cause really serious injury, or were reckless as to whether they would kill or cause really serious injury.

This gives rise to two of the types of murder that will be focused on in this lesson:

1. **Intentional murder**
2. **Reckless murder**

Intentional murder

Intentional murder is where the accused causes the death of another with the **specific intention** to kill or cause grievous bodily harm (serious physical injury), while having no lawful excuse to do so.

Intention to kill or intention to cause grievous bodily harm is determined subjectively by looking at the accused in isolation rather than an ordinary person in the same circumstances.
The accused is regarded to have intended the result if:

- They acted with a conscious desire to bring such a result, or
- They acted with the knowledge and foresight that the outcome was almost certain to occur as a result of their actions.

CASE STUDY

***The Queen v Pavlis* [2018] VSC 440**

75-year-old Pavlis received a 20 year prison sentence for killing his long-time friend and business partner Jennifer, who was 25 years younger than him. The relationship of trust between the two was so close that Pavlis had keys to Jennifer's home, which he used to enter her house and stab her to death while she was making dinner.

Pavlis pleaded guilty to murder. The judge deemed Pavlis' offence a 'brutal murder' and noted that 'a substantial sentence will be imposed upon an offender who kills another with murderous intent and without legal justification or excuse.'

Proving an intention to cause grievous bodily harm is a lower standard than an intention to kill. The prosecution must prove that, at the time of the voluntary act or omission, the accused intended only to cause grievous bodily harm. Provided the death resulted from the intentional act, this will suffice as the mens rea for intentional murder.

CASE STUDY

Jury finds Laa Chol's 18yo killer guilty of her stabbing murder in Melbourne apartment tower

The accused and some friends gatecrashed a party at an apartment in Melbourne which was occupied by Ms Chol, 19, and two other friends. Ms Chol had noticed some people going into the bedroom where her belongings were and later realised her phone was missing. Ms Chol was angry about this and a fight broke out with the gatecrashers. During this, the accused retrieved a knife that was in his jacket and stabbed Ms Chol in the chest, piercing her heart.

The accused, an unnamed 18-year-old, admitted to stabbing Ms Chol, but claimed he did not intend to kill her. The accused's defence was that he was guilty of manslaughter, as he did not possess the relevant mens rea required to be found guilty of murder.

The prosecution claimed that the accused had used an amount of force in his stabbing that was sufficient to establish an intent to kill or cause really serious injury. Instead of stabbing her arm or leg the accused had stabbed her chest, which the prosecution claimed constituted intent.
The prosecution highlighted that 'an intention can be formed instantly and acted on spontaneously — it can take a millisecond to form an intention to do something'.

Ultimately, the jury unnanimously found the accused guilty for the murder of Ms Chol.

Source: ABC News (2019)

Reckless murder

Reckless murder is where the accused causes the death of another while acting with recklessness as to causing death or grievous bodily harm, while having no lawful excuse to do so.

Under Australian common law, engaging in conduct that is likely to cause death or grievous bodily harm will still constitute murder, even if the accused did not intend to kill. Recklessness therefore tends to be easier for the prosecution to prove, as rather than proving the intent of the accused, they must simply show that the death or injury occurred, and that it was easily foreseeable by the accused.

CASE STUDY ***Director of Public Prosecutions (Vic) v Gargasoulas* [2019] VSC 87**

The accused, Gargasoulas, used an illicit drug (ice) and drove at high speeds in a stolen car along a crowded footpath in efforts to evade police. As a result, Gargasoulas struck multiple individuals and vehicles which caused several deaths and serious injuries. Following this incident, Gargasoulas was found guilty of 6 counts of murder and 27 counts of reckless conduct endangering life.

When sentencing Gargasoulas, the trial judge stated:

> Your convictions for murder were based on what is often loosely described as 'reckless', rather than intentional, killing... you knew that, by your actions, you were likely to kill, or at least seriously injure, many innocent pedestrians. That did not faze you.

Distinguishing between intentional and reckless murder

The distinction between intentional and reckless murder lies in the degree of foresight (or knowledge) of probability that the result is likely to occur. For example:

- If the likelihood that the accused's conduct will cause death or grievous bodily harm is so high that it is almost absolute, the accused is deemed to have had an intention to kill or cause grievous bodily harm.
- If the likelihood of causing death or grievous bodily harm is slightly lower, the accused will be deemed to have acted with a reckless state of mind.

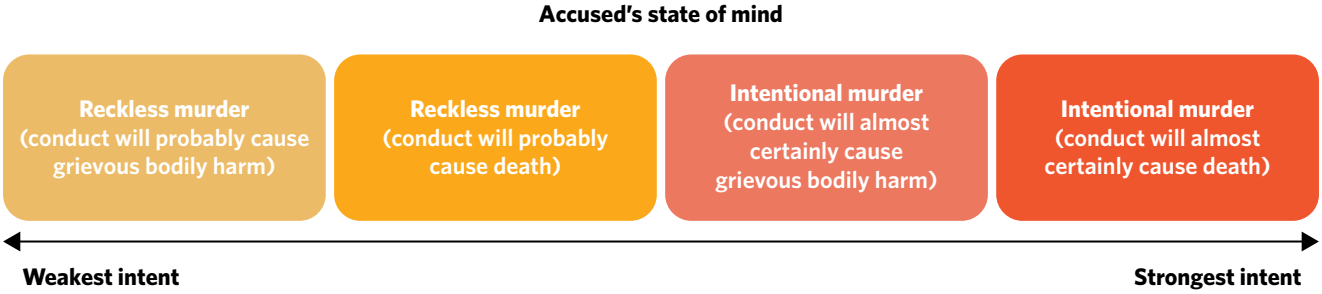


Figure 1 Distinguishing between intentional and reckless murder

Actus reus 1.2.7.1.2

OVERVIEW

Actus reus is a Latin term that refers to the **physical element** of the crime: where the accused person did an act, or failed to do an act, that had criminal consequences.

DETAILS

Establishing actus reus for murder

In order to establish actus reus for murder, the prosecution must show that there was:

1. A voluntary act (or omission to act where the law imposes a duty to act); and
2. Causation between that act (or omission) and the consequences of the offence; and
3. The death of a person.

Voluntary act

The conduct must have been directed by the accused's conscious and voluntary decision. A decision is not conscious if the accused was in a state of automatism (for example, he or she was unconscious), had involuntary movement or if the conduct was caused by another person. If there are multiple acts, the courts will look at the series as a whole to see if it is regarded as one voluntary action.

Some examples of voluntary acts include (but are not limited to):

- Stabbing
- Shooting
- Punching
- Kicking
- Poisoning.

Causation

Causation requires a **causal connection** between the accused's voluntary act (or omission) and the consequences that result. An objective test is used to determine whether the conduct that caused the death of the victim occurred in a continuing manner without a supervening event.

USEFUL TIP

In most murder (and manslaughter) trials, proving the accused person's conduct caused the death of another person is usually straightforward. If the prosecution has evidence the accused person stabbed, shot or punched the deceased, this will usually satisfy the causation element. It is only on some occasions that causation is a more complex issue for the jury to consider.

A supervening event is an additional incident that is so radical that it breaks the chain of causation. Where there are potential supervening events that could break causation, the accused's act or omission must be a 'but-for' cause of the victim's death. This means that it must be proven that but-for the first event (if it wasn't to occur), the death would not have occurred. In these situations, the court may use a range of tests to determine whether the causal connection has been broken.

CASE STUDY

Consider the following hypothetical scenario.

Jake pulls out a knife and threatens to stab Jessica in the chest if she does not give him her wallet. Out of fear, Jessica runs into the middle of a busy road and is hit by a car. Jessica is then rushed to hospital to be treated for life-threatening injuries. However, while in hospital Jessica contracts a serious disease and ultimately dies as a result of this. Is Jake responsible for the murder of Jessica or do the superveining events (getting hit by a car and contracting a disease in hospital) break the chain of causation? This is a difficult question with no simple answer and is a serious point of contention in some murder cases.

Some of the most common tests used by Australian courts in determining whether a supervening event will break the chain of causation include (but are not limited to):

- The substantial and operating cause test
- Natural consequences test

Substantial and operating cause test

This is one of the primary tests used in Australian courts to determine causation, and was originally derived from the United Kingdom. This test requires that the accused's act (or omission) must **substantially or significantly contribute** to the death of the victim where there is a supervening event. The same test is used for manslaughter and was developed through the case *R v Evans and Gardiner (No 2)* [1976] VR 523.

CASE STUDY

***R v Evans and Gardiner (No.2)* [1976] VR 523**

Evans and Gardner stabbed their victim in the stomach during a fight in prison. The victim was treated and survived, but fell seriously ill 11 months later. The victim sought medical treatment, but ultimately 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. However, both men appealed, arguing that 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.

The court referred to the 'substantial and operating cause test' established in *R v Smith* [1959] (UK) and used this as persuasive precedent to reach the decision that the stabbing was a **substantial and operating cause** of the victim's death (despite the failure of the doctor to diagnose the scar tissue).

This case illustrates how a voluntary act (stabbing) that substantially and significantly contributes to the death of the victim (build-up of scar tissue in his bowel) and ultimately leads to the death of the victim can still be sufficient cause of a person's death despite a supervening event (doctor's poor treatment and failure to discover the scar tissue). In this case, Evans and Gardiner exhibit the actus reus required to be found guilty of the murder of their victim.

Natural consequences test

This is often used in cases where the victim acts out of fright or self-preservation resulting from the accused's conduct, which consequently results in their own death. That is, that while the victim's conduct caused their own death, their actions were motivated out of some form of fear on behalf of the accused's actions.

Implications arise around whether the conduct of the victim will destroy the causal connection and amount to a supervening event. This is determined by whether the victim's death was a natural consequence of the accused's actions or whether it went beyond what was reasonably foreseeable.

In order for the accused to be found guilty in these situations the prosecution must prove that:

- The accused caused the victim to have a well-founded fear of physical harm;
- It was reasonable for the victim to want to escape; and
- The victim selected a reasonable mode of escape.

CASE STUDY

***Royall v R* [1991] HCA 27**

The accused, Royall, was convicted for murder and appealed numerous aspects of his trial, including the conviction. Royall had admitted to assaulting the victim after a violent argument. The following morning, the deceased's body was found naked in the street and her hair was wet. Royall claimed that the victim had been in the shower when he heard a thump. The victim had epilepsy which made the accused concerned for her health as she often fainted or became unconscious. He proceeded to open the door with a knife which caused the deceased to jump out of the window.

Royall denied causing her any injury in the bathroom, and denied any intent to injure or cause her death. However, there was evidence of a forcible entry into the bathroom, along with the victim's blood, which was found splashed in the bathroom, a chipped glass ashtray and gouge marks along the bathroom wall. Yet, there were no marks to indicate the victim had been struck and there were no blood or fingerprints on the ashtray.

The main legal issue raised in this case was whether a voluntary act committed out of fear or for self-preservation breaks the chain of causation. The High Court established a number of principles concerning causation when determining this case.

The court held that generally, a reasonable act performed in an attempt to protect oneself (such as attempting to escape violence) **does not destroy the causal connection.** However, an overreaction can break the chain of causation. A person should also not be deemed morally culpable for harm they did not intend and that a reasonable person is unable to foresee. This means that an accused person cannot be found guilty of murder unless the conduct resulting in the victim's death was intended by the accused or a reasonable person could foresee.

Despite this, Royall's appeal on the conviction was dismissed as it was deemed the victim had well-founded reason to jump out of the window and no alternative means of escape.

Death

The voluntary act must cause the death of another person, not an object or animal. A foetus (an unborn child) is not accepted to be a 'person' in Victoria. Therefore, the death of an unborn child would not satisfy this component for murder cases.

CASE STUDY

Death of an unborn

Maddie is pregnant when she is stabbed in the stomach, resulting in the death of her unborn baby. This would not regarded as the death of a person for the purposes of murder in Victorian law. It is likely, of course, the offender in this scenario would be charged with another offence under Victorian law, such as intentionally causing serious injury (covered in Lesson 3C).

Generally, death is the easiest aspect to prove. However, sometimes the point of death is not always as obvious as it may seem. Many implications have arisen around whether a body that has been kept alive by artificial means is a human being capable of being killed. However, in Victoria (along with New South Wales and South Australia), life as a human being finishes at the point of irreversible ending of brain function or blood circulation.

LEGISLATION

***Human Tissue Act 1982* (Vic)**

Section 41 – DEFINITION OF DEATH

For the purposes of the law of Victoria, a person has died when there has occurred—

(a) irreversible cessation of circulation of blood in the body of the person; or

(b) irreversible cessation of all function of the brain of the person.

Comparison with manslaughter 1.2.7.1.3

OVERVIEW

Manslaughter refers to unlawfully causing the death of another person **without** malice aforethought. Murder and manslaughter are very distinct, but some aspects of these criminal offences can overlap.

DETAILS

Murder and manslaughter are similar in some respects as both are homicide offences which involve the killing of another human being without a lawful excuse. However, the two are also very different in a number of ways, especially in terms of their mens rea components.

Table 1 Comparison between murder and manslaughter

Similarities	Differences
Actus reus. Murder and manslaughter both share the same actus reus components: a voluntary act, causation and death.	**Mens rea.** Murder requires some form of intent or recklessness of causing death or grievous bodily harm. Manslaughter involves gross negligence or causing death whilst performing some unlawful and dangerous act.
Criminal offence. Murder and manslaughter are both serious indictable offences.	**Types.** The types of murder include intentional murder and reckless murder. The types of manslaughter include manslaughter by an unlawful and dangerous act and manslaughter by criminal negligence.
Unlawful homicide. Murder and manslaughter are branches of unlawful homicide.	**Penalties.** The maximum penalty for murder is life imprisonment as outlined by s. 3 of the *Crimes Act 1958* (Vic). The maximum penalty for manslaughter is 20 years imprisonment as outlined by s. 5 of the *Crimes Act 1958* (Vic).
Penalties. The penalties for murder and manslaughter are outlined by the *Crimes Act 1958* (Vic). Murder and manslaughter's maximum penalties inolve imprisonment.	**Objective and subjective tests.** The test for murder is subjective, determined by whether the accused themself understood that death or grievous bodily harm would likely result from their actions. The test for manslaughter is objective, determined by how a reasonable person in the accused's position would have acted.

Possible defences (Murder) 1.2.7.2

Self defence 1.2.7.2.1

OVERVIEW

Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another. Self-defence can be raised in response to a charge of murder where the accused believed that their conduct was necessary to protect themself or another person from death or really serious injury at the time of the actus reus.

DETAILS

Self-defence is a complete defence. This means that a person will not be found guilty of an offence if they can prove that they were acting in self defence. The defence will only need to be raised once the elements of an offence (mens rea and actus reus) have been successfully established by the prosecution.

The accused has the burden of proof to provide evidence of their acting in a manner attempting to protect themselves or another person. If the accused proves this, the prosecution must then establish beyond a reasonable doubt that this defence is not applicable in the circumstances.

Self-defence is outlined by s. 322K of the *Crimes Act 1958* (Vic). In order to use self-defence for murder, there is an additional requirement which is outlined under s 322K(3).

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 322K – SELF-DEFENCE

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if—

(a) the person believes that the conduct is necessary in self-defence; and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

Section 322K of the *Crimes Act 1958* (Vic) therefore gives rise to the two elements required to establish self defence:

1. The accused believes that the conduct is necessary in self-defence; and
2. The conduct is a reasonable response in the circumstances.

Conduct is necessary in self-defence

This requires that the force exerted in relation to the threat was reasonably necessary to protect the accused or another person from harm. The defence only applies in **murder cases** where the conduct is necessary to defend the accused or another person against infliction of death or really serious injury. In other words, it is unlikely to be a successful defence to claim that the accused murdered their victim out of fear they were going to be punched in the face or kicked in the chest.

Conduct is a reasonable response in the circumstances

This is determined by considering what the accused reasonably believed in the circumstances. It does not matter what a reasonable person would have believed or if the belief was incorrect.

Relevant considerations to determine reasonableness of response:

- The nature of the conduct to which the accused responded.
- Conduct on the part of the accused which caused the conduct of the victim, to which the accused then responded (such as the accused provoking the victim in some way).
- The surrounding circumstances, including the time available to make a decision.
- Proportionality of the response.
- Availability of other responses.

CASE STUDY

Consider the following hypothetical scenario.

Johnny is sitting in his living room when a robber breaks into his house. Johnny instantly grabs a knife and stabs the intruder which results in their death. It was later found that the intruder was not carrying any weapons and was trying to remain quiet enough to escape unnoticed.

Johnny is charged and convicted for murder after his self-defence claim is unsuccessful. His response was deemed disproportionate to the threat and he didn't attempt any alternative response. It is also held that the threat was not of death or serious injury, but rather likely to only be a loss of property.

Compare this with the following hypothetical scenario.

Johnny is sitting in his living room when a robber breaks into his house. Johnny instantly grabs a knife as precaution but first asks the robber to leave or he will call the police. The robber pulls out a gun and threatens to shoot him. Johnny tries to call the police which causes the robber to shoot him in the leg. The robber threatens to kill him if he tries anything else. Out of fear, Johnny stabs the robber in the head with the knife which leads to their death.

cont'd

Johnny is charged with murder but successfully proves that he was acting in self-defence. The court notes that Johnny was acting in a way to protect himself, not his property, and if he had reacted before the threats to himself were made this could have negated the defence. The court also notes that Johnny first asked the robber to leave, attempted to call the police and only resorted to physical violence when he had exhausted all other options.

Self-defence for family violence

The defence of self-defence is slightly different in situations where the accused murders someone due to previous family violence. The same requirements of the conduct being necessary and reasonable apply as outlined by s. 322K of the *Crimes Act 1958* (Vic).

In family violence cases, however, self-defence can also be proven in two different scenarios that are not usually applicable in standard self-defence claims:

1. The person is responding to harm that is not immediate.
2. The force used may be in excess of the threatened harm.

Self-defence for family violence is outlined by s. 322M of the *Crimes Act 1958* (Vic).

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 322M – FAMILY VIOLENCE AND SELF-DEFENCE

(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—

(a) the person is responding to a harm that is not immediate; or

(b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

CASE STUDY

***DPP v Phillip Paul Bracken* [2014] VSC 94**

Mr Bracken shot and killed his de facto wife which was caught on CCTV footage. It was easily established that Mr Bracken caused the victim's death and did so voluntarily, but issues arose around a claim of self-defence as Mr Bracken believed his actions were necessary to defend himself, despite not being under immediate threat.

Mr Bracken alleged and provided witness evidence that throughout their de facto relationship, he was subjected to family violence by the victim including:

- Physical abuse causing serious injuries
- Threats of violence (including threats of death)
- Intimidation and harassment
- Property damage.

Given this, the jury unanimously found Mr Bracken not guilty of murder.

The judge noted: 'Mr Bracken's state of mind on the day of the death, could only be understood by the jury in the light of expert evidence about the dynamics of relationships affected by family violence and about the cumulative effect of sustained abuse on a victim of family violence.'

Common law self-defence

Previously, the courts used a common law test which had multiple stages including subjective and objective considerations. Requirements of this test included:

- The accused's response must be proportionate to the attack.
- The victim's attack must be unlawful.
- The accused retreated before using force.

However, s. 322N of the *Crimes Act 1958* (Vic) abolished common law self-defence, meaning that the statutory requirement under s. 322K is now the governing requirement to be relied upon.

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 322N – ABOLITION OF SELF-DEFENCE AT COMMON LAW

Self-defence at common law is abolished.

USEFUL TIP

You are expected to know what the law is pertaining to self defence now, not what it was. However, this is included as an illustrative example of parliament's ability to abrogate common law as described in Lesson 1E.

Duress 1.2.7.2.2

OVERVIEW

The defence of duress is the legal recognition that a person has committed a crime while acting under compulsion due to a threat should they fail to comply. In murder cases, the threat must be death or really serious injury to themselves or another person.

DETAILS

At trial, if murder has been proven beyond reasonable doubt, duress can be raised as a possible defence by the accused. The accused has the burden of proof and must provide evidence that they acted under duress. If the accused proves this, the prosecution must then establish beyond a reasonable doubt that this defence is not applicable in the circumstances.

The defence of duress is outlined by s. 322O of the *Crimes Act 1958* (Vic). In order to use duress as a defence for murder, there is an additional requirement which is outlined under s. 322O(4).

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 322O – DURESS

(1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.

(2) A person carries out conduct under duress if—

(a) the person reasonably believes that—

(I) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and

(II) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and

(b) the conduct is a reasonable response to the threat.

(3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.

(4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury.

Section 322O of the *Crimes Act 1958* (Vic) therefore gives rise to the three elements required to establish duress:

1. A threat of harm;
2. The conduct was the only reasonable way to avoid the threatened harm; and
3. The conduct was a reasonable response to the threat.

A threat of harm

A threat must have been made that will be carried out unless the accused commits a specified offence. In murder cases, s. 3220(4) of the *Crimes Act 1958* (Vic) outlines that the person must believe that the threat is to inflict death or really serious injury. A threat of harm alone may not be sufficient.

The conduct was the only reasonable way to avoid the threatened harm

This is a partially **subjective** measure that requires the accused to have reasonably believed his or her conduct was the only reasonable way that the threatened harm can be avoided. In murder cases, the accused must reasonably believe that death or really serious injury will result unless they commit the crime.

The conduct was a reasonable response to the threat

This is an **objective** measure that requires the conduct be a reasonable response to the threat. This involves looking at whether a reasonable person in the accused's position would also be compelled to act in the same manner due to the threat of death or really serious injury. The accused must have no other reasonable means to prevent the execution of the threat or to escape the circumstances.

Common law duress

Previously, the courts accepted common law duress as a defence for many criminal offences. However, murder was explicity excluded from this defence.

Section 322Q of the *Crimes Act 1958* (Vic) abolished common law duress, meaning that the statutory requirement under s 322O is now the governing requirement to be relied upon.

LEGISLATION ***Crimes Act 1958* (Vic)**
Section 322Q – ABOLITION OF DURESS AT COMMON LAW
The defence at common law of duress is abolished.

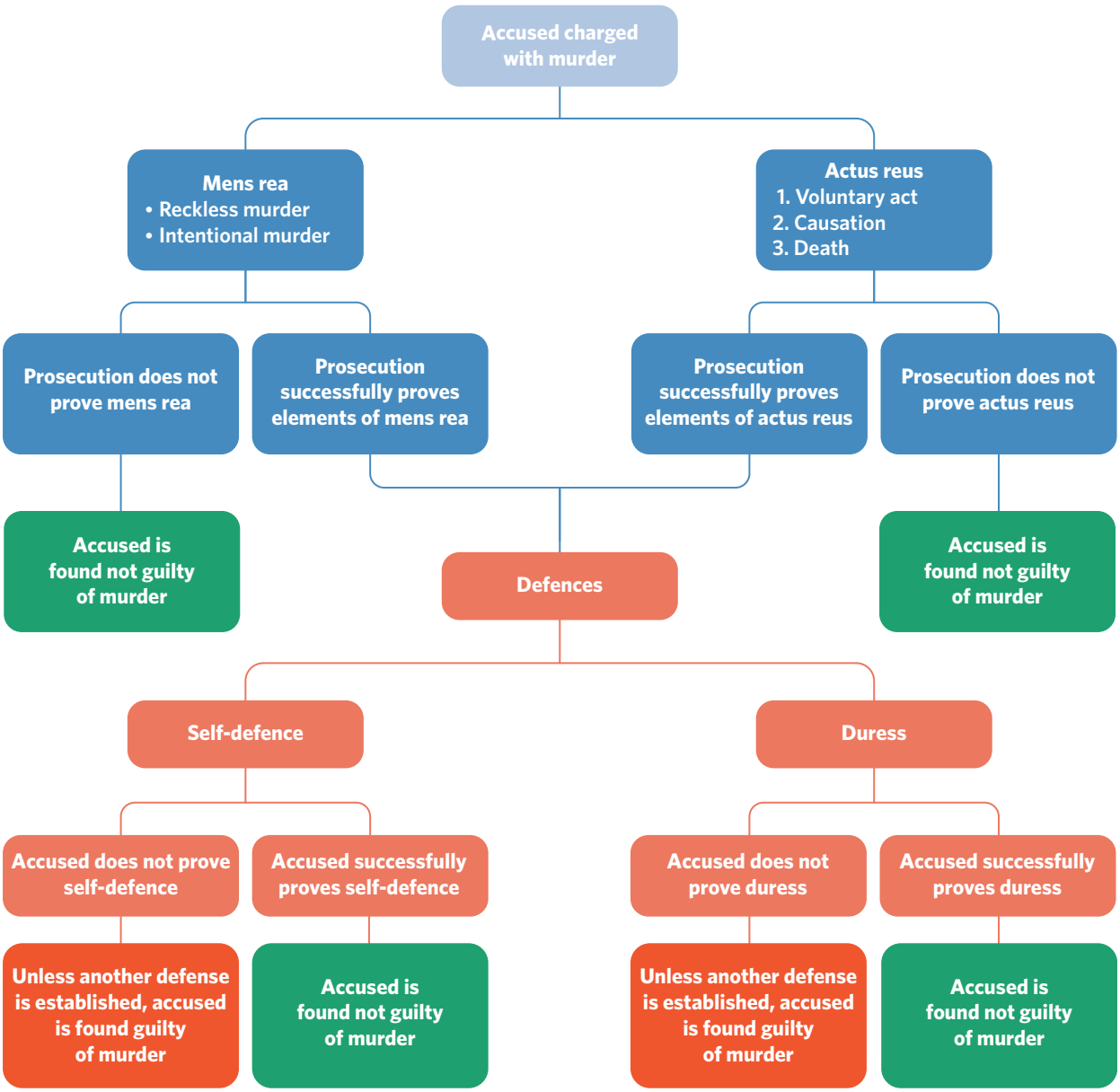


Figure 2 The elements and defences for murder

USEFUL TIP

During a trial for murder, it is a primary defence to argue the elements of murder (mens rea and actus reus) have not been proven beyond a reasonable doubt. Primary defences are illustrated as blue in Figure 2. If these elements are successfully proven, it is a secondary defence to establish a defence for murder (such as self-defence or duress). Secondary defences are illustrated as orange in Figure 2.

Penalties (Murder) 1.2.7.3

OVERVIEW

The penalties for murder are outlined in s. 3 of the *Crimes Act 1958* (Vic).

DETAILS

If a person satisfies the elements of murder, and cannot provide a defence, they may be liable to a maximum penalty of life imprisonment. This is the harshest sanction that may be imposed for a criminal offence, highlighting how severely it is viewed.

However, the standard sentence for murder is 30 years imprisonment (where the victim is a custodial officer or emergency worker on duty) or 25 years imprisionment for any other case. The penalties for murder are outlined by s. 3 of the *Crimes Act 1958* (Vic). This legislation guides the court's judgement when imposing a sanction, and is weighed alongside other factors such as the offender's prior convictions, the need to protect society, whether he or she pleaded guilty and many other factors discussed in Chapter 6.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 3 – PUNISHMENT FOR MURDER

(1) Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to—

(a) level 1 imprisonment (life); or

(b) imprisonment for such other term as is fixed by the court— as the court determines.

(2) The standard sentence for murder is—

(a) 30 years if the court, in determining sentence, is satisfied that the prosecution has proved beyond reasonable doubt that—

(I) the person murdered was a custodial officer on duty or an emergency worker on duty; and

(II) at the time of carrying out the conduct the accused knew or was reckless as to whether that person was a custodial officer or an emergency worker; and

(b) in any other case, 25 years.

Keen to learn more?

Legal Aid, https://www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/serious-criminal-charges

Judicial College of Victoria, http://www.judicialcollege.vic.edu.au/eManuals/CCB/4478.htm

QUESTIONS 3A Murder: The offence & defences

LEVEL 1:
Define and understand

1. Jacob has been found guilty of murder after he stabbed Carly in the chest. Jacob claims that he did not intend to cause Carly's death and just wanted to cause her serious physical injury. Which type of mens rea did Jacob possess at the time of the incident?

A. Reckless murder as he did not intend to kill Carly.

B. Intentional murder as he intended to kill Carly.

C. Reckless murder as he did not intend to cause Carly grievous bodily harm.

D. Intentional murder as he intended to cause Carly grievous bodily harm.

2. Which of the following is not a similarity between murder and manslaughter?

A. Murder and manslaughter have the same maximum penalty.

B. Murder and manslaughter have the same actus reus components.

C. Murder and manslaughter are serious indictable offences.

D. Murder and manslaughter are branches of unlawful homicide.

3. Jason is a scientist who works with many toxic chemicals. Jason was charged with murder for the death of one of his co-workers, Tracey, after spilling a deadly chemical on her chest, causing serious burns and ultimately killing her. However, Jason was found not guilty after claiming he became unconscious at the time of the incident which was the reason he spilled the chemical. Which actus reus element of murder was not satisfied?

A. Voluntary act

B. Causation

C. Death

D. None of the above.

4. Marcus is having a fight with his girlfriend, Nickie, when she hits him in the face. Nickie is serving a CCO and one condition is that she cannot leave her apartment. Marcus attempts to leave the premises to inform police of her misconduct when she grabs a piece of sharp wood and states: 'I'll slice your throat if you go anywhere'. Nickie then walks up and pierces the side of his stomach with the piece of wood. Marcus grabs a brick and hits Nickie on the top of her head, killing her instantly.

Marcus has been charged with murder and the prosecution have satisfied the elements of murder. Which is the best defence for Marcus to provide in this situation?

A. Common law self-defence

B. Statutory self-defence

C. Common law duress

D. Statutory duress

LEVEL 2:
Describe and explain

5. Duress is a complete defence to a murder charge. Describe this defence or one other defence that may be raised in a murder trial. (3 MARKS)

6. Describe the term 'intentional murder'. Provide the two ways a person may be deemed to have the mental state for intentional murder. (4 MARKS)

7. Describe the term 'causation'. In your answer, explain one of the tests that may be used when considering whether the chain of causation has been broken. (4 MARKS)

8. Explain the actus reus component of murder. (5 MARKS)

LEVEL 3:
Apply and compare

9. Mark is involved in a murder trial for the death of Ben after he stabbed him in the neck, back and leg. The prosecution claim that the number of times Mark stabbed Ben show that Mark intended to kill Ben.

a) Explain who has the burden of proof in Mark's case. (2 MARKS)

b) Describe the type of mens rea Mark is likely to have had at the time of the incident. Justify your response. (4 MARKS)

10. Urvi has been charged with manslaughter following the suspicious death of her husband. Distinguish between murder and manslaughter. (4 MARKS)

11. Matilda was kidnapped on her way home from work and was locked in a basement. Matilda heard the kidnapper on the phone planning to hold her captive until he was paid a ransom. During the call, Matilda overheard the kidnapper explain that he would be willing to severely torture her if he did not receive the money within a week. Matilda found a screwdriver in a box and when the kidnapper came into the basement she stabbed him in the stomach and ran home. The police came to Matilda's house and arrested her for murder. During Matilda's trial, the prosecution successfully proved the elements of murder, but Matilda believes she can still raise a successful defence.

Explain one defence that Matilda could raise and justify why this defence would be appropriate in Matilda's case. (4 MARKS)

12. Gale and Joseph got into an altercation following a football match. In the heat of the moment, Joseph threw a brick at Gale's head and caused him to become unconscious. Joseph called the ambulance after noticing a pool of blood around Gale. When the ambulance arrived, Gale was pronounced dead. Joseph has been charged with the murder of Gale but he claims he did not intend to cause his death. Explain the type of murder Joseph is likely to have been charged with. Justify your response. (3 MARKS)

13. Compare intentional murder and reckless murder. (4 MARKS)

14. Peter owed Bert $6,000 after he lent him the money earlier in the month for home repairs. The following week, Bert entered Peter's apartment and demanded his repayment. When Peter said he did not have the money, Bert blocked the only door to exit the apartment, pulled out a gun and stated: 'I'll blow your brains out if I don't get paid now'. Peter lived on the 10th floor of the apartment building, but decided to jump off the balcony to avoid being shot. This resulted in Peter's death.

Justify whether you think Peter jumping from his balcony breaks the chain of causation. In your answer, explain a test the courts could use to determine whether Peter's actions constitute a supervening event. (5 MARKS)

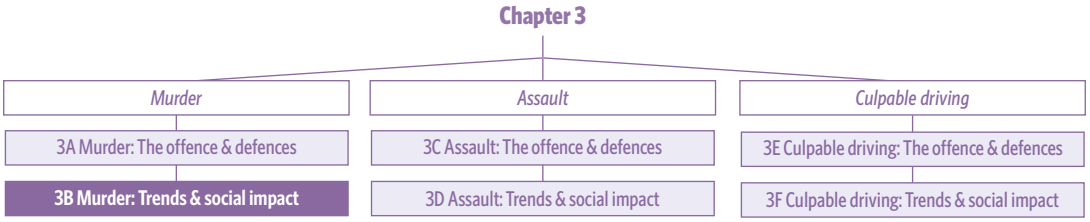
15. Kylie and Frank have been married for six years. Frank has a large temper and often takes out his frustrations on Kylie. Throughout their entire marriage, Kylie has been subjected to threats of violence and actual physical violence but has always been too scared to reach out to police. Frank came home from a bad day at work and begins throwing glasses at the walls. Instinctively, Kylie picks up one of the glass shards and stabs Frank in the chest, causing his death. Kylie is then arrested for the murder of Frank and her trial date has been set.

a) Describe the standard of proof that must be met in this case. (2 MARKS)

b) Explain one defence that Kylie could raise and justify why it would be appropriate in this case. (4 MARKS)

3B Murder: Trends & social impact

Murder has long been regarded as a crime of the utmost severity. What impact do instances of murder have on society? How does the legal system approach the prosecution and sentencing of murder and other homicide offences?



In this lesson, you will learn about the statistical trends surrounding the sentencing of those convicted of murder in Victoria and compare this with New South Wales. You will also consider the impact that murder has on victims' and offenders' families and society as a whole.

Study design dot point

- Two criminal offences and for each offence:
  - the elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Murder)	1.2.7.4
Victoria	1.2.7.4.1
New South Wales	1.2.7.4.2
Possible impact of the offence on individuals and society (Murder)	1.2.7.5
Impact on families	1.2.7.5.1
Society	1.2.7.5.2

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Murder) 1.2.7.4

Victoria 1.2.7.4.1

OVERVIEW

> Murder continues to constitute the most serious of all criminal offences. It has always possessed a special significance to our law and our society. The deliberate taking of human life must never be regarded by the courts as being anything other than a matter of the utmost seriousness.
>
> *Source:* Judicial College of Victoria – Victorian Sentencing Manual (2019)

In Victorian law murder is a Category 1 offence. This means that it carries a maximum penalty of life imprisonment and persons convicted of murder must serve a custodial sentence. What effect does such a serious punishment have on deterring other homicides? Are murder rates changing in Victoria?

USEFUL TIP

While a custodial sentence is usually a term of imprisonment, a judge might choose to impose a custodial supervision order, which is another form of custodial sentence. This form of sentencing will often emphasise some other purpose alongside punishment, such as rehabilitation of the offender.

DETAILS

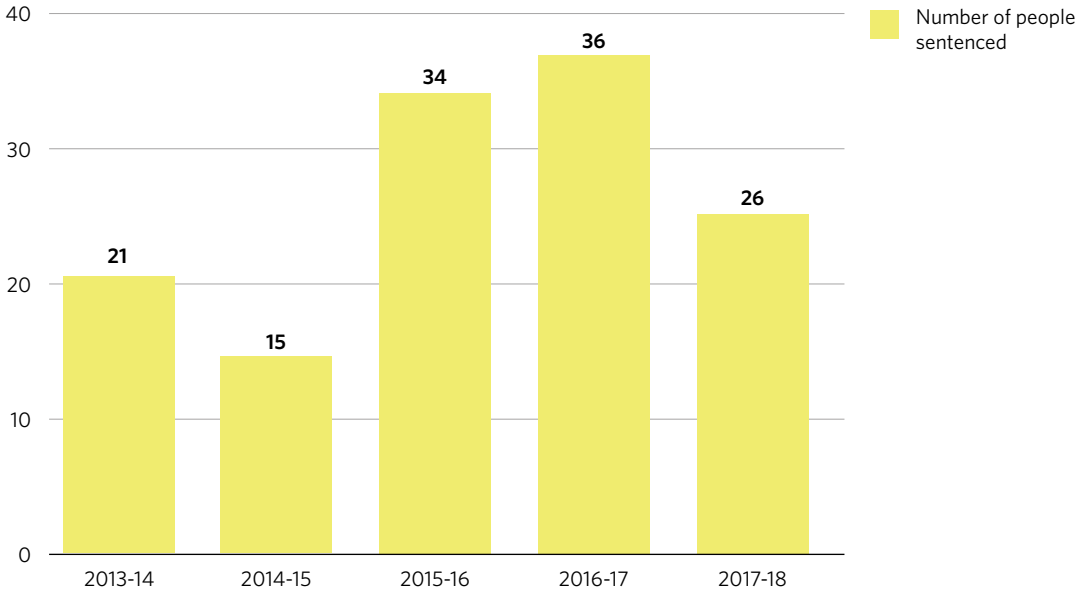
Murder trends – Victoria

Between 2013-14 to 2017-18, a total of 132 people were sentenced for murder in the Supreme Court of Victoria (as shown in Figure 1). This includes the outcomes of appeals in the Court of Appeal and constitutes only 1.5% of principal offences sentenced across this period.

USEFUL TIP

A 'principal offence' refers to the **most serious** offence committed in the course of an overall incident.

For example, James might be tried for a series of charges involving a stolen car, including theft, resisting arrest, speeding and culpable driving causing death. In this instance, the charge of culpable driving causing death would become the 'principal offence' in James' case.

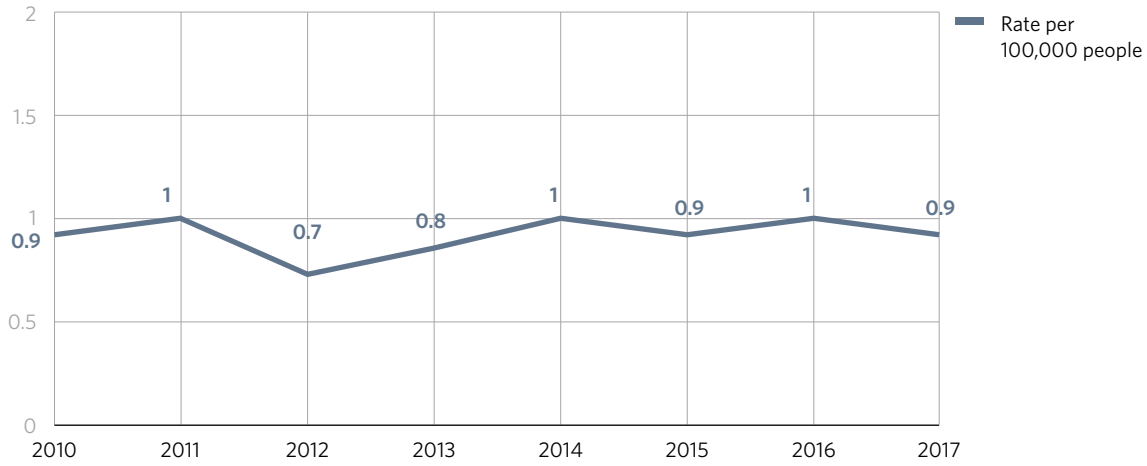


Source: Sentencing Advisory Council – Sentencing Snapshot (2019)

Figure 1 The number of people sentenced for murder – 2013-14 to 2017-18

Victimisation rate – Victoria

According to the Australian Bureau of Statistics's (ABS) Recorded Crime Report, the murder rate in Victoria has remained relatively stable over recent years. Figure 2 highlights the murder victimisation rate from 2010 – 2017, which is based on the number of individuals per 100,000 persons who were victims of murder over this period. This does not include victims of all homicides, which is a broader definition that includes crimes such as manslaughter.



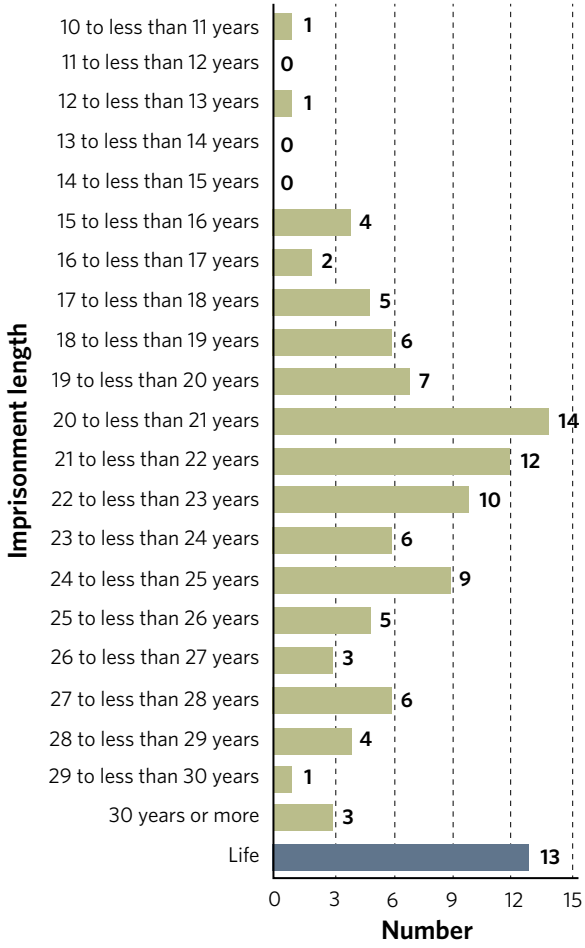
Source: Australian Bureau of Statistics – Recorded Crime – Victims, Australia, (2018)

Figure 2 Murder Victimisation rate per 100,000 people (Vic)

Sentencing practises – Victoria

Pursuant to s. 3 of the *Crimes Act 1958* (Vic), murder is a Level 1 offence and carries a standard sentence of 25 years imprisonment (this applies to offences committed after 1/2/2018). The courts must impose a custodial sentence on someone found guilty of murder.

Figure 3 shows the length of the imprisonment terms for those sentenced for murder across the period from 2013-2018. Imprisonment terms ranged from 10 years and 9 months to life sentences, while the median length of imprisonment was 22 years. The average length of imprisonment that was imposed for murder in 2017-2018 was 23 years and 7 months.



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 3 The number of people sentenced to imprisonment for murder by the length of imprisonment term in the five financial years between 2013-14 to 2017-18.

However, the type and severity of sentence that is imposed by the courts varies dependent on several factors, including (but not limited to):

1. The gender of the offender.
2. The relationship between the victim and the offender.
3. The offender's mental health and prior criminal records.

The following tables make use of historical data recorded by the Sentencing Advisory Council Victoria across the seven-year period between 1999-2006. It demonstrates clear differences in the sentencing outcomes of different offenders dependant on a variety of personal factors, including gender, relationships, mental health and criminal history. For more information on the different factors considered by the courts when sentencing a guilty offender, refer to lesson 6H.

1. The gender of the offender

Table 1 The effect of gender on sentencing outcomes

	Female	Male
Rate of immediate imprisonment	80%	92%
Average length of imprisonment	16 years, 10 months	19 years, 4 months

Source: Sentencing Advisory Council – Homicide in Victoria: Offenders, Victims and Sentencing (2007)

Overall, of the 137 people sentenced for murder in Victoria across this period (1999-2006), 89% were male (122) while only 11% were female (15). From the data, the gender of the offender is an indicator of the type and severity of sentence that is imposed, particularly for the crime of murder.

How might this difference be explained?

One possibility for explaining the gender differences in sentences imposed for murder is to consider the different circumstances in which men and women kill. As Morgan (2002) found, women are more likely to kill in a domestic environment and are often responding to violence from their partners. This is likely to be seen as a mitigating factor in the eyes of the courts, which often decreases the severity of the sentence that is imposed (see lesson 6H for more information on mitigating factors).

Source: Morgan, J., Who Kills Whom and Why: Looking beyond Legal Categories (2002)

Most murders are committed by men. Between 2013 and 2018, 92% of all persons sentenced for murder were male.

Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

2. The relationship between the victim and the offender

Table 2 The effect of relationship on sentencing outcomes

	Victim is a stranger	Victim is a friend/ acquaintance	Victim is an intimate partner	Victim is a family member
Rate of immediate imprisonment	96%	96%	91%	60%
Average length of imprisonment	19 years, 11 months	19 years, 2 months	18 years, 10 months	17 years, 8 months

Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

How might this difference be explained?

Sentencing outcomes do not change dramatically between the murder of a stranger, a friend and a partner. However, there is a drastic decrease of more than 30% in the rate of immediate imprisonment for those convicted of murdering a family member. 60% of people in this category receive a term of imprisonment, while the remaining 40% receive a custodial supervision order.

One possible explanation for this difference is that offenders who are sentenced for the murder of a family member may be more likely to suffer from a mental health condition that contributed to the incident. As a result, these offenders are more likely to be sentenced in a way that has a higher emphasis on rehabilitation (with a custodial supervision order to include treatment and monitoring of their illness) and less emphasis on punishment:

> Almost half (40 per cent) of all offenders sentenced for the murder of a family member suffered from a mental condition and all of these offenders were sentenced to an order providing treatment for their condition.

Source: Sentencing Advisory Council – Homicide in Victoria: Offenders, Victims and Sentencing (2007)

3. The offender's mental health and prior criminal record

Table 3 The effect of mental health and criminal record on sentencing outcomes

	Suffering from a mental health condition	Prior criminal history
Rate of immediate imprisonment	45%	95%
Average length of imprisonment	22 years, 6 months	19 years, 5 months

Source: Sentencing Advisory Council – Homicide in Victoria: Offenders, Victims and Sentencing (2007)

How might this difference be explained?

As Table 3 shows, 45% of individuals sentenced for murder and suffering from a mental health condition received a term of imprisonment. The remaining 55% received a custodial supervision order that included treatment for their condition.

Imprisonment may be an inappropriate sentencing option for offenders who suffer from some form of mental illness or impairment. Instead, the courts are provided with some specialised sentencing options to allow for an increased focus on treatment and rehabilitation in the type of sentence they impose (see Lesson 6I for more information).

New South Wales 1.2.7.4.2

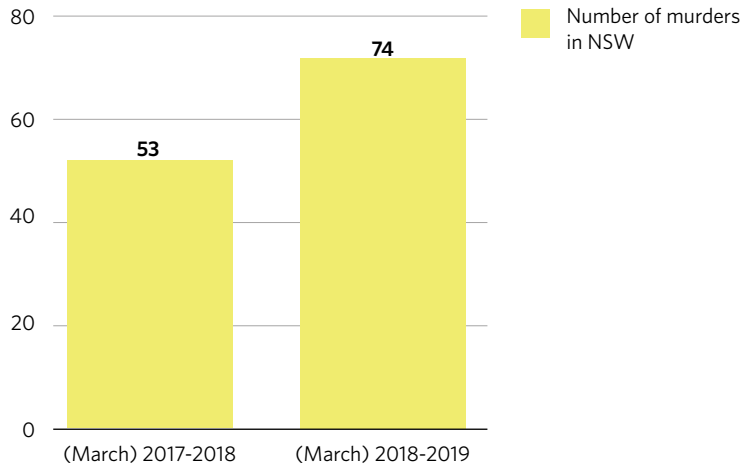
OVERVIEW

How do the trends and statistics regarding murder in Victoria compare to that of another jurisdiction? Particularly, is the frequency of murder comparable to that of New South Wales, Australia's most populous state?

DETAILS

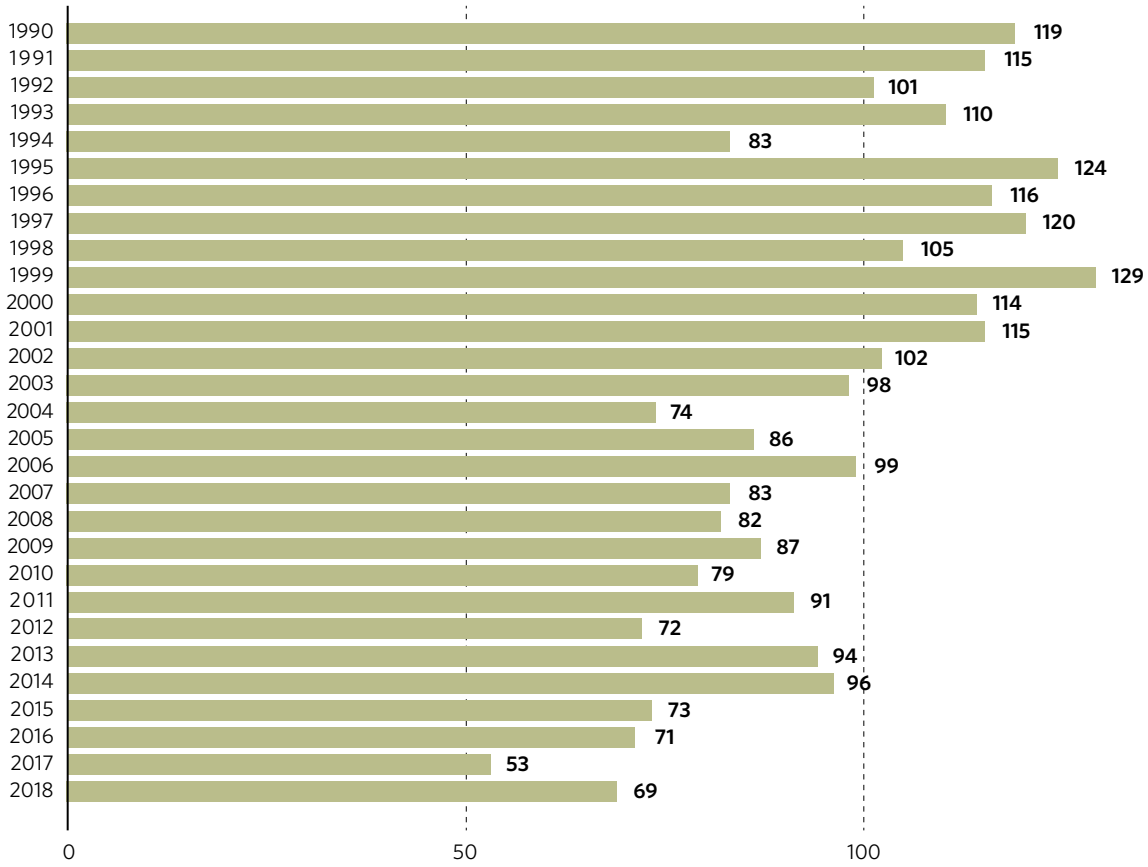
Murder trends – New South Wales

According to the NSW Government's Bureau of Crime Statistics and Research, the number of murders that occurred across the state increased by 39.6% over the last 2 financial years (March 2017 – March 2019). This spike is shown in Figure 4.



Source: NSW Bureau of Crime Statistics and Research – New South Wales Recorded Crime Statistics (2019)
Figure 4 Increase in recorded murders throughout NSW across 24 month period

However, considering long term trends in murder throughout NSW, the statistics clearly show an overall decrease in the frequency of recorded murders in NSW. Despite the NSW population having increased by almost 2 million people since 1990, the number of recorded murders on a yearly basis has almost halved in that time (see Figure 5).

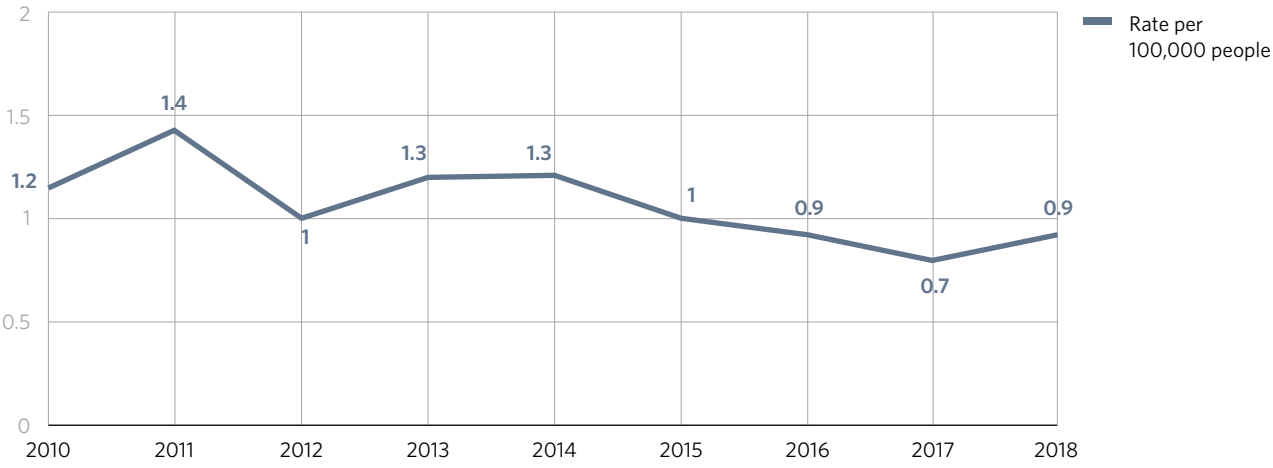


Source: NSW Bureau of Crime Statistics and Research – An update of long-term trends in property and violent crime in New South Wales: 1990-2018

Figure 5 Number of murders recorded in NSW per year through 1990-2018

Victimisation rate – New South Wales

Similar to the murder rate in Victoria, the murder victimisation rates remain relatively stable in NSW. Figure 6 shows the rate at which murders have been recorded per 100,000 population by year in NSW.



Source: NSW Bureau of Crime Statistics and Research – An update of long-term trends in property and violent crime in New South Wales: 1990-2018

Figure 6 Murder victimisation rate per 100,000 people (NSW).

Sentence lengths – New South Wales

The average imprisonment term for murder as a principal offence was just under 20 years (237 months) in 2017. This statistic has remained fairly constant across the last five years, as in 2012 the average term of imprisonment was 20 years (240 months) while the average **aggregate** (including all offences in the course of the murder, such as burglary or stalking) prison term was just over 25 years (302 months).

Source: Ormsby, G., NSW snapshots custodial sentence data (2018)

Possible impact of the offence on individuals and society (Murder) 1.2.7.5

Impact on families 1.2.7.5.1

OVERVIEW

What impact might a murder have on the family and friends of the parties to the crime? How might an individual be affected if someone close to them is involved in a murder – be it the victim, an offender or even a witness? What challenges could this present, beyond the emotional trauma of the crime itself?

DETAILS

There are immeasurable challenges that those close to a murder victim/offender experience following the crime. These challenges are likely to vary from one family to the next.

It is helpful to consider three specific types of impacts when looking at murder and its effect on the families involved:

1. Impact on mental and physical health
2. Impact on family relationships
3. Re-victimisation issues.

1. Impact on mental and physical health

The murder of a close relative has been shown to have a number of detrimental effects on the mental health of family members of the deceased.

- For example, a study conducted in the United States in 2014 examined 47 individuals who had lost a loved one and found a close relationship between murder and severe psychological problems – over 50% of participants evidenced mental disorders such as Post Traumatic Stress Disorder (PTSD) directly resulting from the incident.

Source: Williams, J., & Rheingold, A., Barriers to Care and Service Satisfaction Following Homicide Loss: Associations With Mental Health Outcomes. Death Studies (2014)

As well as the emotional trauma involved, research has also shown a number of physical health problems in the relatives of murder victims.

- For example, research has found significant instances of physical illnesses such as insomnia, memory loss, cardiac problems and even diabetes and thyroid disorders in relatives of the deceased.

Source: Mastrocinque, J., et al., I'm Still Left Here With the Pain: Exploring the Health Consequences of Homicide on Families and Friends. Homicide Studies (2014)

CASE STUDY

***R v Alou (No. 4)* [2018] NSWSC 221**

Following the murder of her husband in a terrorist attack in 2015, Selina Cheng read a victim impact statement in court on behalf of herself and her two children.

Mrs Cheng told the Court that the day her beloved husband was 'murdered in cold blood was the longest and most painful day of my life'. Mrs Cheng stated that she was 'utterly repulsed by those who had any part in Curtis' senseless murder'. The dreams she shared with her husband to 'enjoy a happy retirement had been totally shattered'.

The judge stated that 'Mrs Cheng has suffered enormously as a result of her husband's death... the shocking effects of this senseless crime upon the Cheng family were laid bare for all to see.'

2. Impact on family relationships

Research has shown significant detrimental effects of murder on the maintenance of stable family relationships.

- A review into the literature surrounding the repercussions of homicide suggests the family environment following the death of a loved one, or a loved one committing murder, is often subjected to great levels of stress and discomfort, causing relationships between relatives to become strained and possibly leading to the weakening of family ties.

Source: Harth da Costa, D., Njaine, K., & Schenker, M., Repercussions of homicide on victims' families: a literature review (2017)

The family and friends of someone convicted of murder might have a difficult time coming to terms with the reality of their loved one's actions. Denial and confusion are common amongst the family members of the offender.

CASE STUDY

An accused murderer's sister speaks out

The sister of a man accused of a frenzied attack in Sydney's CBD that resulted in the death of one woman and hospitalisation of another spoke to reporters about the impact of the incident on her family:

> I'm associated to this person. If you heard a family member had done these atrocities like you would also feel so dirty and guilty. [I am] shocked, angry, disgusted. I hate my last name. If someone in your family did this ... how would you feel?

When asked about the impact of the incident on her mother:

> She's sick. She hasn't been eating at all. And we had to go to the doctors last night because of family issues to do with all this stress.

When asked if she plans to visit her brother and offer him support:

> I don't want to meet him. If this happened to [your] family member ... you wouldn't want to go near them. Something so despicable. I'm afraid of him.

Source: Barlass, T., Sorry a million times: Sister of Sydney stabbing suspect speaks out (2019)

3. Re-victimisation

Another major impact of murder on the families involved is **re-victimsation** – secondary difficulties and hardships that arise during the grieving process following the murder of a loved one.
For example:

- Often family members are required to participate in criminal investigations and trials, creating a tension between the pursuit of justice and the process of overcoming and dealing with the reality of the situation.
- The social stigma surrounding murder can lead families to become isolated from their friends and their community due to the difficulties of opening up and socialising amidst the major life trauma that they are continuing to experience.

Source: Englebrecht, C., Mason, DT., & Adams, MJ., The experiences of homicide victims' families with the criminal justice system: an exploratory study (2014)

During a trial and/or sentencing, a victim's family and friends will often hear graphic evidence regarding the suffering endured by the deceased. This process can add to their suffering and is only exacerbated if the offender appeals to a superior court.

CASE STUDY

Impact of court proceedings on a grieving family

Matthew Ross White pleaded 'not guilty' to killing Donna Steele but later changed his plea to 'guilty' only two days into his trial.

Speaking to reporters outside of the court, one of the victim's brothers explained that he was thankful for the early result:

> Obviously with the result, the defendant cut that [the trial] short... this is a godsend rather than having to put up with a few more days of that.
>
> No sentence feels sufficient for this premeditated, heinous crime. However, our family can get some comfort in knowing that the perpetrator of this terrible crime is now in custody and, we believe, should not be released.

Source: Sexton-McGrath, K., & Thompson, J., Matthew Ross White sentenced to life behind bars for killing Cooktown woman in botched extortion bid (2019)

Society 1.2.7.5.2

OVERVIEW

Following the murder of a 22-year-old comedian in a Melbourne park in 2018, a crowd of close to 10,000 people gathered for a candlelight vigil in her honour. The incident sparked widespread outrage and disgust, as issues surrounding violence against women and the safety of the public to walk in public areas of Melbourne at night were again at the forefront of the social psyche.

Source: Tran, D., Eurydice Dixon: Grief, anger as thousands gather at park vigils around Australia (2019)

Violent crimes such as murder can have a drastic effect on society in a variety of ways. In particular, these types of crimes can have a significant economic impact and affect the collective psychological health of society.

DETAILS

Economic impact

Criminal behaviour costs society greatly through the expenses associated with law enforcement (such as the police). The overall cost of crime in Australia amounts to more than $30 billion per year. In particular, the total cost of homicides (which includes murder) is almost $1 billion and has the highest cost per victim at over $1.5 million per victim. This figure includes costs associated with police investigations, court services, keeping an accused person in remand, imprisoning offenders after they are convicted, etc.

Source: Australian Institute of Criminology – Costs of crime (2017)

Psychological impact

Higher rates of murder and other violent crimes can have a significant **psychological impact** on members of a community. These psychological consequences can include (amongst others):

- An increase in feelings of fear and restrictions surrounding freedom of movement.
- A weaker attachment to and sense of community.
- A decreased willingness to intervene in crimes on the streets and/or cooperate in crime prevention.

Source: Taylor, R., The Impact of Crime on Communities (1995)

Murder can impact the extent to which people feel safe in the community and free to move in public and private spaces. For example, if a high profile crime occurs in a particular area, or if certain crimes commonly occur in certain areas, this can affect the reputation and safety of the people who live and travel in that community.

CASE STUDY

R v Price [2016] VSC 105

In 2015, 17-year-old schoolgirl Masa Vukotic was murdered by a stranger whilst taking an early-evening walk within a kilometre from her home in Doncaster.

Price was sentenced for her murder, after he pleaded 'guilty' and therefore did not face trial by jury. Price received an aggregate sentence of life imprisonment after pleading guilty to the murder of Vukotic and a range of other offences including rape and robbery.

Justice Lex Lasry said that Price was a danger to the community. Media coverage of this crime demonstrated outrage that this could happen in daylight to a teenage girl. Some members of the community became fearful of walking in that particular park, after homicide squad Chief Detective Inspector Mick Hughes told ABC Radio National that the 'chilling' case had highlighted the need for people to remain vigilant, saying 'I suggest to people, particularly females, they shouldn't be alone in parks.'

CASE STUDY

Figures suggest a third of Victorians feel unsafe at night

New figures released by the Productivity Commission show that almost a third of Victorians (28.4%) report feeling unsafe walking around their neighbourhoods at night.

The data was released less than a week after international student, Aiia Maasarwe (21) was murdered while walking home from university after dark.

This data places Victorians second only to the Northern Territory (38.5%) in reported safety concerns in travelling at night, and has prompted widespread calls for added safety improvements such as better lighting and more protective service officers on public transport.

Source: Jacks, T., & Preiss, B., Almost a third of Victorians feel unsafe at night on public transport (2019)

Keen to learn more?

Repercussions of homicide on victims' families: a literature review, www.scielo.br/scielo.php?script=sci_arttext&pid=S1413-81232017002903087&lng=en&nrm=iso&tlng=en#B24

Sentencing Trends for Murder, The Sentencing Advisory Council, https://www.sentencingcouncil.vic.gov.au/snapshots/223-murder

Crime Statistics Agency, www.crimestatistics.vic.gov.au/crime-statistics

SACstat – Sentencing Advisory Council Statistics Online, www.sentencingcouncil.vic.gov.au/sacstat/home.html

QUESTIONS 3B Murder: Trends & social impact

LEVEL 1:
Define and understand

1. Based on the statistics provided, which of the following statements is correct?

- **A.** The murder victimisation rate in Victoria has remained relatively stable since 2010.
- **B.** The majority of people who are found guilty of murder in Victoria receive a life sentence.
- **C.** Long term trends show that the murder rate in New South Wales has remained relatively stable over the last two decades.
- **D.** The average term of imprisonment for murder in New South Wales tends to be around 15 years.

2. What is meant by the term 'principal offence'?

- **A.** The principal offence is the term used to describe the first crime that a person is convicted of.
- **B.** The principal offence is the term used to describe the first crime that a person commits in the course of a series of crimes.
- **C.** The principal offence is the term used to describe the main crime that the prosecution is hoping to prove against the accused.
- **D.** The principal offence is the term used to describe the most serious offence committed in the course of an overall incident.

3. What does the annual 'murder victimisation rate' measure?

- **A.** The number of individuals per 100,000 persons who were victims of murder per year in a particular state.
- **B.** The trends surrounding how many people are convicted of murder per year in a particular state.
- **C.** The number of external individuals (such as family and friends) who are directly impacted by murder per year in a particular state.
- **D.** None of the above.

4. Which of the following consequences is not an example of a potential impact of murder on society?

- **A.** Murder can cause people to become less likely to intervene in crimes on the streets and/or cooperate in crime prevention.
- **B.** Murder can impact the extent to which people feel safe in the community and free to move in public and private spaces.
- **C.** Prosecuting and imprisoning offenders for murder is very costly, impacting the governments' ability to fund other public services.
- **D.** None of the above.

LEVEL 2:
Describe and explain

5. Using the statistics provided, describe the long-term trend of murder convictions in New South Wales. (2 MARKS)

6. Using an example, explain what is meant by the term 're-victimisation'. (2 MARKS)

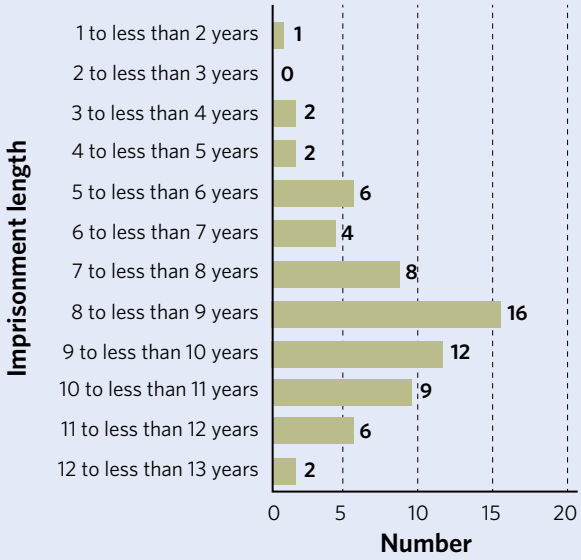
LEVEL 3:
Apply and compare

7. Explain what is meant by the term 'victimisation rate'. In your answer, compare the victimisation rates for murder between Victoria and New South Wales. (3 MARKS)

8. With reference to *R v Price* [2016] VSC 105, explain two ways in which murder might impact psychologically on society. (4 MARKS)

9. Between 2013-2018 a total of 69 people were sentenced in Victoria for manslaughter. The graph shows the length of the imprisonment terms for each of those individuals sentenced across that period for manslaughter.

The median length of imprisonment was between 8 and 9 years. The average length of imprisonment that was imposed for manslaughter in 2017-2018 was 9 years.



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

a) Compare the sentences imposed for manslaughter and murder in Victoria across the same period. (3 MARKS)

b) A legal commentator recently published an article which claimed that murder is rarely sentenced in the Victorian courts. He argued that 'sentencing for manslaughter is much more common in terms of total numbers than is murder, our judges are lucky enough to only have to sentence someone for murder on a much rarer basis.'

Do you agree with this statement? Refer to the statistics provided in your response. (3 MARKS)

LEVEL 4:
Discuss and evaluate

10. A local newspaper recently published the following article:

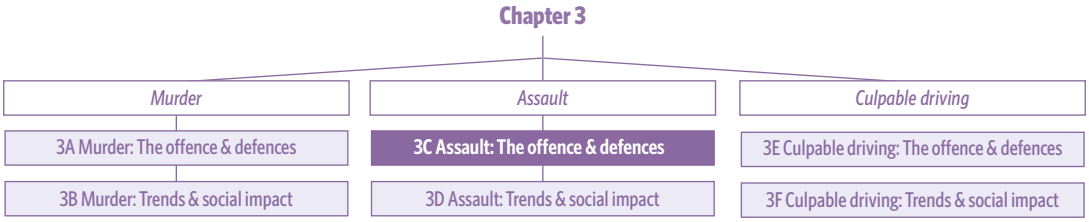
> Re-victimisation – the real impact on families of the deceased. Reducing the length of trials is the most important way to remove the hardship that murder has on those close to the victim.

The article claimed that re-victimisation is the main consequence for those close to someone who has been murdered, particularly in having to endure lengthy criminal trials.

Respond to this statement by describing two other potential impacts on family members of the deceased. (5 MARKS)

3C Assault: The offence & defences

Assault is the application or threat of force against another person without any lawful excuse. A diverse variety of acts can constitute assault and a wide range of penalties may be imposed.



Study design dot point

- Two criminal offences and for each offence:
  - elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

Elements of offence (Assault)	1.2.7.6
Statutory assault	1.2.7.6.1
Common law assault	1.2.7.6.2
Possible defences (Assault)	1.2.7.7
Self defence	1.2.7.7.1
Duress	1.2.7.7.2
Penalties (Assault)	1.2.7.8

USEFUL TIP

The VCAA study design states that you must know the role of statute law and common law in developing the elements of this offence and the defences.

Throughout this lesson, the elements of the offence and the defences have been described by reference to the relevant statutory and common law principles.

Elements of the offence (Assault) 1.2.7.6

Statutory assault 1.2.7.6.1

OVERVIEW

The different categories of statutory assault are all specifically stated in the *Crimes Act 1958* (Vic). These include:

- causing serious injury intentionally in circumstances of gross violence (s. 15A)
- causing serious injury recklessly in circumstances of gross violence (s. 15B)
- causing serious injury intentionally (s. 16)
- causing serious injury recklessly (s. 17)
- causing injury intentionally or recklessly (s. 18)
- conduct endangering life (s. 22)
- conduct endangering persons (s. 23)
- negligently causing serious injury (s. 24)
- assaulting or threatening to assault an emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty (s. 31)

DETAILS

The offences listed above are indictable offences (though some – such as causing serious injury recklessly – are indictable offences that may be tried summarily).

The various types of statutory assault all include four similar elements:

1. Victim suffered an injury (or serious injury).
2. The accused caused the victim's injury.
3. The accused intended to cause injury or was reckless/negligent as to causing the injury.
4. Accused acted without lawful excuse.

Each of these elements have slightly different requirements depending on the category of assault that a person is charged with.

Some of the branches of assault also have special requirements that must be proven in addition to these more general requirements listed above.

Victim suffered an injury

A successful prosecution of an assault offence requires the victim to have suffered an injury. However, the type of injury that must be suffered will vary depending upon the specific offence.

The two types of injury that can be suffered are:

- Injury; or
- Serious injury.

An injury can be a physical injury, or harm to an individual's mental health. This may be temporary or permanent.

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 15 – DEFINITIONS

(1) In this Act unless inconsistent with the context or subject-matter—

injury means—

(a) physical injury; or

(b) harm to mental health —

whether temporary or permanent;

A serious injury is an injury (including the cumulative effect of more than one injury) that either:

- Endangers life;
- Is substantial and protracted; or
- Involves the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman.

LEGISLATION ***Crimes Act 1958* (Vic)**

Section 15 – DEFINITIONS

(1) In this Act unless inconsistent with the context or subject-matter—

serious injury means—

(c) an injury (including the cumulative effect of more than one injury) that—

(i) endangers life;

(ii) is substantial and protracted; or

(d) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm;

Table 1 The type of injury required for each branch of assault in the *Crimes Act 1958* (Vic)

Offences that require an injury	Offences that require a serious injury
• Causing injury intentionally or recklessly (s. 18) • Assaulting or threatening to assault an emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty (s. 31)	• Causing serious injury intentionally in circumstances of gross violence (s. 15A) • Causing serious injury recklessly in circumstances of gross violence (s. 15B) • Causing serious injury intentionally (s. 16) • Causing serious injury recklessly (s. 17) • Negligently causing serious injury (s. 24)

The accused caused the victim's injury

This is the **actus reus** component for statutory assault that requires the accused to be responsible for causing the victim's injury (or serious injury). The term 'causing' is very broad and includes:

- Direct injury (such as physical contact).
- Indirect conduct without any direct application of force (such as psychiatric illness).

The accused intended to cause injury or was reckless/negligent as to causing the injury

This is the **mens rea** component of statutory assault. The prosecution must prove an accused person

- Intended to cause injury; or
- Acted in a manner that was reckless or negligent.

The accused does not need to have intended to cause the specific injury the victim obtained, just intended to cause (or acted recklessly in causing) an injury.

The mens rea element of an accused being 'reckless' refers to an accused person who:

1. Knew their actions would probably result in the victim being seriously injured, and

2. Decided to go ahead anyway.

In cases where an accused person is prosecuted for intentionally causing serious injury, a jury may decide the accused:

- **Did not intend** to cause serious injury (and they will be found not guilty of the offence under s. 16), but
- **Knew their actions would likely cause serious injury** and performed these acts anyway (and instead be found guilty of recklessly causing serious injury under s. 17).

CASE STUDY

***R v Nguyen and Deing* [2014] VSC 203**

The victim was returning to his car with his girlfriend after shopping when a confrontation with another driver occurred. One of the accused then kicked the victim's car, causing him to exit his car and tell the offenders not to kick his car. This prompted one of the accused to pin the victim to the ground in a headlock while the second accused kicked and punched him and a third accused kicked, punched and stabbed the victim.

As a result of this, the victim suffered multiple stab wounds in the back and chest and was required to spend a week in the hospital. All three individuals pleaded guilty to intentionally causing serious injury.

CASE STUDY

***Director of Public Prosecutions (DPP) v Russell* (2014) 44 VR 471**

Russell was drinking with a group of friends when a fight erupted with another group. During the course of this fight, Russell punched the victim in the jaw, causing them to fall on the road. This contact caused the victim to suffer a serious fracture of the jaw. Russell then went to the police voluntarily and provided an account of the incident.

Following the incident, Russell entered a guilty plea for a charge of recklessly causing serious injury – he acknowledged that when he punched the victim in the face he was aware they would probably suffer a serious injury.

Without lawful excuse

This element of statutory assault requires the accused to have acted without lawful excuse (such as the consent of the injured person). There are some situations where the victim may consent to injury (or serious injury), which includes sporting events and medical procedures.

Sporting events

Those participating in many sports (such as martial arts) consent to the possibility of injury being inflicted. When does an injury exceed what a person has consented to and become unlawful?

When an injury is suffered during a sporting contest, the accused will be deemed to have acted without consent if:

- They inflict injuries that are not within the reasonable rules of the game.
- The injuries are committed in anger and hostility.
- The injuries exceed what would be reasonably contemplated by participants in that sport.

CASE STUDY

***Pallante v Stadiums Pty Ltd* [1976] VR 331**

The plaintiff, Pallante, had entered a boxing match and suffered severe injuries to his eyes during the fight. He then pursued a number of assault cases including one against the stadium.

Pallante argued that boxing is focused on conquering an opponent without regard to the physical impact this may have on the victim, and this should amount to assault. The stadium claimed that the fight was illegal (as it was a prize fight), and the plaintiff could not commence proceedings based on an unlawful action.

The judge rejected the plaintiff's argument and instead stated that the test to determine whether the conduct exceeded what is reasonably contemplated by participants in boxing is whether the contact was intended to cause serious harm. In this case, Pallante could not establish this. The judge also held that 'an exercise in boxing skills should not be seen as a criminal act.'

Note: Pallante pursued the cases in a civil trial, but the same principles have been applied in criminal law.

Medical procedures

Many medical procedures can be construed as an 'injury'. Consider an incision by a surgeon with a scalpel or an intravenous drip being inserted through the skin into a blood vessel.

Generally, surgery cannot occur unless the patient consents to it. In these situations, a patient is unable to pursue legal action for an assault, despite the other elements being satisfied, as they consented to the procedure.

Special requirements

Some specific statutory assaults require additional elements to be satisfied in addition to the general elements described above. These are:

- Gross violence circumstances (ss. 15A and 15B).
- An assault of an emergency worker on duty, youth justice custodial worker on duty or custodial officer on duty (s. 31).

Gross violence circumstances

Sections 15A and 15B require that the assault occurs in circumstances of gross violence. The *Crimes Act 1958* (Vic) defines circumstances of gross violence as situations where:

- The offender planned in advance to engage in conduct and at the time of planning:
  - The offender intended to cause serious injury;
  - The offender was reckless to causing serious injury; or
  - A reasonable person would have foreseen that the conduct was likely to cause serious injury.
- The offender was accompanied by two or more individuals to cause serious injury.
- The offender entered into an agreement, arrangement or understanding with two or more individuals to cause a serious injury.
- The offender planned to have an offensive weapon, firearm or imitation firearm and used the offensive weapon.

- The offender continued to cause injury after the victim was incapacitated (that is, unable to defend themself).
- The offender caused serious injury while the victim was incapacitated.

Persons convicted of intentionally causing serious injury in circumstances of gross violence must serve a prison term with a non-parole period of at least 4 years (unless special circumstances apply).

CASE STUDY ***DPP v Whittle* [2017] VCC 2017**

Whittle pleaded guilty to intentionally causing serious injury in circumstances of gross violence. He struck the victim, who hit his head on a concrete driveway and lost consciousness. Whittle then continued to kick and stomp on the victim's head. He walked away from the victim following a brief discussion with a witness to the assault, then returned to the unconscious victim and continued to stomp on his head.

Whittle was imprisoned for five years. A non-parole period of 3 years and 4 months was imposed (rather than four years, as Whittle's culpability was reduced slightly due to an acquired brain injury)

Emergency worker on duty, youth justice custodial worker on duty or custodial officer on duty

Section 31 applies when the accused assaulted or threatened to assault an emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty. This is different to the other branches of assault as it outlines who the offence must be committed against.

Common law assault 1.2.7.6.2

OVERVIEW

Common law assault refers to when the accused makes unlawful contact with another person or threatens to do so. This can include any act which intentionally or recklessly causes another to fear immediate and unlawful violence.

DETAILS

There are two categories of common law assault which equate to two separate offences:

1. Common law contact assault
2. Common law apprehension assault.

Common law contact assault

Common law contact assault refers to the unlawful application of force or contact to the victim, without their consent.

Elements:

1. Accused applied force to the victim;
2. The application of force/contact was without consent; and
3. The application of force/contact was intentional or reckless.

Accused applied force to the victim

This is the **actus reus** element of common law contact assault which requires there is actual contact or application of force to the victim. For common law contact assault, there must be actual contact with the victim, an omission will not suffice.

There is **no requirement** for an injury to result from common law contact assault – there must only be direct contact, which can be satisfied with the slightest degree of contact or touching.

However, if an injury is sustained, police may pursue one of the branches of statutory assault under the *Crimes Act 1958* (Vic).

Types of applied force include:

- Contact aimed directly at the victim:
  - Body to body contact (such as punching the victim).
  - Contact through a weapon or other object (such as hitting the victim with a bat).
- Contact aimed at an object that is supporting the victim:
  - For example, knocking over a ladder the victim is standing on.

The application of force/contact was without consent

The contact must be applied to the victim without their consent. If the victim consents to the force or contact, a claim in common law assault will be unsuccessful. Contacts that are part of everyday life are not actionable, as members of the community are presumed to have implied consent to contacts which are a necessary consequence of everyday life. However, an individual can only consent to a certain level of force/contact.

The application of force/contact was intentional or reckless

This is the **mens rea** component of common law contact assault and it requires an intention for the accused to commit an assault (apply force to another or place another in apprehension of imminent application of force), or that they were reckless in doing so.

Common law apprehension assault

Common law apprehension assault occurs where the victim fears imminent unlawful application of force or contact to their body without consent. This can be prosecuted even where the accused had no intention of carrying out the threat.

Elements:

1. A threat is made to the victim; and
2. The threat is made intentionally or recklessly, causing the victim to fear imminent unlawful contact.

A threat is made to the victim

This is the **actus reus** component of common law apprehension assault and requires the accused to have made a threat to the victim. The threat must be one of force if the victim fails to comply with a stated condition or fails to act in a certain way.

Some examples of threats include:

- 'If you make any movement I will punch you.'
- 'Your phone or your life.'

The threat is made intentionally or recklessly which causes the victim to apprehend imminent unlawful contact

This is the **mens rea** component of common law apprehension assault; it requires the accused to have intended or acted recklessly to cause the victim to fear harm immediately after the threat.

It is irrelevant whether or not the accused had any intention of carrying out the threat, or even whether they had the ability to do so. It is enough that the victim simply believed that the accused had the apparent ability to carry out the threat.

The victim **does not need to sustain an injury** or any contact as a result of the threat, the threat alone can be sufficient to cause the victim to apprehend imminent unlawful contact.

However, there is a requirement that the fear is reasonable in the circumstances. In circumstances where the accused is aware that the victim is very timid, apprehension does not need to be reasonable.

Apprehension means that the victim must be aware that contact is likely to occur directly after the threat. If the threat does not cause any fear in the victim a claim will be unsuccessful.

CASE STUDY

***Mercer (a Pseudonym) v R* [2015] VSCA 257**

The accused pleaded guilty to a number of criminal offences against his domestic partner, including five counts of common law assault.

The conduct amounting to common law assault was:

1. Slapping the victim in the face repeatedly.
2. Grabbing and throwing the victim by her hair.
3. **Gesturing to the victim with a wire coat hanger and threatening to harm her,** followed by whipping the coat hanger across the victim's hand.
4. Punching the victim in the stomach.
5. Pushing into the victim's chest to prevent her from breathing.

This case illustrates a combination of common law contact assault and common law apprehension assault (in bold).

Table 2 Distinguishing between common law contact assault and common law apprehension assault

Similarities	Differences
Common law assault. Common law contact assault and common law apprehension assault are both branches of common law assault. **Mens rea.** Common law contact assault and common law apprehension assault both require a degree of intention or recklessness when carrying out the actus reus component.	**Actus reus.** Common law contact assault requires direct contact to the victim whereas common law apprehension assault does not – a threat alone will suffice.

Table 3 Distinguishing between statutory assault and common law assault

Similarities	Differences
Mens rea. Statutory assaults and common law assault both require a degree of intention or recklessness when carrying out the actus reus component. **Penalties.** The penalties for assault are stated in legislation: • Each of the statutory assault offences described above may result in imprisonment under the *Crimes Act 1958* (Vic). • Common law assault is punishable by fine or 3 months' imprisonment under s. 23 of the *Summary Offences Act 1966* (Vic) (if prosecuted in the Magistrates' Court).	**Indictable or summary offences.** The statutory assaults stated above are indictable offences punishable by 5 to 20 years' imprisonment. Common law assault may be prosecuted in the: • Magistrates' Court as a summary offence, leading to a fine, community correction order or a short term of imprisonment; or • County Court as an indictable offence (if a more serious incident), leading to a community correction order or a term of imprisonment. **Injury.** Statutory assaults require injury or serious injury to have occurred. Common law assault does not require any injury to have occurred, only unlawful contact or a fear of unlawful contact. **Legal basis.** Each branch of statutory assault is defined by the *Crimes Act 1958* (Vic) whereas common law assault has been derived through judicial precedent rather than legislation.

Possible defences 1.2.7.7

Self-defence 1.2.7.7.1

OVERVIEW

Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another.

DETAILS

Self-defence is a **complete defence**, meaning a person will not be found guilty of an offence if they can prove that they were acting in self defence.

The defence will only need to be raised once the elements of an offence have been established by the prosecution – that is, that a sufficient case has been established against the accused.

The accused has the burden of providing evidence that their conduct was an attempt to protect themselves or another person. If the accused proves this, the prosecution must then establish that this defence is not applicable in the circumstances.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 322K – SELF-DEFENCE

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if—

(a) the person believes that the conduct is necessary in self-defence; and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

Section 322K of the *Crimes Act 1958* (Vic) therefore gives rise to the two elements required to establish self defence:

1. The accused **believes** that the conduct is necessary in self-defence; and
2. The conduct is a **reasonable** response in the circumstances.

The accused believes that the conduct is necessary in self-defence

This focuses on whether the accused **genuinely believed that their conduct was required for self-defence**. The accused must have believed the force they exerted in relation to the threat was necessary to protect themselves or another person from harm.

The situations where self-defence can be used as a defence against an assault charge are extensive. They include:

- The defence of the person or another person from harm.
- To prevent or escape an unlawful deprivation of the liberty of the person or another person.
- The protection of property.

The conduct is a reasonable response in the circumstances

After satisfying that the accused believed the conduct was necessary in self defence, it must then be shown that their conduct was an **appropriate course of action considering the surrounding circumstances**.

The conduct must have been a reasonable response – not a disproportionate response to the perceived threat. This is determined by focusing on what the accused might have reasonably believed in the circumstances.

It does not matter what a reasonable person would have believed or if the belief was incorrect.

Relevant considerations to determine the reasonableness of the accused person's response include:

- The nature of the conduct to which the accused responded – was it threatening words or actions? How threatening were these words or actions?
- Any conduct on the part of the victim which caused the actions of the accused. For example, provocative actions or words that escalated tensions between the parties.
- Any prior history between the victim and the accused. For example, a history of threats and intimidation from the victim toward the accused in a situation of family violence may suggest the accused person's response was reasonable.

CASE STUDY

Consider the following hypothetical scenario.

Jeremy is out for his morning walk when he is punched in the back of the head by Nick, causing him to fall onto the sidewalk. Nick then demands Jeremy's phone and wallet. When Jeremy refuses, Nick kicks him in the stomach. Jeremy stands up and punches Nick in the head, causing him to become unconscious. Jeremy panics and runs away. A police officer identifies Jeremy when reviewing CCTV footage of Jeremy punching Nick and arrests him for causing injury recklessly under s. 18 of the *Crimes Act 1958* (Vic).

During Jeremy's trial, he claims that he was acting in self-defence and provides evidence from a witness who saw the entire incident. Ultimately, Jeremy is found not guilty of the offence because the jury is satisfied he was acting in self-defence – he perceived a threat of further harm from Nick and his response to protect himself was reasonable in the circumstances.

Common law self-defence

Previously, the courts used a common law test which had multiple stages including subjective and objective considerations. Requirements of this test included:

- The accused's response must be proportionate to the attack;
- The victim's attack must be unlawful; and
- The accused retreated before using force.

However, s. 322N of the *Crimes Act 1958* (Vic) **abolished** common law self-defence, meaning that the statutory requirement under s. 322K is now the governing requirement to be relied upon.

LEGISLATION *Crimes Act 1958* (Vic)

Section 322N – ABOLITION OF SELF-DEFENCE AT COMMON LAW

Self-defence at common law is abolished.

Duress 1.2.7.7.2

OVERVIEW

The defence of duress is the legal recognition that a person may commit a crime when acting under compulsion, due to a threat of harm should they fail to comply.

DETAILS

At trial, if assault has been proven, duress can be raised as a possible defence by the accused.

The accused has the burden of providing evidence that they acted under duress.

If the accused proves this, the prosecution then must establish beyond a reasonable doubt that this defence is not applicable in the circumstances. The defence of duress is outlined by s. 322O of the *Crimes Act 1958* (Vic).

LEGISLATION *Crimes Act 1958* (Vic)

Section 322O – DURESS

(1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.

(2) A person carries out conduct under duress if—

(a) the person reasonably believes that—

(i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and

(ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and

(b) the conduct is a reasonable response to the threat.

(3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.

Section 322O gives rise to the three elements required to establish duress:

1. A threat of harm;
2. The conduct was the only reasonable way to avoid the threatened harm; and
3. The conduct was a reasonable response to the threat.

A threat of harm

A threat has been made that will be carried out unless the accused commits a specified offence.

The conduct was the only reasonable way to avoid the threatened harm

This is a **subjective** measure that requires the accused to have believed that performing the assault was the only reasonable way that the threatened harm could be avoided.

The conduct was a reasonable response to the threat

This is an **objective** measure that requires the conduct be a reasonable response to the threat.

This involves looking at whether a reasonable person in the accused's position would also be compelled to act in the same manner due to the threat. The accused must have had no other reasonable way to prevent the execution of the threat or to escape the circumstances.

CASE STUDY Consider the following hypothetical scenario.

Harry had organised to rob a bank and have Lucas be his getaway driver. After Harry successfully carried out the offence and approached Lucas' car he was tackled and detained by a police officer. Harry then yelled to Lucas 'you better help me or you know what the consequences are'.

cont'd

Lucas kicked the police officer in the stomach which enabled Harry to escape. While Harry and Lucas were driving away from the crime scene they were pulled over by police and arrested. Lucas is arrested as a principal offender (discussed in lesson 2F) for robbery as he was involved in the commission of the offence by driving the getaway car. Lucas was also charged with assaulting a police officer on duty under s. 31 of the *Crimes Act 1958* (Vic).

During his trial, Lucas' barrister presented evidence of 7 text messages from Harry to Lucas threatening to stab him and his elderly mother if he refused to drive. The jury considered this in light of the charges and held that Lucas was acting under duress in both instances and found him not guilty of both offences.

Common law duress

Previously, the courts accepted common law duress as a defence for many criminal offences. Section 322Q of the *Crimes Act 1958* abolished common law duress, meaning that the statutory requirement under s. 322O is now the governing requirement to be relied upon.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 322Q – ABOLITION OF DURESS AT COMMON LAW

Self-defence at common law is abolished.



Figure 1 The elements and defences for assault

USEFUL TIP

During a trial for assault, it is a primary defence for an accused person to contest whether the elements of assault have been proven beyond a reasonable doubt. If these elements are successfully proven, it is a secondary defence to establish a lawful defence for assault (such as self-defence or duress). Secondary defences are illustrated as orange in Figure 1.

Penalties (Assault) 1.2.7.8

OVERVIEW

If an individual is found guilty of a statutory or common law assault, and does not provide a successful defence, they will be liable to one of many penalties dependant upon the type of assault committed.

DETAILS

Penalties for statutory assaults

Various periods of imprisonment are prescribed as the maximum penalty for statutory assaults, however many offenders will receive a community correction order for such offences.

Table 4 Penalties for statutory assaults

Type of assault	Legislation	Maximum penalty
Causing serious injury intentionally in circumstances of gross violence	Section 15A of the *Crimes Act 1958* (Vic)	20 years' imprisonment; within a minimum non-parole period of 4 years (unless special circumstances apply)
Causing serious injury recklessly in circumstances of gross violence	Section 15B of the *Crimes Act 1958* (Vic)	15 years' imprisonment
Causing serious injury intentionally	Section 16 of the *Crimes Act 1958* (Vic)	20 years' imprisonment
Causing serious injury recklessly	Section 17 of the *Crimes Act 1958* (Vic)	15 years' imprisonment
Causing injury intentionally or recklessly	Section 18 of the *Crimes Act 1958* (Vic)	10 years' imprisonment (If the injury was caused intentionally) 5 years' imprisonment (If the injury was caused recklessly)
Conduct endangering life	Section 22 of the *Crimes Act 1958* (Vic)	10 years' imprisonment
Conduct endangering persons	Section 23 of the *Crimes Act 1958* (Vic)	5 years' imprisonment
Negligently causing serious injury	Section 24 of the *Crimes Act 1958* (Vic)	15 years' imprisonment
Assaulting or threatening to assault: • an emergency worker on duty • a youth justice custodial worker on duty • a custodial officer on duty.	Section 31 of the *Crimes Act 1958* (Vic)	5 years' imprisonment

Penalties for common law assaults

The maximum penalty that may be imposed for common law assault is generally **5 years' imprisonment** as outlined by s. 320 of the *Crimes Act 1958* (Vic).

However, s. 320A of the *Crimes Act 1958* (Vic) outlines certain circumstances where the maximum penalty for common law assault may be **10 years' imprisonment**.

These circumstances include:

- The offender has a weapon readily available at the time of the assault.
- The victim is a police officer or protective services officer on duty.
- The offender is reckless as to whether the victim is a police officer or protective services officer.

- The offender enables the victim to see the offensive weapon or suggests to the victim they have an offensive weapon/firearm readily available.
- The offender knows (or ought to have known) that engaging in certain conduct will raise fear or apprehension.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 320A – MAXIMUM TERM OF IMPRISONMENT FOR COMMON ASSAULT IN CERTAIN CIRCUMSTANCES

(1) Despite section 320, the maximum term of imprisonment for common assault is level 5 imprisonment (10 years maximum) if—

(a) at the time of the assault, the person who commits the assault (the offender) has an offensive weapon readily available; and

(b) the person assaulted (the victim) is a police officer on duty or a protective services officer on duty; and

(c) the offender knows or is reckless as to whether the victim is a police officer or a protective services officer; and

(d) the offender—

(i) enables the victim to see the offensive weapon or the general shape of the offensive weapon; or

(ii) tells or suggests to the victim that the offender has an offensive weapon or a firearm readily available; and

(e) the offender—

(i) knows that engaging in conduct referred to in subsection (1)(d) would be likely to arouse apprehension or fear; or

(ii) in all the particular circumstances, the person ought to have known that engaging in conduct referred to in subsection (1)(d) would be likely to arouse that apprehension or fear.

If a relatively minor common law assault is prosecuted in the Magistrates' Court, an offender may be **fined or imprisoned for 3 months**, pursuant to s. 23 of the *Summary Offences Act 1966*.

Keen to learn more?

The Judicial College of Victoria – Common law assault, http://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm

The Judicial College of Victoria – Statutory assault, http://www.judicialcollege.vic.edu.au/eManuals/CCB/4963.htm

QUESTIONS 3C Assault: The offence & defences

LEVEL 1:
Define and understand

1. Kelsey has been convicted for a type of assault under s. 18 of the *Crimes Act 1958* (Vic). When sentencing Kelsey, the judge stated 'you were reckless and had no consideration of the consequences of your actions'. What is the maximum sentence that can be imposed on Kelsey?

A. 5 years' imprisonment

B. 10 years' imprisonment

C. 15 years' imprisonment

D. 20 years' imprisonment

2. Tyrone has been charged with statutory assault after kicking his neighbour. Tyrone claims that his neighbour illegally entered his house and tried to take his very expensive TV. Tyrone argued that he was acting in order to protect his property. What defence has Tyrone raised?

A. Common law self-defence

B. Statutory self-defence

C. Common law duress

D. Statutory duress

3. Zoe and Jessica got into an argument over the last pair of discounted sunglasses during a sale. After Jessica purchased the sunglasses, Zoe stated 'I saw those glasses first. I am going to hit you so hard that you will regret taking them from me'. An off-duty police officer overheard the threats and charged Zoe with assault. Zoe is confused because she never touched Jessica and only threatened her.

What type of assault did Zoe allegedly commit?

A. A branch of statutory assault.

B. Common law contact assault.

C. Common law apprehension assault.

D. Zoe did not commit any type of assault as she did not make physical contact with Jessica.

4. Jacob stabbed Ivan at a bar after they got into a heated argument. A witness called an ambulance after noticing Ivan had lost a dangerous amount of blood. When the ambulance arrived, Toby (an emergency worker) tried to remove Ivan from the premises to take him to hospital. Jacob punched Toby and screamed 'he doesn't deserve any help'. Toby became unconscious and was unable to save Ivan. Jacob is then charged with the murder of Ivan and the statutory assault of an emergency officer on duty.

What section details the branch of assault that Jacob was charged with?

A. Section 16 of the *Crimes Act 1958* (Vic)

B. Section 18 of the *Crimes Act 1958* (Vic)

C. Section 23 of the *Crimes Act 1958* (Vic)

D. Section 31 of the *Crimes Act 1958* (Vic)

5. Lynda kicked her sister after her violent boyfriend Jack threatened to punch her in the face if she refused. Lynda is then charged with assault. What is the most appropriate defence for Lynda to raise?

A. Common law self-defence

B. Statutory self-defence

C. Common law duress

D. Statutory duress

LEVEL 2:
Describe and explain

6. Explain the term 'common law assault'. Identify the two branches of common law assault in your answer. (3 MARKS)

7. Joseph has been charged with causing serious injury intentionally under s. 16 of the *Crimes Act 1958* (Vic). Joseph claims he was forced to assault the victim – at the time of the assault his wife was being held at the house of an outlaw motorcycle club leader, and there were threats that she would be harmed unless he complied.

Identify and explain the defence that Joseph has raised. (3 MARKS)

8. Describe the four general elements of statutory assault offences under the *Crimes Act 1958* (Vic). (8 MARKS)

9. Explain self-defence and provide an example of a situation where someone can commit assault in self-defence. (3 MARKS)

LEVEL 3:
Apply and compare

10. Sally has been charged with statutory assault and common law assault but does not understand the difference between them. Compare statutory assaults and common law assault. (5 MARKS)

11. Bonnie has been charged with one count of intentionally causing serious injury to Julian, outlined by s. 16 of the *Crimes Act 1958* (Vic). Bonnie claims she had been kidnapped by Julian and only committed the crime to escape.

a) What is the maximum penalty that can be imposed on Bonnie if she is found guilty? (2 MARKS)

b) Distinguish between injury and serious injury. (2 MARKS)

c) Explain the defence that Bonnie could raise and justify why it would be appropriate in this scenario. (3 MARKS)

12. The following scenario contains errors.

Julia and Brooke got into an altercation at a football match after Julia's team lost to Brooke's. Brooke was gloating, resulting in Julia threatening to punch her. Brooke has a history of abuse and is extremely timid as a result. Julia is unaware of this as the two had never met prior to the game. Julia is then charged and convicted of common law contact assault and her sentence is 20 years' imprisonment.

Identify two errors in the scenario and provide the correct procedure or definition. (4 MARKS)

13. Compare common law contact assault and common law apprehension assault. (4 MARKS)

14. Eden is a member of a small and aggressive environmental activist group called 'GreenLeaf'. Eden is very passionate about saving the environment, but he starts to notice that some of the other members are becoming very aggressive in their approach. During a group meeting, Vickie confesses that she does not like the group's new approach to sparking change and wants to pursue her environmental passion elsewhere. Paige, the group leader, then pushes Vickie to the floor and kicks her in the leg. Paige has previously encouraged group members to act violently towards anyone who doesn't share GreenLeaf's commitment to stopping environmental damage, and threatens Eden that he will be next unless he also kicks Vickie in the ribs. Vickie suffers a broken rib as a result of the incident. Eden is arrested and charged with an offence under s. 18 of the *Crimes Act 1958* (Vic).

a) Describe what is meant by the element 'the accused caused the victim's injury' and explain whether Eden caused Vickie's injury. (3 MARKS)

b) What is the maximum penalty that could be imposed on Eden if he is found guilty? Justify your response. (2 MARKS)

c) Identify one defence that Eden could raise. Why it would be appropriate in this case? (3 MARKS)

d) Assume that Paige continued to kick and hit Vickie, who then lost consciousness as a result of the attack. After a brief argument with other group members whilst walking away from the meeting, Paige stomped on Vickie's head and her jaw broke.

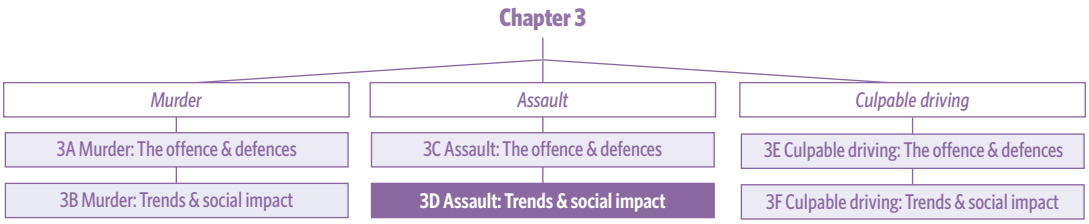
With which offence would Paige most likely be charged? Give reasons for your response. (3 MARKS)

3D Assault: Trends & social impact

'Since 2000, well over one hundred lives have been lost in Australia from deadly blows to the head, and hundreds more victims injured. The coward's punch leaves a devastating ripple through society, mentally and physically scarring family, friends and survivors for life.'

Source: Green, D., Stop the Corward's Punch Campaign (2019)

Violence seems ever-present in society, whether it be on the sporting field, in the school-yard or in movies and video games. The criminal justice system protects against unlawful violence by establishing the various assault offences. The news still seems ripe with instances of violence and assault throughout Victoria – while instances of assault can range in severity, are assaults in Victoria on the rise? What impact might such violence have on society?



In this lesson, you will be learning about the statistical trends regarding the prevalence of assaults and sentencing practices for such offending in Victoria and compare this with New South Wales. You will also consider the impact that assault has on victims, their families and society as a whole.

Study design dot point

- Two criminal offences and for each offence:
  - the elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and
  - the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Assault)	1.2.7.9
Victoria	1.2.7.9.1
New South Wales	1.2.7.9.2
Possible impact of the offence on individuals and society (Assault)	1.2.7.10
Impact on victims	1.2.7.10.1
Society	1.2.7.10.2

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Assault) 1.2.7.9

Victoria 1.2.7.9.1

OVERVIEW

What are the statistics regarding assaults in Victoria? How does the Victorian criminal justice system approach sentencing those individuals charged with assault offences?

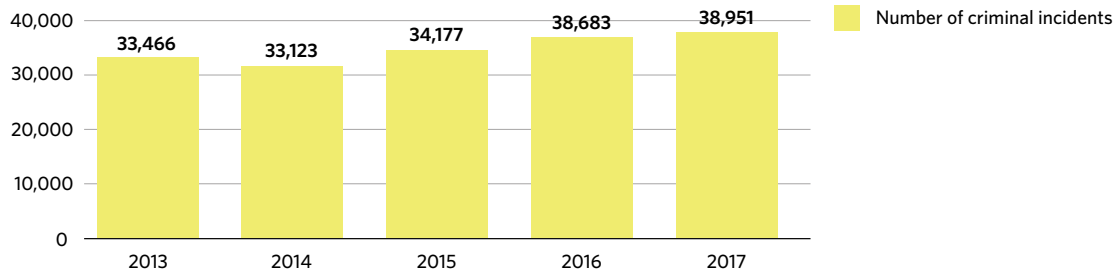
DETAILS

Trends in assault – Victoria

There has been a general increase in the number of recorded criminal incidents of assault across the state of Victoria between 2013-2017.

In the year ending 31 December 2017, there were 38,951 recorded criminal incidents with a principal offence of assault:

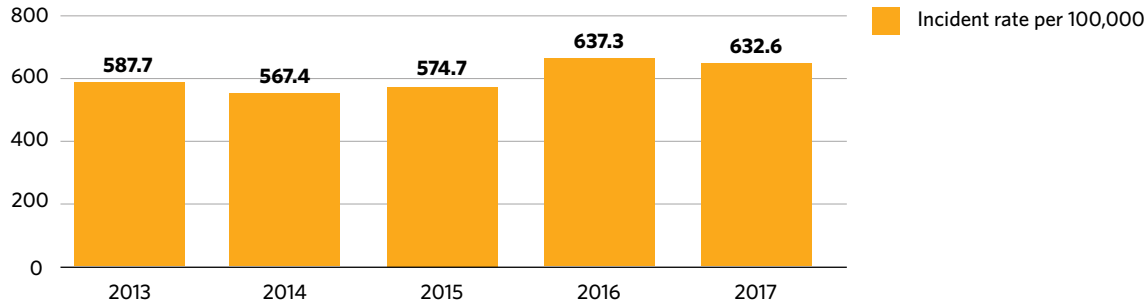
- 52.9% (20,595) of these were **less serious assault offences.**
- 42.1% (16,389) of these were **more serious assault offences,** such as those involving injury or serious injury (covered in lesson 3C).
- 5.0% (1,967) of these were assault offences against an **emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty**.



Source: Crime Statistics Agency – Spotlight: Assault and Related Offences (2017)

Figure 1 Number of criminal incidents with a principal offence of assault (2013-2017)

While the number of assault incidents increased by 268 from 2016 to 2017, the increase to the overall Victorian population was greater – meaning that there was actually a decrease of 0.7% in the assault incident rate over that year. As such, an important measure detailed in Figure 2, shows the **assault incident rate per 100,000** of the population of Victoria across the same 5 year period.



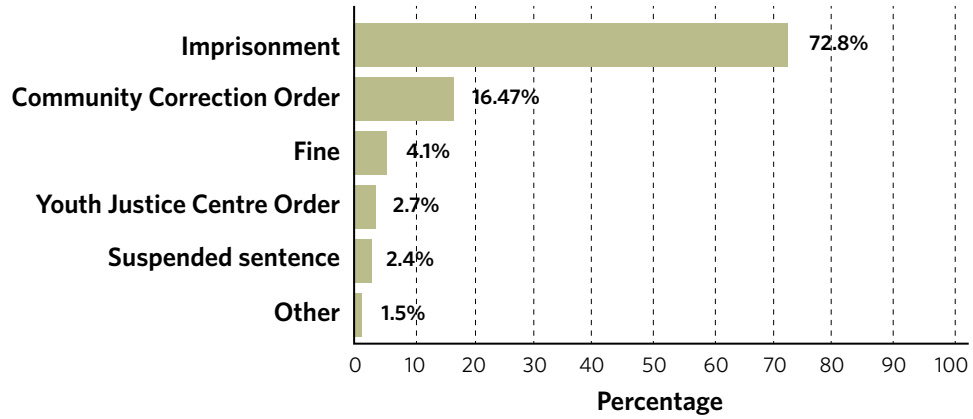
Source: Crime Statistics Agency – Spotlight: Assault and Related Offences (2017)

Figure 2 Criminal incident rate per 100,000 of the population (2013-2017)

Sentencing outcomes – Victoria

Figure 3 demonstrates the variation in sentencing outcomes for those individuals found guilty of **a single proven count of common law assault** in the higher courts of Victoria from 1 Jul 2013 to 1 July 2018.

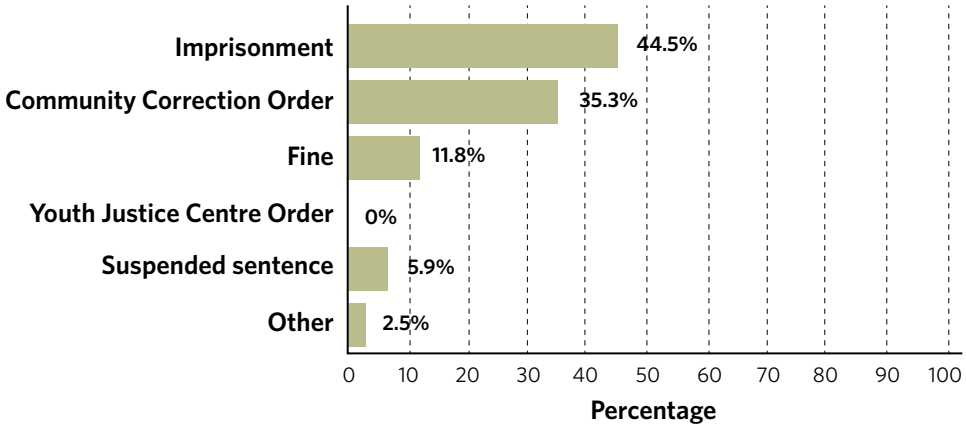
Of a total number of 659 people sentenced to a single proven charge of common law assault in the higher courts, imprisonment was the majority sentence type (72.8%). By comparison, only 40% of those sentenced for common law assault in the Magistrates' Court are imprisoned, with many more offenders receiving a CCO.



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 3 Sentencing outcomes – single charge of common law assault – 2013-2018

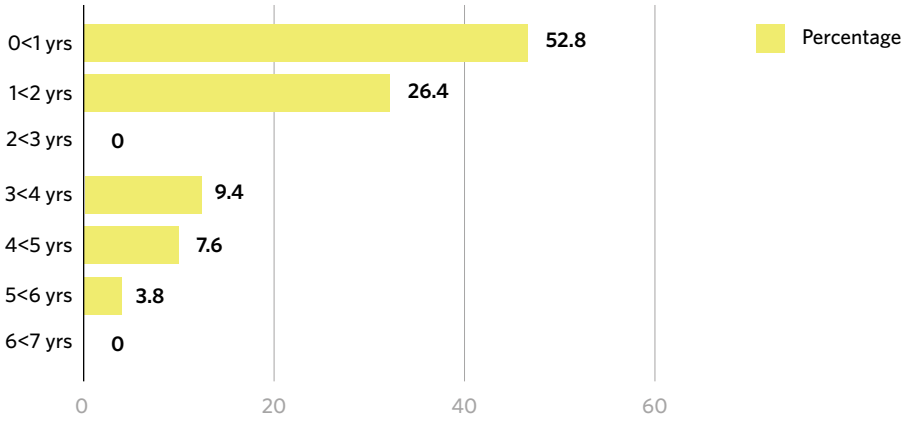
Figure 4 shows the sentencing outcomes for those individuals found guilty of **common law assault**, where assault forms part of a collection of one or more charges during the course of a single incident. In these cases imprisonment remains the most common sanction (44.5%). However, notice the increase in CCOs – perhaps other offending behaviour in these instances has created a greater emphasis on rehabilitation?



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 4 Sentencing outcomes – common law assault along with other offences – 2013-2018

As Figure 4 shows, 44.5% of the individuals sentenced for common law assault received a term of imprisonment. Figure 5 shows the percentage breakdown of this group based on the length of imprisonment they received.



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 5 Sentence length – imprisonment – common law assault – 2013-2018

USEFUL TIP

Please note the statistics above highlight the sentences imposed for common law assault charges.

For the other branches of statutory assault studied in Lesson 3C, different sentencing outcomes occur:

- 91.7% of those sentenced for a single charge of causing serious injury intentionally in circumstances of gross violence (s. 15A of the *Crimes Act 1958* (Vic)) are imprisoned.
- 87.7% of those sentenced for a single charge of intentionally causing serious injury intentionally (s. 16 of the *Crimes Act 1958* (Vic)) are imprisoned.
- 80.4% of those sentenced for a single charge of recklessly causing serious injury (s. 17 of the *Crimes Act 1958* (Vic)) are imprisoned.
- 73.7% of those sentenced for a single charge of intentionally causing injury and 62.5% of those sentenced for a single charge of recklessly causing injury (both outlined by s. 18 of the *Crimes Act 1958* (Vic)) were imprisoned.
- 84.6% of those sentenced for a single charge of conduct endangering life (s. 22 of the *Crimes Act 1958* (Vic)) are imprisoned.
- 82.6% of those sentenced for a single charge of conduct endangering persons (s. 23 of the *Crimes Act 1958* (Vic)) were imprisoned.
- 83.1% of those sentenced for a single charge of negligently causing serious injury (s. 24 of the *Crimes Act 1958* (Vic)) were imprisoned.
- 78.6% of those sentenced for a single charge of assaulting or threatening to assault an emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty (s. 31 of the *Crimes Act 1958* (Vic)) were imprisoned.

Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

The data highlights the tendency for the courts to imprison individuals found guilty of statutory assault, especially where there is an intention to cause injury or serious injury.

New South Wales 1.2.7.9.2

OVERVIEW

In February 2014, the Government of New South Wales introduced lockout laws throughout Sydney in efforts to prevent alcohol-fuelled assaults. These laws required 1:30am lockouts and 3am last drinks at all bars, pubs and clubs throughout the Sydney CBD. Research into the impact of the lockout laws found a significant decline in assaults throughout the Sydney CBD entertainment precincts that were restricted under this legislation.

Source: NSW Bureau of Crime Statistics and Research – Alcohol Related Violence (2019)

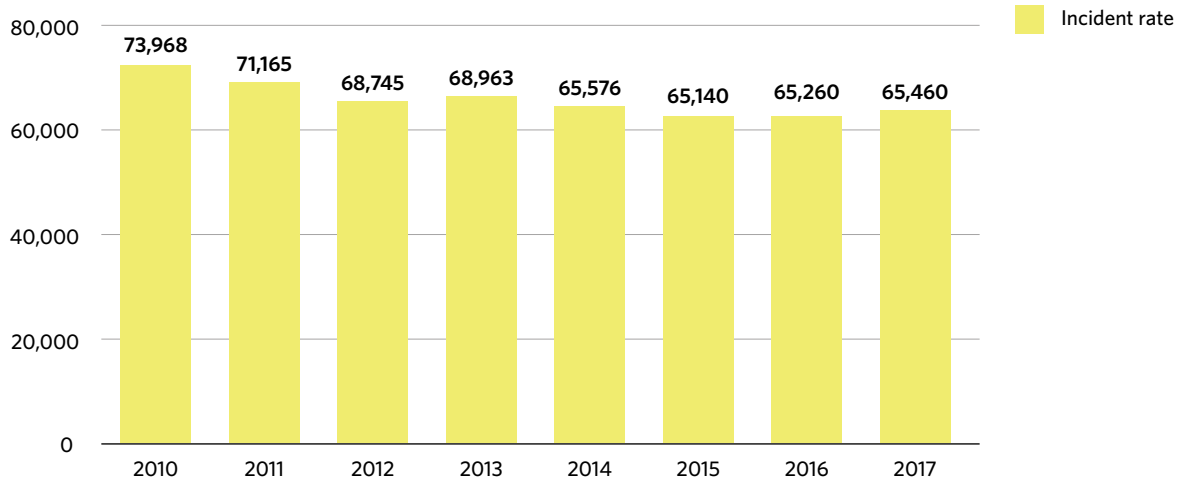
However, Premier Gladys Berejiklian recently discussed removing this legislation in efforts to boost Sydney's nightlife economy. What are the existing trends regarding assaults in New South Wales? Should such data be considered before removing these protective laws?

DETAILS

Trends in assault – New South Wales

According to the Australian Bureau of Statistics (2018), there has been an almost 12% decrease in recorded criminal incidents of assault from 2010 to 2017 in NSW (Figure 6).

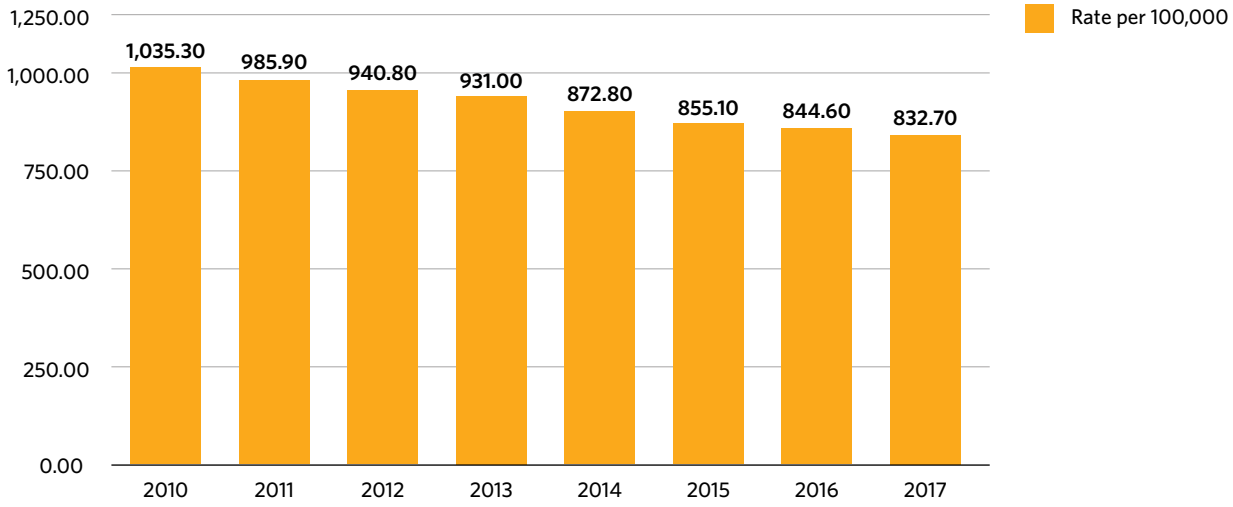
In 2017, just under a quarter of assault victims were aged between 25 and 34 years (24% or 15,929 victims), while a further 19% were aged between 35 and 44 years (12,490 victims).



Source: Australian Bureau of Statistics – Recorded Crime – Victims (2018)

Figure 6 Annual rate of criminal incidents (assault) – 2010-17

Following this trend, the incident rate of assault per 100,000 of the NSW population has also steadily decreased across the same period (Figure 7).

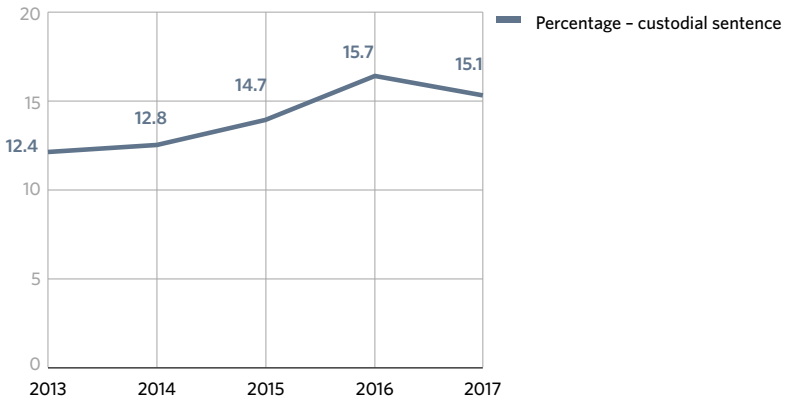


Source: Australian Bureau of Statistics – Recorded Crime – Victims (2018)

Figure 7 Annual rate of criminal incidents (assault) – 2010-17

Sentencing outcomes – New South Wales

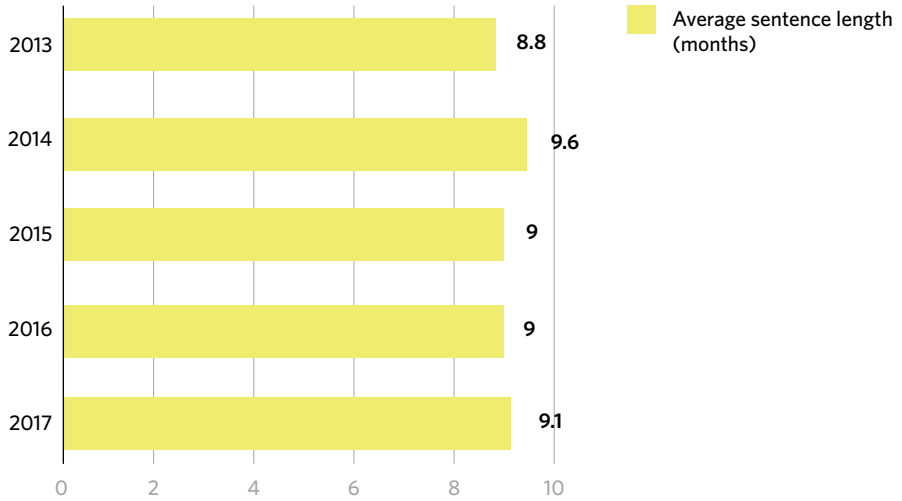
When an individual is found guilty of a charge of assault in NSW, what is the likelihood of that offender receiving a custodial sentence? Figure 8 shows the percentage of convicted offenders (where assault was the principal offence in their case) who received a custodial sentence in the NSW higher criminal courts between 2013-2017.



Source: New South Wales Parliamentary Research Service – A statistical snapshot of crime and justice in New South Wales (2018)

Figure 8 Percentage of convicted offenders who received a term of imprisonment for assault in NSW (2013-17)

Figure 8 demonstrates that roughly 15% of offenders convicted of assault as a principal offence received some form of prison sentence. It is also important to consider the average length of imprisonment that convicted offenders are likely to receive. Figure 9 highlights the average length of custodial sentence in months between 2013-2017.



Source: New South Wales Parliamentary Research Service – A statistical snapshot of crime and justice in New South Wales (2018)

Figure 9 Average custodial sentence length in months for offenders convicted of a principal offence of assault in NSW (2013-17)

Possible impact of the offence on individuals and society (Assault) 1.2.7.10

Impact on victims 1.2.7.10.1

OVERVIEW

Victims of assault often struggle significantly as a result of the physical effects of the crime. However, the effects of experiencing an assault are rarely limited to only the physical consequences of the incident and will often also include a range of psychological, economic and social consequences as well.

DETAILS

The academic research into victimisation of violent crime is extensive and demonstrates that individuals who experience physical assaults perceive and interpret the world around them in fundamentally different ways following the incident. The impact on the victims of assault often range beyond direct physical consequences and begin to impact negatively across psychosocial, financial and even occupational aspects of an individual's life.

Psychological Impact

- Research has found that victims of assault demonstrate an increased risk of mental health conditions such as **post-traumatic stress disorder (PTSD).**

  Source: Freeman, D., et al., Paranoia and post-traumatic stress disorder in the months after a physical assault (2013)

- A study into the data collected by the 'Australian Institute of Criminology's Database of Victimisation Experiences' found that 93% of surveyed victims of assault scored in the 'severe' bracket of Beck's Depression Scale – which measures levels of **sadness, pessimism and self-esteem.**

  Source: Fuller, G., The Database of Victimisation Experiences (2015)

- Victims also tend to report increased **hesitance in visiting public places** due to fears of potentially re-encountering their offender. These fears may often manifest themselves as hypervigilance, leaving an individual in a consistently aroused state and increasing the likelihood of misinterpreting ambiguous cues as threatening.

  Source: Beck, T., Emery, G., & Greenberg, R., .Anxiety disorders and phobias: A cognitive perspective (2005)

Economic Impact

- Studies have demonstrated that the experience of physical assault resulted in **negative occupational behaviours** such as absenteeism and increased unemployment.

  Source: Hanson, R., et al., The impact of crime victimisation on quality of life (2010)

- Research has reported that many victims report an **inability to re-engage at work** due to the development of serious mental health issues following the incident. For example, one particular individual who was assaulted at his place of work was unable to continue running his business and was forced to pursue bankruptcy.

  Source: Fuller, G., The Database of Victimisation Experiences (2015)

Social Impact

- Social relationships can often provide victims of violent crime with valuable support to assist in healing and managing the negative consequences of the assault. However, often these same relationships may be tested, sometimes leading to a **breakdown of a victim's social network.** This was found to be particularly true in instances where a friend or family member was required to become the primary caregiver to a victim experiencing physical or mental injury.

  Source: Fuller, G., The Database of Victimisation Experiences (2015)

- Additionally, victimisation can lead to a **withdrawal from social engagement** and an avoidance of social contact due to the anxieties associated with the incident.

  Source: Shapland, J., et al., Victims in the criminal justice system (1985)

Society 1.2.7.10.2

OVERVIEW

Assaults have a large impact on a societal level. How might repeated instances of violence affect the broader community?

DETAILS

Feeling safe in the community

Higher numbers of assaults in a given area can impact the extent to which people feel safe in the community and free to move in public spaces. Particular areas may be avoided, as the community come to feel hesitant about certain areas at given times.

CASE STUDY

Improving lighting in streets to prevent assaults at night

The NSW Government has continued its push to increase lighting in the streets of the CBD as well as residential areas experiencing high rates of assaults during night-time hours. This includes increasing the number of streetlights, relocating lights to minimise dark areas and installing brighter lighting.

A report in 2012, found that:

> Lighting helps to improve visibility, which makes it easier for people in and around problem areas to detect suspicious or criminal behaviour and to identify perpetrators.
>
> Areas that are in darkness or dimly lit may serve to create a feeling of personal insecurity, even if the likelihood of being victimised is actually quite low.
>
> Lighting also promotes feelings of safety among users (or potential users) and encourages pedestrian movement through an area that may have previously been avoided.

Source: New South Wales Department of Justice – Fact sheet: Improving lighting to prevent non-domestic assault (2012)

Local reputation

High rates of assaults and violence in particular areas or locations can cause those locations to develop a negative reputation, which can cause people to avoid them and therefore harm business and/or housing prices.

CASE STUDY

Violent crime found to affect property prices in regional Victoria

A study commissioned by Infrastructure Victoria in 2018 found that 'an increase in the per capita rate of crimes against persons reduces property prices in regional Victoria'. This means for parts of regional Victoria where violent crimes (such as assaults) increase, the housing prices in those areas decrease. Other recent Australian studies also found similar negative effects of violent crime on regional Australian towns.

Source: Cigdem-Bayram, M., & Prentice, D., How do crime rates affect property prices? (2018)

Increasing regulations

Continuing instances of violent crimes may prompt the government to pass harsher laws or limit access and movement between venues serving alcohol, such as the 'lock out' laws that apply in NSW and Victorian laws requiring those convicted of an act of gross violence to be imprisoned.

CASE STUDY

The debate over lock-out laws in Sydney

The Sydney lockout laws were introduced by the government of New South Wales in early 2014 in an effort to minimise alcohol-fuelled violence, after a string of serious assaults dominated the media. The legislation requires 1.30am lockouts and 3am last drinks at bars, pubs and clubs throughout the Sydney CBD.

However, recent debate has seen the 2019 Government prepare to completely scrap the laws in favour of more liberal drinking legislation that go far beyond lifting the lockout. Instead, a government-led report has now recommended removing rules that ban the sale of shots, doubles and premixed drinks after midnight.

Liberal member Natalie Ward has said 'we're looking at the economic argument for why we're missing out on $16 billion worth of potential employment, innovation and economic infrastructure, and we'd like to do something about that ... but in a balanced way'.

Health lobbyists, doctors and nurses from many of the major hospitals throughout the Sydney CBD have expressed concerns following the push to scrap or dilute lockout laws. The New South Wales Nurses and Midwives' Association (NSWNMA) has suggested extending the lockout laws not just throughout all of Sydney, but across the entire state, as they report a dramatic decrease in alcohol-related assaults in many of the major hospitals such as St. Vincents.

Source: Koziol, M., 'No shots after midnight' and other drinking laws to be ditched in lockout overhaul (2018)

LEGISLATION

In 2012 the *Sentencing Act 1991* (Vic) was amended to impose more serious penalties for extremely violent assaults.

Section 10(1): In sentencing an offender for an offence against section 15A or 15B of the *Crimes Act 1958* (whether on appeal or otherwise), a court must impose a term of imprisonment and fix... a non-parole period of not less than 4 years unless the court finds... that a special reason exists.

When introducing these new laws regarding acts of gross violence and the requirement to imprison offenders with a non-parole period of four years, the Attorney-General explained the reason for the legislation:

> For too long, the law has not done enough to protect innocent Victorians from being victims of horrific, unprovoked attacks that leave terrible lifelong injuries. A young man leaving a football game is king-hit from behind without warning and then kicked in the head repeatedly, suffering permanent brain damage. A student innocently walking home through a railway underpass is bashed by a gang until unconscious, and then left for dead. A promising footballer is choked unconscious in a fast food restaurant before being flung face first to the ground.
>
> Vicious kicking or stomping on the heads of victims has become commonplace, as has the deliberate carrying and use of knives to inflict terrible wounds. These attacks go way beyond spontaneous street brawls. They are part of a culture of extreme violence that threatens to shatter the generally law-abiding and peaceful way of life we have been fortunate to enjoy in Victoria.
>
> This bill sends a clear message that violent attacks such as these will not be tolerated. It will ensure that adult offenders who inflict gross violence will go to jail and will stay in jail for at least four years, unless the court decides that a genuinely special reason applies.

Source: Victorian Parliamentary Debates, Legislative Assembly,13 December 2012, p. 5549

Increasing police presence

Violent crimes and assaults impose a cost on society as offenders are tried and imprisoned and victims undergo medical treatment. Assaults also impose a cost on society through an increased workload on law enforcement institutions such as the police, funded by tax-payers.

CASE STUDY

Violence at the AFL

Recently, the Australian Football League (AFL) has had to deal with repeated instances of violence and fighting amongst spectators at games. These incidents are often fueled by alcohol and can prove difficult to contain.

- In March 2019, the opening game of the season between Richmond and Carlton caused headlines as a violent brawl between a group of men proved difficult to contain.
- In May 2019, police charged four men with assault after a serious fight occurred at the MCG during a match between Carlton and Collingwood.
- In July 2019, a man and woman were charged with assault by police and banned from Adelaide Oval for three months following a violent altercation with opposition fans.

These incidents, along with many others, have prompted widespread debate surrounding security and safety at sporting events throughout Australia. In response, the AFL has been forced to consider ways of 'cracking-down' on spectator violence, including heightening police and security presence at games.

AFL CEO Gillon McLachlan has spoken extensively about the issue but has formally ruled out segregating opposition fans to separate areas of the arenas:

> Segregation is not happening... we have seven million people go to our game ... everyone gets on famously, it's a part of our game, sitting with opposition supporters, we're able to do it the right way and have a great time.

Source: ABC News – Woman and man charged with assault after latest AFL spectator altercation (2019)

Keen to learn more?

A statistical snapshot of crime and justice in New South Wales, https://www.parliament.nsw.gov.au/researchpapers/Documents/A%20statistical%20snapshot%20of%20crime%20and%20justice%20in%20NSW.pdf

Sentencing Council SACSTAT, https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_LAW_3.html

QUESTIONS 3D Assault: Trends & social impact

LEVEL 1:
Define and understand

1. Which of the following statements best summarises the statistical trends regarding assault in Victoria between 2013-2017?

A. The statistics show that across this period, there was a general decrease in the prevalence of assault incidents. Victorians were less likely to experience an assault in 2017 than they were in 2013.

B. The statistics show that across this period, there was a general increase in the prevalence of assault incidents. However, because the Victorian population had decreased in size across the same period, Victorians were less likely to experience an assault in 2017 than they were in 2013.

C. The statistics show that across this period, there was a general decrease in the overall prevalence of assault incidents. However, because the Victorian population had increased in size across the same period, Victorians were more likely to experience an assault in 2017 than they were in 2013.

D. None of the above.

2. Other than imprisonment, which of the following sentencing outcomes was most common for those individuals found guilty of common law assault (along with other offences) in Victoria between 2013-2018?

A. Fine

B. Suspended Sentence

C. CCO

D. Youth Justice Centre Order

3. Based on the statistics provided, identify whether the following conclusions are true or false:

a) In Victoria, those offenders found guilty of common law assault (along with other offences) were much more likely to be sentenced to a term of imprisonment than were offenders found guilty of a single count of common law assault. T/F

b) More than half of those offenders sentenced for common law assault (along with other offences) in Victoria received a term of imprisonment. T/F

c) In recent years, Victoria has experienced an increase in recorded criminal incidents of assault, while New South Wales has experienced a decrease. T/F

d) The average length of sentence for those individuals who received a custodial sentence for assault in NSW between 2013-17 was less than a year. T/F

4. Which of the following is an example of a potential social impact of assault on the victim?

A. Experiencing an assault has been shown to cause negative workplace behaviour, such as increased absences.

B. Studies have shown that victims of assault often exhibit severe symptoms when measured on depression scales.

C. Victims of assault have been shown to avoid social engagement following the incident due to potential anxieties associated with strangers.

D. Bodies such as the AFL have been forced to consider ways of minimising assaults following a string of violent incidents.

LEVEL 2:
Describe and explain

5. Describe two potential economic impacts that assault could have on a victim. (2 MARKS)

6. Using an example, describe one way that assaults can have a negative economic impact on society. (3 MARKS)

LEVEL 3:
Apply and compare

7. The NSW Police Force Commissioner, Mick Fuller, recently responded to an increase in police force numbers by claiming that 'these fully funded positions are the resource boost we need to continue to drive down crime and protect the community.'

a) Consider the data in Figure 6. Does Mr. Fuller's suggestion that crime is decreasing within NSW communities apply for assault? (2 MARKS)

b) Other than creating a need for increased government spending on police numbers, outline one way that higher instances of violent crime such as assault could negatively impact on society. Use an example to support your answer. (3 MARKS)

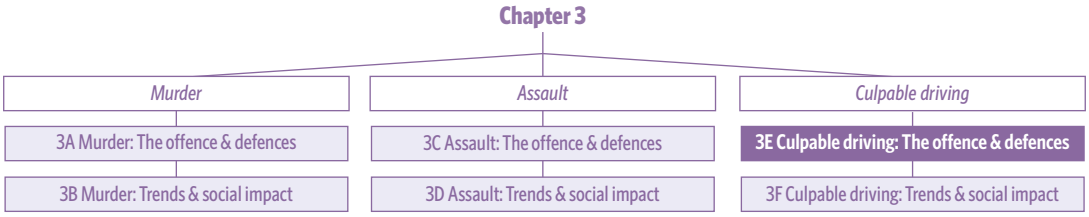
LEVEL 4:
Discuss and evaluate

8. A local news reporter in NSW made the following statement on air: 'Assault is clearly on the decline here in our home state. By looking at the assault statistics, we can conclude NSW is the safest place to live in all of Australia.'

Comment on the news reporter's statement by comparing the assault incident rate in NSW and Victoria for 2017. In your answer, explain why it is important to consider the assault incident rate when comparing assault trends across multiple states. (4 MARKS)

3E Culpable driving: The offence & defences

Culpable driving causing death is one of the most serious offences that can occur when driving a motor vehicle. The offence of culpable driving is outlined by s. 318 of the *Crimes Act 1958* (Vic) and those sentenced for culpable driving causing death often serve a prison term exceeding 5 years.



In this lesson you will be learning about the elements of culpable driving, the possible defences to a charge of culpable driving and the role of statute law and common law in developing these.

Study design dot point

- Two criminal offences and for each offence:
  - the elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

Elements of the offence (Culpable driving)	1.2.7.11
Mens rea	1.2.7.11.1
Actus reus	1.2.7.11.2
Comparison with dangerous driving causing death	1.2.7.11.3
Possible defences (Culpable driving)	1.2.7.12
Automatism	1.2.7.12.1
Penalties (Culpable driving)	1.2.7.13

USEFUL TIP

The VCAA Study Design states that you must know the role of statute law and common law in developing the elements of this offence and the defences. Throughout this lesson, the elements of the offence and the defences have been described by reference to the relevant statutory and common law principles.

Elements of the offence (Culpable driving) 1.2.7.11

Mens rea 1.2.7.11.1

OVERVIEW

Mens rea is a Latin term that refers to the **mental element** of the crime: the state of mind which must be proven to the judge/jury that the accused held at the time of the offence.

DETAILS

The mens rea element for culpable driving requires the driver to have been 'culpable' when driving a motor vehicle. The meaning of 'culpable' is outlined by s. 318(2) of the *Crimes Act 1958* (Vic) to include any of the following mental states:

- **Recklessly** – s. 318(2)(a)
- **Negligently** – s. 318(2)(b)

- **Whilst so affected by alcohol** as to be incapable of having proper control of the motor vehicle – s. 318(2)(c)
- **Whilst so affected by drugs** as to be incapable of having proper control of the motor vehicle – s. 318(2)(d).

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 318 – CULPABLE DRIVING CAUSING DEATH

(2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle

(a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or

(b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or

(c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or

(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.

Recklessly

Section 318(2)(a) of the *Crimes Act 1958* (Vic) defines **recklessly** as a situation in which the accused 'consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from [their] driving'.

This definition gives rise to the requirements for a jury to decide whether a person drove 'recklessly'. The prosecution must prove all of the following (beyond reasonable doubt):

- The accused was **aware of the risk that death or grievous bodily harm** may result as a consequence of their driving;
- The risk was **substantial;** and
- The accused, knowing of this real risk of serious injury, **disregarded the risk.**

Examples of reckless driving could include:

- Excessive speeding whilst drag-racing another motorist.
- Excessive speeding, perhaps also influenced by drugs or alcohol.
  - Consider a driver who causes a fatal collision whilst travelling at 110km/h in a 40km/h zone near a school, who had been drinking alcohol for three hours prior to the incident. A jury could certainly decide this person was aware of the risk of death, the risk was substantial and the accused drove this way regardless of the risk – that is, a jury could conclude they had been reckless.

Negligently

Any person can make a mistake or lose concentration momentarily when driving. For a person to be negligent in the offence of culpable driving requires more than proving such an error. Instead, the mens rea element requires the prosecution to prove **gross negligence.**

Section 218(2)(b) of the *Crimes Act 1958* (Vic) defines **negligently** as being where the accused 'fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case'.

The **level of negligence required is high** and must involve a **great falling short of the standard of care that a reasonable person would have exercised** in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct (*Bouch v R* [2017] VSCA 86).

The jury does not only need to consider the accused's physical control of the vehicle when determining if the accused was driving negligently. They may also consider the question of whether the accused should have been driving at all in the circumstances.

Source: Judicial College of Victoria – Criminal Charge Book, Culpable Driving Causing Death (2019)

In making this determination, they can take into account factors such as:

- The condition of the vehicle.
  - For example, consider an accused person who chose to drive a vehicle at high speed despite knowing that the vehicle was not roadworthy due to its faulty brakes – a jury might decide that this was highly negligent and therefore culpable.

- The time of driving and lighting conditions
  - For example, imagine an accused person driving late at night who, as a joke with their passengers, turned off their headlights and caused a fatal collision – a jury might decide that this was highly negligent and therefore culpable.

What other driving behaviours could be regarded as highly negligent for these purposes? Whilst this is for a jury to decide, examples might include:

- Face-timing, whilst holding a mobile phone and driving at the same time.
- A road-rage incident in which a driver aggressively passes one motorist, then quickly hits their brakes in front of that car, causing a fatal collision.
- Exceeding the speed limit and being alcohol-affected.

Is falling asleep while driving an example of negligence for these purposes?

According to s. 318(2A) of the *Crimes Act 1958* (Vic) a driver is negligent (and therefore satisfies the mens rea element) if he or she:

1. Was so exhausted that they knew (or should have known) there was a large risk of them falling asleep and losing control of the vehicle; and
2. By falling asleep the accused person failed to meet the standard of care a reasonable person would expect.

CASE STUDY

***DPP v Namdar* [2017] VCC AAB**

The accused, Namdar, was operating a jet ski at high speed in a swimming-only area surrounding a pier. He struck a swimmer in the head with the jet ski causing life-threatening injuries. At the time of the collision, the accused was looking backwards and talking to a passenger. Witnesses stated the accused was travelling upwards of 70km/h in an area where vehicles exceeding 9km/h were prohibited even outside of the swimming-only area.

The victim was on life support but had suffered irreversible brain damage and was incapable of surviving. Two days after the incident the victim's life support was removed.

The accused pleaded guilty to one charge of culpable driving under s. 318 of the *Crimes Act 1958* (Vic) and was sentenced to five years' imprisonment. During sentencing the judge stated that the accused was 'operating the jet ski in a highly inappropriate and negligent manner'.

Under the influence of alcohol

For the prosecution to establish that the accused was culpable due to their alcohol consumption, s. 318(2)(c) of the *Crimes Act 1958* (Vic) requires the accused to be 'under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle'. It is not sufficient to merely show that the accused was under the influence of alcohol, they **must have been so influenced that they were incapable of having proper control of the motor vehicle.**

As every person's driving ability is impacted by alcohol, the jury must determine the extent to which an accused person was influenced by alcohol in a given case.

While evidence of a blood-alcohol concentration (BAC) above 0.05 (or above 0.00 for probationary drivers) proves that a person's driving is alcohol-affected, this alone is not enough. Instead, it must be determined that the accused person in a given case was so intoxicated he or she was 'incapable of having proper control of the motor vehicle'. Their BAC is only one piece of evidence upon which the jury will make such a determination.

CASE STUDY

***DPP v Hollands* [2016] VCC 1113**

Hollands consumed a significant amount of alcohol prior to riding his motorcycle home. During this journey, he collided with Alan Robison as he used a pedestrian crossing, whom he had not seen. The victim suffered severe leg and internal injuries, was taken to the hospital and died two days after the incident.

cont'd

Hollands was very intoxicated when he struck Robison as he crossed the road (his BAC was 0.16 two hours after the incident, and was calculated to be between 0.184 and 0.208 at the time of the collision). He pleaded guilty to culpable driving causing death. The judge held that Hollands' moral culpability was high as he should have known how intoxicated he was and the risk of driving in his condition. The offender was sentenced to six years imprisonment.

Under the influence of a drug

Section 318(2)(d) of the *Crimes Act 1958* (Vic) requires the accused to be 'under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle'. It is not sufficient to merely show that the accused was affected by a drug, **they must have been so influenced that he or she was not capable of having proper control of the car or motorcycle.**

CASE STUDY

***DPP v Bosman* [2016] VCC 1689**

Bosman had been using ice for several days and had very little sleep. Despite feeling drowsy, Bosman decided to drive. He veered onto the wrong side of the road and collided with an oncoming vehicle, causing the other driver's death. Bosman pleaded guilty to culpable driving.

Bosman was sentenced to seven years and six months' imprisonment. He had extensive experience with the drug and its side effects, making his moral culpability for the event high. The only factor reducing the severity of this offence was that he was not speeding or deliberately disobeying the road rules.

During sentencing, the judge stated:

> I am satisfied beyond reasonable doubt, you were, by the time you got behind the wheel... well aware of the risks of what you were doing. You were well aware that you should not have been behind the wheel of a motor vehicle. Indeed, you had just had some further methamphetamine... You chose to drive in that condition. This was not just an isolated or momentary lapse.

Actus reus 1.2.7.11.2

OVERVIEW

Actus reus refers to the **physical element** of the crime: the accused person did an act, or failed to do an act, that had criminal consequences.

DETAILS

Establishing actus reus for culpable driving

In order to establish actus reus for culpable driving, the prosecution must show that:

1. The accused was driving a motor vehicle;
2. The culpable driving caused the death of another person.

Driving a motor vehicle

Driving

There is no legal definition of when a person is driving a motor vehicle. It is generally accepted that **a person will be driving where they have the ability to accelerate, brake and control the movement of the motor vehicle.** In most cases it will be self-evident whether or not the accused was driving a motor vehicle at the time of the offence.

However, there are some situations where the law remains unclear as to whether a person is 'driving' a motor vehicle, including where:

- The motor vehicle was broken or faulty at the time of the offence (such as an engine or brake fault).
- The motor vehicle was being moved by an external force (such as rolling down a hill or being towed by another person/object).
- The motor vehicle was parked or motionless at the time of the offence (such as stopping at traffic lights or parked with the engine on).

To determine whether the accused is 'driving' is a question of fact for the jury and requires them to consider the surrounding circumstances of each case.

CASE STUDY

***Tink v Francis* [1983] 2 VR 17**

This trial involved three unconnected cases being heard heard together, including *Tink v Francis* and *Hughes v McFarlane*.

In *Tink v Francis,* the accused's motor vehicle had run out of petrol but she remained in the driver's seat and steered the car while it was pushed along the road. In *Hughes v McFarlane,* the accused was sitting in the driver's seat of his car and steering it while it was being towed by another vehicle. When approaching a corner, the tow rope broke and the accused approached an oncoming vehicle. The accused tried to steer away to avoid the vehicle, but still collided with it.

The question in both cases was whether this amounted to 'driving'. The Supreme Court of Victoria held that in both of these cases the accused was not driving a motor vehicle.

These cases clarified some situations that do not amount to 'driving':

- Sitting in the driver's seat and directing (steering) the vehicle while being pushed along the road (when the vehicle had run out of petrol).
- Steering a car as it was being towed (causing a collision with another motor vehicle as a result of a broken tow rope).

These scenarios are uncommon. As mentioned above, in most cases it will be very clear to a jury whether an accused person was driving at the time of a collision that resulted in death.

Motor vehicle

The definition of a **motor vehicle** is outlined by s. 3 of the *Road Safety Act 1986* (Vic). This definition requires the vehicle to be intended for highway use and is built to be propelled by a motor. This includes (but is not limited to):

- Cars
- Motorbikes
- Trucks
- Vans.

The definition also excludes a number of vehicles, such as:

- Vehicles intended to be used on a railway or tramway (such as a train or a tram).
- A motorised wheel-chair with a speed that does not exceed 10km/h and is to be used by an injured or disabled person.

The definition of a motor vehicle also extends to vessels as outlined by s. 317B of the *Crimes Act 1958* (Vic). The definition of a 'vessel' is provided for by s. 3 of the *Marine Safety Act 2010* (Vic). This requires a vessel to be used in water. Some examples of vessels include (but are not limited to):

- Lifeboats
- Speedboats
- Jet skis.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 317B – INTERPRETATION

motor vehicle' includes vessel, whether or not the vessel is powered by a motor.

***Marine Safety Act 2010* (Vic)**

Section 3 – DEFINITIONS

'vessel' means any kind of vessel that is used, or capable of being used, in navigation by water, however propelled or moved.

Death

This requires the culpable driving to have **caused the victim's death.** This element requires the prosecution to prove causation and the death of another person.

Causation

Causation requires a **causal connection** between the accused's voluntary act and the consequences that result (as discussed in Lesson 3A). An objective test is used to determine whether the conduct that caused the death of the victim occurred in a continuing manner without a supervening event.

Where the accused was influenced by drugs/alcohol

When the accused is alleged to have been driving under the influence of alcohol or drugs, it must only be shown that the victim's death was caused by the accused's driving. In these situations, it is not relevant whether the accused's inability to control the vehicle caused the death of the victim – it is sufficient to prove:

- The accused was so affected by drugs/alcohol they couldn't control the vehicle; and
- The driving caused the death.

Where the accused was negligent or reckless

When the accused is alleged to have been driving recklessly or negligently, this must have been **a substantial and operating cause** of all events leading to the victim's death.

Substantial and operating cause test

In order to have caused the victim's death, the accused's culpable driving must have been a 'substantial and operating cause' of it. This is one of the primary tests used in Australian courts to determine causation. This test requires that the accused's act (or omission) must **substantially or significantly contribute** to the death of the victim where there is a supervening event.

The same test is used for murder and manslaughter and was developed through the case *R v Evans and Gardiner (No 2)* [1976] (discussed in Lesson 3A) and the High Court case of *Royall v R* (1991).

CASE STUDY

Consider the following hypothetical scenarios.

Contributing behaviour of the deceased

Hoang was driving a motor vehicle at excessive speed whilst under the influence of alcohol when he hit Olive at a pedestrian crossing. Olive had failed to look carefully before crossing the road. This collision caused Olive to become unconscious and she was rushed to hospital. Olive went into a coma while in hospital and remained there for a number of days before she passed away.

Olive's failure to look carefully was a contributing factor to the death. If the jury decides that Hoang's driving was grossly negligent **and** a substantial cause of the collision, then he will likely be convicted – even though Olive's conduct also contributed to the incident.

Intervening act

Emma was drag-racing Jason when she hit a pedestrian, Duncan. She was doing 147km/h in a 60km/h zone and holding her mobile phone to film the race (which she intended to post on Instagram). Duncan was rushed to hospital and died during surgery. Emma was charged with culpable driving. Emma later learned that during surgery doctors were delayed in receiving the correct blood type to give Duncan a blood transfusion. If the correct blood type had arrived sooner, Emma claims that Duncan may have survived.

Despite this intervening act (the delay in the correct medical procedure), Emma can still be held to have caused the death – her reckless driving was a substantial cause of Duncan's death, despite not being the only cause of death.

Death of another person

The culpable driving must cause the death of another person. An unborn child is not accepted to be a 'person' in Victoria. Therefore, the death of an unborn child as a result of an individual's driving would not satisfy this component of culpable driving.

CASE STUDY

Death of an unborn

Lilian is pregnant when she is hit by a vehicle driven at high speed. Her unborn baby dies as a result of the person's driving. This would not be regarded as the death of a person for the purposes of culpable driving in Victorian law, however the motorist may be charged with other driving offences.

Generally, death is the easiest aspect to prove. However, sometimes the point of death is not always obvious. Many implications have arisen around whether a body that has been kept alive by artificial means is a human being capable of being killed. However, in Victoria (along with New South Wales and South Australia), life as a human being finishes at the point of irreversible ending of brain function or blood circulation.

LEGISLATION

***Human Tissue Act 1982* (Vic)**

Section 41 – DEFINITION OF DEATH

For the purposes of the law of Victoria, a person has died when there has occurred—

(a) irreversible cessation of circulation of blood in the body of the person; or

(b) irreversible cessation of all function of the brain of the person.

Separating culpable driving from other unlawful homicide offences

While culpable driving involves causing the death of another person, this offence is still separate to the other branches of unlawful homicide (such as murder and manslaughter):

- A person who has been found guilty (or acquitted) of culpable driving cannot later be charged with a different unlawful homicide offence.
- A person who has been found guilty (or acquitted) of an unlawful homicide offence cannot later be charged and convicted of culpable driving.

LEGISLATION

***Crimes Act 1958* (Vic)**

Section 318 – CULPABLE DRIVING CAUSING DEATH

(4) A person who is convicted or acquitted of an indictable offence under this section shall not in respect of the death concerned subsequently be prosecuted for unlawful homicide or under this section.

(5) A person who is convicted or acquitted of any form of unlawful homicide not referred to in this section shall not in respect of the death concerned subsequently be prosecuted under this section and no other form of unlawful homicide shall be charged in the same indictment with an indictable offence under this section.

Comparison with dangerous driving causing death 1.2.7.11.3

OVERVIEW

Dangerous driving causing death occurs where the accused drives in a way that is dangerous to the public and results in the death of another person.

DETAILS

Dangerous driving causing death is a less serious offence than culpable driving and often operates as an alternative verdict for the jury. That is, a jury may decide that a person's driving caused another person's death, yet the driving was dangerous rather than culpable.

For example, a driver might be careless but not so grossly negligent as to meet the high threshold required to establish the mens rea element in culpable driving, with conduct such as:

- Being somewhat alcohol affected; and/or
- Exceeding the speed limit slightly; and/or
- Driving whilst tired, but not so tired they fell asleep and lost control of their car.

A person charged with culpable driving causing death may in some cases negotiate with the prosecution to plead guilty to the lesser charge of dangerous driving causing death. Such a plea negotiation will usually result in a less severe punishment being imposed, and avoids the need to present evidence at a jury trial (minimises delays and costs).

Table 1 Comparing dangerous driving causing death and culpable driving

Similarities	Differences
Actus reus. Dangerous driving causing death and culpable driving are offences where the accused is driving a motor vehicle and this driving results in the death of another person.	**Penalties.** Dangerous driving causing death has a maximum penalty of 10 years' imprisonment. Culpable driving has a maximum penalty of 20 years' imprisonment. **Mens rea.** Dangerous driving causing death focuses on whether the speed or manner of the accused person's driving was dangerous to the public. Culpable driving causing death focuses on whether the accused was driving recklessly, negligently or so affected by drugs/alcohol that they were unable to control the vehicle.

Possible defences (Culpable driving) 1.2.7.12

Automatism 1.2.7.12.1

OVERVIEW

Rather than raising a specific defence, an accused person will more commonly argue that their conduct does not satisfy the mens rea element in a culpable driving charge – that is, they'll contend their driving was not reckless or grossly negligent. An accused person may argue that his or her driving was merely dangerous (and therefore they should be subjected to a lesser sentence).

However, there are a limited number of defences available to an individual accused of culpable driving causing death. One defence that may be raised is automatism.

DETAILS

Automatism occurs when an offence is committed by an accused suffering from an involuntary state of mind. The law recognises that a person should not be held responsible for an act they did not voluntarily commit. Automatism is accepted as a common law defence. There are two types of automatism that could potentially be raised: sane automatism and insane automatism.

Sane automatism

Sane automatism is where a person's mental capacity is severely influenced by **external** factors. This includes where the accused had a concussion, was sleepwalking or suffered an involuntary movement or spasm.

Sleepwalking occurs where a person is unknowingly engaging in activity and cannot control their actions (whereas falling asleep occurs after a person has consciously made the decision to drive a motor vehicle despite being fatigued). As shown by the elements of culpable driving, being under the influence of alcohol or a drug does not satisfy this defence.

If the accused is found to have acted in a state of sane automatism, they will be acquitted of the crime.

CASE STUDY

Consider the following hypothetical scenario.

Hillary is driving her car when she becomes unconscious. As a result of this, Hillary loses control of her motor vehicle and swerves into oncoming traffic. Hillary then collides with another car, causing the other driver's death.

Hillary could raise the defence of automatism as she was suffering from an involuntary state of mind as a result of becoming unconscious when driving.

Insane automatism

Insane automatism is where the accused is reacting to their own internal illusions. This is known as a 'disease of the mind' due to the accused suffering from a mental impairment. Insane automatism occurs where the accused has experienced delusions from their own mind and a crime occurs as a result of this.

Examples of disease of the mind accepted under insane automatism include (but are not limited to):

- Mental illnesses such as schizophrenia
- Brain injuries, tumors and disorders
- Dissociation and epilepsy.

Unlike sane automatism cases, if the accused is found to have acted in a state of insane automatism, they will not be automatically acquitted. Instead, the jury must consider whether the requirements for the defence of 'mental impairment' (a separate defence) are satisfied.

- If the jury finds the accused meets the standards for mental impairment, they will be found not guilty by reason of mental impairment.
- If the accused does not meet the standards for mental impairment, they may be convicted.

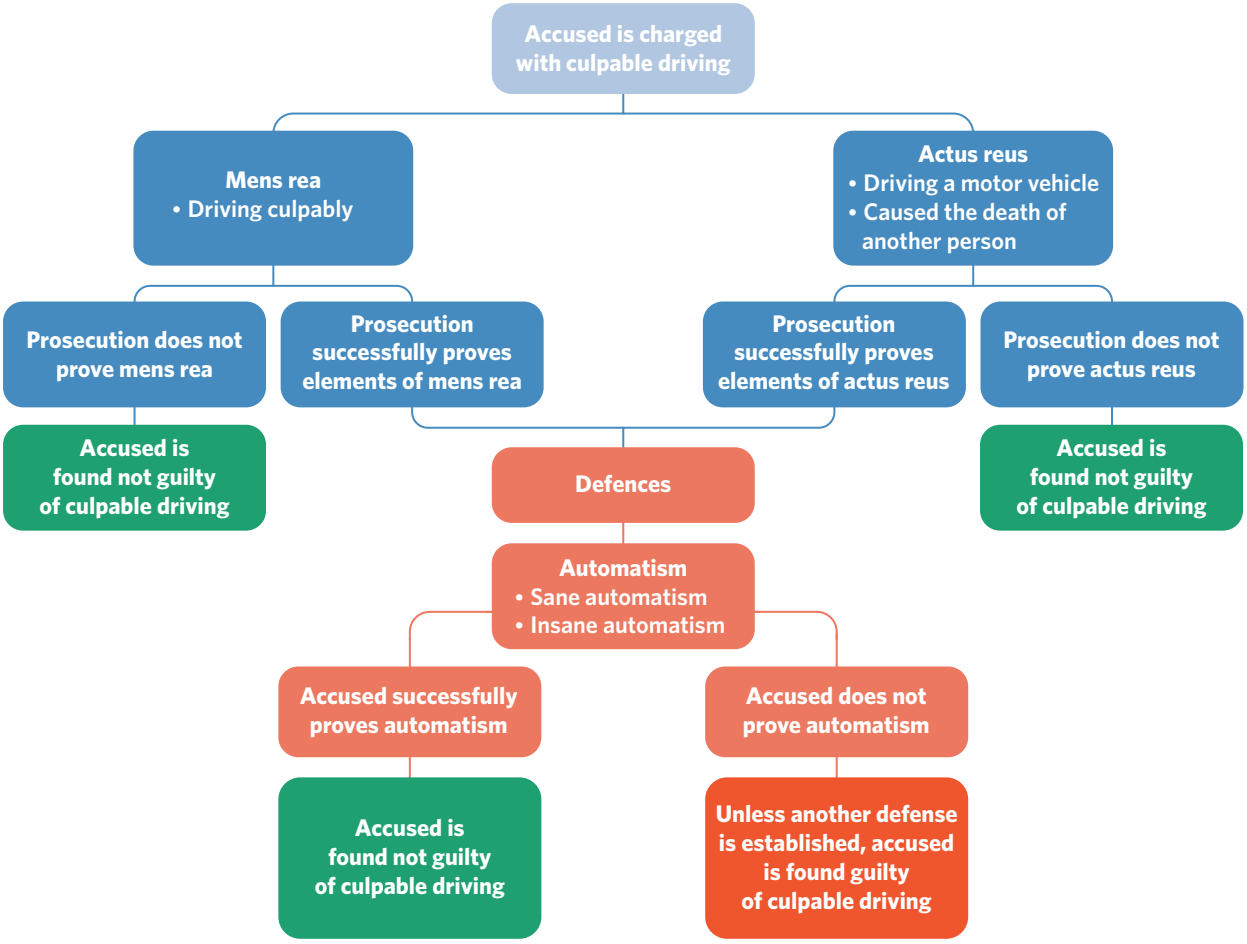


Figure 1 The elements and defences for culpable driving

USEFUL TIP

During a trial for culpable driving causing death, many accused persons will contest whether the prosecution has proven the mens rea and actus reus elements (in blue in Figure 1). For example, an accused person may try to disprove that they were aware of a risk and disregarded it, will perhaps argue there was a minor lapse in their concentration and that's not 'culpable'.

If the mens rea and actus reus elements appear to be established, an accused person may try to raise the defence of automatism (illustrated as orange in Figure 1).

Particularly for culpable driving, it is more likely that the accused will contest whether the elements are proven rather than to raise a successful defence of automatism.

Penalties (Culpable driving) 1.2.7.13

OVERVIEW

Culpable driving causing death is one of the most serious offences that can occur in a motor vehicle and is severe in terms of its impact on the victim and society. The harsh maximum penalty that may be imposed for culpable driving reflects this.

DETAILS

The maximum penalty that can be imposed for culpable driving is 20 years' imprisonment. A fine may be imposed instead of, or in addition to, imprisonment. This is outlined in s. 318 of the *Crimes Act 1958* (Vic).

- In practice, all persons sentenced for culpable driving in recent years have been imprisoned.
- The standard sentence for culpable driving causing death is 8 years' imprisonment.
  - The 'standard sentence' provides a guide from the parliament to the courts in determining what is an appropriate sanction for a serious crime.
  - This is a signpost to the court as to what may be suitable punishment when offending is in 'the middle of the range of seriousness'. This will be weighed alongside aggravating and mitigating factors in a particular case (see Chapter 6 for further details).

Source: Sentencing Advisory Council – Standard Sentences (2018)

Pursuant to s. 89 of the *Sentencing Act 1991* (Vic) a person sentenced for culpable driving causing death must also have their licence cancelled by the court.

Keen to learn more?

The Judicial College of Victoria, Criminal Charge Book, http://www.judicialcollege.vic.edu.au/eManuals/CCB/4519.htm

QUESTIONS 3E Culpable driving: The offence & defences

LEVEL 1:
Define and understand

1. Margaret had been drinking all night when she decided to drive home. Margaret was aware that she should not be driving in her condition, but disregarded this. Margaret felt extremely light headed as a result of the alcohol which caused her to drive on the wrong side of the road and hit an oncoming motorbike. The police conducted a breath test on Margaret which indicated that her blood alcohol concentration was double the legal limit. The other driver suffered serious injuries and was rushed to hospital. A few days later, the other driver was released from the hospital but was paralyzed from the waist down as a result of the incident.

Which element of culpable driving is not satisfied?

A. Actus reus, as Margaret was not driving a motor vehicle.

B. Mens rea, as Margaret was not so affected by alcohol as to have lacked the ability to control her vehicle.

C. Mens rea, as Margaret was not reckless in her decision to drive.

D. Actus reus, as Margaret did not cause the death of another person.

2. Which of the following is not one of the mens rea elements of culpable driving?

A. Driving negligently

B. Driving with an intention to kill

C. Driving recklessly

D. Driving so affected by alcohol as to be incapable of controlling the vehicle

3. Dean is riding a motorbike when he hits a person at a pedestrian crossing. The person dies on impact. Dean claims he has no recollection of driving the motorbike and the last thing he remembers is being asleep in his bed. It is later discovered that Dean has a history of sleepwalking. Which of the following would be the best defence for Dean to raise in a trial for culpable driving?

A. Self-defence

B. Sane automatism

C. Insane automatism

D. Duress

4. Brad has been convicted of culpable driving after recklessly causing the death of Tina when driving at 150km/h in an 80km/h zone. What is the maximum penalty that can be imposed in Brad's case?

A. A fine

B. 10 years' imprisonment

C. 20 years' imprisonment

D. Life imprisonment

LEVEL 2:
Describe and explain

5. One of the elements of culpable driving is the accused driving a motor vehicle.

Describe the terms 'driving' and 'motor vehicle'. Provide one example of a motor vehicle. (3 MARKS)

6. Lucy was convicted of culpable driving. She hit another vehicle after consuming a large quantity of alcohol and is awaiting her sentence.

Explain what the maximum penalty for culpable driving causing death is. (2 MARKS)

7. Explain automatism as a defence for culpable driving. (4 MARKS)

8. Describe one of the mental states a person may have in order to be held to be 'culpable'. (3 MARKS)

LEVEL 3:
Apply and compare

9. Distinguish between sane and insane automatism. Provide one example of each. (4 MARKS)

10. In *Tink v Francis,* one of the three cases being heard (*Hughes v McFarlane*) involved the accused colliding with another vehicle and killing the other driver after a tow rope broke. The accused was sitting in the driver's seat at the time but only had the ability to steer the car. Ultimately, the accused was found not guilty of culpable driving.

Explain which of the actus reus elements of culpable driving was not satisfied in this case. (3 MARKS)

11. The following scenario contains errors.

Moses was recklessly riding his bicycle when he hit his neighbour's dog. As a result of the collision, the dog was rushed to an animal hospital with severe injuries. The dog then died as a result of the incident. Moses is charged and convicted of culpable driving causing death as he was culpable, driving a motor vehicle and caused the death of another person. Moses is sentenced to 25 years' imprisonment.

Identify two errors in the scenario and provide the correct procedure or definition. (4 MARKS)

12. Jason was driving a motor vehicle when he hit another vehicle, causing the other driver's death. Following the incident, Jason was charged with culpable driving causing death. Jason and his barrister have discussed a plea negotiation with the prosecution, whereby if he agrees to plead guilty to dangerous driving causing death the prosecution will not proceed with the culpable driving charge. Jason is unsure if he should accept this deal because he believes dangerous driving causing death sounds worse than culpable driving.

Compare culpable driving and dangerous driving. In your response, explain which offence is more serious. (5 MARKS)

13. In *DPP v Namdar* the accused was convicted of culpable driving for causing the death of a swimmer, after hitting them with his jet ski in a 'swimming only zone'. With reference to the term 'motor vehicle', explain why a jet ski fits into this definition. (3 MARKS)

14. Link and his friends regularly participate in drag races that they conduct in the early hours of the morning. They use specific backstreets which they know are not monitored by police to avoid any criminal consequences. Link is racing his friend Eric and is driving at 160km/h in a 50km/h zone when he loses control of his car and collides with Eric's car. Eric dies instantly as a result of the collision. Police arrive to the area after receiving a call from a witness. Link is then charged with culpable driving. At the police station Link is drug and alcohol tested, with both returning a negative result as he was not under the influence of either.

a) Explain the standard of proof that must be met in this case. (2 MARKS)

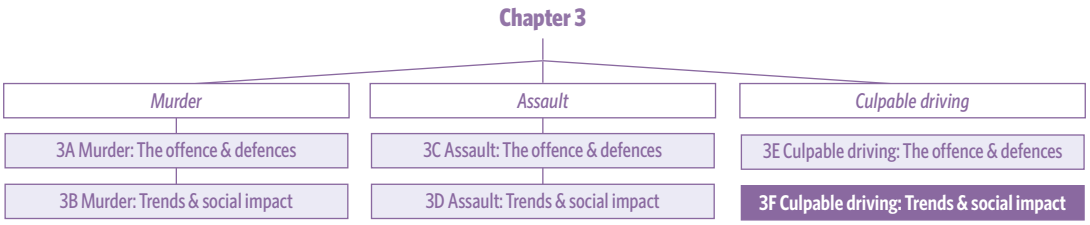
b) Describe the mental state Link had at the time of the offence. Justify your response. (4 MARKS)

c) Link is found guilty of culpable driving and is awaiting his sentence.

Identify the maximum penalty Link can have imposed on him for this offence. If a court decides Link's offending is in the middle range of seriousness for culpable driving offences, what sanction is likely to be imposed? (3 MARKS)

3F Culpable driving: Trends & social impact

Culpable driving causing death is a serious offence – but how common is culpable driving in the community? What sort of harm might this offence cause for the broader society?



In this lesson you will be learning about the trends and social impact of culpable driving causing death in both Victoria and New South Wales.

Study design dot point

- Two criminal offences and for each offence:
  - the elements of the offence
  - possible defences
  - the role of statute law and common law in developing the elements of the offence and the defences
  - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
  - the possible impact of the offence on individuals and society

Key knowledge units

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Culpable driving)	1.2.7.14
Victoria	1.2.7.14.1
New South Wales	1.2.7.14.2
Possible impact of the offence on individuals and society (Culpable driving)	1.2.7.15
Impact on victim's family	1.2.7.15.1
Impact on offender	1.2.7.15.2
Impact on society	1.2.7.15.3

Trends and statistics in relation to the offence in Victoria and in one other jurisdiction (Culpable driving) 1.2.7.14

Victoria 1.2.7.14.1

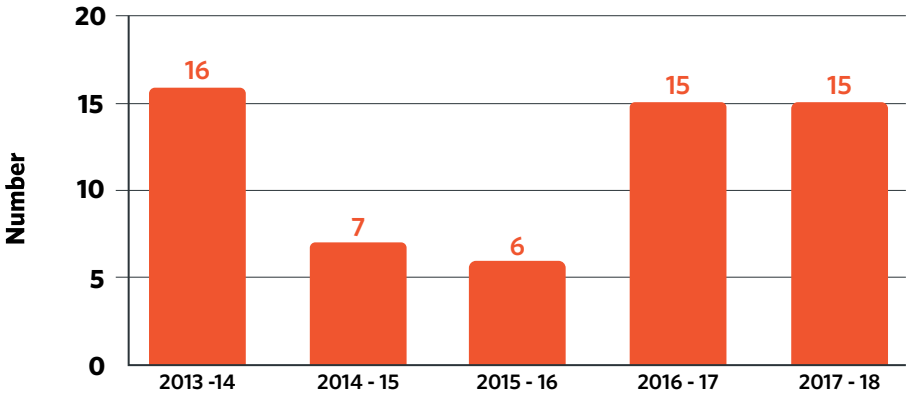
OVERVIEW

Road trauma is a major concern for the Victorian community. Campaigns such as 'Towards Zero' lead by bodies such as the Transport Accident Commission (TAC), VicRoads and Victoria Police exemplify the importance society places upon increasing road safety and reducing the road toll.

DETAILS

Trends in culpable driving – Victoria

In the five years between 2013 and 2018, a total of 59 people were sentenced in the higher courts for a principal offence of culpable driving causing death (Figure 1).

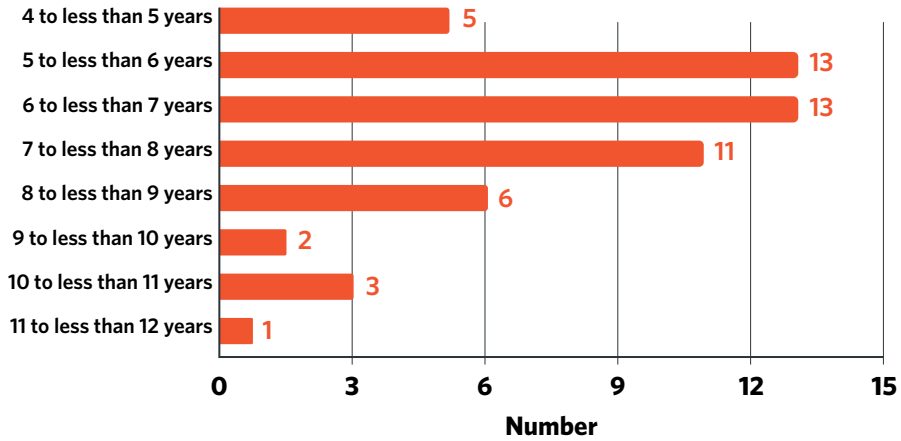


Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 1 The number of people sentenced for culpable driving causing death (2013-2018)

Sentencing outcomes – Victoria

Almost all persons sentenced for culpable driving causing death received a sentence of imprisonment (95% – 56 of 59 people).



Source: Sentencing Snapshot, Sentencing Advisory Council (2019)

Figure 2 The number of people sentenced to imprisonment for culpable driving causing death (2013-2018).

As Figure 2 demonstrates, the most common lengths of imprisonment that were imposed were between 5 to 7 years. A total of 26 offenders fell into this range (46%).

In 2017-2018, the average length of imprisonment (Figure 3) imposed on people sentenced for culpable driving causing death was **7 years and 8 months**. This represents the highest average imprisonment length of the five years shown, indicating:

- A rising trend in the severity of sentencing for this offence, which is likely to continue; and
- 2017/18 included some particularly serious culpable driving cases (such as *DPP v Arpaci,* discussed in Lesson 7C), attracting longer prison terms and raising the average sentence imposed.

LEGISLATION

In 2017 the *Crimes Act 1958* (Vic) was amended to create a 'standard sentence' for culpable driving.

Section 318(1A): The standard sentence for an offence under subsection (1) is 8 years.

- The 'standard sentence' provides a guide from the parliament to the courts in determining what is an appropriate sanction for a serious crime committed after February 2018.
- This is a signpost to the court as to what may be suitable punishment when offending is in 'the middle of the range of seriousness'. This will be weighed alongside aggravating and mitigating factors in a particular case (see Chapter 6 for further details).

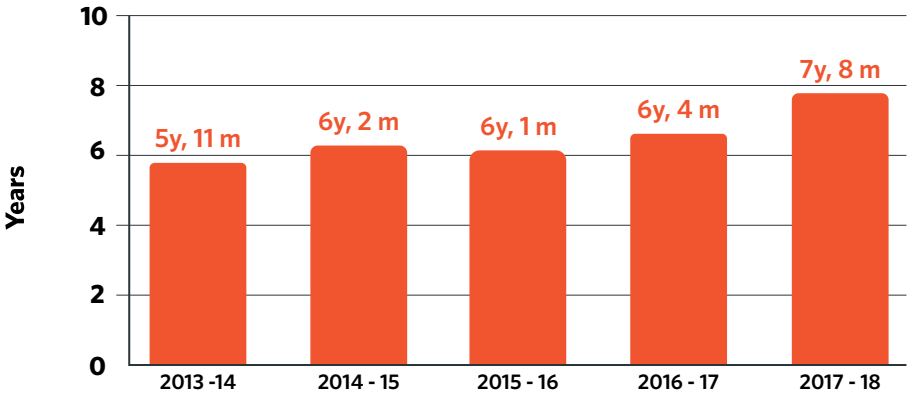
Source: Sentencing Advisory Council – Standard Sentences (2018)

LEGISLATION

When introducing the standard sentence for culpable driving (and other serious crimes), the Attorney-General said:

> This bill reflects the government's commitment to ensuring that sentencing outcomes are consistent with community expectations, and sends a strong message to perpetrators that they can expect longer terms of imprisonment if they commit serious offences.
>
> Sentences are expected to increase for standard sentence offences, bringing sentencing for the most serious offences in line with community expectations.

Source: Victorian Parliamentary Debates, Legislative Assembly,25 May 2017, p. 1509



Source: Sentencing Advisory Council – Sentencing Snapshots by Offence (2019)

Figure 3 The average length of imprisonment per year for people sentenced for culpable driving causing death in Victoria (2013-2018).

USEFUL TIP

In Lesson 3E you learned about the offence of dangerous driving causing death. This offence:

- Is put to a jury considering a person charged with culpable driving causing death – a jury may acquit an accused person of the more serious charge and return a 'guilty' verdict on the less serious charge of dangerous driving causing death.
- Has a different mens rea requirement to culpable driving.
- Is an offence that an accused person might plead guilty to, in return for the culpable driving charge being withdrawn (following a plea negotiation).

Approximately twice the number of persons are sentenced for dangerous driving causing death, compared with culpable driving causing death. Around 55% receive a term of imprisonment (usually under 4 years); many offenders are placed on a CCO.

New South Wales 1.2.7.14.2

OVERVIEW

NSW criminal laws differ in some ways when compared to Victorian law: a separate offence of culpable driving causing death does not exist, however NSW law allows a person to be prosecuted for manslaughter if their driving is criminally negligent (a mens rea element very similar to the mens rea element in culpable driving in Victoria). NSW law includes a serious offence of dangerous driving in circumstances of excessive speed and alcohol consumption.

DETAILS

In New South Wales, there exists a hierarchical structure of different charges for driving causing death. At the top of this hierarchy stands 'manslaughter' as the most serious offence, which carries a maximum term of 25 years' imprisonment.

The NSW data published by BOCSAR tracks the sentences imposed for manslaughter, but does not separate out manslaughter charges arising from driving incidents; this makes direct comparisons with culpable driving in Victoria more difficult.

There are less serious offences in NSW criminal law, including (but not limited to):

- Dangerous driving causing death, which carries a maximum penalty of 10 years imprisonment. This is similar to the offence in s. 319 of the *Crimes Act 1958* (Vic) that operates in Victoria.
- Negligent driving occasioning death, which carries a maximum penalty of 18 months imprisonment.

NSW legislation includes a separate offence of **dangerous driving causing death in circumstances of aggravation:**

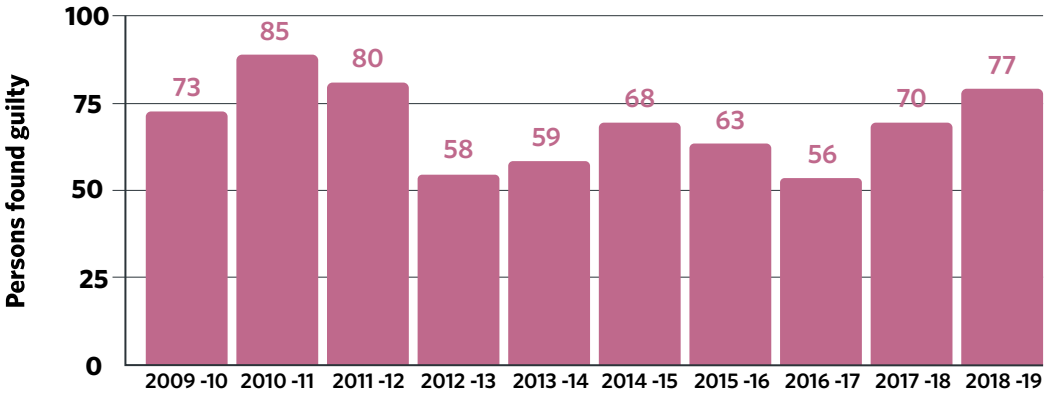
- This has a maximum penalty of 14 years' imprisonment;
- 'Circumstances of aggravation' include:
  - Having a particularly high blood alcohol concentration;
  - Being substantially affected by illicit drugs; or
  - Exceeding the speed limit by 45km/h or more.
- Such a charge is therefore similar to culpable driving causing death in Victoria.

For the purpose of this section, we will be focusing on the total figures for all offences relating to driving causing death, **excluding manslaughter**. Keep in mind that this delineation is why sentencing trends from Victoria may seem more severe than that of NSW.

Source: Singh, J., The Law on Driving Occasioning Death (2018)

Trends in driving causing death – New South Wales

Figure 4 summarises the total number of people sentenced for one of the driving causing death offences (excluding manslaughter) in NSW in the ten years between 2009-2019. Figures have clearly fluctuated in this period, having ranged from a low of 56 in 2016-17 to a high of 85 in 2010-11.

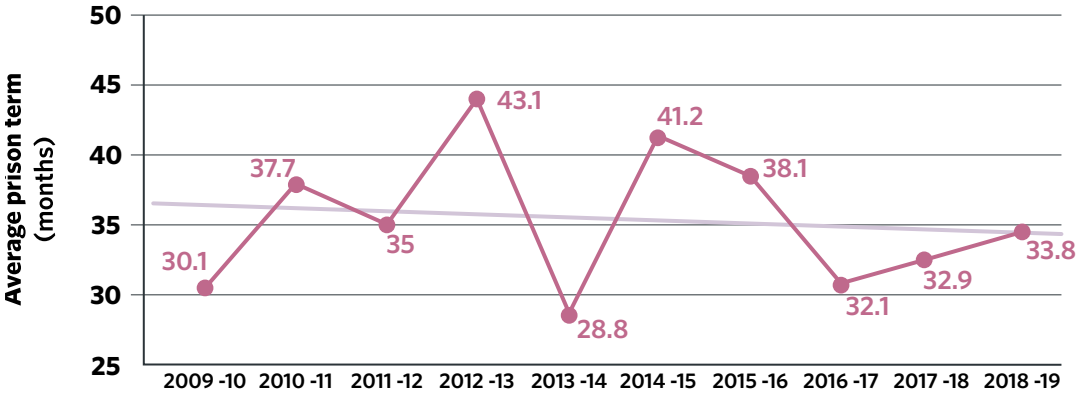


Source: New South Wales Bureau of Crime Statistics and Research: BOCSAR (2019)

Figure 4 The total number of persons found guilty of driving causing death in NSW each financial year (2009-2019)

Sentencing outcomes – New South Wales

Figure 5 shows the percentage of those individuals sentenced for one of the offences related to driving causing death who were sentenced to a term of imprisonment over the same ten-year period (2009-2019). As the data shows, only around 35% of individuals received a term of imprisonment, while the remaining offenders received some form of community sentence.



Source: New South Wales Bureau of Crime Statistics and Research: BOCSAR (2019)

Figure 5 The percentage of individuals sentenced for a form of driving causing death who were sentenced to a term of imprisonment (2009-2019)

Further, of those offenders who received a term of imprisonment for driving causing death offences (excluding manslaughter) in NSW between 2009-2019, the average imprisonment length was just under two years (22.8 months).

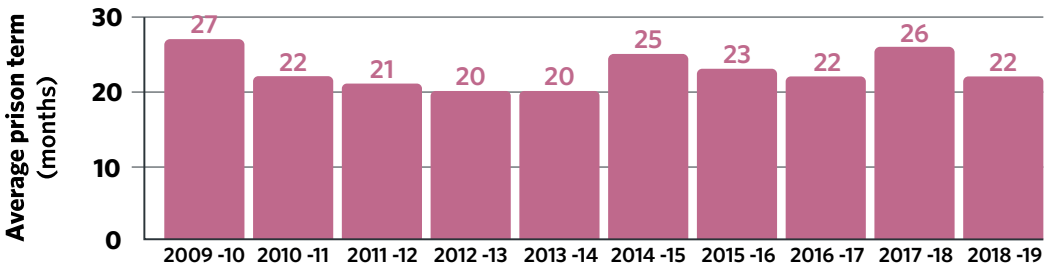
The average imprisonment length across this range of driving offences is much less than the average sentence imposed in Victoria for the very serious offence of culpable driving causing death – this is because the NSW data only includes deaths caused by negligence or dangerous driving, which attracts a less-severe sanction.

USEFUL TIP

Each state in Australia is responsible for developing its own criminal laws and punishments for offenders. As a consequence:

- The mens rea and actus reus elements for similar offences will vary slightly between states.
- Each state parliament will set different guidelines regarding the minimum and maximum sentences for each offence.
- Every state will record different statistics about crime, punishment and recidivism.

For these reasons, state-to-state comparisons can be difficult and data should be treated with caution when looking at crimes across Australia.



Source: New South Wales Bureau of Crime Statistics and Research: BOCSAR (2019)

Figure 6 The average length of imprisonment (months) per year for people sentenced for driving causing death offences (excluding manslaughter) in NSW (2009-2019)

Possible impact of the offence on individuals and society (Culpable driving) 1.2.7.15

Impact on victim's family 1.2.7.15.1

OVERVIEW

The shock of abruptly losing a loved one by road trauma is immeasurable for the family and friends close to the victim. The impact of the victim's death comes without warning and can leave a huge hole in a family's life emotionally, socially and financially.

DETAILS

> Road trauma is a type of death that is random, unexpected and beyond control. It is a tragic event that may cause a range of painful emotional reactions, including a strange feeling of 'unreality' as the world goes on around you, while your own has been suddenly shattered.
>
> *Source:* Road Trauma Support Services – Grief following road trauma (2018)

Following the death of a family member as a result of culpable driving, friends and relatives may exhibit a variety of reactions, including (but not limited to):

- Shock, disbelief and/or denial.
- Fear, panic and/or anxiety.
- Guilt, anger and/or agitation.
- Extreme fatigue, exhaustion and/or loss of concentration.
- A sense of isolation and feelings of numbness.
- Difficulty making sense of things.

Another point to consider is the potential impact of those victims seriously injured in culpable driving cases. For example, for every one death on Australian roads, a further 30 people are hospitalised, meaning the true impact of reckless driving often extends to the costs and consequences associated with a family member who is seriously injured.

CASE STUDY

Queensland mother Anita Camilleri and her 3-year old daughter Aylah were involved in a serious crash that saw them sustain serious physical injuries and long-term stays in intensive care units in the hospital.

More than a year on from the accident, Camilleri and her family are still dealing with the immense trauma they were faced with as a result of the incident. For example, Mrs. Camilleri still attends multiple rehabilitation sessions on a weekly basis. She was also required to employ a nanny for the first 8 months following the accident to help take care of her daily responsibilities.

Source: ABC News – 'The ripple effect' of road trauma: The true toll is not just the deaths (2018)

Impact on offender 1.2.7.15.2

OVERVIEW

Culpable driving causing death has a large impact on the offender and their family.

DETAILS

Culpable driving causing death can often be devastating for an offender, who is burdened with the knowledge that, by reason of their own stupidity or extreme carelessness, an innocent person has died. The impact on the offender can include:

- **Mental health consequences** – such as regret, guilt and the development of serious mental conditions like depression, anxiety and PTSD.
- **Social consequences** – such as feeling isolated from others.
- **Imprisonment and loss of liberty** – as well as the grief and guilt that often accompanies the crime, the lengthy period of imprisonment adds to the immense impact on the offender by removing their liberty and freedom of movement.

CASE STUDY

***Khoja v The Queen* [2014] VSCA 9**

Riyaz Khoja pleaded guilty to culpable driving causing death (amongst other driving-related offences) and received a sentence of 8 years and 6 months (with a non-parole period of 5 years and 6 months). He had been travelling at 114km/h in a 60 zone, with one hand on the wheel and a blood-alcohol concentration (BAC) of between 0.088 and 0.108.

Khoja had five of his close friends as passengers. As he began to speed and zigzag across the road, each of his friends repeatedly told him to slow down and stop driving erratically. Khoja ignored the pleas of his friends and after losing control of the car collided with a power pole at extremely high speeds – killing one of the passengers and seriously injuring the other four.

Following the incident, Khoja's doctor referred him to a psychologist, whom he attended more than 20 counselling sessions with. According to his psychologist, Khoja had reported the following symptoms in response to the accident:

- He hardly slept, as he had become fearful of sleeping due to frequent dreams of the accident.
- He had memories and visions of the accident, including hearing the screams of his friends.
- He often woke up sweating and crying, and was afraid to close his eyes.
- He was spending approximately 20 hours per day in his bedroom with the curtains closed.
- He felt unable to ride in a car because of his feelings of anxiety.
- He saw images in his mind of the face of his deceased friend.
- He had become socially isolated and was experiencing frequent suicidal thoughts.

On the basis of the psychological report, the court found that Mr. Khoja had developed PTSD and depression as a result of the accident.

CASE STUDY

***McGrath v The Queen* [2018] VSCA 134**

McGrath pleaded guilty to culpable driving causing death (amongst other driving related offences) and received a sentence of 8 years and 9 months (with a non-parole period of 6 years). He had been travelling between 137-147 km/h on a thin road (with a 100km/h speed limit). He also had a range of prior dangerous driving convictions as well as a high BAC at the time of the crash.

McGrath had lost control of the vehicle coming around a slight bend in the road, and after attempting to break for roughly 52.3 metres, he ended up veering into the oncoming lane and colliding head on with another vehicle at an estimated speed of 90-100km/h. The driver of the other vehicle died immediately on impact, while McGrath's passenger (a close friend) suffered serious injuries, including a fractured ulna, a collapsed lung, a broken ankle, a broken wrist and a fractured kneecap.

The court found the effects of the incident on McGrath were significant. As well as a range of physical injuries, including mild to moderate traumatic brain injury, he also developed severe depression, anxiety and adjustment disorder following the incident.

Impact on society 1.2.7.15.3

OVERVIEW

The social impacts of culpable driving can also be devastating. For example, according to statistics published by the National Road Safety Strategy, the annual costs of road crashes generally throughout all of Australia is estimated to be at least $27 billion. However, outside of the purely economic costs involved, what other societal impacts might culpable driving have?

DETAILS

Throughout the 20th century increasing numbers of motor vehicles populated Australian roads and road trauma grew as a major public health concern. Road trauma was considered as an inevitable part of the 'costs and benefits' associated with economic development and growth.

However, academic analysis surrounding road trauma today indicates a shift away from viewing accidents as an unavoidable byproduct of growth, to now looking at them as an indication of insufficiently designed development and a lack of thoughtful protection of society.

Source: Borowy, I., Road Traffic Injuries: Social Change and Development (2013)

This is evidenced in campaigns such as 'Towards Zero' – a partnership between government bodies (TAC, police, etc) and other expert institutions that is aimed at reducing deaths and injuries on Victorian roads through research driven protective strategies. Towards Zero point to a range of design solutions to minimise road trauma:

- Safer road designs, including improved asphalting and roundabouts.
- Increasing safety barriers on rural roads (in 2017, such safety barriers were hit more than 1700 times).
- Improving the design and safety of the cars on the roads.
- Educating the public on safer driving behaviours.

Source: Road Safety Victoria – Towards Zero (2019)

Increased focus on reducing the road toll and culpable driving has therefore seen a societal-level change in the way our government agencies attempt to curb dangerous driving in our communities. This has had a range of benefits, including (but not limited to):

- Prompting technological innovations, and improved techniques for measuring and preventing accidents (consider the case study into LIDAR technology).
- More detailed analysis and targeted research and education.
  - For example, the TAC has learned the majority of drink driving offenders are male (84%), while instances of drink driving decrease as the person gets older (linear decrease from 21 onwards). This allows education efforts to be targeted more closely with those who will benefit the most from them (such as males and young people), while also allowing the parliament to pass laws that reflect this insight (such as the probationary driver system that requires inexperienced drivers to have a BAC of 0.00).

Source: Transport Accident Commission – Drink Driving Case Study (2008)

CASE STUDY

Victoria trials new 'LIDAR' road safety technology in Australian-first

Victoria is trialling a new form of technology in efforts to better analyse crashes and their causes. The new technology, which uses specialised light detection and ranging (LIDAR) sensors, will be fitted at the intersection of Williamstown Road and Somerville Road in Yarraville and will be able to record all crashes and near misses that occur in the intersection.

The project is funded through a state government grant and will provide real-time warnings of upcoming dangers to all vehicles with connected technology. Victorian Minister for Roads, Roads Safety and TAC, Jaala Pulford says that: "Victoria has always led the way in connected and automated vehicle technology, this is another way we're making our infrastructure and policies support the uptake of this life-saving technology."

Source: Murphy, I., Victoria trials Australia-first road safety technology (2019)

Keen to learn more?

Sentencing Snapshot, Culpable Driving Causing Death, https://www.sentencingcouncil.vic.gov.au/snapshots/225-culpable-driving-causing-death

New South Wales Bureau of Crime Statistics and Research, https://www.bocsar.nsw.gov.au/

QUESTIONS

3F Culpable driving: Trends & social impact

LEVEL 1:
Define and understand

1. Based on the sentencing trends in Victoria for culpable driving causing death between 2013-2018, which of the following statements is correct?

- **A.** The most common sentence length was between 4-5 years.
- **B.** The most common sentence length was between 6-7 years.
- **C.** The most common sentence length was between 5-7 years.
- **D.** The most common sentence length was between 7-8 years.

2. Based on the sentencing trends in Victoria for culpable driving causing death between 2013-2018, which of the following statements is incorrect?

- **A.** The 2015-2016 financial year had the lowest number of people sentenced in the higher courts of Victoria for a principal offence of culpable driving causing death.
- **B.** The majority of people sentenced for culpable driving causing death in Victoria in 2016-2017 received a term of imprisonment.
- **C.** A total of 6 people received a prison sentence exceeding 9 years for culpable driving causing death.
- **D.** The average length of imprisonment that was imposed on individuals found guilty of culpable driving causing death across this period was less than 8 years.
- **E.** None of the above.

3. Which of the following statements best completes the sentence.

In the ten-year period between 2009-2019, the percentage of individuals in NSW who received a term of imprisonment for driving causing death offences (excluding manslaughter) was

- **A.** more than 75%.
- **B.** less than 75%.
- **C.** more than 50%.
- **D.** less than 50%.

LEVEL 2:
Describe and explain

4. With reference to *Khoja v The Queen* [2014], briefly describe two negative impacts that culpable driving causing death could have on the offender. (3 MARKS)

5. With reference to the statistics provided, identify the most common length of imprisonment imposed on persons found guilty of culpable driving causing death in Victoria between the years of 2013-2019. Is the sentencing of this offence likely to become more or less harsh? Give reasons for your answer. (4 MARKS)

LEVEL 3:
Apply and compare

6. At a major road safety conference in 2018, one presenter argued that: 'the way we as a society think about road trauma nowadays is markedly different to how Australians thought about it earlier in the 20th century when the volume of cars on our roads grew dramatically'.

- **a)** With reference to the 'Towards Zero' campaign in Victoria, explain what the presenter was referring to in regards to a 'markedly different' societal approach to road trauma. (3 MARKS)
- **b)** Other than prompting technological innovation, describe one way this change in societal approach to road trauma has influenced the government's approach to curbing dangerous driving. (3 MARKS)

Unit 1, Area of study 3

CHAPTER 4

CIVIL LIABILITY

04

From time-to-time, individuals and businesses will suffer injury or loss. Consider:

- A pedestrian injured by a careless driver, resulting in physical pain, medical expenses and loss of income while she recovers in hospital.
- A construction business that builds a new home for a family, but is unpaid for its work.
- A landlord who has her rental property damaged by a tenant.
- A woman who is denied job opportunity because she is pregnant and suffers emotional and financial harm as a result of this discrimination.

The civil justice system is designed to protect individuals and businesses from such loss. A wide range of civil laws provide ways for injured parties to take action against those who cause their injury.

By the end of this chapter, you will know:

- What civil law is, including examples of civil laws that impact upon the lives of individuals and businesses in Victoria.
- Who can take legal action to seek compensation for injury or loss.
- Who can be held legally responsible for causing such loss.

UNIT 1 AOS 3 – KEY KNOWLEDGE

- the purposes and types of civil law
- key concepts of civil law, including:
  - breach
  - causation
  - loss
  - limitation of actions
  - the burden of proof
  - the standard of proof
- possible plaintiffs and defendants to a civil dispute
- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

UNIT 1 AOS 3 – KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about civil law
- explain the purposes and key concepts of civil law
- classify civil law according to its type
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

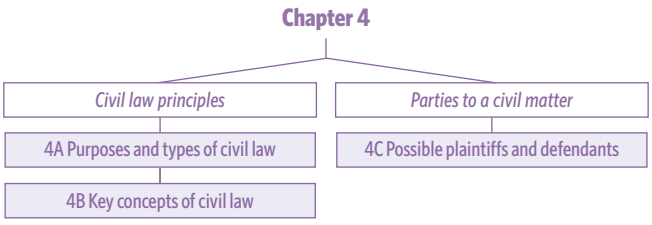


Image: Elnur/Shutterstock.com

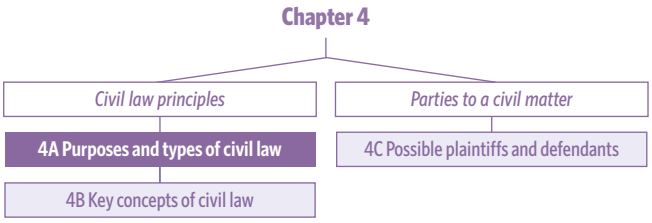
4A Purposes and types of civil law

Consider the following hypothetical scenarios:

- **Your friends spread lies about you online which damage your reputation.**
- **You find that you are no longer getting shifts at work since your last birthday because you are now more expensive to pay.**
- **You purchase a new phone and later find it is broken. When you contact the business that sold it to you they refuse to refund or exchange it.**
- **You enter a new phone contract for 2 years with unlimited calls, texts and 25 gigabytes of data per month. However, the company only provides half of what they promised.**
- **You injure yourself at work because your employer failed to clean up an oil spill.**

In all of these situations your personal rights have been infringed but criminal law does not seem to apply. There must be a way to ensure your rights are upheld and you are compensated for any loss.

This is the role of **civil law,** which refers to laws that are made by judges (common law) or made by parliament (statute law or legislation) that aim to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.



In this lesson you will be learning about the purposes and types of civil law. Civil law exists to protect the rights of individuals in their private dealings with each other. The police or prosecution will not initiate cases concerning civil law, instead the individual who believes their rights have been infringed is required to bring a claim.

Study design dot point

- The purposes and types of civil law

Key knowledge units

Purposes	1.3.1.1
Types	1.3.1.2

Purposes 1.3.1.1

OVERVIEW

Civil law aims to uphold the rights of individuals. If an individual's rights have been violated, they may take the matter to court or other institutions to obtain a remedy.

DETAILS

The purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss. In civil law, the plaintiff will be restored to their original position through a remedy. **A remedy is** an order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered.

However, achieving this purpose is not always possible. Consider an individual who has been hit by a car and has lost the ability to walk – can they ever be restored to their original position? In these situations, monetary compensation aims to restore them as close as possible. Lost income, medical expenses, funds lost when a person buys faulty goods - these can be adequately compensated for with money. Can emotional and physical suffering? (See Lesson 8F for further discussion of this point).

USEFUL TIP

The purpose of civil law is **not** to punish the defendant. The purpose is to restore the plaintiff to their original position. However, sometimes restoring the plaintiff to their original position may involve punishing the defendant in some way (such as a large amount of damages). Use of remedies to punish a defendant is not common, and is a controversial and debated use of civil remedies among legal experts.

Types 1.3.1.2

OVERVIEW

There are many different types of civil law and the specific rights that are protected in a civil matter depends on which area of civil law the dispute falls under. In Chapter 5 you will explore some of the types of civil law, including negligence, defamation and Australian consumer law, in more detail.

DETAILS

Some of the types of civil law include (but are not limited to):

- **Workplace law:** regulates the relationship between employees and their employers and includes matters such as pay and working conditions. This is enforced by numerous Acts including the *Fair Work Act 2009* (Cth).
- **Contract law:** aims to protect the rights of parties to make enforceable agreements. This is enforced by numerous Acts including the *Goods Act 1958* (Vic).
- **Family law:** guides important decisions surrounding the care of children and division of assets when families have broken down. This is enforced throughout Australia by the *Family Law Act 1975* (Cth).
- **Defamation law:** protects a person's reputation from being damaged by lies. This is enforced in Victoria by the *Defamation Act 2005* (Vic).
- **Negligence law:** requires certain individuals to take reasonable care in preventing foreseeable damage from occurring. This is enforced in Victoria by the *Wrongs Act 1958* (Vic).
- **Consumer protection laws:** ensures that individual's purchasing goods and services from businesses do not have their rights infringed. This is enforced by numerous Acts throughout Australia, but primarily by *Australian Consumer Law*.
- **Wills and probate law:** concerned with the creation and enforcement of wills. This is enforced in Victoria by the *Administration and Probate Act 1958* (Vic).
- **Property law:** helps individuals buy, sell or rent houses or deal with commercial property leases. This is enforced in Victoria by the *Property Law Act 1958* (Vic).

Keen to learn more?

Department of Justice, https://www.justice.vic.gov.au/justice-system/laws-and-regulation/civil-law

Victoria Legal Aid, https://www.legalaid.vic.gov.au/about-us/what-we-do/civil-justice

Victoria Legal Aid, https://handbook.vla.vic.gov.au/handbook/2-types-of-matters-that-may-be-assisted/state-civil-law-matters

QUESTIONS 4A Purposes and types of civil law

LEVEL 1:
Define and understand

1. What is the main purpose of civil law?

A. To punish the defendant

B. To restore the plaintiff to their original position

C. To show society's disapproval of the defendant's conduct

D. To provide monetary compensation to individuals who have suffered

2. Which of the following is not a type of civil law?

A. Road rules

B. Wills and probates

C. Family law

D. Workplace law

LEVEL 2:
Describe and explain

3. Describe the purpose of civil law. (2 MARKS)

4. Explain the term 'civil law'. Provide an example of two types of civil law. (3 MARKS)

LEVEL 3:
Apply and compare

5. Alice purchased a new couch online from Happy Times, a furniture manufacturing company. When the couch arrived at Alice's house she noticed multiple large rips in the pillows. Alice contacted Happy Times about the fault yet they refused to provide her with an exchange or a refund. Alice contacted the police about the matter, resulting in the arrest of Happy Times for breaching Australian Consumer Law. Happy Times was found guilty for infringing Alice's rights. In order to return Alice to her original position, Happy Times was sentenced to a term of 5 years imprisonment.

Identify two errors in the scenario and provide the correct procedure. (4 MARKS)

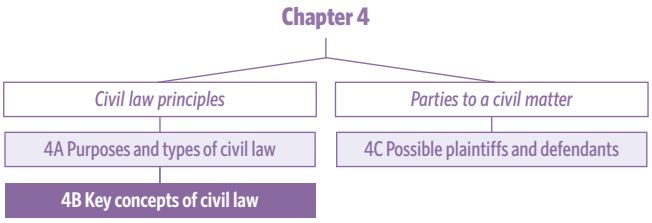
LEVEL 4:
Discuss and evaluate

6. Jasmine's negligence resulted in Bailey requiring ongoing medical treatment and permanently losing his vision. Upon providing Bailey with a remedy for his suffering, the Judge stated 'Bailey can never be returned to his original position, so monetary compensation is the only remedy that can aid him'.

With reference to Bailey, discuss the ability of remedies to achieve the purpose of civil law. (4 MARKS)

4B Key concepts of civil law

To explore how civil proceedings are conducted in the Victorian justice system, you must first understand critical terminology and concepts within civil law.



In this lesson you will be learning about key concepts within the civil justice system, as identified in Figure 1.

Study design dot point

- Key concepts of civil law, including:
  - Breach
  - Causation
  - Loss
  - Limitation of actions
  - The burden of proof
  - The standard of proof

Key knowledge units

Breach	1.3.2.1
Causation	1.3.2.2
Loss	1.3.2.3
Limitation of actions at civil law	1.3.2.4
The burden of proof at civil law	1.3.2.5
The standard of proof at civil law	1.3.2.6

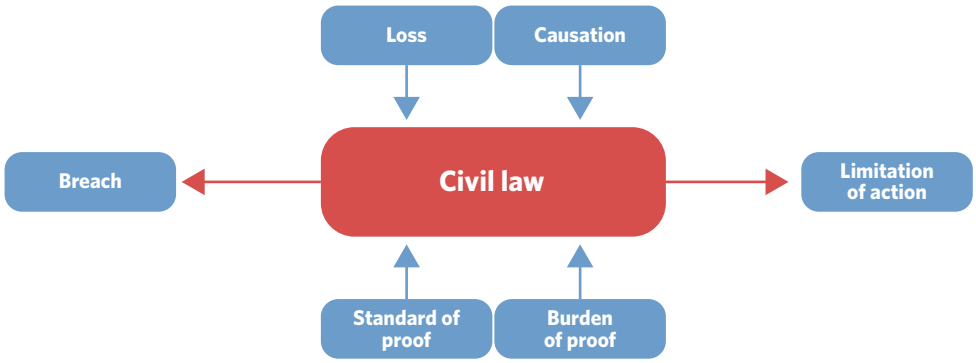


Figure 1 Key concepts within civil law

Breach 1.3.2.1

OVERVIEW

When a person or company fails to abide by civil law, this is described as a **breach** of the law. This means that there has been a failure to perform a legal obligation owed to a person or business.

DETAILS

Because civil law protects certain individual rights, whenever these rights have been infringed it means a civil law has been breached. It is an element of legal action in civil law that there has been a relevant **breach of legislation or common law** – some act (or omission) that represents a failure to meet some legal obligation.

Civil law covers many different areas of individual rights and what constitutes a 'breach' of the law will vary depending on the nature of the legal rights that have been infringed.

For example:

- A breach under anti-discrimination law means a party has infringed equal opportunity legislation, such as a business dismissing a worker because she is pregnant – they have therefore **breached** the *Sex Discrimination Act (1984)* (Cth).
- A breach under contract law means one party has failed to adhere to agreements made under a written contract, such as a homeowner failing to make a payment to a builder renovating her home that was required under the contract – they have therefore **breached** the contract.
- A breach under negligence law includes a violation of the duty of care that one party owes to another, such as a doctor not exercising enough care when performing surgery – they have **breached** their responsibility to ensure they do not cause harm or loss to a person under their care.
- A breach under defamation law means one party has communicated information which is defamatory and identifies another party – they have **breached** the law which prevents the communication/publication of false material.

Causation 1.3.2.2

OVERVIEW

For a party to be found to be legally responsible for loss suffered by another (and therefore legally required to provide a remedy to restore them to the position they were in before they suffered the loss) it must be possible to say, on the balance of probabilities, that they **caused** the loss.

DETAILS

Similarly to criminal law, if the law is going to hold someone responsible for a particular outcome, it must be possible to say that **they did indeed cause the loss**. To establish a claim for damages (monetary compensation), the plaintiff needs to show that the defendant's breach caused (or at least contributed to) the loss suffered.

How have the courts developed the law of causation?

- In most cases, a simple application of the **'but for'** test will resolve the question of causation in civil law. That is, 'but for' the defendant's actions, would the plaintiff have suffered the loss? If yes, the defendant is not liable. If no, the defendant is likely to be found liable.
- Alternatively, the defendant will not be liable if the damage would, or could on the balance of probabilities, have occurred anyway, regardless of the behaviour of others.

However, there are some situations where it becomes difficult to establish causation. For example:

- If a plaintiff slips in a puddle outside a shopping centre and breaks her arm, is the supermarket liable for the injury suffered?
- If a doctor negligently approves an injured plaintiff to work in a manual labour job and the plaintiff aggravates his back injury by carrying heavy loads, is the doctor liable?
- If a plaintiff buys a faulty product from a clothing store and develops a rash from wearing the clothing, but the product was made faulty by the manufacturer rather than the store that sold it, who caused the injury and is therefore liable?

Causation may also be problematic in cases where there exists more than one possible cause of an injury. Generally speaking, it will be sufficient if the defendant's breach is the main or leading cause of the injury/loss.

Sometimes it may be possible for a defendant to avoid liability if they can prove that their breach wasn't the true cause of the loss – that is, that there has been a break in the chain of causation.

Loss 1.3.2.3

OVERVIEW

For most causes of action in civil law, a plaintiff must have suffered **loss** in order to be granted a remedy by the courts. This is part of what the plaintiff must prove.

DETAILS

Examples of types of loss which may be remedied by an action in civil law:

- A loss of future earnings for a sports star who has been injured and can no longer play.
- A loss of reputation for a celebrity who has been defamed by false articles in a magazine.

- Loss of enjoyment of life due to pain, suffering and mental anguish.
- Damage to property caused by a dead tree that falls on a house and which the local council should have removed.
- Injury or death (to the plaintiff or a close family member, or even the trauma from witnessing an accident causing injury or death).

USEFUL TIP

In a SAC/assessment task or exam, be careful not to repeat the legal terminology you're trying to define. For instance, avoid descriptions such as 'causation requires the plaintiff to prove the defendant caused their injury.'

A better way is to use synonyms (the exemplar responses in this text demonstrate how this can be done). For example, you could describe 'loss' as 'the plaintiff having suffered some financial, emotional and/or physical injury or deprivation.'

Limitation of actions at civil law 1.3.2.4

OVERVIEW

A person who feels that their rights have been breached under civil law must initiate a civil action within a set period of time, depending on the law that applies to that particular civil wrong. This is known as the **limitation of actions**.

DETAILS

The purpose of the limitation of actions is to ensure that civil cases are resolved in a timely manner. This means that evidence is readily available and that the defendant does not have cases pending for an unlimited amount of time.

The limitation of action laws are statutory (that is, passed by parliament, who can also change the law to amend the limitations that will apply). 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 types of cases must be initiated.

Table 1 Limitation periods for different types of civil law

Type of civil law	Limitation period
Defamation	1 year
Negligence	3 years
Contract	6 years

The burden of proof at civil law 1.3.2.5

OVERVIEW

As you learned in Lesson 2C, the burden of proof refers to the responsibility of proving the facts of the case.

DETAILS

Burden of proof in civil trials

In a civil trial, **the plaintiff has the burden of proving their claim** and showing that the defendant was liable for their harm or injury, on the balance of probabilities. The plaintiff must gather evidence to support their claim. It is not the responsibility of the defendant to disprove liability:

- This is seen to be **fair** in the civil justice system because the plaintiff is the party bringing the action and alleging that the defendant has breached civil law, so they should have to prove the case.
- It would be **unfair for the law to assume a defendant was responsible** for another party's injury and require that defendant to prove they didn't cause injury.

There are some situations in which the burden of proof will be reversed. If the defendant wishes to raise a particular defence (for example, claiming that the plaintiff's own negligence contributed to their injury), they bear the burden of proving the facts that support their defence. This is described in further detail in Lesson 5A.

USEFUL TIP

It is important to remember that the burden of proof does not lie with the prosecution in civil trials – only criminal trials. There is no prosecution in a civil trial. The parties to a civil trial are the plaintiff and the defendant. The plaintiff has the burden of proof.

The standard of proof at civil law 1.3.2.6

OVERVIEW

As you learned in Lesson 2C, the standard of proof refers to the strength of evidence required for the decision maker to reach a verdict in a case.

DETAILS

Standard of proof in civil trials

In civil trials, the plaintiff must prove that the defendant is liable for breaching civil law **on the balance of probabilities.** This is a lower standard of proof than that required in criminal trials ('beyond reasonable doubt').

LEGISLATION

***Evidence Act 2008* (Vic)**

Section 140 – CIVIL PROCEEDINGS — STANDARD OF PROOF

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

Meaning of 'on the balance of probabilities':

- This standard of proof means that it is 'more probable than not' that what the plaintiff is claiming is true.
- The court weighs up the evidence and decides which version of events is 'most probably true'.

Who decides whether or not the defendant is liable?

- In the Magistrates' Court, a magistrate decides on the verdict.
- In the County Court and Supreme Court, a judge or, in rare cases, a jury of six will decide whether or not the defendant is liable.

Keen to learn more?

Judicial College of Victoria, Civil Juries Charge Book – 1.5 Burden and standard of proof, http://www.judicialcollege.vic.edu.au/eManuals/CJCB/45322.htm

***Limitation of Actions Act 1958* (Vic),** http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/loaa1958226/

QUESTIONS 4B Key concepts of civil law

LEVEL 1:
Define and understand

1. Fill in the blank spaces:

Before a person can be found to have _____ a civil law, the plaintiff in a civil dispute will usually have to prove _____ that the defendant's actions _____ them to suffer injury or _____. The plaintiff must ensure that they initiate a claim within the _____. They will have the onus of proving their claim, as the plaintiff carries the _____ in a civil trial.

A. caused; beyond reasonable doubt; lead; damage; limitation period; standard of proof

B. breached; on the balance of probabilities; caused; loss; limitation period; burden of proof

C. breached; beyond reasonable doubt; caused; loss; year; burden of proof

D. violated; on the balance of probabilities; caused; breach; month; standard of proof

2. Which of the following is the best definition of the term 'breach' in civil law?

A. Pain or injury suffered by the plaintiff as a result of the defendant's actions.

B. The requirement that the plaintiff prove that there was a direct link between the actions of the defendant and the loss that they suffered.

C. When a person does not abide by the civil law by failing to perform a legal or moral obligation owed to another person or to the public at the time.

D. A violation of the law.

3. Which of the following is not true of the limitation of actions?

A. The limitation of action laws are statutory.

B. The limitation period ensures that evidence is readily available and the defendant does not have cases pending for an unlimited amount of time.

C. 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.

D. The limitation periods for different civil wrongs are fixed and cannot be changed by parliament.

4. What is the limitation period for a claim of defamation?

A. 2 years

B. 6 years

C. 3 years

D. 1 year

5. Sam operates a small business and has recently been informed that a civil case has been initiated against him by a former employee. Sam is worried about having to go to court and prove that he did not breach civil law. Who has the burden of proof in Sam's case?

A. Sam

B. The plaintiff

C. The prosecution

D. The judge

6. Emily is attempting to sue a food manufacturing company after finding a decomposing snail in a tub of ice cream that she bought from her local convenience store and getting very sick afterwards. Emily was told by a friend that she will have to prove, beyond reasonable doubt, that the manufacturer did not take reasonable measures to ensure that no harm would come to consumers. What is the standard of proof in a civil trial?

A. On the balance of probabilities.

B. Beyond reasonable doubt.

C. Beyond considerable doubt.

D. In all likelihood.

LEVEL 2:
Describe and explain

7. Describe the term 'breach' and provide an example of a breach of civil law. (2 MARKS)

8. Jason works for a company doing manual labour and is required to walk back and forth between the production building and the loading dock each day. Health and safety laws for the workplace require that companies maintain certain standards for checking machinery and ensuring that there are no safety hazards for workers. One day Jason is rushing to the loading dock when he slips in a puddle created by a leaking machine and severely injures his back. Jason was rushing at the time because his boss was pressuring him to work faster and said that he could run between the production facility and the loading dock if it would help.

Describe the term 'causation' in civil law and explain how the court might determine whether or not the defendant caused the plaintiff's injury in this case. (3 MARKS)

9. Explain the limitation of actions and provide one example of the limitation period for one type of civil wrong. (3 MARKS)

10. Sue is initiating a civil claim for negligence against her local council after a tree in the park behind her house fell and caused her roof to collapse. Sue is not familiar with civil procedures and does not know who is responsible for proving the case, or to what extent the case must be proved.

Outline the burden and standard of proof in relation to Sue's case. (2 MARKS)

LEVEL 3:
Apply and compare

11. The following information relates to Pamela's case in the County Court:

- Pamela is the plaintiff in a defamation claim against a local newspaper.
- Pamela believes that the standard of proof in civil cases is more strict than in criminal cases.
- The publication of the defamatory material occurred six months ago and Pamela is worried that she should have initiated a claim earlier. She does not understand how the limitation of actions operates.

a) Who has the burden of proof in this case? Explain why this is fair. (2 MARKS)

b) Is it true that the standard of proof is more strict in civil cases than criminal cases? Explain your answer. (3 MARKS)

c) Identify the limitation period for a defamation claim and advise Pamela what will happen if she attempts to bring a claim after this set time period. (3 MARKS)

12. The case of *YZ (a pseudonym) v The Age Company Limited* [2019] VCC 148 was a negligence case involving plaintiff 'YZ' claiming damages for psychological injuries sustained while employed over a ten-year period from 2003 to 2013 as a journalist with The Age. It was alleged that as a crime reporter, YZ was exposed to trauma and vicarious trauma in investigating and reporting distressing crime, injury and death scenes. She alleges that The Age:

- failed to have a system in place to enable her to deal with the trauma of the work;
- failed to intervene when she or others complained;
- failed to provide counselling and support from qualified peers;
- failed to allocate her to other appropriate reporting; and
- transferred her in April 2010 to Supreme Court reporting after she had complained of being unable to deal with the trauma of being a crime reporter.

She claims to have suffered Post-Traumatic Stress Disorder (PTSD) as a result of the exposure. Judge O'Neill of the County Court found in favour of the plaintiff and she was awarded $180,000 in damages.

Source: County Court of Victoria (2019). *YZ (a pseudonym) v The Age Company Limited* [2019] VCC 148.

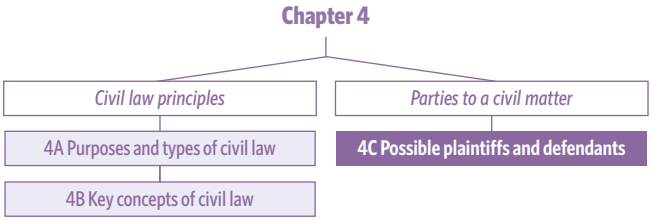
a) How might the defendant have breached their duty of care to the plaintiff in this case? In your answer, explain what is meant by the term 'breach' in civil law. (2 MARKS)

b) The defendant's legal team might have argued that the trauma YZ experienced was a natural part of the job, and that it was the plaintiff's disposition that contributed to her psychological injuries and not the conduct of the company. How might the defendant have directly caused the plaintiff's loss in this case? In your answer, explain what is meant by the term 'causation'. (2 MARKS)

c) Explain the term 'loss' with reference to the case. (2 MARKS)

4C Possible plaintiffs and defendants

Civil disputes involve one or more parties who feel that their rights have been infringed bringing a case against another party who they believe is legally responsible for their loss or suffering. In civil cases, the parties involved are known as the plaintiff and the defendant.



In this lesson you will be learning about the different individuals and organisations that can be plaintiffs and defendants in a civil dispute.

Study design dot point

- Possible plaintiffs and defendants to a civil dispute

Key knowledge units

Possible plaintiffs	1.3.3.1
Possible defendants	1.3.3.2

Possible plaintiffs 1.3.3.1

OVERVIEW

A plaintiff is the party bringing the action in a civil dispute. This means that they have the **burden of proof** and must prove their case **on the balance of probabilities** by presenting arguments and evidence.

DETAILS

Any individual, company or institution that believes their rights have been infringed in some way may initiate civil proceedings as a plaintiff.

In some cases there may be more than one plaintiff to a civil proceeding. These situations are known as representative proceedings (or a class action). **A representative proceeding is** brought on behalf of at least seven people where the incident involves the same or related circumstances and raises common factual and legal implications. Representative proceedings are conducted in the Supreme Court and involve hearing each individual case as one group.

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 such a case representative proceedings are appropriate.

CASE STUDY

First banking class action post Royal Commission filed

Maurice Blackburn has commenced representative proceedings in the Federal court on behalf of thousands of individuals who, after 1 January 2011, were given unsuitable loans by Westpac in breach of its responsible lending obligations. This comes after the publication of the Hayne Royal Commission Report which found a high degree of misconduct by some banks.

Following this report, the Australian Securities and Investments Commission (ASIC) commenced an unsuccessful proceeding against Westpac. In this case, Westpac accepted that between December 2011 and March 2015, approximately 10,500 loans shouldn't have been approved through their automated process and instead should have been manually assessed. Despite this, Westpac denied that the loans provided were unsuitable for customers.

The representative proceeding aims to compensate for the losses that have been suffered or are ongoing as a result of Westpac's conduct. The amount sought is anticipated to be tens of millions of dollars.

Source: Maurice Blackburn Lawyers (2019)

Possible defendants 1.3.3.2

OVERVIEW

A defendant is the party defending their case in court. Any individual, company or institution that is accused of a civil wrong may be the defendant to a civil claim in court.

DETAILS

In some situations, there may be multiple individuals or groups that could be a possible defendant. Generally, the defendant to a civil dispute will be the person or group that was responsible for breaching the plaintiff's rights.

However, in some instances the defendant in a civil case may not be directly responsible for breaching the plaintiff's rights. **Vicarious liability refers to** accountability being imposed upon a defendant (often a company or institution) as a result of the actions of another (often an employee or representative of the company or institution), despite the employer not being at fault itself.

For example:

- Employers can be held legally responsible for acts of discrimination or harassment that occur in the workplace between employees.
- Schools can be held legally responsible for the actions of teachers in relation to matters that occur within the school.
- Hospitals can be held legally responsible for the actions of doctors.
- An individual can be held legally responsible for the actions of an agent employed acting on their behalf to carry out a transaction with a third-party.

Table 1 Possible plaintiffs and defendants to a civil dispute

Possible plaintiff or defendant	Example
The government	The Commonwealth government has recently introduced a financial plan to assist Australian households. This plan involves various services for which the states are usually responsible. However, the Commonwealth government has bypassed the states in this process, prompting the Victorian government to commence civil proceedings against the Commonwealth on the basis of a breach of constitutional powers. In this situation: • **The Victorian government is the plaintiff.** • **The Commonwealth government is the defendant.**

cont'd

Possible plaintiff or defendant	Example
Patients	Bethany has noticed that she has developed a severe rash on her leg and books a doctor's appointment to have it checked out. Keely, her doctor, explains that the rash is infectious and that she must have an expensive operation immediately to remove the rash before it spreads. After going through this process, it is discovered that Keely incorrectly diagnosed the rash and it was easily treatable. Bethany commences civil proceedings against Keely for this misinformation and to regain the financial loss for the operation. In this situation: • **Bethany is the plaintiff.** • **Keely is the defendant.**
Employees	Jackson has noticed that Stacey, his boss, has been underpaying him for the last four months. When Jackson confronts Stacey about the issue she refuses to provide the amount he has been underpaid and says she will fix the issue for the future. Jackson feels that his rights have been infringed and commences civil proceedings to recover the unpaid amount. In this situation: • **Jackson is the plaintiff.** • **Stacey is the defendant.**
Partners/spouses	Harry and Kelsey are in the process of finalising their divorce after being married for 4 years. Out of rage, Kelsey posts on Facebook that Harry abused her despite this never happening. Consequently, Harry's friends start ignoring him and he feels that his reputation has been damaged by this lie. Harry commences civil proceedings for the harm Kelsey has caused to his reputation. In this situation: • **Harry is the plaintiff.** • **Kelsey is the defendant.**
Students/parents	Maddison went on a school excursion to the zoo where they had organised a catered lunch in the butterfly enclosure. On her excursion permission form, Maddison informed the school that she is allergic to peanuts and provided them with her epipen. However, the school forgot to inform the catering company of Maddison's allergy which resulted in her consuming peanut sauce. Maddison has an anaphylactic reaction and the staff on the excursion realise they left the epipen at the school. Maddison is rushed to hospital and has a near death experience. Maddison's parents commence civil proceedings against the school on her behalf. In this situation: • **Maddison's parents are the plaintiffs.** • **The school is the defendant.**
Households	Sally organised for a new soap dispenser to be installed in her bathroom by Awesome Installments Pty Ltd. Following this, Sally slips on a soap spill due to an improperly installed dispenser. Sally feels that the dispenser should have been more carefully and safely installed to ensure this did not happen. Sally has commenced civil proceedings against Awesome Installments to recover her medical costs and fees involved in replacing the dispenser. In this situation: • **Sally is the plaintiff.** • **Awesome Installments Pty Ltd is the defendant.**

Keen to learn more?

Supreme Court of Victoria, https://www.supremecourt.vic.gov.au/law-and-practice/class-actions

County Court of Victoria, https://www.countycourt.vic.gov.au/going-court/self-represented-litigants/trial

QUESTIONS 4C Possible plaintiffs and defendants

LEVEL 1:
Define and understand

1. Guy has worked for Greener Ltd for the past 5 years and is involved in producing fake grass. His role is primarily automated and involves feeding material into a machine which then creates the product ready for sale. Recently he has noticed one of the conveyor belts is a bit rusty and he informed his manager of the issue. Three weeks later, the rusted conveyor belt broke and fell on Guy's legs, leaving him paralyzed from the waist down. Guy has contacted a lawyer about the incident and has commenced civil proceedings against Greener Ltd.

Who is the plaintiff in this situation?

A. Greener Ltd

B. Guy

C. The lawyer

D. The manager

2. Lucas is an employee at Magical Marketing Ltd and works in a small team to create campaigns for a number of their biggest clients. Recently, Lydia has been promoted into this team and Lucas does not feel like Lydia fits into their dynamic very well. Lucas has taken it upon himself to try and make Lydia resign as she is the only female in the group and therefore the least capable. Lydia has spoken to a lawyer about the situation who assists her to commence civil proceedings against the company for workplace harassment. Who is the defendant in this situation?

A. Lucas

B. Lydia

C. Magical Marketing Ltd

D. The lawyer

LEVEL 2:
Describe and explain

3. Describe the term 'plaintiff'. Provide two examples of possible plaintiffs to a civil dispute. (3 MARKS)

4. Describe the term 'defendant'. Explain how a situation may arise where the defendant is not directly responsible for breaching an individual's rights. (3 MARKS)

LEVEL 3:
Apply and compare

5. Justin recently moved to Australia and has been employed by a hairdressing company called Style n' Wave. In Justin's first month at the company he notices one of his coworkers, Jackie, whispering and laughing whenever he is around. This makes Justin uncomfortable going into work, especially when he is working with Jackie. Justin confronts Jackie about the situation and she tells him 'go back to where you came from'. Following the confrontation, Justin talks to his boss who explains there is nothing he can do as Jackie is their best employee. Justin wants to commence civil proceedings for workplace harassment.

Identify one possible defendant that Justin could commence proceedings against. Justify your response. (3 MARKS)

6. Billy and Chase are studying law at university together and have become good friends during their studies. Billy is getting frustrated as he works extremely hard and Chase does not, yet Chase always gets a better mark. Out of envy, Billy posts on social media that Chase always cheats on his assessments, knowing this is not true. One of the other students sees the post and informs their course director. As a result, their course director commences an investigation against Chase for academic misconduct. The course director finds these accusations to be false and Chase is very unhappy about the whole situation. Chase has just studied defamation at university and wants to take Billy to court for damaging his reputation

Identify who would be the plaintiff and who would be the defendant in this situation. ustify your response. (3 MARKS)

7. Hayley has invested in a company called Flair'd who specialise in gourmet food. She has been promised a return of $100 per month and is informed that she is one of 10 other investors in the company. However, the company has decided that they will only pay each investor $25 per month as they wish to retain more of their funds. After four months, one of the investors calls a meeting to discuss taking Flair'd to court in a 'representative proceedings' to obtain the returns they were promised.

Describe the term 'representative proceeding' and explain why this would be appropriate for this case. (4 MARKS)

REVIEW QUESTIONS

04 Civil liability

LEVEL 5: Bringing it all together

1. Read the following case:

> *Mirabella v Price & Anor* [2018] VCC 650
>
> The plaintiff Sophie Mirabella, former Member of the Commonwealth House of Representatives for the electorate of Indi, initiated a claim against Libby Price and Benalla Newspapers Pty Ltd after the publication of a defamatory article which alleged that the plaintiff had 'pushed' her opponent in the forthcoming general election, Cath McGowan.
>
> Mirabella claimed to have been:
>
> > Seriously injured in her feelings, her career and in her reputation both personally, as a politically active participant in the public arena and in her role within the community of North East Victoria.
>
> She also claimed that the defamatory article contributed to her loss in the 2016 general election. A jury found the defendants liable for defamation. In determining damages, Judge Macnamara of the County Court stated: 'This defamation has caused significant hurt to Mrs Mirabella's reputation.' The defendants were therefore found liable for defamation and the plaintiff was awarded $175,000 in damages.

a) Outline the burden and standard of proof in this case. (2 MARKS)

b) Identify and describe the type of civil law that Mirabella made a claim under in this case. (2 MARKS)

c) Identify the limitation of actions period for this type of civil law and explain any consequences for Mirabella if she had initiated a claim after this period. (3 MARKS)

d) Describe the terms 'causation' and 'loss' with reference to the case. (4 MARKS)

2. Eleanor, 85, was shopping in her local supermarket when she slipped in a puddle of juice that another customer had spilt. The juice had been on the floor for almost an hour and the supermarket employees had not yet cleaned it up. Eleanor suffered serious injuries as a result of the fall, including concussion and a broken wrist. She was required to undergo surgery on her wrist, resulting in substantial medical expenses.

Eleanor successfully sued the supermarket for their negligence in failing to clean up the spill. The County Court found that the supermarket had breached the duty of care that they owed Eleanor as a customer, and was therefore ordered to pay damages of $110,000 to compensate Eleanor for her medical bills, pain and suffering.

a) Identify the plaintiff and the defendant in this case. (2 MARKS)

b) In order for a defendant to be found liable for a civil wrong, it must be proven that they caused injury to the plaintiff. With reference to the 'but for' test, explain how the supermarket caused Eleanor to suffer loss or injury. (2 MARKS)

c) Outline the purpose of civil law and discuss whether it was achieved in this case. (4 MARKS)

Unit 1, Area of study 3

CHAPTER 5

TYPES OF CIVIL DISPUTES

05

The purpose of civil law is to uphold individuals' rights, such as the right to be treated with care by a professional (your doctor or a builder renovating your home, for example) and the right to have your reputation protected from an unfair attack.

But not all physical, emotional or financial injury to a person or business results in compensation, so what does the law require a plaintiff to prove (on the balance of probabilities) to be entitled to a civil remedy?

By the end of this chapter, you will know:

- What rights are protected by particular civil laws (such as the law of negligence).
- What the law requires an injured person (or business) to prove, to be entitled to compensation for their loss.
- Whether legislation and/or common law allows a defendant to reduce or eliminate their liability for compensating a plaintiff.
- How to apply your knowledge of particular civil laws to case studies, to determine whether an injured person is entitled to a remedy and/or whether a defendant can raise a lawful defence in such a case.

UNIT 1 AOS 3 – KEY KNOWLEDGE

- the purposes and types of civil law
- key concepts of civil law, including:
  - breach
  - causation
  - loss
  - limitation of actions
  - the burden of proof
  - the standard of proof
- possible plaintiffs and defendants to a civil dispute
- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

UNIT 1 AOS 3 – KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about civil law
- explain the purposes and key concepts of civil law
- classify civil law according to its type
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

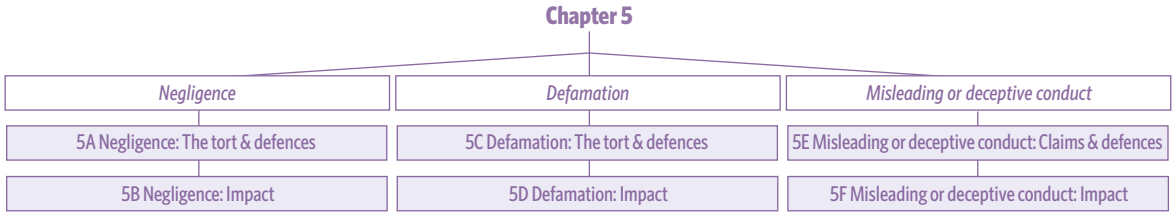
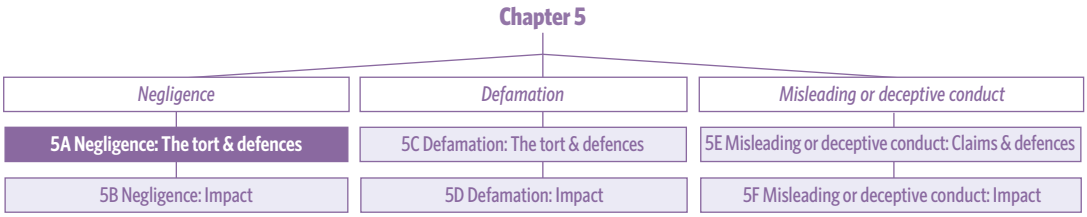


Image: Zivica Kerkez/Shutterstock.com

5A Negligence: The tort & defences

Negligence is a civil tort that occurs where the defendant breaches a duty of care owed to the plaintiff, resulting in some form of loss or damage to the plaintiff.



In this lesson you will be learning about the tort of negligence, including the rights it aims to protect, the elements involved in establishing a claim, the limitation of actions and the possible defences that may be raised by a defendant. Statute law (the *Wrongs Act 1958*) and common law have contributed significantly to the elements of negligence and defences that be may raised which will be referred to throughout the lesson.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

The rights protected by the law (negligence)	1.3.4.1
Elements of tort (negligence)	1.3.4.2
Limitation of actions (negligence)	1.3.4.3
Defences	1.3.4.4
Contributory negligence	1.3.4.4.1
Voluntary assumption of risk	1.3.4.4.2
Remedies	1.3.4.5

The rights protected by the law (negligence) 1.3.4.1

OVERVIEW

The tort of negligence protects a person's (and an organisation's) right to not be harmed by someone who does not take reasonable care to prevent this.

DETAILS

The law of negligence requires all individuals and organisations to take reasonable care to avoid any act or omission that may reasonably be foreseen to cause injury or harm to another person.

For example:

- Businesses must take reasonable care to ensure the products they produce will not harm those who purchase them.
- Schools must take reasonable care to protect students from various types of physical and mental harm. Conducting fire safety drills and providing student counsellors are examples of how schools do this.
- Drivers must take reasonable care to ensure they do not harm other road users.
- Doctors and other specialists must take reasonable care when advising patients.

How the law of negligence protects this right

If a plaintiff successfully argues that they have suffered harm, and the defendant should have taken further steps to prevent this harm, the court will award a civil remedy to restore them to their original position.

Types of harm that are protected by the law of negligence

- Financial harm (such as loss of income as a result of being unable to work or any medical bills arising from the harm);
- Physical harm (such as contracting a disease or a broken leg); and
- Mental harm (such as psychiatric harm or post traumatic stress disorder following the incident).

Elements of the tort (negligence) 1.3.4.2

OVERVIEW

There are four elements that must be proven for a claim of negligence to be successfully established:

1. The defendant owed a duty of care to the plaintiff;
2. The defendant breached that duty of care;
3. The breach of duty caused injury or harm to the plaintiff (causation); and
4. The breach of duty must be a significant cause of the damage suffered (remoteness of damage).

DETAILS

The defendant must owe a duty of care to the plaintiff

It must first be shown that the defendant owed a duty of care to the plaintiff not to create the risk of injury that occurred. **Duty of care is** the legal obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour.

Duty of care involves two legal concepts that have been derived from the famous English case of *Donoghue v Stevenson:*

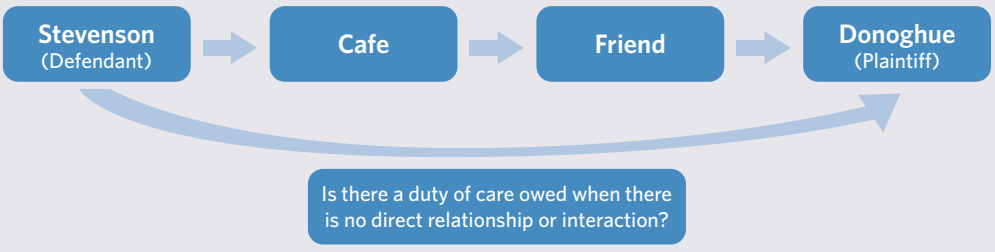
- Reasonable foreseeability; and
- The neighbour principle.

CASE STUDY

***Donoghue v Stevenson* [1932] AC 562**

One of Donoghue's friends gave her a ginger beer which she had purchased from a cafe. After Donoghue had consumed most of the beverage, she found a decomposing snail inside. As a result, Donoghue suffered mental shock and severe gastro.

The drink was manufactured by the defendant, Stevenson, but questions arose around the fact that Donoghue had no direct interaction or relationship with the defendant. The main question in this case was whether Stevenson had owed Donoghue a duty of care.



The House of Lords held that manufacturers owe consumers a duty of care, even when they have no direct relationship or interaction with them. This meant that Stevenson owed Donoghue a duty of care.

This case established the neighbour principle:

- Reasonable care must be taken to avoid acts or omissions that can be reasonably foreseen to injure a person's neighbour.
- A 'neighbour' is any person so closely and directly affected by my act that I should have them in contemplation when engaging in that act.

In this case, the manufacturer should have end-consumers of their products in mind when producing goods.

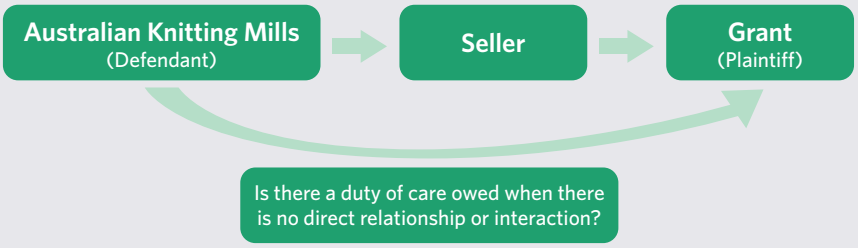
The equivalent case that has set precedent in Australia is *Grant v Australian Knitting Mills*.

CASE STUDY

***Grant v Australian Knitting Mills Limited & Anor* [1935] HCA 66**

Grant had entered a store and purchased a pair of woollen underwear and two singlets which had originally been manufactured by the Australian Knitting Mills. After wearing the underwear, Grant suffered skin irritation and developed a severe case of dermatitis. It was later discovered that Australian Knitting Mills had left a chemical in the material from which the underwear was made, which caused Grant's dermatitis.

Grant had contact with the shop-seller but did not have any relationship or interaction with Australian Knitting Mills (manufacturer). The issue arose around whether a duty of care is owed when there is no direct relationship or interaction between the manufacturer and customer.



The court referred to *Donoghue v Stevenson* and applied the law in the same manner. Manufacturers owe a duty of care to those who are intended to use their products. This meant that Australian Knitting Mills were liable in negligence for the harm caused to Grant.

Reasonable foreseeability

Reasonable foreseeability focuses on the capacity to anticipate that a person's act or omission could cause harm to someone else. Where the defendant knows, or ought to have known, that their actions or inaction would impact someone else, a duty of care is likely to exist.

The neighbour principle

The neighbour principle requires all individuals and organisations to take reasonable care to avoid acts or omissions that can reasonably be foreseen to injure their 'neighbour'. A person's neighbour was defined in *Donoghue v Stevenson* as:

> persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> *Source:* Lord Atkin, *Donoghue v Stevenson* [1932] AC 562

Established categories

There exist some relationships which have been found to always give rise to a duty of care. These are known as **established categories** and an automatic duty of care arises. Some of these established categories include:

- Doctors owe a duty of care to their patients.
- Drivers owe a duty of care to other road users.
- Schools owe a duty of care to their students.
- Manufacturers owe a duty of care to consumers who purchase their goods.
- Employers owe a duty of care to employees to provide a safe system of work.
- Solicitors owe a duty of care to their clients.
- Land owners owe a duty of care to tenants.

The defendant breached that duty of care

This is the element that determines whether the defendant has actually been 'negligent'. **A breach of duty** is when the defendant has fallen below the standard of care that would be expected of a reasonable person in the same position:

- The key focus in this area is reasonableness.
- It is not an absolute duty to ensure the plaintiff will not be harmed but rather is a duty to take **reasonable care** to prevent the harm from occurring.

What steps/precautions does a person or business have to take to ensure they have exercised 'enough' care? Section 48 of the *Wrongs Act 1958* (Vic) includes general principles for establishing when a duty of care has been breached.

A person breaches their duty of care if the following is established:

- The risk of harm was foreseeable;
- The risk was not insignificant; and
- A reasonable person in the same position would have taken those precautions.

LEGISLATION

***Wrongs Act 1958* (Vic)**
Section 48 – DUTY OF CARE: GENERAL PRINCIPLES

(1) A person is not negligent in failing to take precautions against a risk of harm unless—
  (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
  (b) the risk was not insignificant; and
  (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
  (a) the probability that the harm would occur if care were not taken;
  (b) the likely seriousness of the harm;
  (c) the burden of taking precautions to avoid the risk of harm;
  (d) the social utility of the activity that creates the risk of harm.

CASE STUDY

Consider the following hypothetical scenario.

Daniel visits his GP, Dr Kat, to receive a flu vaccination. Dr Kat has been rushing all day and in her haste uses a syringe that has not been sterilised. There was medical equipment scattered all over the treatment room at the GP surgery. Daniel ultimately becomes very ill with an infection contracted from the syringe.

A doctor cannot guarantee infection will never occur, but they do have a duty to exercise care toward their patient. Did Dr Kat breach her duty? Consider the principles in s. 48 of the *Wrongs Act:*

- It is definitely foreseeable that using an unsterilised syringe on a patient could transmit a disease;
- The risk of such transmission was high (and the consequences are severe); and
- A reasonable person would have exercised precautions to prevent this, such as keeping used and sterile medical equipment separate or conducting each procedure with disposable syringes.

Therefore, Dr Kat will likely be found to have breached her duty towards her patient, Daniel.

The breach of duty caused injury or harm to the plaintiff (Causation)

Causation requires **a causal link** between the breach of duty and the harm caused. Causation for negligence is outlined by s. 51 of the *Wrongs Act 1958* (Vic) and is comprised of two elements:

- Factual causation; and
- Scope of liability.

LEGISLATION

***Wrongs Act 1958* (Vic)**
Section 51 – GENERAL PRINCIPLES

(1) A determination that negligence caused particular harm comprises the following elements—
  (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation); and
  (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

Factual causation

This requires the defendant's negligence to be a necessary condition for causing the harm. That is, the court must determine whether harm to the plaintiff would still have occurred **'but for'** the defendant's negligent act or omission.

This **does not** require the defendant's negligence to be the only cause of the harm, but a substantial contributor to the harm. This is determined subjectively and requires the court to consider all surrounding circumstances.

CASE STUDY

***Amaca Pty Ltd v Ellis* [2010] HCA 5**

Cotton was exposed to asbestos throughout the course of his employment with two different employers and subsequently died of lung cancer. Cotton was also a smoker who consumed over 15 cigarettes daily. The executor of Cotton's estate commenced an action in negligence against both employers and the supplier of asbestos.

This claim was unsuccessful as it could not be proven that Cotton's lung cancer would not have occurred 'but for' asbestos. There was no evidence that the exposure to asbestos alone caused the cancer. It was determined that Cotton's heavy smoking was the most probable cause of his lung cancer and not his exposure to asbestos (which may or may not have contributed).

Legal Causation (Scope of Liability)

The court must consider whether and why liability for the harm should be imposed on the defendant. When determining the scope of liability, the court will consider:

- *Novus actus intravenous*
  - A supervening event that is so drastic that it breaks the chain of causation between the defendant's negligence and the plaintiff's injury.
- Policy considerations
  - Any considerations relating to questions of morality, justice or ethics that would make it impractical to hold the defendant liable.
  - Some policy considerations include the type of harm suffered by the plaintiff, the defendant's control over the situation, any human rights considerations and upholding other legal considerations.

The breach of duty must be a significant cause of the damage suffered

The breach of the duty must be a significant cause of the damage suffered by the plaintiff. In determining whether liability should be imposed on the defendant, the court must consider whether the plaintiff's harm is **too remote.** This limits liability in negligence to harm that was a reasonably foreseeable outcome of the negligent act. A person will not be liable for harms which are too remote and not a reasonably foreseeable outcome.

In order for a risk of harm to be reasonably foreseeable there must be a real risk of damage, not one that is too far-fetched or fanciful.

CASE STUDY

Consider the following hypothetical scenarios.

Damage not too remote

Mark owns a business which manufactures a range of cleaning products. The business has been rapidly expanding and its production has doubled in the past year. In order to produce the cleaning products, the business works with a range of toxic chemicals and has a large quantity of toxic waste. Mark already pays a premium to have the toxic waste collected and is informed that this cost will double as a result of the increased wastage.

Mark decided to dump some excess waste in a nearby lake to minimise his costs. Unknown to Mark, the lake is used by locals for swimming and other water sports. The following day, Ingrid was swimming in the lake and suffered a serious burn as a result of the toxic chemicals in the water.

Ingrid commenced an action against Mark, claiming he was negligent in dumping a toxic chemical in the lake, which caused physical harm to her. In this situation, the court would likely decide that it was reasonably foreseeable that Mark's actions would cause harm to Ingrid. The chemicals were toxic and he had dumped them in a public lake. This injury was therefore not too remote from his failure to exercise care in disposing of the chemicals.

cont'd

CASE STUDY **Damage too remote**

Sally was participating in a 42km marathon organised by Run for Fun. During this marathon, Sally tripped over a branch that had fallen from a nearby tree as a result of the wind during the marathon. Sally sustained an injury to her ankle and was unable to finish the marathon.

Sally commenced an action against Run for Fun claiming that they negligently omitted to remove the branch which caused her injury. In this situation, the court would likely decide that it was not reasonably foreseeable that Sally would be harmed by a fallen branch. The branch fell during the marathon as a result of the wind and could not have been reasonably foreseen by Run for Fun. The harm is too remote in this situation.

Limitation of actions (negligence) 1.3.4.3

OVERVIEW

A person who feels that their rights have been breached under civil law must initiate a civil action within a set period of time, depending on the law that applies to that particular civil wrong. This is known as the **limitation of actions.** The *Limitation of Actions Act 1958* (Vic) places time restrictions on when a person may pursue a claim in negligence.

DETAILS

Time restrictions

Section 5 of the *Limitation of Actions Act 1958* (Vic) outlines **that a claim in negligence must be pursued within 3 years of the cause of action arising.** The cause of action is assumed to have occurred on the date the plaintiff first knows that they suffered personal injuries and that those injuries were caused by the act or omission of some person.

USEFUL TIP

Remember that 'cause of action' refers to the date in which the plaintiff first becomes aware of the injuries suffered to them as a result of someone else's negligence. This does not necessarily need to be the same date on which the act or omission first occurred.

For example, consider a landscaper who in 2012 installed a retaining wall in Nickie's backyard using recycled timber. The landscaper was negligent and failed to remove a series of dangerous rusty nails protruding from the retaining wall.

Five years later (2017), Nickie slips and falls on the rusty nail, causing severe bruising and bleeding. The cause of action, and thus the limitation of actions, begins in 2017, rather than 2012 when the landscaper negligently left the nails in the timber, because this is when Nickie was injured.

Extending the limitation period

Section 23A of the *Limitation of Actions Act 1958* (Vic) outlines that a court may extend the limitation period in certain negligence cases to such a period as the court deems fit. Subsection 3 details some of the considerations that a court will make when determining whether the limitation period should be extended:

LEGISLATION

***Limitation of Actions Act 1958* (Vic)**
Section 23A – PERSONAL INJURIES

(1) ...the court... may, if it decides that it is just and reasonable so to do, order that the period within which an action on the cause of action may be brought be extended for such period as it determines.

(2) In exercising the powers conferred on it by subsection (2) a court shall have regard to all the circumstances of the case including... —

(a) the length of and reasons for the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;

(c) the extent, if any, to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;

(d) the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

Defences 1.3.4.4

If a case of negligence is likely to be proven against a defendant, that defendant may raise some defences to avoid being held liable. Two of the defences available against a negligence claim include:

- **Contributory negligence** – where the plaintiff themselves have contributed to their harm; and
- **Voluntary assumption of risk** – where the plaintiff is aware of, and accepts the risks involved.

Contributory negligence 1.3.4.4.1

OVERVIEW

Contributory negligence is a defence that may be raised where the plaintiff also played a part in causing their own loss or damage by failing to take reasonable care for themselves.

Contributory negligence is **not a complete defence,** meaning that if the defence is successfully raised, the defendant will still be liable for negligence (though to a lesser degree).

DETAILS

In order to establish contributory negligence, the defendant must prove both of the following:

1. The plaintiff themselves behaved negligently; and

2. The plaintiff's negligence was a contributing cause of the damage suffered.

The plaintiff was negligent

It must be shown that the plaintiff did not take reasonable care for their own safety, by failing to take sensible steps to avoid a foreseeable risk of injury.

The plaintiff's negligence was a cause of the damage

This requires the defendant to prove that the plaintiff's negligence contributed to the loss or damage suffered. The defendant does not need to prove that the negligence caused the incident.

For example, consider a plaintiff's failure to wear a seatbelt. If seeking damages due to the negligent conduct of another driver a defendant may argue that the plaintiff would not have suffered an injury, or suffered a lesser injury, if a seatbelt had been used.

Impact of a successful defence

Contributory negligence is not a complete defence – even if the defence is successfully raised, the defendant will still be liable for negligence. However, the defence reduces the defendant's liability because the plaintiff also contributed to the loss or damage suffered.

The court then must consider what the appropriate reduction in damages would be. This is a question of fact for each case and requires the judge to determine:

- The culpability of each party in terms of how far they strayed from the expected standard of care that would be displayed by a reasonable person; and
- The relative importance of the acts of the parties in causing the injuries.

For example, consider the car accident scenario above. If the plaintiff did not have a seatbelt on, this fact will have contributed to their injury; however, the court may decide the defendant (who was intoxicated and driving a car he knew to be unroadworthy due to its failing brake pads) was still 80% liable for the plaintiff's injury.

LEGISLATION

***Wrongs Act 1958* (Vic)**
Section 26 – CONTRIBUTORY NEGLIGENCE

(1) If a person (the claimant) suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person or persons—

(a) ...a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant; and

(b) the damages recoverable in respect of the wrong must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Voluntary assumption of risk 1.3.4.4.2

OVERVIEW

Voluntary assumption of risk is a defence that can be raised where the plaintiff willingly accepts the likelihood of risk when participating. This is based around the Latin saying 'volenti non fit injuria' (to one who is willing no legal wrong is done).

DETAILS

Voluntary assumption of risk **is a complete defence,** meaning that if proven the defendant will not be liable for negligence.

LEGISLATION

***Wrongs Act 1958* (Vic)**
Section 54 – VOLUNTARY ASSUMPTION OF RISK

(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (volenti non fit injuria) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.

In order to establish the defence of voluntary assumption of risk, the defendant must show that the plaintiff:

- Had full knowledge of the nature and extent of the risk; and
- Freely and voluntarily agreed to incur the risk of injury.

Source: Judicial College of Victoria, Civil Charge Book (2019)

Full knowledge of the nature and extent of the risk

This requires that the plaintiff knew all of the facts about the danger and understood the exact extent of this. It is not enough to show that the plaintiff knew there was danger involved in the activity, or engaged in a dangerous recreational past-time – the plaintiff must have an understanding of the extent of the specific risk involved.

Obvious risk

In situations where the risk is an obvious risk, the plaintiff is assumed to have been aware of the risk. An obvious risk tends to be matters of common sense and includes activities like skydiving and skateboarding.

LEGISLATION

***Wrongs Act 1958* (Vic)**
Section 53 – MEANING OF OBVIOUS RISK

(1) A risk that would have been obvious to a reasonable person in plaintiff's position.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

Freely and voluntarily agreed to incur the risk of injury

The plaintiff must have consented, either expressly or implicitly, to the risk of injury that occurred and given up their right to bring action. This tends to occur by having the plaintiff sign a consent form or contract which states that they understand and accept the risk involved.

Impact of a successful defence

Voluntary assumption of risk is a complete defence. This means that successfully raising this defence will remove the defendant's liability in negligence.

Remedies 1.3.4.5

OVERVIEW

A remedy is an order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered. You will learn more about the types and purposes of remedies in Lesson 8F.

DETAILS

The main remedy for negligence is damages. **Damages are** an award of monetary compensation to the plaintiff, to be paid by the defendant. The main form of damages awarded in negligence cases is compensatory damages. This can be split into three categories:

- **Specific:** have a precise value and are easily quantifiable.
  - For example, any medical bills resulting from injury obtained due to the defendant's negligence.
- **General:** do not have a precise value and are not easily quantifiable.
  - For example, compensation for pain and suffering or loss of quality of life as a result of the defendant's negligence.
- **Aggravated:** further compensation for humiliation and insult.
  - For example, embarrassment or distress resulting from the defendant's negligence.

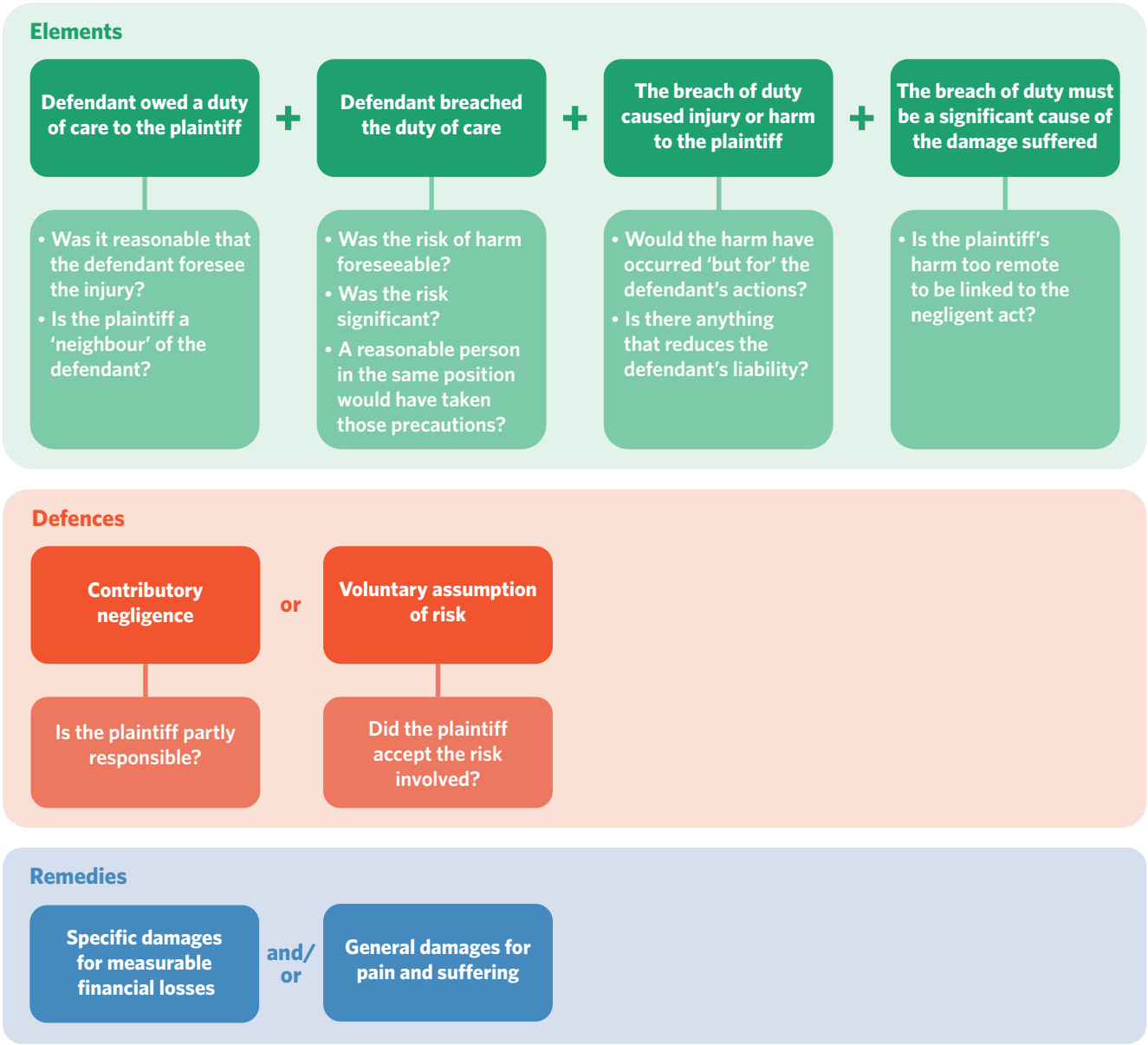


Figure 1 An overview of key concepts in negligence claims

Keen to learn more?

The Law Handbook, Negligence, Liability and Damages, https://www.lawhandbook.org.au/2019_10_01_01_negligence_liability_and_damages/

The Law Handbook, Negligence and Duty of Care, https://www.lawhandbook.org.au/2019_08_06_04_negligence_and_duty_of_care/

QUESTIONS 5A Negligence: The tort & defences

LEVEL 1:
Define and understand

1. Which of the following is not one of the elements that needs to be proven to establish a case of negligence?

A. Remoteness of damage

B. Causation

C. Breach of negligence

D. Duty of care

2. What is the most sought remedy for a successful claim in negligence?

A. An injunction

B. A fine

C. An award of damages

D. A period of imprisonment

3. What are the time constraints on when a person can commence a claim in negligence?

A. Within 2 years of the incident occurring

B. Within 2 years of the cause of action

C. Within 3 years of the incident occurring

D. Within 3 years of the cause of action

4. After bungee-jumping at Bungee n' Co, Alesha suffered severe stiffness and muscle pains. She was required to see a physiotherapist and get a weekly massage as a result of the pain. Alesha commences legal action against Bungee n' Co, claiming that they acted negligently when tightening her harness. Bungee n' Co provide a briefing to their customers before each session which explains that muscle soreness is a potential side effect. Each participant is also required to sign a form that outlines they understand and accept the risks involved.

Which is the best defence for Bungee n' Co to raise against Alesha's claim?

A. Contributory negligence

B. Voluntary assumption of risk

C. Absolute privilege

D. There are no defences for Bungee n' Co to raise

LEVEL 2:
Describe and explain

5. Describe the term 'duty of care'. Identify two established categories where a duty of care automatically arises. (3 MARKS)

6. Explain the term 'limitation of actions' and identify what impact this has on negligence cases. (3 MARKS)

7. Suzie is the defendant in a negligence case. The plaintiff has successfully established all of the elements for negligence. Describe one of the defences Suzie could raise and explain the impact this defence would have if it was successfully raised. (4 MARKS)

8. Explain the four elements that the plaintiff must prove in a negligence claim. (8 MARKS)

LEVEL 3:
Apply and compare

9. Four years ago, Jasmine noticed that she had developed a back injury at her workplace. She recalled that her employer did not train her how to safely lift heavy boxes. Jasmine could not be bothered commencing legal action at the time of the incident as she did not want to cause any workplace issues. However, after Jasmine was fired from her job she wants to commence legal action against the employer for negligence.

Explain whether Jasmine would be able to initiate a claim in negligence. (3 MARKS)

10. Lucinda raised a successful negligence case against her doctor after she failed to warn her about the risk of blindness if she underwent eye surgery. There was a 0.25% chance of this happening as a result of the surgery, but the court held the doctor breached her duty of care by failing to warn Lucinda of the risk. Lucinda provided evidence of existing medical bills and the cost of ongoing care due to her blindness. Lucinda also claims that the quality of her life has been severely reduced due to her blindness.

Explain one of the types of compensatory damages the court may award to Lucinda and justify why it would be appropriate. (3 MARKS)

11. Mountain Climbin' is the manufacturer of various types of hiking equipment. They distribute their products to various retailers who sell directly to consumers. Before embarking on a three-day hike, Mildred purchased a pair of hiking boots produced by Mountain Climbin' from one of it's retailers. On her trip she noticed she had a serious rash that had spread from her feet all the way up to her knees. Mildred was rushed to hospital and it was discovered that a dangerous chemical in her hiking boots had given her a severe skin disease. After Mildred was released from hospital she commenced legal action in negligence against Mountain Climbin' to recover damages for the hospital bills and for pain and suffering caused. Mountain Climbin' argued that they had no direct interaction with Mildred and therefore cannot be liable.

a) With reference to the neighbour principle, explain whether Mountain Climbin's argument would be successful. (3 MARKS)

It is then discovered that Mildred did not wear socks with the boots despite a warning that socks should be worn with these shoes. Mildred disregarded this warning and is aware that she was partly at fault for her own harm.

b) Describe the defence that Mountain Climbin' should raise and justify why it would be appropriate in this case. (3 MARKS)

12. In *Amaca Pty Ltd v Ellis,* the plaintiff was unsuccessful in a negligence claim as it could not be proven that the deceased would not have died of lung-cancer but-for the existence of asbestos on the premises where he worked. The deceased was a heavy smoker which was deemed to be the primary cause of his death.

Explain which of the elements of negligence was not satisfied in this case. (4 MARKS)

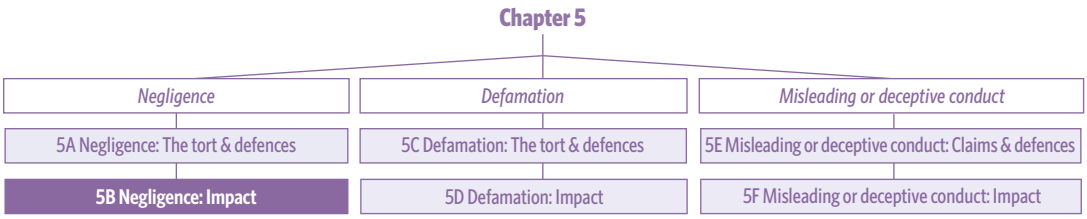
13. Penny had organised to go skydiving through the company Jump for Joy. Before Penny was allowed to get on the plane, Penny had to read multiple documents and provided her signature stating she was aware of the risks and accepted liability for any injury incurred. Penny then got on the plane and was taken 4,000 metres in the air. After Penny jumped out of the plane a large gust of wind caused interference with her parachute. Penny had a rough landing as a result of the wind and suffered a broken leg. Penny commenced an action in negligence against Jump for Joy and they raised the voluntary assumption of risk defence.

With reference to the elements of the defence, explain whether the voluntary assumption of risk defence is likely to be successful in this case. (4 MARKS)

5B Negligence: Impact

The tort of negligence protects the right of a person or business not to be harmed by those who do not take reasonable care to prevent such harm or loss. In Lesson 5A you learned about the elements that must be proven by a plaintiff in pursuing a claim of negligence, and the possible defences and remedies applicable in a negligence case.

You will now consider the potential impact that a breach of the law of negligence has on the parties involved. A range of negligence cases will demonstrate the variety of ways negligence can impact people within the community.



In this lesson you will be learning about the impact that a case of negligence can have on the parties involved.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

The impact of the breach on the parties (Negligence)	1.3.4.6

The impact of the breach on the parties 1.3.4.6

OVERVIEW

How might instances of negligence impact the parties involved in the case? That is, how might a breach of a specific duty of care adversely affect both the plaintiff and the defendant in a negligence case?

DETAILS

Plaintiffs

The plaintiffs in a negligence case may be impacted in a variety of different ways, both as a direct consequence of the incident as well as flow-on effects associated with taking the matter to court. These impacts include (but are not limited to):

- **Physical injuries** – perhaps being injured at work or in a shop (such as broken bones, head trauma or rashes).
- **Psychological injuries** – perhaps feeling fearful to return to work, or frustration arising from the physical injuries sustained. Stress-related claims for workplace injury are increasingly common; the psychological suffering following a car accident caused by another motorist's negligence can be significant.
- **Financial loss** – such as a loss of income arising from the need to take time off work and/or the high costs associated with taking a matter to court, if a defendant challenges whether they are indeed liable for the plaintiff's injury.
- **Re-victimisation** – needing to endure a lengthy trial in order to be compensated for the losses sustained.

CASE STUDY

***Cattanach v Melchior* [2003] HCA 38**

The High Court of Australia decided the parents of a child born as a result of a doctor's negligence could recover compensation for the costs of raising the child.

After having two daughters, Melchior underwent voluntary sterilisation to avoid falling pregnant for a third time. At the age of 15, Melchior had undergone a surgery that supposedly had removed her right ovary and ovarian tube. After telling her gynaecologist Dr. Cattanach of this prior surgery, he proceeded to clip her left fallopian tube only (rather than both the left and right tubes as was normal practise for the sterilisation procedure). Dr. Cattanach had performed an ultrasound and reported not being able to see the right fallopian tube.

However, the right fallopian tube was in fact intact and Melchior later fell pregnant to a healthy son. The family sued Dr. Cattanach for negligently performing the sterilisation surgery and claimed damages for the pain and suffering of childbirth as well as the costs of raising their son until the age of 18.

Psychological impact:

This case brought with it many questions surrounding the true psychological impact of the incident. For example, how can the birth of a healthy third child be considered an injury rather than a blessing? How is a court to measure, in financial terms, the harm associated with an unwanted birth?

Financial loss:

Raising a child can be extremely costly. The financial burden of feeding, clothing, housing and educating a third child may indeed be beyond the capabilities of many families. As such, the Melchiors successfully claimed financial compensation for raising their child until adulthood.

Source: Weston-Scheuber K., Victory for reluctant parents: Cattanach v Melchior (2003)

CASE STUDY

***Oyston v St Patrick's College* [2011] NSWSC 269**

Jazmine Oyston brought a claim in negligence against her former school, St Patrick's College, alleging that she had been significantly injured as a result of being exposed to 'relentless bullying' while a pupil at the school between 2002-2005.

Oyston argued that the College's practices in relation to preventing bullying were insufficient, and that they failed to protect her from a recognised and foreseeable harm.

The school argued that Oyston was not the subject of such relentless bullying, and that if she was, the circumstances surrounding the bullying prohibited the College from being able to become aware of the issue. Thus, the school claimed that Oyston had contributed to the pervasiveness of the bullying (contributory negligence).

Ultimately, the court found in favour of Oyston and awarded her damages for the harm and suffering that resulted.

Psychological impact:

Oyston allegedly suffered from panic attacks, anxiety, and depression as a result of being exposed to bullying by other pupils of the school between 2002 and 2005.

Financial loss:

Oyston claimed damages for her decreased capacity to work and find employment later in life as a direct result of the bullying. She also claimed damages for her need for ongoing domestic assistance and treatment for her mental health conditions.

Defendants

The defendants to a negligence case will also be impacted in a variety of different ways, regardless of whether they are found to be liable or not. Such impacts may prove devastating for a business in particular, and many precautions are taken by people within industry to avoid having a negligence claim filed against them (for example, workplaces that promote safe work practices to prevent injuries at work and any resultant legal proceedings).

These impacts include (but are not limited to):

- **Reputational damage** – often one of the most damaging impacts of a negligence case is the reputational damage that it can cause a business. Having consumers associate your goods or services with a breach in duty of care can be debilitating for the future health and success of a business.
- **Financial loss** – another major impact of negligence cases for the defendant is often the compensatory damages they are ordered to pay to restore the plaintiff/s to their original position. These damages may be high in value, and may only be partially covered by insurance. A defendant who is found to be liable will often be required to pay:
  - Damages to the plaintiff;
  - A large portion of the plaintiff's legal expenses (including court fees and costs for legal representation); and
  - Their own legal costs.
- **Cultural changes** – in some instances, major negligence cases in a particular industry can prompt cultural changes and behavioural improvements within that industry to avoid future negligence. For example, consider the way hospitals are constantly improving health and safety measures to avoid any potential breaches of their duty of care.
- **Third-party claims and class actions** – in some instances, cases of negligence brought against a particular defendant can prompt other plaintiffs to bring similar claims or join together to form a representative action. This can prove devastating for a defendant:
  - The settlements or payouts associated with class actions can be much greater than an individual negligence claim; and
  - Claims with multiple plaintiffs can often be time consuming (due to their complexity) and difficult to resolve quickly.

CASE STUDY

***Burke v Ash Sounds Pty Ltd (trading as Falls Music and Arts Festival)* [2018] VSC 771**

Michela Joy Burke brought a class action (representative proceeding) on behalf of approximately 65 persons who suffered injury, damage or loss when attempting to exit one of the venues at the Falls Music and Arts Festival at Lorne on 30 December 2016.

The injuries were allegedly suffered when people at the festival were attempting to exit the Grand Theatre, one of the venues at which patrons listened to music. In her statement of claim, the plaintiff alleged she suffered injury, loss and damage by reason of the defendant's breach of duty.

Third-party claims and class actions:

Ash Sounds Pty Ltd have reached an out-of-court settlement (of different values) with a number of the plaintiffs to the class action, however discussions remain ongoing as parties attempt to keep the dispute out of the courts.

Cultural changes:

Following the 'stampede-like' exiting of the Grand Theatre that resulted in approximately 80 injuries, Falls Festival (as well as many other festivals) have made significant efforts in subsequent years to improve the design of their stages and implemented precautionary measures to avoid injuries of this kind in the future.

Significant reputational damage:

Repeating events such as music festivals rely heavily on their reputation to ensure continued business and success. Following the incident, Falls Festival organisers came under fire in the media for what was deemed to be poorly designed and unsafe exits and a lack of organisational foresight.

CASE STUDY

Dreamworld faces country's largest ever compensation payout

Following the death of four Dreamworld guests in late 2016 due to a ride malfunction, the iconic theme park in Queensland has been forced to face a history-making compensation payout. Claims have reported to run into the millions as the theme park faces a debilitating hit to its reputation.

An inquest into the tragedy found a series of failures of the park to uphold safety measures, including (but not limited to):

- An 'archaic' computer system that was outdated and unsafe.
- Long overdue workplace health and safety inspections.
- A recent major cutback to repairs and maintenance budget.
- A health and safety policy that hadn't been updated in six years
- An external audit safety score of 46% in 2014 and 61% in 2015, despite a score of 75% being the benchmark for full compliance.
- A new ride operator who had only just started her job and hadn't been instructed what the big, red 'emergency' stop button was for prior to the incident.
- The ride had already failed twice in the hours leading up to the accident, yet was not shut down.
- None of the main ride operators had any first aid training.
- An external audit recommendation in 2013 called for a single emergency stop system to be put in place, but this was ignored by the park and not implemented.

Significant reputational damage:

Journalist Joe Hildebrand (2018) had this to say about the tragedy:

> Dreamworld is not just a Gold Coast icon, it is a national symbol. For years it was Australia's answer to Disneyland, a place that represented countless children's dreams. And that is why the death of these four innocent people has so tortured the national psyche.

Cultural changes:

Following the tragedy in October 2016, the park's safety manager Mark Thompson hired a new safety team that was on the ground by January 2017. Though arguably far too late, the incident has sparked a much more stringent safety system at the park, as well as many of the other theme parks in Queensland.

Third-party claims and class actions:

As Dreamworld attempt to reach favourable out-of-court settlements and minimise the financial damage resulting from the incident, lawyers have commented that the theme park could not only be sued by the families of the victims, but also by traumatised park visitors and staff who may have been significantly affected by the accident.

Source: Hildebrand, J., One word that lead to Dreamworld Tragedy (2018)

CASE STUDY

***Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379**

Tony Caccaviello of Riverman Orchards issued proceedings against his neighbour Rodney Hayden seeking damages for negligence after a cloud of agricultural chemicals – all deadly to grapevines – had blown across from Hayden's property and destroyed the plaintiff's crops.

The plaintiff claimed that the chemicals used by Hayden constituted an unreasonable interference with Riverman Orchards and that the spraying was negligently carried out by the defendant, who failed to take reasonable care to avoid overspray into Caccaviello's vineyards.

Financial loss:

The court found that the defendant had indeed breached a duty of care to the plaintiff and ordered a record payout of $7,248,213.76 (including interest). This was to cover the costs associated with the loss of grape sales, the rehabilitation of the land and the future loss of grape sales while the new vines grow.

Cultural changes:

Cases of this magnitude often prompt behavioural changes within the affected industry to avoid future liability. For example, new technologies are helping farmers avoid overspray and chemical drift, including air inducted nozzles. Spray drift expert Bill Gordon says that: 'the odd large legal case like this [will] send a wake up call to a lot of growers'.

Source: Jasper, C., Chemical spray damage results in record $7m negligence court payout (2017)

Keen to learn more?

The Law Handbook, https://www.lawhandbook.org.au/2019_10_01_01_negligence_liability_and_damages/

QUESTIONS 5B Negligence: Impact

LEVEL 1:
Define and understand

1. Which of the following statements regarding the case of *Cattanach v Melchior* is correct?

- **A.** Melchior is the defendant in the case, bringing proceedings against her gynaecologist for an alleged breach of duty of care.
- **B.** The High Court of Australia ruled in favour of Melchior in this case, finding Dr. Cattanach's execution of the sterilisation surgery to have been performed negligently.
- **C.** The Melchiors claimed damages for the pain and suffering associated with childbirth, as well as the full costs of putting their child through university.
- **D.** The court found that Melchior had clearly told Dr. Cattanach about her past surgery, therefore absolving him of any duty of care.

2. Which of the following statements regarding the case of *Burke v Ash Sounds Pty Ltd* is incorrect?

- **A.** Following the incident, the organisers of the festival were accused of poorly designing the exits of the stages.
- **B.** The plaintiff alleges that the festival owed her a duty of care.
- **C.** Some injured persons have settled their claim with the defendants out-of-court.
- **D.** As a result of the class action, Falls Festival will most likely be shut down.

3. Following the death of four of its guests in late 2016, Dreamworld has been forced to address major compensation payouts and reputational damage as a result of its negligence. If the case was to progress to court, which of the following lines of legal reasoning is likely to be used by the presiding judge?

- **A.** It was found that the ride operator had only just started her job and was therefore unaware of much of the safety procedures. This is taken to be a mitigating factor in favour of Dreamworld, who cannot be held responsible for her inexperience.
- **B.** Dreamworld had not updated their health and safety policy in six years, nor had they kept up-to-date with their workplace health and safety inspections. These factors represent oversight by the theme park, and could certainly amount to a breach of duty of care.
- **C.** It is clear that visiting theme parks such as Dreamworld involves some level of personal risk. Patrons must accept that, while incredibly unlikely, ride malfunctions are an inevitable part of running such a hugely popular theme park.
- **D.** It is not only the responsibility of Dreamworld to identify potential risks. The main liability falls to the external auditing companies, who should have recommended the implementation of an emergency stop system long before the tragedy occurred.

LEVEL 2:
Describe and explain

4. Describe two potential impacts that a negligence claim can have on the defendant. (4 MARKS)

5. With reference to *Oyston v St Patrick's College,* describe one impact that negligence may have on the plaintiff. (2 MARKS)

LEVEL 3:
Apply and compare

6. Lauren has recently broken her arm at work, and believes that her employer breached the duty of care owed to her. After visiting a solicitor, Lauren was told that any compensation payout that she may be awarded by the courts will only cover the costs of her medical expenses. Her lawyer explained that future losses, such as not being able to work, cannot be compensated because they have yet to occur and are therefore speculative.

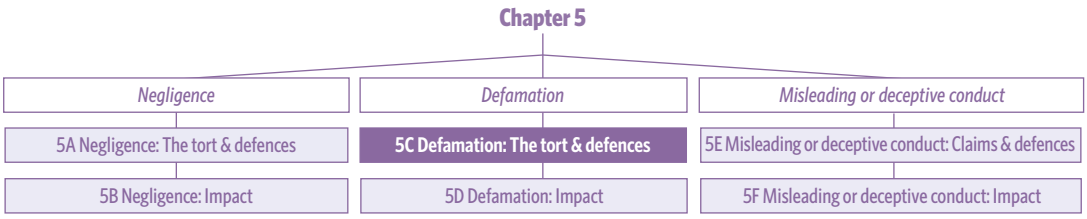
With reference to *Riverman Orchards Pty Ltd v Hayden,* advise Lauren as to whether the advice given by her lawyer is correct. (3 MARKS)

7. The in-house legal team at TedRolla are concerned that the company may face a significant class action following a string of incidents related to their new line of teddy bears, which have been found to carry large traces of Bisphenol A (BPA). The BPA compound can cause a number of health problems if consumed in high quantities.

With reference to the case of *Ash Sounds Pty Ltd* explain how a representative proceeding could negatively impact TedRolla. (3 MARKS)

5C Defamation: The tort & defences

Defamation is a civil tort that aims to protect a plaintiff from having their reputation unfairly damaged. A case of defamation occurs when a defendant communicates false information to a third party which unjustly lowers the reputation of the plaintiff. This is a tort of strict liability, meaning there is no need to show the defendant had any intention of harm towards the plaintiff - only that they published defamatory information.



In this lesson you will be learning about the tort of defamation, including the rights this tort protects, the elements required to establish the tort, the limitation of actions and the possible defences that may be raised. Statute law (*Defamation Act 2005* (Vic)) and common law have contributed significantly to the elements of defamation and the defences that may be raised which will be referred to throughout the lesson.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

The rights protected by the law (defamation)	1.3.4.7
Elements of tort (defamation)	1.3.4.8
Limitations of actions (defamation)	1.3.4.9
Defences	1.3.4.10
Truth	1.3.4.10.1
Fair comment	1.3.4.10.2
Absolute and qualified privilege	1.3.4.10.3
Remedies	1.3.4.11

The rights protected by the law (defamation) 1.3.4.7

OVERVIEW

Defamation law protects a person's reputation from false statements.

DETAILS

An action in defamation cannot be pursued if the statement is true, it only protects the plaintiff from **false statements** that unjustly lower their reputation. Defamation law focuses on balancing the protection of a person's reputation against the protection of freedom of speech.

The types of reputations protected by defamation law include:

- Personal reputation
  - For example, a false statement that a person is having an affair.
- Professional reputation
  - For example, a false statement that a person is acting unethically in their workplace.

- Business reputation
  - For example, a false statement that a small business is supplying faulty goods.

Limitations on corporations

There are limitations on what type of corporations may commence an action in defamation. Corporations, generally, are prohibited from pursuing a case in defamation.

Section 9 of the *Defamation Act 2005* (Vic) prohibits certain corporations from commencing an action in defamation. The only corporations excluded from this prohibition are:

- Nor-for-profit/charities; and
- Companies with fewer than ten employees.

LEGISLATION ***Defamation Act 2005* (Vic)**

Section 9 – CERTAIN CORPORATIONS DO NOT HAVE CAUSE OF ACTION FOR DEFAMATION

(1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

A corporation is an excluded corporation if—

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; [Not-for-profit/charity] or

(b) it employs fewer than 10 persons and is not related to another corporation— and the corporation is not a public body.

Elements of the tort (defamation) 1.3.4.8

OVERVIEW

For a claim in defamation, three elements must be proven:

1. The matter conveys defamatory imputations;
2. The matter identifies the plaintiff as a person defamed; and
3. The matter has been published to a third party.

DETAILS

The matter conveys defamatory imputations

The matter must contain defamatory imputations. In other words, the overall message that is published by the material must lower the plaintiff's reputation.

Matter is the material which is defamatory. Some examples of matter are included in s. 4 of the *Defamation Act 2005* (Vic).

LEGISLATION ***Defamation Act 2005* (Vic)**

Section 4 – DEFINITIONS

Matter includes:

(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical; and

(b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication; and

(c) a letter, note or other writing; and

(d) a picture, gesture or oral utterance; and

(e) any other thing by means of which something may be communicated to a person

The matter must contain defamatory meaning or imputation. An **imputation is** the overall message conveyed to the receiver from the matter. There are two focuses here:

1. What meanings would the ordinary or reasonable person give to the matter?
2. Would the ordinary or reasonable person think less of the plaintiff as a result?

What meanings would the ordinary or reasonable person give to the matter?

The ordinary or reasonable person is a hypothetical referee that represents a single standard used by the courts to determine what meanings would be given to the matter in question. The ordinary or reasonable person is deemed to have the following characteristics:

- Is fair and objective;
- Will engage in a degree of loose thinking;
- Will read between the lines;
- Has general knowledge about worldly affairs;
- Is of average intelligence;
- Does not approach the matter in an unreasonable way; and
- Does not have any interest or prejudice toward the matter.

The single meaning rule

The matter must be given its single ordinary meaning. While each piece of matter may result in numerous imputations, each imputation must be given a single meaning. This single meaning is either defamatory or not defamatory.

Would the ordinary or reasonable person think less of the plaintiff as a result?

This is a question of whether the plaintiff's reputation was actually damaged. A person's reputation will be damaged where the false imputation causes the ordinary reasonable person to think less of the plaintiff.

CASE STUDY

***Random House Australian Pty Ltd v Abbott & Costello* (1999) 94 FCR 296**

Tony Abbott and Peter Costello (federal ministers in the Howard government) recovered damages for passages in a book written by Bob Ellis (former speechwriter for Labor). The relevant section claimed that Abbott and Costello were both in the right wing of the Labor Party at university, until they had an intimate relationship with a woman who inducted them into young Liberals.

The court held that the ordinary or reasonable person would read between the lines and understand Ellis to be imputing that the politicians were weak, lacked integrity, could easily be persuaded to abandon their political principles and their commitment to the Liberal party was shallow. These imputations were held to be defamatory.

Some false imputations that are actionable in defamation include:

- The plaintiff has committed a crime.
- The plaintiff associates with known criminals.
- The plaintiff is dishonest or deceitful.
- The plaintiff has been adulterous.
- The plaintiff is a hypocrite.
- The plaintiff engaged in misconduct in public office.
- The paintiff is incompetent or lacks qualification to hold a specific job.

CASE STUDY

***Byrne v Deane* (1937) 1 KB 818**

The court held that it would not be defamatory to impute that someone was a police informer, even though that person might lose standing among criminal associates. The court instead believed that being a police informer would raise their character in the eyes of the ordinary or reasonable person.

The ordinary or reasonable person will take into account the full context in which the words or images are used when determining this. The plaintiff's claim will fail where one part of the matter conveys a defamatory imputation, but another part neutralises this.

CASE STUDY

***Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33**

Articles published in the defendant's newspapers contained the headline 'Treasurer for sale' in reference to Mr Hockey, who was Federal treasurer at the time. Hockey complained about the articles themselves as well as about placards and tweets promoting the articles, claiming that they provided several defamatory imputations including that he was corrupt and prepared to accept payments to influence his decisions as treasurer.

The court held that when the articles were read as a whole, the ordinary or reasonable person would not understand that it was being suggested that he was corrupt and could be bought. The article was criticising the use of fundraising events that gave donors to the Liberal Party special access to Hockey.

Despite this, Hockey was successful with the placards and tweets because they contained the headlines alone. Without the surrounding context of the article, the placards and tweets were deemed defamatory against Hockey through the words 'for sale'.

Whether a statement would lower the reputation of the plaintiff must be considered against the beliefs and values at the time of the publication. For example, being born out of wedlock was defamatory against previous standards but would no longer be considered as a defamatory statement today.

The matter identifies the plaintiff as a person defamed

The plaintiff must be, either expressly or impliedly, identifiable as the person defamed by the matter. This is often self-evident by the matter expressly naming the plaintiff, but can be more difficult where the plaintiff is not expressly identified or if the publication could be referring to multiple individuals. In these situations, it must be shown that the ordinary or reasonable person would identify the plaintiff upon learning of the matter.

This means, if it is found that the ordinary or reasonable person would identify the plaintiff as the subject of the matter, a defendant can still be liable for defamation even where:

- They are unaware of the plaintiff's existence;
- They are referring to an imaginary character; and
- They are referring to a different person with the same name.

CASE STUDY

***Lee v Wilson* (1934) 51 CLR 276**

A newspaper report of an inquiry into corruption by police officers referred to evidence from a witness that a 'Detective Lee' had accepted a bribe. The Detective Lee in question was a police officer in the motor registration branch. However, two other Victorian police officers known as 'Detective Lee' commenced action in defamation.

The court noted that liability in defamation is not dependant upon what was intended by the words, but instead what the ordinary or reasonable reader of the newspaper report would understand from it. Where the defamatory matter can be capable of referring to more than one person, they are all able to commence an action in defamation.

In this case, the court held that readers of the article could reasonably identify all three Detective Lees as the subject of the matter.

CASE STUDY

***E Hulton & Co v Jones* (1910) AC 20**

The defendant wrote a story about a person named Artemus Jones who was cheating on his wife. The author had used this name for a fictional character. As a result of the story, real-life barrister, Artemus Jones, commenced legal action. The defendant claimed that they should not be held liable as the plaintiff's name had been used as an imaginary character and they were unaware of the plaintiff's existence. The plaintiff provided witnesses who believed the story was referring to him.

The court held that the story defamed the real Artemus Jones as readers who knew him could reasonably understand that the story was referring to him. It did not matter that the defendant did not intend the story to refer to the plaintiff and was completely fictitious.

The matter has been published to a third party

A person's reputation cannot be damaged unless it is published to at least one third party. Simply publishing the defamatory matter does not always satisfy this element. Matter is considered published when it is fully comprehended by the third-party. For matter to be published online, the plaintiff must provide evidence that it was actually downloaded and comprehended by at least one third party.

Communications between spouses are exempt from publication. For example, a spouse can go home and criticise their co-workers and no action in defamation can be taken against them.

Publication can include:

- A defendant posting defamatory material online, to a large or small audience; and
- A defendant sharing defamatory material, such as re-tweeting a defamatory article or tweet, or sharing a defamatory post on Facebook (that was authored by a person other than the defendant).

Limitation of actions (defamation) 1.3.4.9

OVERVIEW

A person who feels that their rights have been breached under civil law must initiate a civil action within a set period of time, depending on the law that applies to that particular civil wrong. This is known as the limitation of actions. *The Limitation of Actions Act 1958* (Vic) places time restrictions on when a person may pursue a claim in defamation.

DETAILS

Section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic) outlines that a claim in defamation must be brought within **one year of the date of publication.**

LEGISLATION

***Limitation of Actions Act 1958* (Vic)**

Section 5 – CONTRACTS AND TORTS

(1AAA) An action for defamation must not be brought after the expiration of 1 year from the date of the publication of the matter complained of.

Extending the limitation period

This can be extended by a court in certain circumstances **to up to 3 years** as outlined by s. 23B of the *Limitation of Actions Act 1958* (Vic) if it was not reasonable for the plaintiff to have commenced action within the one year period.

LEGISLATION

***Limitation of Actions Act 1958* (Vic)**

Section 23B – DEFAMATION

(1) A person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period for the cause of action.

(2) A court... must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 5(1AAA) to a period of up to 3 years from the date of the publication.

Defences 1.3.4.10

If a case of defamation is likely to be proven against a defendant, that defendant may raise one or more defences to avoid being held liable. Some of the defences available against a defamation claim include:

- **Truth** - where the imputations in the defamatory matter are true;
- **Fair comment** - where the defamatory matter was a statement of opinion that was honestly held by the defendant;
- **Absolute privilege** - where the publication of the defamatory matter is always exempt from defamation law; and,
- **Qualified privilege** - where the publication of the defamatory matter was driven by a legal or moral duty.

Truth 1.3.4.10.1

OVERVIEW

Truth is a defence that protects the defendant where the matter is actually true. Matter cannot be defamatory if it is true.

DETAILS

There are two types of truth defences:

1. Defence of substantial truth.
2. Defence of contextual truth.

Defence of substantial truth

The defence of substantial truth (or justification) can be raised where the defendant claims the matter was true and therefore not defamatory. The defendant must prove that the statements were **substantially true**, which means true in substance or not materially different from the truth. This is the only element that must be proven for the substantial truth defence.

The defence of substantial truth is provided for by s. 25 of the *Defamation Act 2005* (Vic). The definition of substantial truth is provided by s. 4 of the *Defamation Act 2005* (Vic).

LEGISLATION

***Defamation Act 2005* (Vic)**

Section 25 – DEFENCE OF JUSTIFICATION

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

Section 4 – DEFINITIONS

'substantially true' means true in substance or not materially different from the truth

Generally, the substantial truth defence requires the defendant to provide evidence that the imputations are true. When the defendant raises the defence against multiple imputations, they must show that each is true. However, sometimes the defendant may impute that the plaintiff is a certain type of character which cannot be factually proven. In these cases, it must be determined whether the ordinary or reasonable person would consider the plaintiff to be of that character.

The substantial truth defence will still be satisfied even when the matter contains errors, so long as the errors do not alter the overall imputation the ordinary or reasonable person would draw.

For example, a newspaper article that states the plaintiff stole $50,000 when they actually only stole $40,000 would still satisfy the substantial truth defence as the overall imputations (the plaintiff is a criminal, is a thief and is greedy) have not been altered.

Where the matter is substantially true, it is irrelevant if the defendant intended to harm the plaintiff or benefit from its publication.

Defence of contextual truth

Contextual truth is a defence that may be raised where the imputation does not damage the plaintiff's reputation when read in context with other truthful imputations.

This occurs where the matter includes a mixture of defamatory imputations, some of which are true and others are false. There are two elements of contextual truth:

- The matter conveys an additional contextual imputation that is substantially true; and
- Due to the existence of the truthful imputations that lower the plaintiff's reputation, the false imputations do no further damage to their reputation.

CASE STUDY

Consider the following hypothetical scenario.

Harry commenced a defamation claim against Herald Fox Media, after they published an article which stated he unlawfully killed animals on his farm including 15 kangaroos and 2 eagles. Harry claimed that he only poisoned the kangaroos and the statement implying his cruelty towards the eagles was defamatory. The court held that the overall imputation from the article (that Harry had unlawfully killed native animals) was substantially true because he did poison the kangaroos. As a result of the substantial truth of the first statement, the claim that Harry also killed the wild eagles was deemed to be contextually true because it did not lower his (already low) reputation.

The defence of substantial truth is provided for by s. 26 of the *Defamation Act 2005* (Vic).

LEGISLATION

***Defamation Act 2005* (Vic)**

Section 26 – DEFENCE OF CONTEXTUAL TRUTH

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

It is a defence to the publication of defamatory matter if the defendant proves that—

(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true; and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

CASE STUDY

***McLachlan v Browne (No 7)* [2018] NSWSC 1914**

McLachlan sued in defamation against newspaper and television allegations that he had indecently assaulted and harassed multiple female staff members during the 2014 production of the Rocky Horror Show. The imputations were specific to misconduct occurring during that production.

The defendants sought to raise the defence of contextual truth on the basis that the matter was not just about the 2014 production but also general conduct of a similar nature. The court enabled the defendant to raise the defence of contextual truth. This gave the defendants the ability to provide evidence of misconduct on other television or theatre productions, not just the 2014 production, to justify the truth of their publications.

Impact of a successful defence

The truth defence (substantial truth or contextual truth) is a **complete defence**, meaning a defendant will not be liable in defamation for any imputations that are true.

Fair comment 1.3.4.10.2

OVERVIEW

Fair comment (or honest opinion) is a defence that protects a statement of opinion that was honestly held by the defendant.

DETAILS

The defence of fair comment requires the defendant to prove three elements:

- The matter was a statement of opinion;
- The opinion was a matter of public interest; and
- The opinion was based on proper material.

An honest opinion is protected by s. 31 of the *Defamation Act 2005* (Vic).

LEGISLATION

***Defamation Act 2005* (Vic)**

Section 31 – DEFENCES OF HONEST OPINION

(1) It is a defence to the publication of defamatory matter if the defendant proves that—

(a) the matter was an expression of opinion of the defendant rather than a statement of fact; and

(b) the opinion related to a matter of public interest; and

(c) the opinion is based on proper material.

The matter was a statement of opinion

The matter must be a statement of opinion that the defendant honestly held at the time of communicating the material. A factual basis must be provided in the publication, or referenced in support of the honest opinion.

The opinion was a matter of public interest

The opinion must be of public interest, meaning that the audience must have an interest in receiving the information. Some examples of areas of public interest include (but are not limited to):

- Political matters
- Activities of large corporations
- Sport and the conduct of sportspersons
- Quality of literary and artistic works
- Other matters of community concern such as:
  - Environmental matters
  - Animal welfare
  - Consumer welfare.

The opinion was based on proper material

The opinion must also be based on proper material. An opinion is based on **proper material** if it is based on material that:

- Is substantially true;
- Is protected by absolute or qualified privilege; or
- Is protected by s. 28 (public documents) or s. 29 (reports of public proceedings) of the *Defamation Act 2005* (Vic).

Impact of a successful defence

Fair comment is a **complete defence**, meaning a defendant will not be liable in defamation if this defence is raised successfully.

Absolute and qualified privilege 1.3.4.10.3

OVERVIEW

There are two privilege defences that may be raised against a defamation claim: absolute privilege and qualified privilege.

DETAILS

Absolute privilege

Absolute privilege is a defence that applies to statements made on an occasion where the free communication of information is considered to be so important that it must be exempt from defamation law.

There are three situations where the publication of information is completely protected:

- Communications in the course of parliamentary proceedings;
- Communications made during the course of judicial proceedings; and
- Communications between government ministers.

In situations where absolute privilege applies, the speaker is immune from defamation proceedings, even if:

- They make the statement with knowledge that it is false;
- They are acting with an intention to harm the plaintiff; and/or
- Substantial harm results from the statement.

The defence of absolute privilege is provided for by s. 27 of the *Defamation Act 2005* (Vic).

LEGISLATION ***Defamation Act 2005* (Vic)**

Section 27 – DEFENCE OF ABSOLUTE PRIVILEGE

(1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.

(2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if—

(a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to)—

(i) the publication of a document by order, or under the authority, of the body; and

(ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law; and

(iii) the publication of matter while giving evidence before the body; and

(iv) the publication of matter while presenting or submitting a document to the body; or

(b) the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to)—

(i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process); and

(ii) the publication of matter while giving evidence before the court or tribunal; and

(iii) he publication of matter in any judgment, order or other determination of the court or tribunal

Qualified privilege

Qualified privilege is a defence that can be raised where the publication of the defamatory matter was driven by a legal or moral duty. The privilege is qualified because it will be lost if the defendant was motivated by malice, or if it was published to persons without a special and reciprocal interest in receiving the information. There is both a common law qualified privilege defence and a statutory qualified privilege defence.

Common law qualified privilege

In order for common law qualified privilege to apply, there must be a reciprocal duty of interest between the publisher and the recipient. This means the publisher of the information must have a duty to publish it, and the receiver must have a legitimate duty or interest in receiving this information.

A legitimate interest or duty extends beyond merely being fascinated or curious about the information. As a result, common law qualified privilege generally won't protect mass media publications as not every receiver will have a legitimate duty in receiving the information.

There will only be limited circumstances where a person has an interest or duty to communicate information to a recipient who has a corresponding interest or duty in receiving it. Some circumstances that are protected by common law qualified privilege include:

- A previous employer giving a job or character reference to a prospective employer.
- Reporting a suspected crime to the police.
- Reporting suspected misconduct of an employee to their manager.
- Providing a report on an individual's credit rating.

The privilege is lost if the plaintiff proves that the defendant was driven by malice or extended beyond what would be considered reasonable. Where malice exists, the plaintiff must prove that it was the predominant reason for the publication, not just that it was a contributing factor.

CASE STUDY

***Guise v Kouvelis* (1947) 74 CLR 102**

A card game was being held in a room occupied by around 60 individuals. During the course of this, a dispute broke out between some of the participants in the game. The defendant loudly yelled at the plaintiff 'you're a crook'.

The defendant argued that the statement was privileged. The court rejected this argument, holding that the defendant was under no duty to publish his suspicions to the entire room. The court stated that if the defendant had honestly believed that the plaintiff was a crook, he should have reported it to the club committee members who could act upon this.

CASE STUDY

***Papaconstuntinos v Peter Holmes a Court* (2012) 249 CLR 534**

The defendants, Peter Holmes a Court and Russell Crowe, put forward a proposal to save a rugby league football club in financial difficulty. The plaintiff was a member of the board of the club who rejected this proposal.

Holmes a Court and Crowe then sent a letter to the club which suggested the plaintiff had provided information about the proposal which he knew was misleading. They also imputed that the plaintiff had been corruptly channelling funds to himself that were meant for the club.

The High Court in this case accepted the defence of common law qualified privilege as there was a reciprocal interest between the defendants (Crowe and Holmes a Court) and the club. The defendants had an interest in helping the proposal succeed and the club had an interest in receiving information about the conduct of one of their board members - so the negative comments about the plaintiff were protected by the defence of qualified privilege.

Self-defence common law qualified privilege

Common law qualified privilege will more broadly apply where acting in **self-defence.** This enables the defendant to make statements to the public when they have a duty to protect their reputation and the receiver will have an interest in receiving this information. For the self-defence privilege to apply, three elements must be shown: The comments were made in response to an attack on the defendant's reputation;

- The defendant's response related to the initial attack; and
- The response was made in order to protect the defendant's reputation.

Statutory qualified privilege

Enacted to provide media companies with a broader defence on matters of public interest, considering mass publications are generally not protected by other defences.

There are three elements required for statutory qualified privilege:

- The recipient has an interest or apparent interest in having information on the subject;
- The matter is published in the course of giving that information; and
- The conduct of the publisher is reasonable in the circumstances.

This is outlined by s. 30 of the *Defamation Act 2005* (Vic).

LEGISLATION

***Defamation Act 2005* (Vic)**

Section 30 – DEFENCE OF QUALIFIED PRIVILEGE FOR PROVISION OF CERTAIN INFORMATION

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that—

(a) the recipient has an interest or apparent interest in having information on some subject; and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

The recipients must have an interest in receiving the information on the subject. An interest is generally required to be of substance or tangible, an interest does not extend to an interest in gossip or mere curiosity. Where the publication is accessible by the public at large, it must be a matter of public interest or concern.

Some examples of relevant interest in receiving subject matter include:

- Discussion of private access to a government minister in return for political donations.
- Claims that a healthcare worker is providing incompetent care.
- Allegations that a businessman has bribed officials.
- Discussion of the views and conduct of a candidate for election to the committee of a turf club.

The matter must also be published to the recipient in the course of giving information on the subject. It must be reasonably appropriate to have published the information in order to communicate the matter of interest. The defence will be unsuccessful if the information is extraneous to or exceeded the matter of public interest.

Publishing the matter must also have been reasonable in the circumstances. Section 30(3) of the *Defamation Act 2005* (Vic) details some of the considerations the court may have when determining whether the conduct was reasonable.

LEGISLATION ***Defamation Act 2005* (Vic)**

Section 30 – DEFENCE OF QUALIFIED PRIVILEGE FOR PROVISION OF CERTAIN INFORMATION

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—

(a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

A defence of qualified privilege will not be successful where the publication of the defamatory matter was motivated by malice or spite. However, a defence of statutory qualified privilege is not defeated merely because the defamatory matter was published for reward.

Impact of a successful defence

Absolute and qualified privilege are **complete defences**, meaning a defendant will not be liable in defamation if either of these defences are raised successfully.

Remedies 1.3.4.11

OVERVIEW

A remedy is an order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered. You will learn more about remedies in Lesson 8F. In defamation cases, the most common remedies are damages or an injunction.

DETAILS

Damages

Damages are an award of monetary compensation to the plaintiff, to be paid by the defendant. The main form of damages awarded in defamation cases is compensatory damages. This can be split into three categories:

- **Specific:** have a precise value and are easily quantifiable.
  - For example, a reduction in sales following the publication of a defamatory article.
- **General:** do not have a precise value and are not easily quantifiable.
  - For example, pain and suffering as a result of a defamatory article.
- **Aggravated:** further compensation for humiliation and insult.
  - For example, continuing to publish a defamatory article after legal action has been commenced.

In defamation cases, damages may be awarded for:

- Non-economic loss, which includes an award of aggravated damages or general damages; or
- Economic loss, which includes an award of specific damages.

Exemplary damages cannot be awarded in defamation cases. Exemplary damages are an additional sum of money (awarded to a plaintiff in addition to compensatory damages) that seeks to punish a defendant for an extreme infringement of rights and, to some extent, deter others from undertaking similar actions.

LEGISLATION

***Defamation Act 2005* (Vic)**

Section 37 – EXEMPLARY OR PUNITIVE DAMAGES CANNOT BE AWARDED

A plaintiff cannot be awarded exemplary or punitive damages for defamation.

Injunction

Injunctions are court orders compelling a party to do something, or preventing a party from doing something.

There are two types of injunctions that could be granted for defamation:

- **Mandatory injunctions** force parties to do something.
  - For example, an injunction requiring the defendant to publish a new article acknowledging the previous publication was defamatory.
- **Restrictive injunctions** prevent parties from doing something.
  - For example, an injunction that prevents a newspaper from publishing a defamatory article.

CASE STUDY

***Hunt v Bailey and Anor* [2017] VCC 990**

Hunt ran a business that supplied various meat products to China. Hunt commenced legal action against Bailey over claims that Bailey had sent numerous emails and WeChat messages to his customers that were of a defamatory nature. Hunt claimed that they damaged his business reputation. After Hunt commenced legal action, Bailey continued to send emails and messages of this nature.

The court held that the emails and WeChat messages were defamatory as they contained imputations that Hunt engaged in crime, evaded tax and was corrupt. If the customers believed the emails and messages, this would be likely to damage Hunt's business reputation.

The court awarded Hunt $220,000 in **damages** which consisted of:

- General damages for the harm to Hunt's business reputation; and
- Aggravated damages as Bailey continued to send emails and messages that were defamatory after Hunt had pursued the case.

The court also granted Hunt an **injunction** to prevent Bailey from sending further emails and messages of that nature.

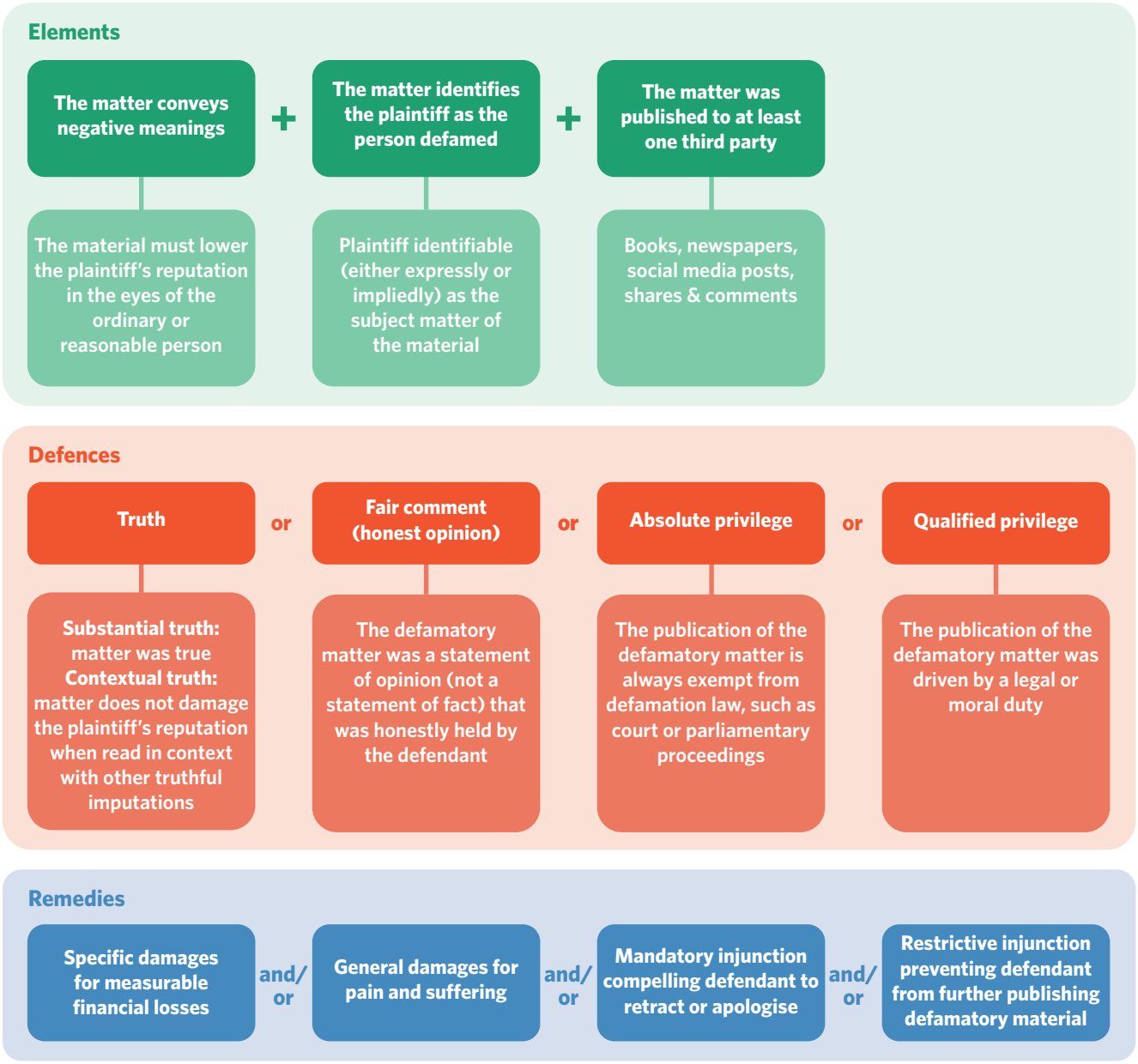


Figure 1 An overview of key concepts in defamation claims

Keen to learn more?

Legal Aid, Defamation, https://www.legalaid.vic.gov.au/find-legal-answers/defamation

The Law Handbook, What is defamation, https://www.lawhandbook.org.au/2019_11_02_01_what_is_defamation/

The Law Handbook, Defamation and your rights, https://www.lawhandbook.org.au/2019_11_02_00_defamation_and_your_rights/

QUESTIONS 5C Defamation: The tort & defences

LEVEL 1:
Define and understand

1. Which of the following false imputations would not be defamatory?

- **A.** The plaintiff is a criminal.
- **B.** The plaintiff is a hypocrite.
- **C.** The plaintiff is incompetent.
- **D.** The plaintiff is a police informer.

2. Which of the following is the primary right that is protected by defamation law?

- **A.** The right to not have bad things said about you.
- **B.** The right to not have your reputation damaged by the truth.

C. The right to not have your reputation damaged by lies.

D. The right to free speech.

3. Which of the following is not one of the elements that must be shown in a defamation case?

A. The matter has been published to a third party.

B. The matter is determined by the ordinary or reasonable person.

C. The matter conveys defamatory imputations.

D. The matter identifies the plaintiff as the person defamed.

4. Izac has commenced an action in defamation against a newspaper outlet that published a defamatory story about him. Izac is a hardworking businessman and the story imputes that he is greedy, incompetent and lazy. Izac wants to ensure the story is no longer published as it has damaged his professional reputation. What is the most appropriate remedy for Izac to seek to ensure the newspaper outlet stops publishing the defamatory story?

A. General damages as the harm to Izac's professional reputation is non-quantifiable. Ordering a payment of damages would discourage further publication of the defamatory story.

B. Aggravated damages to make the newspaper pay for the humiliation caused to Izac's business reputation. Ordering a payment of damages would discourage further publication of the defamatory story.

C. A mandatory injunction that forces the newspaper outlet to publish different stories.

D. A restrictive injunction that prohibits the newspaper outlet from publishing the defamatory story.

5. Within a six month period, a newspaper published a number of articles that defamed multiple individuals and businesses, all of whom wish to commence an action in defamation. Which of the following would be prohibited from commencing an action in defamation?

A. WonderWorld – a multinational business that that has 300 employees.

B. John Blackbox – the CEO of WonderWorld.

C. Helping Hands – a not-for-profit organisation that has 50 employees.

D. DangerCo – a business that that has 6 employees.

6. Renee was a witness in Ben's trial for the murder of Yvonne. Renee claimed that she saw Ben with Yvonne right before she went missing and that he had criminal tendencies. Despite this, Ben is found not guilty after security footage shows Ben leaving the premises before the murder occured. Following the trial, Ben commenced an action in defamation against Renee for suggesting that he is a criminal during the murder trial. Which defence protects Renee when providing evidence during judicial proceedings?

A. Truth defence

B. Fair comment

C. Absolute privilege

D. Qualified privilege

LEVEL 2:
Describe and explain

7. Describe the right protected by defamation law. (2 MARKS)

8. Explain the three elements that must be proven in defamation. (6 MARKS)

9. Eugine is the defendant in a defamation case. The plaintiff has proven all of the elements and Eugine wants to raise a defence. Explain one defence that Eugine could raise. (3 MARKS)

10. Describe the limitation of actions in defamation cases. (2 MARKS)

11. Maple has successfully brought a defamation case against Lewis after he posted an online status which claimed that she was dishonest.

Outline one of the remedies that could be awarded to Maple and why it could be appropriate. (3 MARKS)

LEVEL 3:
Apply and compare

12. Michael sees Richard copying his work during their maths exam. When the exam finishes, Michael confronts Richard who states 'you can't prove anything'. Michael then goes to his math teacher, Ms Blackwood, and informs her about the situation. Ms Blackwood then compares the answers of Richard's exam to Michael's and notices they are identical. After speaking to the principal about the incident, Ms Blackwood decides the best course of action is to invalidate Richard's exam result.

Richard claims that Michael defamed him as he imputed to Ms Blackwood that Richard is a cheat and his reputation has been damaged because of this. Explain one possible defence Michael could raise against the defamation accusation and justify why it would be appropriate. (4 MARKS)

13. Kelly Bickmore recently ended her two-year relationship with Graham. Out of rage, Graham posted a status online that stated 'I have suffered years of mental abuse from Kelly Bickmore and I've finally built up the courage to dump her!'

Graham is aware this claim is false but wanted to make her suffer for breaking his heart. The status was seen by Kelly's entire class and had two responses:

- 'Kelly is a bully! I'm always here for you if you need a friend.'
- 'I never thought Kelly was so abusive, you guys seemed so happy.'

The next day at school, Kelly's friends avoid her. She also overhears one of her classmates whisper 'I won't talk to Kelly, didn't you hear that she is a bully'. Kelly has just learnt about defamation and is considering commencing an action against Graham.

Do you think Kelly could successfully establish the elements of defamation in a claim against Graham? Justify your response. (6 MARKS)

14. *Bauer Media Pty Ltd v Wilson (No 2)* (2018) VSCA 154 is a case that involved well known actress, Rebel Wilson, who successfully sued in defamation in respect of numerous articles published by Bauer-owned magazines, including Woman's Day, Woman's Weekly and OK Magazine. The articles imputed that Wilson was a serial liar who was untrustworthy.

Two of the defences that Bauer Media raised against the defamation claim were substantial truth and qualified privilege. However, the jury rejected both of these defences and Bauer Media was held to be liable in defamation.

Explain one of the defences raised by Bauer Media and provide two possible reasons as to why it was not successful. (3 MARKS)

15. *Seafolly v Madden* [2012] FCA 1346 is a case that involved a claim and cross-claim from two competitors in the swimwear industry. Madden operates a business retailing as White Sands and Seafolly is a large organisation with multiple stores worldwide.

Madden falsely believed that Seafolly had copied a number of her swimwear designs. As a result, Madden posted a Facebook status to her personal profile comparing the designs with a caption 'The most sincere form of flattery?'. However, most of Seafolly's designs were already in the market before Madden's. Following Madden's post, Seafolly published media releases where they accused Madden of deliberately and maliciously lying about them copying her designs in order to damage their business.

Seafolly commenced a claim against Madden in a number of areas of civil law, including misleading and deceptive conduct (covered in Lesson 5E). Madden commenced a cross-claim against Seafolly for misleading and deceptive conduct and defamation.

a) Madden had falsely accused Seafolly of copying her designs but Seafolly was unable to commence a claim for defamation, despite this being a negative and false claim about their business. Explain why they were unable to do so. (2 MARKS)

The court held that it was defamatory for Seafolly to claim that Madden had acted maliciously in posting the Facebook status. However, Madden's defamation claim ultimately failed because Seafolly raised the qualified privilege defence. The court held that Seafolly had been acting in self-defence as they were responding to an attack made against them and their attack went to Madden's credibility.

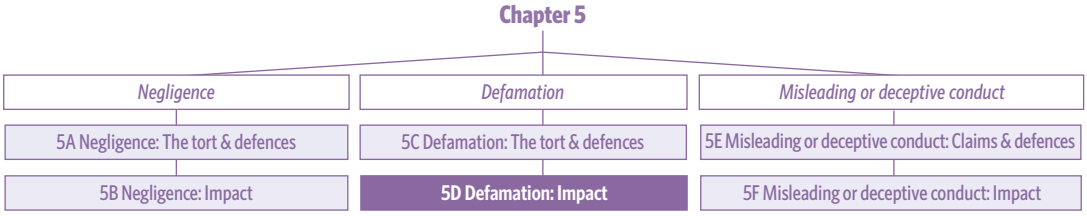
b) Explain the qualified privilege defence that may be raised when acting in self-defence. (4 MARKS)

5D Defamation: Impact

Australia has relatively strict defamation laws that tend to prioritise the protection of a person's reputation over the free-speech of a defendant. For example, leading media lawyer Peter Bartlett has said that 'we are in the unfortunate position that we have some of the most restrictive media laws in the world'.

Source: Story, Carter & Carrick, Do Australia's strict defamation laws help protect high-profile abusers? (2017).

However, the number of defamation matters that reach the courts is only a small proportion of the total claims initiated. Many cases are settled out-of-court. Regardless of whether they reach trial or are settled in advance, incidents of defamation can have a significant impact on the parties to the case.



In this lesson you will be learning about the impacts that a case of defamation can have on the parties involved.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

Impact of the breach on the parties (Defamation)	1.3.4.12

Impact of the breach on the parties 1.3.4.12

OVERVIEW

How might a case of defamation impact the parties involved? That is, how might the communication of false information harm both the plaintiff and the defendant?

DETAILS

Claims of defamation can have a range of impacts on the parties involved, including (but not limited to):

- **Financial losses** – there can be significant financial ramifications for both plaintiffs and defendants involved in a defamation action:
  - If a plaintiff succeeds in pursuing a defamation claim, a defendant is likely to have to pay:
    - Damages to compensate the plaintiff for their suffering (which may be significant if the defamation caused a highly-paid actor, sportsperson or similar to lose income due to the defamatory publication);
    - Their own legal expenses; and
    - The legal expenses of the plaintiff (including the court's filing fees and the costs of legal representation).
  - An unsuccessful plaintiff may have to pay:
    - Their own legal expenses; and
    - A large portion (if not all) of the defendant's legal costs.

- **Reputational damage to the plaintiff** – when a defamatory statement is made, a plaintiff has suffered some degree of damage to their public image, reputation and/or character. This can have long-term negative effects, including:
  - Loss of work.
  - Negative impact on relationships.

  A plaintiff who succeeds in a defamation claim may still suffer some reputational damage that cannot be undone by the court's decision; that is, some members of the public may continue to hold a negative view of the plaintiff based on the original publication, despite the court declaring such publication to be defamatory.
- **Reputational damage to the defendant** – following the publication of defamatory information, the credibility, integrity and/or accuracy of the defendant's conduct/speech may be questioned in the future.
- **Psychological damage** – defamatory statements can cause significant humiliation and shame for the plaintiff, who may have to continue going to work or appearing in public despite the damage to their reputation, before the matter is resolved by the courts.
  - Giving evidence in proceedings and discussing the impact of a defamatory publication may be a difficult experience for many plantiffs.
  - This is especially the case if another individual (beyond the plaintiff and the defendant) is connected unwillingly to the defamatory publication and legal action. Consider the impact on Eryn Jane Norvill in the 2019 *Rush v Nationwide News* matter (discussed in Lesson 9B).
- **Threat to free speech** – it has been suggested the 'plaintiff-friendly' defamation laws that operate in Australia may have a potentially negative impact on free-speech. In particular, it has been argued that strict defamation laws could decrease the likelihood of people coming forward with controversial allegations, especially against people in power or authority. For example, Peter Bartlett has said that:

  > While the strict nature of Australia's defamation laws helps stop the media publishing material that is false and potentially damaging to an individual's reputation, it also creates a major barrier for victims of harassment or abuse at the hands of a high-profile individual, for instance, to come forward.

  Source: Story, Carter & Carrick, Do Australia's strict defamation laws help protect high-profile abusers? (2017)

CASE STUDY

Actor Geoffrey Rush awarded record $2.9 million in defamation case

Geoffrey Rush will receive almost $3 million in damages after a series of articles that were published by the Daily Telegraph described him as engaging in 'inappropriate behaviour' towards a female co-star in a theatre production of King Lear.

Justice Michael Wigley found in favour of Rush on the grounds that the article was published recklessly and without sufficient grounds to support the claims made against the actor. This case is described in further detail in Lesson 9B.

Financial losses:

Justice Wigley estimated that Rush's earnings as an actor would suffer for as long as two years following the significant damage to his reputation.

Freedom of speech:

The defendant's legal team has challenged the decision of Justice Wigley and has said that it could have 'a chilling effect on future reporting of an issue which is of enormous significance and importance... the 'me too' [movement]'.

As at November 2019, this award of damages is being appealed by the defendant.

Source: McGowan, M., Geoffrey Rush to receive record $2.9m damages in Daily Telegraph defamation case (2019)

CASE STUDY

Silverchair lead singer sues NewsCorp over front-page brothel article

The former frontman of Silverchair, Daniel Johns, is currently pursuing defamation proceedings against the Sunday Telegraph (NewsCorp) in the Supreme Court of Victoria. The claim involves a front-page story alleging that he had spent up to 18 hours a day for two weeks at a Sydney brothel called The Kastle.

Johns claims that he has never set foot in the brothel, nor did he even know it existed. This claim was supported by the owner of the brothel, who publicly stated that Johns had never been a client. He also claims that nobody from the Sunday Telegraph contacted him or his representatives to check the facts prior to publishing the article.

Johns claims he asked the newspaper for an apology and a retraction of the article, but received neither. NewsCorp has since removed the article from its website.

Psychological damage:

Johns explained that the false reporting published by the Sunday Telegraph had 'been very hurtful, humiliating and damaging to [him] and [his] family'.

Reputational damage:

- This case is another defamation case against NewsCorp publications, including the case of Geoffrey Rush mentioned above. Multiple instances of defamatory and inaccurate articles can damage the credibility and legitimacy of a publication's reporting.
- Defamation cases of this nature can also have reputational consequences for adjacent parties who are not involved in the proceedings. For example, the brothel in question in this case was forced to make a statement explaining that 'in our 30 year history, we've never revealed the identity of clients and take privacy very seriously'.

Source: McGowan, M., & Meade, A., Daniel Johns sues News Corp for defamation over front-page brothel story (2019)

USEFUL TIP

While a case is ongoing, the court may grant what is known as an interlocutory injunction. In regards to defamation claims, this may involve certain publications being removed or withheld after the case is started and before it is decided whether the statements are indeed defamatory. See Lesson 8F for further details.

CASE STUDY

***The School for Excellence Pty Ltd v Trendy Rhino Pty Ltd* [2018] VSC 514**

Justice Dixon granted an interlocutory injunction against the marketing company, Trendy Rhino, behind the popular facebook page 'VCE Discussion Space'.

The court heard that the original Facebook group had constituted over 139,000 members and consistently engaged in discussions about the VCE and its examinations. After The School for Excellence (TSFX) complained to Facebook in July 2018 regarding breaches of its copyright in relation to the publication of numerous TSFX practice exams, Facebook shut down the group. At the same time, the defendant said that it would not make any derogatory, defamatory, unsavoury, untrue or unfavourable comments about the plaintiff in future.

However, it was found that Trendy Rhino almost immediately formed a new Facebook group with a similar name (VCE Discussion Space Backup) and urged the estimated 11,000 followers in the second group to 'reclaim the group that is rightfully ours'.

Reputational damage:

The Court heard that there have since been derogatory and abusive posts made in regards to the plaintiff's business. Justice Dixon said that in posting to 'reclaim the group', the page was in effect provoking a campaign of harassment against the plaintiff.

Freedom of speech:

Facebook is often seen as a place to discuss opinions and air grievances. However, in recent times and through defamation cases such as this, this function of Facebook has been called into question. Pages that disseminate unsavoury material about a business, and call for 'discussions' of a similar nature from their followers, may well be in breach of defamation law. Concerns as to whether this harms the freedom of speech that is inherent to Facebook are hotly debated.

Note: This is an interlocutory injunction only. A trial will proceed at a later date.

Keen to learn more?

Victoria Legal Aid, https://www.legalaid.vic.gov.au/find-legal-answers/defamation

The Law Handbook, https://www.lawhandbook.org.au/2019_11_02_00_defamation_and_your_rights/

QUESTIONS 5D Defamation: Impact

LEVEL 1:
Define and understand

1. A police officer successfully sued for defamation in the Supreme Court of Victoria following online posts claiming that he had 'executed' a teenager in 2008. Justice Bell said that the damage suffered by the police officer was clear: 'a baseless challenge to the moral foundation of the plaintiff's personal integrity and public standing'. Based on Justice Bell's statement, which of the following arguments would the police officer most likely support?

- **A.** These online posts are defamatory, and represent a threat to free speech here in Australia. The strict defamation laws that I am faced with serve the interests of the plaintiff, and limit my ability to express myself.
- **B.** Being sued for defamation has been extremely damaging financially. I have been forced to defend myself in court, which has cost my family and me a lot of money.
- **C.** As a result of these online posts, I have suffered damage to my public image. The posts constitute a direct attack on my character.
- **D.** Issuing proceedings against these online posts has proven to be a useful way of squashing disapproval. Regardless of whether my claim was to be dismissed, the high costs involved in defending against my claim should be enough to hold those responsible to account.

2. Consider the defamation case involving Daniel Johns and the Sunday Telegraph. Which of the following statements is not supported by the information provided?

- **A.** The newspaper had the opportunity to apologise to Johns and retract the article.
- **B.** The brothel involved in the story felt the need to publicly address the claims.
- **C.** To avoid a defamation claim, the Sunday Telegraph need only to have contacted Johns or his representatives to inform them of the article prior to publishing.
- **D.** Johns explained that the article has had significant psychological consequences on him and his family.

3. Fairfax Media lawyer Richard Coleman says only about 10 to 15 percent of defamation claims made against the media organisation ever made it to court. Which of the following statements best explains this statistic?

- **A.** The high costs involved in defending defamation claims in court often means that defendants will seek to settle matters in advance of trial to avoid associated costs.
- **B.** When a defamation claim is raised, the court will always grant an interlocutory injunction while deciding whether the statements are indeed defamatory.
- **C.** When a defendant is faced with a defamation claim, they need only apologise to the plaintiff prior to trial to avoid having the claim progress to court.
- **D.** All of the above.

LEVEL 2:
Describe and explain

4. Outline the response of NewsCorp following the decision of Justice Wigley in the Geoffrey Rush defamation case, regarding freedom of speech. (2 MARKS)

5. Victoria Legal Aid describes defamation as: 'causing harm to a person's reputation by publishing material about them that changes the way people feel about them. Publishing includes speaking, writing, drawing, photographing or blogging.'

Source: https://www.legalaid.vic.gov.au/find-legal-answers/defamation

a) Using *The School for Excellence* as an example, describe how defamation can cause reputational damage to a plaintiff. (2 MARKS)

b) Using NewsCorp as an example, describe how defamation can cause reputational damage to a defendant. (2 MARKS)

LEVEL 3:
Apply and compare

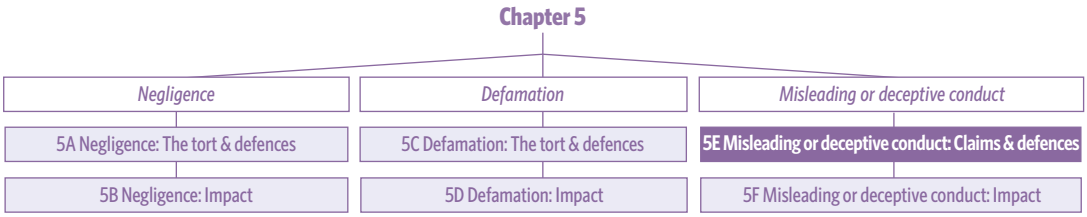
6. In a recent presentation at a legal seminar in Melbourne, Mr. Barry Star described Australia's defamation laws as being 'too plaintiff-friendly' and a 'direct threat to our freedom of speech'.

Explain what Mr Star means by a 'threat to freedom of speech'. Refer to an example to support your answer. (3 MARKS)

5E Misleading or deceptive conduct: Claims & defences

Legislation prohibiting misleading or deceptive conduct is an example of civil law that aims to protect consumers and businesses from being deceived when engaging in commercial transactions. Misleading or deceptive conduct is prohibited by the *Australian Consumer Law (ACL)* which is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). This is a national law – it applies to all individuals and organisations throughout Australia.

Misleading or deceptive conduct is a strict liability claim, meaning there is no need to show the defendant had any intention of harming the plaintiff – only that they engaged in conduct that was misleading or deceptive, or likely to mislead or deceive.



In this lesson you will learn about misleading or deceptive conduct claims, including the rights protected by this area of law, the elements to be proven by a plaintiff in such claims, the limitation of actions and the possible defences that may be raised. Both statute law (the *Australian Consumer Law*) and common law define the elements of misleading or deceptive conduct and the defences that be may raised; these common law principles and legislative provisions will be referred to throughout the lesson.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

The rights protected by Australian Consumer Law	1.3.4.13
Elements required to establish liability (misleading or deceptive conduct)	1.3.4.14
Limitation of actions (misleading or deceptive conduct)	1.3.4.15
Defences	1.3.4.16
Remedies	1.3.4.17

The rights protected by Australian Consumer Law 1.3.4.13

OVERVIEW

The *ACL* is a very broad-ranging law that operates to protect Australians engaging in commercial transactions. The *ACL* protects consumers in the following areas:

- Unfair contract terms
- Consumer guarantees
- Product safety
- Unsolicited consumer agreements (such a door-to-door sales and telephone sales)
- Lay-by-agreements.

Furthermore, regulators such as the Australian Competition and Consumer Commission (ACCC) are able to take legal action against businesses engaging in conduct that is prohibited by the *ACL*, and the *ACL* outlines remedies for injured parties and penalties courts may impose for a breach of the *ACL*.

Please note this lesson specifically focuses on claims of misleading or deceptive conduct and how consumers are protected in this area.

DETAILS

Rights protected by the *ACL* concerning misleading or deceptive conduct

Misleading or deceptive conduct is prohibited by s. 18 of the *ACL*.

> **LEGISLATION** ***Australian Consumer Law***
>
> **Section 18 – MISLEADING OR DECEPTIVE CONDUCT**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 18 therefore protects consumers from being misled or deceived by businesses when engaging in commercial transactions. The additional phrase 'likely to mislead or deceive' in s. 18 has the effect of making this protection extremely broad.

How these rights are enforced

The *ACL* applies to Victorians through the operation of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

> **LEGISLATION** ***Australian Consumer Law and Fair Trading Act 2012* (Vic)**
>
> **Section 8 – APPLICATION OF AUSTRALIAN CONSUMER LAW**
>
> (1) The Australian Consumer Law text, as in force from time to time—
>
> (a) applies as a law of this jurisdiction; and
>
> (b) as so applying may be referred to as the Australian Consumer Law (Victoria); and
>
> (c) as so applying is a part of this Act.

Direct protection of consumers' rights

Victorian consumers who have been misled or deceived when purchasing goods and services can seek to have their rights restored by taking legal action against the business.

The *Australian Consumer Law and Fair Trading Act 2012* (Vic) enables a Victorian consumer to uphold their rights by seeking a remedy in VCAT. Lesson 8C describes in detail how VCAT operates to resolve civil disputes.

Indirect protection of consumers' rights

The ACCC may initiate court proceedings against businesses engaging in misleading or deceptive conduct.

In doing so, the ACCC will ask a court to impose a financial penalty against firms that mislead or deceive consumers. The threat of such financial penalties should discourage businesses from engaging in misleading or deceptive conduct, preventing consumers from suffering loss or injury.

Elements required to establish liability (misleading or deceptive conduct) 1.3.4.14

OVERVIEW

Four elements must be satisfied in misleading or deceptive conduct claims:

1. A person
2. In trade or commerce
3. Engage in conduct
4. Misleading or deceptive or likely to mislead or deceive.

DETAILS

A person

Generally, 'a person' is one of the easiest elements to prove. For the purposes of s. 18 of the *ACL*, **a person is** the individual or organisation that allegedly engaged in misleading or deceptive conduct. In practice this is generally a corporation.

The definition of 'corporation' is provided for by s. 4 of the *Competition and Consumer Act 2010* (Cth) and includes foreign corporations, trading corporations or financial corporations. However, most cases concerning misleading or deceptive conduct involve trading corporations. In order to be a trading corporation, a substantial part of their activities must be trading activities.

CASE STUDY

***E v Australian Red Cross Society* (1991) 27 FCR 310**

A recipient of a blood transfusion by the Australian Red Cross contracted HIV from infected blood. He commenced proceedings against the Red Cross and also against the public hospital where he had received the blood transfusion for misleading and deceptive conduct. He claimed he was misled as to the quality of the blood.

The main issue in this case was whether the Australian Red Cross and the hospital were trading corporations as their main activities were the provision of blood products and medical services which were not categorised as trading activities.

The court held that they both were trading corporations as they engaged in trading activities on a large scale. The Australian Red Cross had gift shops and training courses which contributed to only 5% of their overall revenue, but this equated to $2 million which is substantial.

This case illustrates that a not-for-profit organisation can be a trading corporation even though the income from its trading activities is a relatively minor percentage of all revenue.

Please note that the Red Cross was ultimately not liable in this case, as the conduct did not occur in trade or commerce (as it was the provision of a public service) – a separate element to be proven in such claims.

In trade or commerce

Section 18 of the *ACL* only applies to conduct that occurs in trade or commerce. **Trade or commerce refers to** activities during a commercial dealing or transaction. It is not sufficient for a plaintiff to prove that the conduct occurred during the corporation's overall activities.

In trade or commerce is broad and extends to dealings such as:

- Pre-contractual negotiations
- Professional advice
- Selling goods or services to customers.

'In trade or commerce' is distinct and separate from being a trading corporation. Just because an activity is undertaken by a trading corporation does not mean that occurred in trade or commerce. It must have occurred during a commercial dealing or transaction.

CASE STUDY

***Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594**

The plaintiff was employed on a building site by Concrete Constructions. The site foreman informed the plaintiff that an entrance to an air-conditioning shaft was secured. This was not true and the plaintiff fell to the bottom of the shaft, sustaining a serious injury. An action for personal-injury damages would generally be brought as a workplace injury claim or a claim in negligence, but the plaintiff commenced an action for misleading and deceptive conduct.

The plaintiff claimed that Concrete Constructions engaged in misleading or deceptive conduct by the foreman's false statement about the securing of the air-conditioning shaft.

The High Court held this did not occur 'in trade or commerce', adopting a narrow approach to this phrase. Therefore, it is not enough that the conduct occurred as part of the corporation's overall trading or commercial activities, it must occur as part of a particular transaction.

Engage in conduct

Section 18 of the *ACL* refers to 'conduct'. **Engaged in conduct refers to** doing an act or omitting to do an act – the phrase 'engaged in conduct' is very broad. For s. 18 of the *ACL*, this focuses on whether there is a causal relationship between the disputed conduct and the error.

Some examples of conduct for s. 18 of the *ACL* includes (but is not limited to):

- Advertisements
- Promotions
- Quotations
- Statements
- Posting information online
- Withholding or interfering with the accuracy of information.

CASE STUDY

***ACCC v Meriton Property Services Pty Ltd* [2017] FCA 1305**

Meriton, a large provider of accommodation services, participated in a review system operated by TripAdvisor. This required Meriton to provide TripAdvisor with the email addresses of guests who had used their services and TripAdvisor would email them for a review of their stay.

The ACCC commenced an action against Meriton due to concerns they were interfering with this review service. If staff were concerned that a guest may leave a negative review, they would insert the extra letters 'MSA' into the email address when providing TripAdvisor with guest details. Staff would also completely withhold guest information from TripAdvisor during periods of service disruptions (such as hot water outages or problems with their elevators).

The court had to consider whether this contravened s. 18 of the *ACL* by engaging in conduct that was likely to mislead or deceive potential consumers about the quality of their accommodation services.

The court held that by reducing the number of negative reviews, Meriton was creating a false impression of the quality of the hotel service they provided, which was likely to mislead or deceive TripAdvisor users into error.

The court emphasised the focus should be on the existence of the causal connection between the conduct in question and the error that has been made, or likely to be made, by the ordinary reasonable member of the target audience.

CASE STUDY

***Begovic v Northpark Berwick Investments Pty Ltd (Civil Claims)* [2019] VCAT 772**

Begovic purchased a new Triton for almost $40,000. At the car dealership, a label on the windscreen advertised the Triton as being particularly fuel efficient, and Begovic relied on this information when deciding to purchase the car. It proved to much less fuel efficient than advertised.

Begovic succeeded in his claim of being misled. The label advertising how much fuel the Triton consumed was the conduct that was held to be misleading. See Lesson 9C for further details.

USEFUL TIP

Consider a consumer who feels they were misled about the good or service they have purchased.

It is not sufficient for a plaintiff to demonstrate they were confused about a product by the actions of the defendant. Instead, the plaintiff in such a case must show that the actions of the defendant (for example advertising, statements made in person, etc.) resulted in the decision to buy a particular good or service. He or she must prove they were led into error by the actions of the defendant.

Misleading or deceptive, or likely to mislead or deceive

The *ACL* does not define the terms 'misleading or deceptive' or 'likely to mislead or deceive'.

Through common law decisions, the courts have determined that conduct will be misleading where it conveys a meaning which is likely to lead the ordinary or reasonable member of the target audience into error.

The target audience is the intended group of consumers to which the conduct is directed at. Where the conduct is directed to a diverse cross-section of the public, the ordinary or reasonable member of the target audience is deemed to be:

- Inexperienced in transactions of that kind
- Of average education
- Not careless or gullible.

While it is not essential to show that the defendant had any intention of misleading or deceiving, showing an intention will support the conclusion that the conduct was misleading or deceptive.

CASE STUDY

***Targetts Pty Ltd v Target Australia Pty Ltd* [1993] FCA 259**

Targetts had operated a retail clothing and footwear business in Launceston (in Tasmania) for a number of years and had developed an established reputation in that location. Targetts commenced a claim of misleading or deceptive conduct against Target Australia to prevent them from trading in Launceston. Targett's claimed that this would breach s. 52 of the *Trade Practices Act 1974* (which was the equivalent of s. 18 of the *ACL* at the time) due to the use of the word 'Target' in their trading name.

The court held that the word 'Target' would mislead the ordinary or reasonable member of the target audience (in Launceston) into believing that Target Australia had a connection with Targetts. This was the case even though it would not mislead consumers in different locations.

CASE STUDY

***Seafolly Pty Ltd v Madden* [2012] FCA 1346**

This case included a claim and cross-claim from two competitors in the swimwear industry. Madden operated a swimwear business (White Sands) and Seafolly is a large organisation with multiple stores worldwide.

Madden believed (incorrectly) that Seafolly had copied a number of her swimwear designs. As a result, Madden posted a Facebook status to her personal profile comparing the designs with a caption 'The most sincere form of flattery?'

Most of Seafolly's designs were, in fact, already in the market before Madden's. Following Madden's post, Seafolly published media releases in which they accused Madden of deliberately and maliciously lying about them copying her designs in order to damage their business.

Seafolly claimed Madden engaged in misleading or deceptive conduct

Seafolly commenced a claim against Madden in a number of areas of civil law, including a misleading or deceptive conduct claim.

Madden was found liable for misleading or deceptive conduct, because she had misled readers of her Facebook status that Seafolly had copied her designs – this was untrue. Seafolly was awarded $20,000 in damages.

Madden claimed Seafolly engaged in misleading or deceptive conduct

Madden also commenced a claim against Seafolly for misleading or deceptive conduct.

Madden argued that Seafolly's media releases were misleading because they suggested she had set out to maliciously damage Seafolly's business. Madden argued this was untrue, and the court accepted her argument. She was therefore successful in her claim that Seafolly had engaged in misleading or deceptive conduct and was awarded $40,000 in damages.

Puffery

Puffery is a term used to describe wildly exaggerated, fanciful or vague claims about a good or service that no one could possibly treat seriously or find misleading. These statements are not considered misleading or deceptive under the *ACL*.

Source: ACCC, Advertising and Selling Guide (2017)

Puffery involves exaggerated or vague claims that are intended to gain attention rather than make factual claims about a product or service. The ordinary or reasonable consumer will not be misled or deceived, and is not likely to be misled or deceived by puffery, so it will not be actionable under s. 18 of the *ACL*.

In order for a claim to be considered puffery, it must be reasonably self-evident to the ordinary or reasonable member of the target audience that it is not meant to be taken seriously.

Some ways to identify puffery include (but are not limited to):

1. Quirky and abnormal language
2. Imprecise and indefinite claims
3. Exaggerated and self-serving claims
4. High level of generality.

CASE STUDY

***REA Group Limited v Fairfax Media Limited* [2017] FCA 91**

Fairfax published advertisements in its newspapers and on billboards promoting a mobile phone app that was operated by its wholly-owned subsidiary, Domain Group. Domain operated the property listings website and an associated app. REA group operated a rival property listings business realestate.com.au.

The advertisements published by Fairfax contained two phrases which REA group disputed:

- #1 property app in Australia. The best listings in Melbourne are on Domain.
- #1 property app in Australia. The most property listings in Sydney are on Domain.

REA alleged that these claims were false and by making them Domain had engaged in misleading or deceptive conduct. Domain argued that due to the exaggerated and imprecise nature of the claims, they would be understood by the ordinary or reasonable member of the target audience as puffery.

This argument was accepted in respect of the first phrase. These claims were very general and the ordinary or reasonable member of the target audience would not understand them to be making definitive claims.

However, the second phrase conveyed the meaning that it was the best property app **because** it had the most property listings in Sydney. This provided an actual benchmark that was specific and quantifiable as opposed to a general statement. The court held that this was misleading or deceptive as it was shown that REA had more property listings in Sydney at the relevant time.

Limitation of actions (misleading and deceptive conduct) 1.3.4.15

OVERVIEW

A person or business who feels they have been misled or deceived in a commercial transaction must initiate proceedings within six years of the cause of action.

DETAILS

Limitation of actions are the time restrictions placed on individuals or businesses who wish to commence legal action. An injured party must pursue a claim for misleading or deceptive conduct within **six years** of the cause of action arising. The cause of action for misleading or deceptive conduct is the date that the alleged conduct occurred.

LEGISLATION

Australian Consumer Law

Section 236 – ACTIONS FOR DAMAGES

(2) An action…may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

Defences 1.3.4.16

OVERVIEW

The best approach for defending a claim for misleading or deceptive conduct is to challenge one of the elements.

DETAILS

Challenging 'in trade or commerce'

Section 18 of the *ACL* only applies to conduct that occurred in trade or commerce. If the defendant can prove that the conduct occurred privately or was not involved in a particular commercial dealing or transaction, this will help to avoid liability for misleading or deceptive conduct under s. 18 of the *ACL*.

CASE STUDY ***Orion Pet Products Pty Ltd v RSPCA (Vic)* (2002) 120 FCR 191**

Orion Pet Products manufactured a particular dog training collar which the RSPCA believed tortured dogs – because owners were able to press a button to emit voltage. The RSPCA believed the collars were burning dogs' necks and had been campaigning to have the collars banned from sale and use. In an interview with the Herald Sun, RSPCA claimed the collars emitted 3,000 volts.

Orion commenced action in a number of areas of civil law, including defamation and misleading or deceptive conduct.

The misleading or deceptive conduct claim failed as it was found to have not occurred in trade or commerce. The RSPCA was a trading corporation as they made a substantial amount of revenue from their trading services, but their comments to the Herald Sun were made for educational purposes and were political in nature, not commercial.

Challenging 'conduct'

The best way to challenge the 'conduct' element is to prove that there is no causal relationship between the disputed conduct and the error made. Section 18 will not be contravened where the defendant can prove:

- The ordinary or reasonable member of the target audience would be confused by the conduct; or
- The ordinary or reasonable person would only be led into error by their own mistaken assumption.

Confusion

The defendant may argue that the ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.

CASE STUDY ***McWilliam's Wines Pty Ltd v McDonald's System of Australia Ltd* (1980) 49 FLR 455**

McWilliam's sold wine which was referred to as 'The Big Mac'. This was a reference to the 'Mc' in McWilliam's and the fact it was a larger bottle of wine. Fast food outlet, McDonald's, sought an injunction to prohibit the use of the term 'Big Mac'. They argued that it would falsely represent to consumers that there was a connection between the two companies.

However, the court refused to award an injunction on the basis that although readers of the advertisement might have been confused about the existence of a connection between the companies, they would not actually have been misled into believing that there was a connection.

Consumers might be confused about whether there was a connection between McWilliam's Wines and McDonald's, and may even wonder if McDonald's had branched out into the wine industry - but merely being confused about the existence of a connection is not enough to establish misleading or deceptive conduct under s. 18 of the *ACL*.

Erroneous assumption

The defendant may argue that the error was caused by an erroneous assumption by the plaintiff rather than the defendant's conduct.

In other words, the defendant may argue their actions would not lead to any loss suffered by a consumer; instead, any loss is the result of a mistake made by the plaintiff in deciding whether to purchase a product.

CASE STUDY

***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191**

Puxu manufactured lounge suites known as 'The Contour Range'. The lounge suites had been advertised widely but the design had not been trademarked. Parkdale then began to manufacture lounge suits under the names Parkdale Custom Built Furniture and Custom Built Furniture. Parkdale's lounge suite was almost identical to Puxu's.

Puxu commenced proceedings arguing that Parkdale had engaged in misleading or deceptive conduct because of the close resemblance of the product's appearance and design. Puxu argued that consumers would be misled into believing that the Parkdale lounge was the original Puxu lounge. However, the court held that the conduct of Parkdale in copying the design of the applicant's lounge was not misleading or deceptive.

Copying a design from someone else is not misleading or deceptive – to be misleading, such conduct must falsely imply that there is a connection between the companies or the products. Clearly labelling or branding the product will generally be sufficient to avoid any misleading or deceptive impression. Parkdale's lounge was clearly labelled as 'Rawhide', it wasn't labelled as a 'Contour Lounge'.

The existence of the label corrected any confusion created by the similarity of design as to the source of the lounge. If purchasers were lead to error, this was not because of any misleading conduct of Parkdale, but because of their own incorrect assumption based on the closeness of the design and preconceived ideas that the first manufacturer had a monopoly on that design.

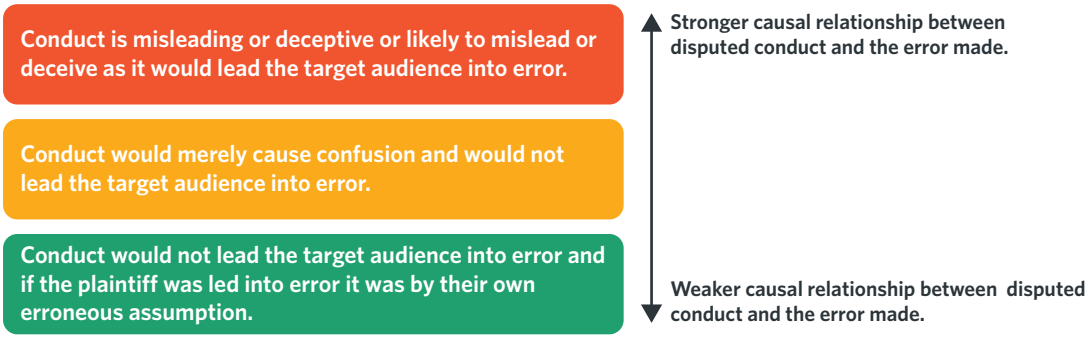


Figure 1 From confusion to deception

Challenging misleading or deceptive or likely to mislead or deceive

Section 18 will not be contravened where members of the target audience would not be misled or deceived, even if other ordinary reasonable persons would be. If the defendant can prove that the target audience would not be misled or deceived by the conduct, they will not be liable under s. 18 of the *ACL*.

CASE STUDY

***Dr Martens Australia Pty Ltd v Rivers (Aust) Pty Ltd* [1999] FCA 1655**

Dr Martens (the exclusive Australian Distributor of Doc Martens shoes) commenced an action against Rivers for selling look-alike Doc Martens shoes, arguing that consumers would be misled into believing that the imitation shoes were actual Doc Martens.

The potential purchasers of Doc Martens shoes were generally younger people who knew about the existence of imitation products and were able to differentiate between the two classes by reference to branding, pricing and labels.

Thus, Dr Martens' claim was unsuccessful because the target audience (purchasers and potential purchasers of Doc Martens shoes) would not be misled by the look alike shoes. It was irrelevant that other sections of the community may have been misled by this.

Impact of a successful defence

If any of the elements are successfully challenged, then the defendant will not be liable for misleading or deceptive conduct under s. 18 of the *ACL*. However, they may still be liable under other sections of the *ACL* or different common law torts.

USEFUL TIP

As stated at the beginning of this lesson, s. 18 is not the only section of the *ACL* that protects consumers and businesses from misleading conduct.

For example, ss. 29, 33 and 34 of the *ACL* also relate to claims of false or misleading conduct about goods and services. However, instead of entitling a consumer to compensation for any loss caused by a firm's misleading conduct, these provisions empower the courts to penalise businesses engaging in misleading and deceptive conduct.

Remedies 1.3.4.17

OVERVIEW

A remedy is an order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered. You will learn more about remedies in Lesson 8F. The most common remedy sought for a breach of s. 18 of the *ACL* is damages.

DETAILS

Section 18 of the *ACL* does not actually provide a cause of action, so proceedings for damages are commenced under s. 236 of the *ACL*.

LEGISLATION ***Australian Consumer Law***

Section 236 – ACTIONS FOR DAMAGES

(1) If:

(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

Note: s. 18 is contained in Chapter 2 of the *ACL*.

A consumer who succeeds in a misleading or deceptive conduct claim may ask the court to order any of the following:

- An order entitling the plaintiff to reject the goods and obtain a refund of the purchase price.
- An order instructing the manufacturer to repair the item.
- An order instructing the defendant to replace the item.
- Compensatory damages for any additional loss caused by the misleading conduct.

USEFUL TIP

If the ACCC succeeds in a misleading or deceptive conduct claim against a business, the court may impose a pecuniary penalty (rather than a remedy for individual consumers).

A pecuniary penalty is a monetary fine that is imposed and collected exclusively by civil courts. It is referred to as a pecuniary penalty to distinguish it from a 'fine', which is generally a criminal penalty.

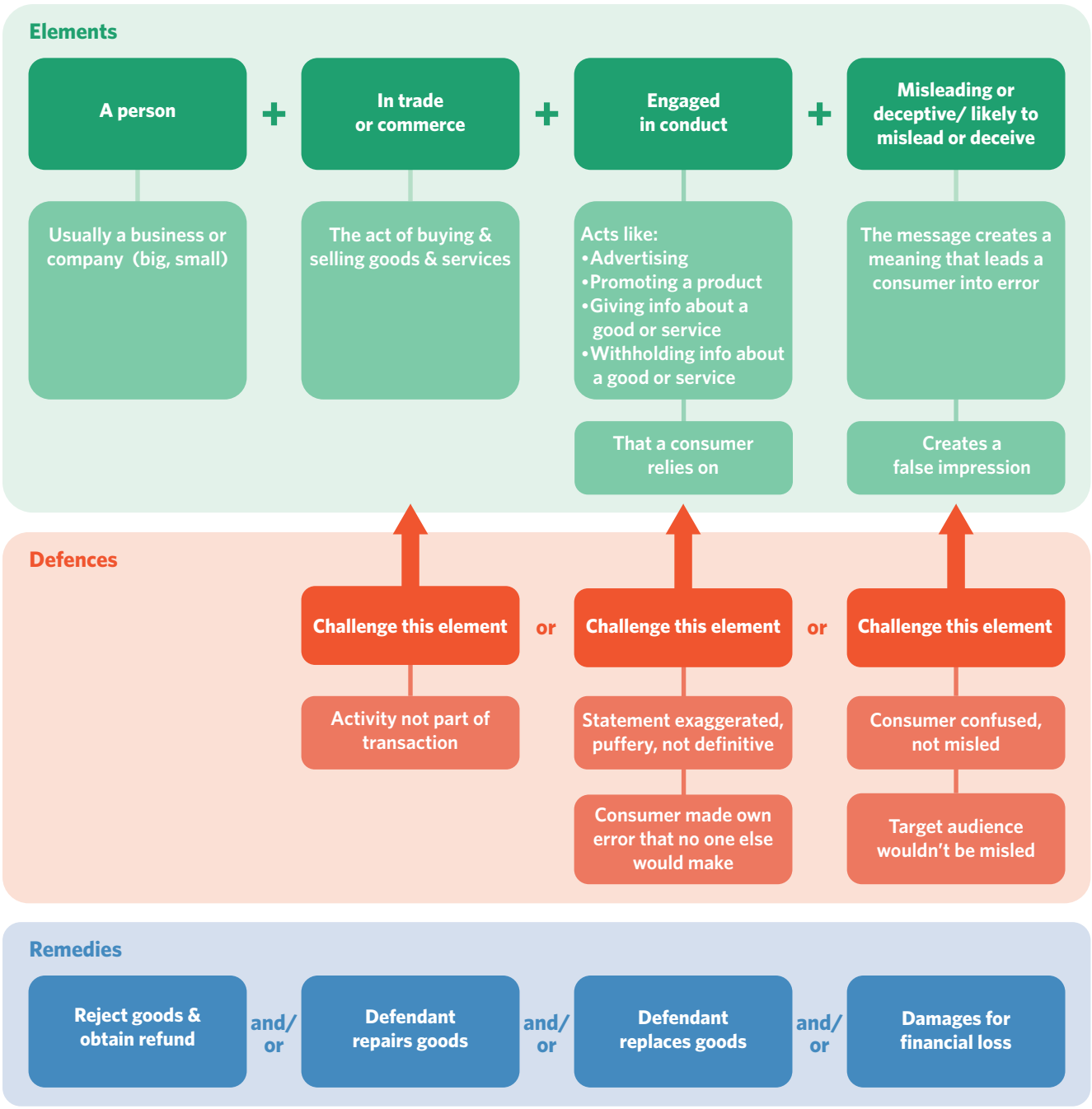


Figure 2 An overview of key concepts in misleading and deceptive conduct claims

Keen to learn more?

Consumer Affairs Victoria, Misleading or deceptive conduct, https://www.consumer.vic.gov.au/products-and-services/business-practices/advertising-and-promotions/misleading-or-deceptive-conduct

Australian Competition and Consumer Commission, Misleading or deceptive conduct, https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct

QUESTIONS 5E Misleading or deceptive conduct: Claims & defences

LEVEL 1:
Define and understand

1. Which of the following is the name of the regulator that may commence action for a breach of s. 18 of the *Australian Consumer Law* (*ACL*)?

A. Victoria Police.

B. Australian Federal Police.

C. Victorian Civil and Administrative Tribunal (VCAT).

D. Australian Competition and Consumer Commission (ACCC).

2. What is the limitation of actions that operates for a claim of misleading or deceptive conduct?

A. Within one year of the cause of action.

B. Within three years of the cause of action.

C. Within six years of the cause of action.

D. Within ten years of the cause of action.

3. Brock successfully brought a claim for misleading conduct against Bright White Pty Ltd after he was misled as to the quality of a teeth-whitening service, which resulted in multiple cavities. The court awarded Brock $250 for the cost of the teeth-whitening service and $1,000 for the dental bills Brock paid to fill the cavities. This meant Bright White Pty Ltd was ordered to pay a total sum of $1,250 to Brock.

Which remedy was Brock awarded?

A. Compensatory damages.

B. An injunction.

C. A pecuniary penalty.

D. None of the above.

4. Regina has commenced proceedings for misleading or deceptive conduct against Moovers, her workplace. Regina claims that in a meeting her manager made a statement that she would be given a promotion, which did not occur. Regina claims that Moovers should be liable for misleading or deceptive conduct as she was misled into believing that she would receive a promotion.

Which of the following elements is unlikely to be satisfied?

A. A person.

B. In trade or commerce.

C. Engaged in conduct.

D. Misleading or deceptive, or likely to mislead or deceive.

5. In *McWilliam's Wines Pty Ltd v McDonald's System of Australia Ltd* [1980], McDonald's was unsuccessful in its claim of misleading conduct claim against McWilliam's Wines. Why?

A. The court stated that consumers might find the name of the wine ('The Big Mac') confusing, but would not conclude the two businesses were connected then rely on this information when making decisions to purchase the product.

B. McDonald's is a business that started operations overseas, and only Australian businesses can be held liable for misleading conduct.

C. McDonald's had initiated its claim 7 years after McWilliam's had named its wine 'The Big Mac' and this was outside the limitations period.

D. Because the ACCC was not a party to the dispute and all misleading conduct matters should be pursued by the ACCC.

6. Tara loves vintage European cars, and following a one year search she purchased a 1963 Mercedes Benz convertible for $80,000 from Jack's Euro Automobiles. Jack assured Tara that the car had only one previous owner (who Jack knew personally), had never been in a collision and the original engine and transmission were still in the vehicle. He also said 'This is the best Mercedes I have ever seen'. Tara relied on all of this information. Within one year of the purchase, Tara learned the Mercedes had twice been damaged in car accidents and the engine had been replaced with a more modern, reconditioned VW engine.

Is Jack liable for misleading or deceptive conduct?

A. No, because he didn't know all the history of the car and cannot be liable for misleading a person he didn't intend to mislead.

B. Yes, because he made statements about the car that were incorrect and Tara relied on this information when deciding to purchase the car for $80,000.

C. No, because his statements are puffery – general and exaggerated claims about the car.

D. Yes, because she was led into confusion about the true state of the car and loss that arises from confusion can be compensated under s. 18 of the *ACL*.

LEVEL 2:
Describe and explain

7. Describe the right that is upheld by s. 18 of the ACL and outline two ways it protects consumers in Victoria. (4 MARKS)

8. Explain one of the ways the element 'conduct' may be challenged. (2 MARKS)

9. Nickie believes that she has a claim against ToyWorld Pty Ltd for misleading or deceptive conduct in contravention of s. 18 of the *ACL*. She purchased an electronic device to help her daughter learn to read, because the package included the statement 'A great tool to help your child learn to read, supported by research in Australia's best universities'. Nickie's daughter's reading has not improved and she has learned that no university in Australia has published research suggesting the device improves reading ability.

The transaction occurred two years ago so she is unsure if she is still able to commence proceedings.

a) With reference to the limitation of actions, explain whether Nickie would be able to initiate a claim for misleading or deceptive conduct against ToyWorld Pty Ltd. (2 MARKS)

b) Assume ToyWorld defends this action by arguing the claim on the packaging was puffery. Would this defence succeed? Justify your response. (3 MARKS)

10. Two of the elements for misleading or deceptive conduct under s. 18 of the ACL are 'a person' and 'in trade or commerce'. Describe the two other elements that must be proven for a misleading or deceptive conduct claim. (4 MARKS)

LEVEL 3:
Apply and compare

11. Duke has commenced an action for misleading or deceptive conduct against Bikerz Pty Ltd after he purchased a motor bike. He claims he was told that it was more fuel efficient than it actually was. Bikerz Pty Ltd argue that they do not satisfy the element 'a person' because they are a trading corporation.

With reference to 'a person', explain whether Bikerz Pty Ltd is correct. (3 MARKS)

12. Sally and Marcus got into a fight at school. When Sally got home she posted a status on social media that stated 'Marcus is a rude person, he can't be trusted and I know he cheated on a recent exam'. Following this, Marcus commenced legal action for misleading or deceptive conduct under s. 18 of the ACL, arguing that Sally has misled people as to the type of person he is. Sally believes that she cannot be liable to under s. 18 of the ACL because the conduct did not occur 'in trade or commerce'.

Explain whether it is likely that this element would be satisfied.
Justify your response. (3 MARKS)

13. Maddison wants to pursue a case for misleading or deceptive conduct over an advertisement for pain relief medication manufactured by Gliderz Pty Ltd. She spent $400 on the medication 8 years ago, when she had seen advertisements for the product online. Maddison only recently found out she could have commenced proceedings.

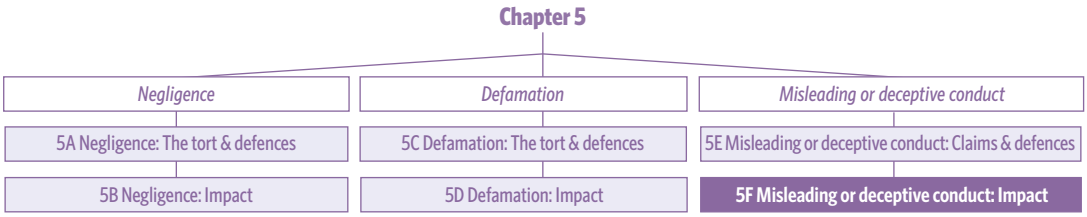
Advise whether Maddison would be able to bring an action for misleading or deceptive conduct against Gliderz Pty Ltd. (3 MARKS)

14. Jacqueline believes she has been subject to misleading or deceptive conduct in contravention of s. 18 of the ACL. She purchased a television from Tech Lovers Pty Ltd after an online advertisement stated they had 'the best televisions in Australia'. After purchasing the television, she determined that her old television was better.

Do you think that this conduct is misleading or deceptive or likely to mislead or deceive? Give one reason for your conclusion. (3 MARKS)

5F Misleading or deceptive conduct: Impact

In the previous lesson, you looked at claims of misleading or deceptive conduct. Allegations of misleading conduct can range from small consumer claims of being misled about a product, to corporations claiming another business has caused very significant economic loss due to misleading or deceptive communications. What are the possible impacts that cases of misleading and deceptive conduct may have on the parties involved and society more generally?



In this lesson you will be learning about the potential impacts of misleading or deceptive conduct on the parties involved and the broader community.

Study design dot point

- Two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

Key knowledge units

Impact of the breach on the parties (misleading or deceptive conduct)	1.3.4.18

Impact of the breach on the parties (misleading or deceptive conduct) 1.3.4.18

OVERVIEW

Actions for misleading or deceptive conduct are governed by s. 18 of the *Australian Consumer Law* (and similar legislation governing the activities of businesses in the financial services sector) and is in place to protect parties to large and small transactions: individuals, businesses and suppliers are protected from the harm that may arise if other businesses mislead them.

Why does society need this protection under civil law? What impact might misleading or deceptive conduct have on the parties involved?

DETAILS

Impact on the plaintiff

The impact of a case of misleading or deceptive conduct **on the plaintiff** almost always relates to some form of **financial loss.** A plaintiff will usually have relied on the information provided to them by a defendant, and have suffered some form of loss of property, status or position which is almost exclusively financial in nature.

CASE STUDY

***Selig v Wealthsure Pty Ltd & Ors* [2015] HCA 18**

Mr and Mrs Selig were victims of a Ponzi scheme and lost significant funds after having invested in Neovest Limited on the advice of their financial advisers Mr Bertram (second respondent), a representative of Wealthsure Pty Ltd (first respondent).

A 'Ponzi scheme' is a fraudulent investing tactic that promises high returns at little risk, by paying out early investors with the returns generated when acquiring new investors.

The investment was recommended to the Seligs using a misleading and deceptive disclosure document, which had otherwise suggested to the couple that the company was in a strong financial position. This turned out to be factually incorrect, as Neovest soon became insolvent causing the Seligs to lose their entire investment.

The trial judge found in favour of the Seligs and awarded $1.7 million in damages (a sum which was later reduced on appeal by a majority of the Full Federal Court).

Source: Clark, M., Selig v Wealthsure Pty Ltd | Opinions on High (2015)

The range of economic transactions in which we participate that could be negatively affected by misleading or deceptive acts is almost endless. For example:

- You spend $15,000 on your first car based on a statement that it has always been serviced. You later learn this to be false and that it is, in fact, unroadworthy; you spend $3000 having the car repaired but would not have purchased it at all had you known its true history.
- You attend a gym that advises you and all other customers their personal trainers all have experience working with AFL clubs and Netball Australia. Based on this information, you purchase a membership that seems very expensive but you think it's worth the cost to access this expertise. You later learn this is an exaggeration, with only one trainer having such experience.
- A business purchases a property from a developer on the basis that three well-known fast food chains will be opening as part of the same shopping centre development. The business then learns this is not true, but has spent hundreds of thousands of dollars setting up its operations – that will now have fewer customers than expected as the promised fast food chain tenants are not at the shopping centre (decreasing overall patronage at the shopping centre).

Impact on the defendant

Some of the potential impacts that a case of misleading or deceptive conduct might have on **the defendant** include (but are not limited to):

- Financial costs.
- Reputational damage.
- Complex questions of liability.

Financial costs – defendant in a civil claim

A business or individual who is found liable in civil proceedings for misleading another party in an economic transaction can face significant costs, including (but not limited to):

- The expense of paying damages to the successful plaintiff.
- A requirement to repair or replace goods purchased as a result of a misleading conduct action (if the court or tribunal orders this remedy for the plaintiff).
- Their own legal expenses and some (or all) of the plaintiff's legal costs (including filing and hearing fees, and the cost of the plaintiff's legal representation).
- Larger sums of damages if a group of consumers (or businesses) succeed in a misleading conduct representative proceeding. Consider, for example:
  - A large group of consumers that purchased a loan or signed-up to a credit card based on misleading advertising about the costs associated with the loan.
  - A large group of consumers who were misled by advertising for a sports supplement, who suffered adverse health consequences.



USEFUL TIP

Section 18 is not the only section of the *ACL* that protects consumers and businesses from misleading conduct.

For example, ss. 29, 33 and 34 of the *ACL* also relate to claims of false or misleading conduct about goods and services. However, instead of entitling a consumer to compensation for any loss caused by a firm's misleading conduct, these provisions empower the courts to penalise businesses engaging in misleading and deceptive conduct.

Government agencies such as the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) can initiate legal proceedings against businesses engaging in misleading conduct. This regulatory action (and the subsequent penalty incurred by any firm held to have deceived consumers or other businesses) will indirectly protect consumers by discouraging other firms from acting in a misleading or deceptive way, but does not lead to financial compensation to a consumer.

Financial consequences – defendant in regulatory action

In addition to a plaintiff claiming damages for loss caused by misleading conduct, the ACCC and ASIC can institute legal proceedings against businesses engaging in misleading and deceptive conduct. The maximum penalties that a corporation can face for a breach of the *ACL* are **the greater of:**

- $10,000,000
- Three times the value of the benefit received, or
- 10% of the annual turnover of the corporation for the next 12 months (if the court cannot determine the exact benefit received).

CASE STUDY

Optus ordered to pay $10 million for misleading conduct

In early 2019, Optus was ordered to pay $10 million for misleading customers who were unknowingly charged for content which they had not agreed to pay for. Optus was found to be using a direct carrier billing service (DCB) which required only one or two clicks on a web page to confirm purchases or subscriptions to third-party pages by customers, often without them knowing.

ACCC chair Rod Sims said that 'in many cases, Optus customers had no idea they were buying anything, and certainly did not need or want the content for which they were being charged'.

Source: Optus fined $10 million for misleading customers, ABC (2019)

Reputational damage

As well as financial costs, instances of misleading or deceptive conduct can severely tarnish a company's reputation. As consumers, Australian individuals rely on the honest representations of businesses about their services and goods. For example, the purpose of the *Competition and Consumer Act 2010* (which includes the *ACL*) is defined as being 'to enhance the welfare of Australians by promoting fair trading and competition'.

If a company is found to continually engage in misleading or deceptive conduct – or is unsuccessful in a single, well-publicised matter – this can cause consumers to question the integrity of that business and its offerings, and potentially look elsewhere rather than engaging their services.

CASE STUDY

As well as the $10 million payout in 2019, Optus has been found liable for other cases of misleading and deceptive conduct in the past. For example, in 2012, the Full Federal Court ordered the company to pay $3.61 million in pecuniary penalties in relation to advertising for its 'Think Bigger' and 'Supersonic' broadband internet plans.

The plans offered 'unlimited' downloads for users who paid the monthly fee, however, it was later found that the plans were subject to major limitations including significant speed reductions once a certain amount of data had been downloaded per month. This was deemed to be misleading and deceptive by the Federal Court, who found that the use of the term 'unlimited' was not correct and had misled customers.

This was not Optus' first encounter with such civil penalties; as the court found in this case: 'Optus cannot be regarded as a first offender. It failed to observe the requirements of the Act, and not for the first time.'

Source: Full Federal Court orders Optus to pay $3.6 million penalty, ACCC (2012)

USEFUL TIP

A pecuniary penalty is a monetary fine that is imposed and collected exclusively by civil courts. It is referred to as a pecuniary penalty to distinguish it from a 'fine', which is generally a criminal penalty.

Complex questions of liability

Concerns of misleading and deceptive conduct can also affect the way businesses interact with, and gain mutual benefit, from one another. This issue is particularly true of advertising the services of another business.

- For example, would company A (Promoterz) be liable for advertising the services of company B (Tools n' Things), if it turns out the Tools n' Things is representing misleading information (which Promoterz was unaware of)?

The High Court has held that, generally, advertisers will not be liable for misleading or deceptive conduct carried out by businesses utilising their services. This concept was discussed in *Google Inc v Australian Competition and Consumer Commission*.

CASE STUDY

***Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1**

When you visit Google's search engine, you will be met with 'organic' (unpaid) and 'sponsored' (paid) advertisements. When creating sponsored links, Google's programming uses keywords that are selected by the advertisers themselves. In some cases, advertisers purposely use the names of competitors in their selection of keywords.

Google was tried in the Federal Court and found to have engaged in misleading conduct contrary to s. 18 of the *ACL* after displaying sponsored advertisements for a business that included the name of one of its key competitors. The trial judge found that the sponsored adverts contained misleading representations that falsely suggested an association between the advertiser and the other company.

Google argued that it was merely a 'conduit' (channel) for advertisers to present information and therefore could not be held in breach. However, the Full Court unanimously found in favour of the ACCC, holding that Google itself had actively engaged in misleading or deceptive conduct, rather than simply acting as a conduit for the adverts.

Google appealed this decision to the High Court, which reversed the decision and found in favour of Google. This case opens up interesting considerations into the liability of one company advertising the services of another company and which organisation is liable to ensure communications do not mislead or deceive.

Keen to learn more?

Selig v Wealthsure, http://hbalegal.com/wp-content/uploads/2015/05/Selig-v-Wealthsure-Pty-Ltd-Ors-2015-HCA-18.pdf

Misleading or deceptive conduct – ACCC, https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct

QUESTIONS 5F Misleading or deceptive conduct: Impact

LEVEL 1:
Define and understand

1. In 2012, the Full Federal Court had the following to say about Optus: 'Optus cannot be regarded as a first offender. It failed to observe the requirements of the Act, and not for the first time.' Which of the following impacts of misleading and deceptive conduct does this statement most closely represent?

A. Complex questions of liability

B. Financial damage (defendant)

C. Financial damage (plaintiff)

D. Reputational damage



2. Which of the following situations most accurately reflects the issue of complex questions of liability?

A. James is concerned that the business he has recently bought is not in as healthy a financial position as what was originally suggested to him.

B. The High Court has awarded upwards of $9 million in pecuniary penalties following a widespread case of misleading conduct that influenced approximately 300,000 Australian consumers.

C. John saw an advertisement for a new barber in his local fish and chip shop window. The advertisement read: 'Wildboys Barber = the cheapest haircut in town'. However, after having his haircut at Wildboys, John was disappointed to find out that the cost was significantly higher than his old barbershop.

D. None of the above.

3. The following passage contains errors:

In 2012, Optus was found to have engaged in misleading and deceptive conduct when advertising two new broadband plans to its customers. The misleading representation related exclusively to the price of the plans, which were each marketed as being lower than what customers were actually charged. Later, in 2019, Optus was again found liable for misleading conduct after charging customers extra fees hidden within their broadband plans. This time, Optus was required to pay $10 million in pecuniary penalties – as this is the maximum penalty that a corporation can face for a breach of the *ACL*.

Which of the following options does not correct an error in the passage?

A. Optus were required to pay $13.61 million, rather than only $10 million.

B. $10 million is not the maximum civil penalty that a corporation can face for a breach of the *ACL*.

C. In 2012, the misleading representation related not to the price of the plans, but to the representation of 'unlimited' downloads.

D. In 2019, the misleading representation related to the use of its DCB service, rather than extra fees hidden within broadband plans.

LEVEL 2:
Describe and explain

4. With reference to the case of *Selig v Wealthsure* [2015], explain the possible impact that misleading or deceptive conduct might have on a plaintiff. (3 MARKS)

5. Other than complex questions arising regarding liability for misleading conduct, describe two consequences for a defendant found liable for misleading a consumer. (4 MARKS)

LEVEL 3:
Apply and compare

6. Instantconnect, an online social media platform, offers paid advertisements for businesses on its homepage. Akat, 28, has recently began his own marketing business and decides to run an advert on Instantconnect in an effort to gain new clients:

- The advert reads: 'Exciting new business, voted 'most promising new marketing company' by the Best Marketing Association (BMA) 2019'.
- In their terms and conditions, Instantconnect clearly states that it checks each advert for offensive content or language, but does not 'fact-check' each advert to ensure accuracy.

Joseph, the CEO of MarketingDirect, notices the advert and decides to sue Instantconnect for misleading and deceptive conduct. Joseph argues that Akat's business did not win the award that the advert suggests and claims that it was his business that won the award this year.

Explain whether you believe Instantconnect will be held liable for the advert. In your answer, refer to the case of *Google Inc v ACCC* [2013]. (4 MARKS)

Unit 2, Area of study 1

CHAPTER 6

SANCTIONS

06

In Unit 1 you explored examples of criminal laws. The Victorian criminal justice system empowers the police to investigate crimes and imposes consequences for those who breach criminal laws.

A range of sanctions can be imposed for criminal conduct. But the circumstances surrounding every offender and every crime are different.

Consider a man convicted of culpable driving; in Victoria, the average sentence for this offence is six-to-seven years in prison. Is seven years an appropriate sanction if:

- He was driving without a licence; or
- He had no prior convictions for driving offences; or
- He had many prior convictions for driving offences; or
- He pleaded 'guilty', meaning the victim's family didn't need to listen to evidence about their loved one's death; or
- He was suffering from a mental illness; or
- He was very young and inexperienced; or
- At the time of the accident he was rushing to a hospital to be with a sick relative.

How would any or all of these factors change what is the 'right' outcome? If the offender feels the sanction imposed is too harsh, what options does he have?

Alternatively, consider a drug-addicted woman who injures a member of the public in an unprovoked attack. Is society better served by the courts being 'tough on crime' or by an outcome that addresses her drug addiction and prevents future crimes? Would her victim, her family and the police answer this question in the same way?

By the end of this chapter, you will know:

- How the courts resolve criminal disputes.
- The task completed by a jury in criminal trials.
- The extent to which a dissatisfied party can have the outcome of a criminal case reviewed.
- The sentencing options courts have when sanctioning an offender, and how they decide which sanction to impose in a given case.

UNIT 2 AOS 1 – KEY KNOWLEDGE

- the principles of justice: fairness, equality and access
- institutions that enforce criminal law, such as the police and delegated bodies
- the balance between institutional powers and individual rights
- an overview of the role and criminal jurisdictions of the Victorian courts
- the role of the jury in a criminal trial
- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- types of sanctions such as fines, community correction orders and imprisonment
- factors considered by judges in sentencing
- aspects of sentencing practices in Victoria and in one other jurisdiction
- alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs
- two recent criminal cases and for each case:
  - an overview of the charges and the central facts of the case
  - courts that may be or were involved
  - sanctions that could be or were imposed and their appropriateness
  - factors that may be or were taken into consideration in sentencing
  - possible avenues of appeal
  - the extent to which the principles of justice could be or were achieved.

UNIT 2 AOS 1 – KEY SKILLS

- define and use legal terminology
- research, analyse and apply information in relation to criminal law and two recent criminal cases
- describe the institutions that enforce criminal law
- explain the role of the Victorian courts and juries in criminal cases
- discuss the principles of justice in relation to the enforcement of criminal law and sanctions
- discuss the ability of sanctions to achieve their purposes
- discuss approaches to sentencing
- analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases.

Unit 2 AOS 1: Chapter 6

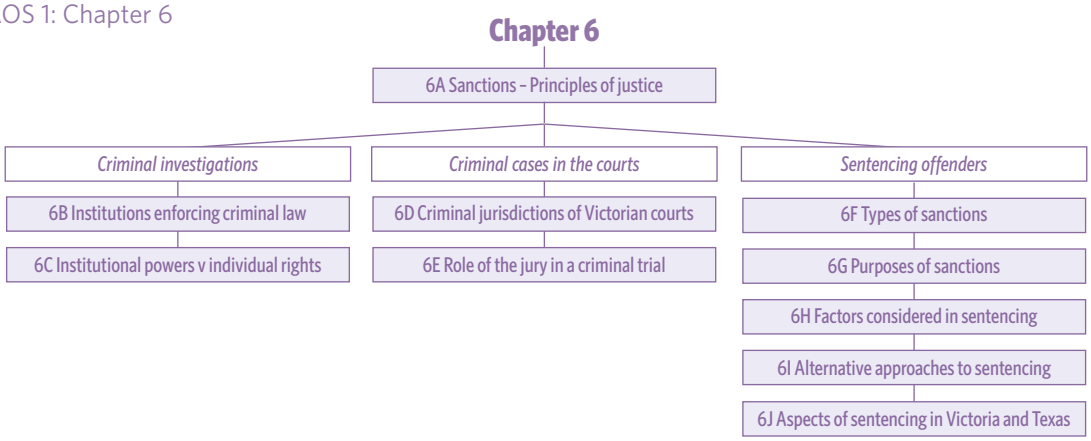


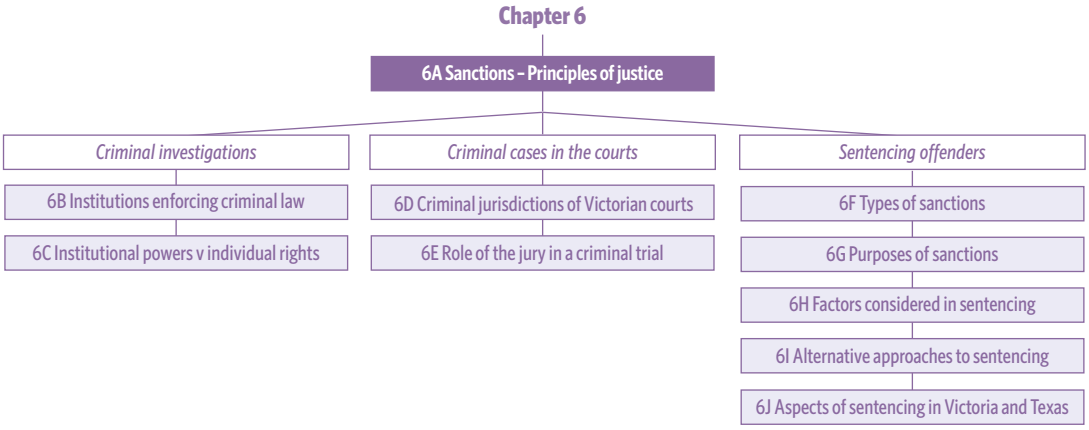
Image: Nils Versemann/Shutterstock.com

6A Sanctions – Principles of justice

A 19-year-old driver picks up her phone. It's only for 10 seconds, but she hits and kills a cyclist. The life of an otherwise good person is changed forever; so are the lives of her family members and the witnesses. The family of the cyclist will never be the same. The driver pleads 'not guilty', and the trial process is heartbreaking for her family and the family of the cyclist. No sanction can bring the cyclist back or undo his family's suffering. What is a 'just' outcome in this case?

What if she'd been drinking, but pleads 'guilty' and avoids a long and costly trial? What is a fair outcome in this situation?

There is no universal definition of 'justice'. Therefore, what one person may consider a 'just' outcome may be very different from what another person decides is 'just'. This is one of the reasons why there are such varied opinions on the appropriateness of the institutions and mechanisms that exist within the criminal justice system.



In this lesson you will be learning about the principles of justice: fairness, equality and access.

The principles of justice are the fundamental or basic ideas and values that aim to promote just treatment and outcomes in our legal system. These three concepts will help you assess the extent to which justice has been achieved in a particular case or whether specific institutions or processes in the criminal justice system uphold or achieve justice.

Study design dot point

- The principles of justice: fairness, equality and access

Key knowledge units

Fairness	2.1.1.1
Equality	2.1.1.2
Access	2.1.1.3

Fairness 2.1.1.1

OVERVIEW

'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.'

DETAILS

Fairness is upheld through criminal proceedings in the following ways:

- Decision-makers are independent and unbiased; the decisions about whether an accused is guilty and any sanction imposed are based solely on the law and the facts.
- Ideally, sanctions are imposed with minimal delays, as delays add to the stress and anxiety of victims, witnesses and accused persons awaiting the sanction.
- Offences have maximum sentences to ensure offenders are not unfairly punished.

- Those charged with offences are entitled to know what evidence will be presented by the prosecution, and are given the chance to test whether that evidence is accurate and reliable.
- Accused persons are able to engage legal representation - an expert to prepare and present their evidence and legal argument in its best light.
- Accused persons have their personal characteristics taken into account in sentencing. For example:
  - A young first-time offender who has shown remorse should be treated differently to a middle-aged career criminal.
  - The impact the crime has on the victims is taken into account when sentencing, as individuals will respond differently to crime.

USEFUL TIP

In your assessment tasks, 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 **equitable** legal processes are in place, and all parties receive an **unbiased** hearing.*

Equality 2.1.1.2

OVERVIEW

'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.'

DETAILS

Equality is upheld through criminal proceedings in the following ways:

- Courts have access to sentencing data to ensure that similar offences receive similar sanctions.
- The sanctions imposed on offenders do not vary based on their language, background, ethnicity or religion - offenders from particular social groups are not treated more or less harshly due to being in such a group.
- All victims of crime remain informed about proceedings and contribute to the sentencing process, regardless of their personal characteristics such as wealth, language background, ethnicity or religion.
- 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 (either as a victim of crime or an accused person).

USEFUL TIP

In your assessment tasks, avoid using the word 'equal' to define 'equality'. Instead try using words such as 'the same', 'alike' or 'equivalent' in the definition.

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

Access 2.1.1.3

OVERVIEW

'Access' is defined in the VCAA Legal Studies Study Design as ensuring individuals in society have an 'understanding of legal rights and ability to pursue their case'.

DETAILS

Access is promoted through criminal proceedings in Victoria in the following ways:

- The availability of Legal Aid in some cases.
- The information regarding sentencing being freely available on websites such as Victorian Legal Aid.
- Individuals understand the court system and the sanctions that may be imposed for an offence.
- Accused persons are entitled to know what the criminal law is, the legal defences they may be able to present, and how to present evidence.
- Victims of crime understand their legal entitlements.



- Court services provide support to those in the court system, such as support for witnesses giving evidence, victims and their families.
- Individuals who are found guilty know whether they have the right to appeal the sanction imposed.
- The judge can often provide some assistance to the accused if they do not have a lawyer (only so far as to not impact the impartiality of the case).

USEFUL TIP

Looking at how criminal cases are resolved in the following lessons will also include focusing on whether these processes always achieve fairness, equality and access. It is possible that the principles of justice are not always achieved.

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 fairness is upheld through the legal system, it will be coloured yellow.

When considering whether access is upheld through the legal system, it will be coloured purple.

When considering whether equality is upheld through the legal system, it will be coloured orange.

Keen to learn more?

The County Court of Victoria, https://www.countycourt.vic.gov.au/files/documents/2018-08/factsheet-5-processes-and-principles-justice.pdf

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 6A Sanctions – Principles of justice

LEVEL 1:
Define and understand

1. Which of the following is the best example of how fairness is upheld through criminal proceedings?

A. Individuals understanding the court system and the sanctions that may be imposed for an offence.

B. Accused persons having their personal characteristics taken into account in sentencing.

C. Courts have access to sentencing data to ensure that similar offences receive similar sanctions.

D. None of the above.

2. Which of the following is the best example of how equality is upheld through criminal sanctions?

A. All victims are able to contribute to the sentencing process, regardless of their personal characteristics.

B. Victims of crime understanding their legal entitlements.

C. Sanctions are provided with minimal delay to avoid additional stress or anxiety for individuals involved.

D. None of the above.

3. Which of the following is the best example of how access is upheld through criminal sanctions?

A. Offences have maximum sentences to ensure offenders are not unfairly punished.

B. All offenders have a sanction imposed by a judge that is independent and unbiased.

C. Individuals that are found guilty know whether they have the right to appeal the sanction imposed.

D. None of the above.

LEVEL 2:
Describe and explain

4. Describe fairness as one of the principles of justice. Provide one example of how fairness is upheld by the Victorian criminal justice system. (2 MARKS)

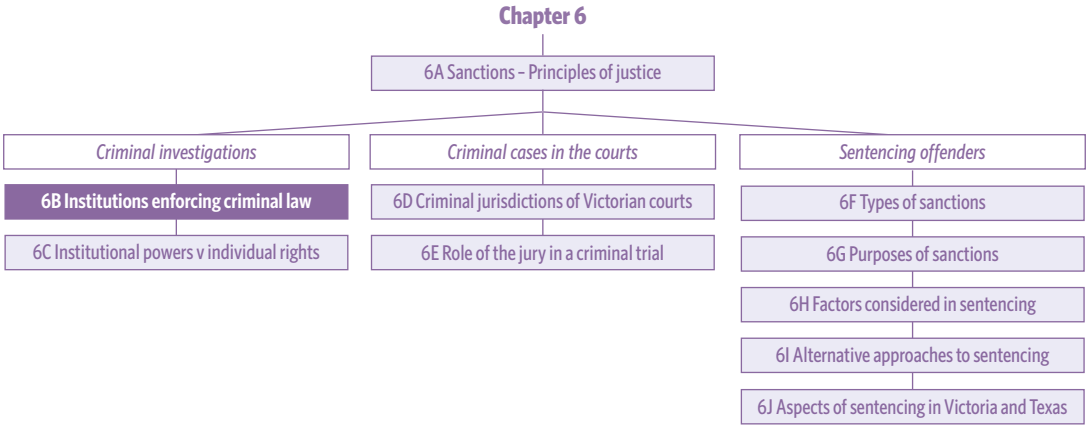
5. Describe equality as one of the principles of justice. Provide one example of how equality is upheld by the Victorian criminal justice system. (2 MARKS)

6. Describe access as one of the principles of justice. Provide one example of how access is upheld by the Victorian criminal justice system. (2 MARKS)



6B Institutions enforcing criminal law

Earlier in the course you learned about the purposes of criminal law and types of crimes that are punishable under Victorian law. It is now important to consider the different institutions that enforce the criminal law – namely the police and other government bodies – and the role such institutions play in maintaining law and order.



In Lesson 1C you learned what makes a law effective, including whether or not that law is enforceable. To 'enforce' the law is to ensure individuals, businesses and other organisations comply with the laws created by parliament.

In this lesson you will learn about the different institutions that enforce the criminal law and keep society safe. This includes the police force, who exercise a variety of roles in our community, and other bodies such as VicRoads and local councils who each play an important role enforcing the law.

Without these institutions, the criminal law would be redundant. There would be no means to enforce the law and the ideals of social cohesion and community safety that the criminal law aims to uphold would come into serious jeopardy.

Study design dot point

- Institutions that enforce criminal law, such as the police and delegated bodies.

Key knowledge units

The role of the police	2.1.2.1
The role of delegated bodies	2.1.2.2

The role of the police 2.1.2.1

OVERVIEW

'For many, the police represent an essential law enforcement entity that makes public safety and security the highest of its priorities.'

Source: Chambliss, W., Police and law enforcement, (2011)

DETAILS

The role of the police has expanded beyond simply maintaining public order and settling on the spot disputes. For instance, Victoria Police describes its function as being 'to serve the Victorian community and uphold the law to promote a safe, secure and orderly society.'

The different roles and responsibilities of the police today can be stated in three categories:

- Prevention.
- Investigation.
- Prosecution.

Prevention

A major role of the police is to prevent crime. This means deterring individuals from engaging in criminal behaviour to reduce crime rates and ensure that society is protected from harm.

The police prevent crime in two main ways:

1. **Patrolling and maintaining social order.**
   This depends largely on police presence. Police are constantly in and around the community, whether that be driving the streets in marked police cars or patrolling areas where crime is often likely to occur. For example, have you ever noticed a large police presence at popular sporting events? What about community events like the 'White Night Festival' that takes place throughout the streets of Melbourne each year? In concentrating a visible police presence in these areas, the police are more likely to prevent crime from occurring in the first place.
2. **Educating society to deter criminal behaviour.**
   Using education as a means of deterring criminal activity is known as 'proactive crime prevention'. This means the police often aim to 'stay ahead' of crime rather than reacting to it once it has already occurred. They may achieve this through educating the community on the dangers of criminal behaviour and the consequences involved in breaking the law. For example, have you ever experienced a police visit at your school to discuss the dangers of drink driving, or seen TV and social media advertisements regarding the work of Victoria Police?

CASE STUDY

Victoria Police has developed a range of partnership programs to engage in community based crime prevention. They describe their rationale as follows:

> Pro-active crime prevention programs are a key focus. The organisation's members seek to develop links within the local community, schools, ethnic communities, local business and other groups to reduce the incidence and impact of crime. Victoria Police understands the importance of community partnerships in reducing crime and in providing a safer place to live.

Source: Your safety, Victoria Police website

Investigation

Another major responsibility of the police is to detect and investigate crimes. This includes investigating crimes that have already occurred, as well as detecting future crime to avoid it from taking place.

The purpose of criminal investigations is to identify offenders and collect evidence of their offending (which will then support the prosecution and sanctioning of the offender). This ensures that crimes committed incur consequences.

Offenders may be caught in the act of breaking the law. For example, perhaps a driver is seen driving erratically, crossing lanes and changing speeds. The police may detect this behaviour and decide to conduct a breath test on the driver to measure their blood alcohol level.

The police may be called to the scene of a crime after it has taken place. In these cases, it is the role of the police to begin investigating to identify possible offenders and the evidence that proves their guilt. This may involve interviewing witnesses, searching the scene and collecting forensic evidence.

Prosecution

A third responsibility of the police is to prosecute offenders for the crimes they have committed. This often involves charging an individual with a crime and conducting legal proceedings against them in a court. In so doing, the police are responsible for gathering and presenting evidence of the crime.

However, whether or not a crime is prosecuted depends largely on the circumstances of the offence. For example, for minor offences the police may use their discretionary power to issue a **police caution**, which is a formal alternative to prosecution (similar to a warning). Similarly, other smaller offences such as traffic violations might result in an on-the-spot infringement notice or fine, rather than court proceedings.

Victoria Police is responsible for prosecuting summary offences in the Magistrates' Court. For indictable offences, evidence collected during an investigation is given to the Office of Public Prosecutions, to support its prosecution of accused persons in the County Court and Supreme Court.

The main aim of the prosecution arm of police responsibilities is to ensure that criminal behaviour is addressed in an appropriate fashion, and that punishment reflects the gravity of the offence.



Police powers

To ensure the police have the tools necessary to carry out these responsibilities described above, the law affords police officers a range of powers to prevent, investigate and prosecute crime.

At the same time, the criminal justice system aims to balance police powers with the personal rights of individuals within our society. Police possess great authority within our community, so it is important to ensure that individuals are given rights to protect their civil liberties and safeguard against abuses of power.

Table 1 details some of the police powers and individual rights of all persons when dealing with the police.

Table 1 Balancing police powers with the rights and responsibilities of individuals

Police have powers to:	Individuals have the right to:
• Question suspects • Search a person's property (in some cases) • Arrest and detain some suspects • Caution minor offenders • Collect forensic evidence such as fingerprints, DNA evidence (in some cases)	• Remain silent (except providing name and address) • Be informed of the crime which they are suspected to have committed • An interpreter and legal representation when questioned by police • Read statements taken by police during questioning

The role of delegated bodies 2.1.2.2

OVERVIEW

The police are not the only body entrusted with enforcing criminal law in Victoria. **Delegated bodies are** specialised government agencies who, due to their expertise in a particular area, have been given the authority from parliament to make and enforce laws within their area.

DETAILS

There are many examples of delegated bodies at both a state and national level. For example:

- **VicRoads** can issue infringement notices for incorrectly completing a learner driver's log book.
- **Local councils** can issue parking fines and penalties for breaching local laws they have made.
- **WorkSafe Victoria** can prosecute companies that breach occupational health and safety laws.
- **Australian Securities and Investment Commission (ASIC)** can take action against large corporations that behave unlawfully, such as banks charging customers fees without providing a service.
- **Environmental Protection Authority (EPA)** can take action against businesses for breaches of environmental protection laws.
- **The Australian Tax Office (ATO)** can charge and prosecute people for failing to comply with tax laws.

CASE STUDY

In December 2018, the EPA worked in cooperation with WorkSafe Victoria and emergency services to investigate and uncover a stockpile of hazardous chemical storages across eight separate sites in Epping and Campbellfield.

The EPA coordinated the targeted inspections based on leads they had received, and were able to contain the chemicals to avoid any risk to the surrounding communities. When describing next steps, the EPA wrote: 'All of the agencies are working closely together in a whole-of-government response, placing priority on preventing harm to the community and the environment from pollution and waste.'

Source: Epping and Campbellfield chemical storage, Current issues, Environmental Protection Authority Victoria website

Keen to learn more?

Victoria Police, www.police.vic.gov.au/

Consumer Affairs Victoria, www.consumer.vic.gov.au/

Environmental Protection Authority Victoria, www.epa.vic.gov.au/

Australian Taxation Office Victoria, www.ato.gov.au/

QUESTIONS 6B Institutions enforcing criminal law

LEVEL 1:
Define and understand

1. Fill in the blank spaces:

The criminal justice system aims to _____ police powers with the _____ of individuals within our society. For example, while the police have the authority to _____ individuals in relation to a crime, it is also the right of each individual to remain _____ to protect themselves against self-incrimination. Providing individuals with these rights protects their _____ and safeguards against abuses of power.

A. enhance; rights; detain; silent; rights

B. balance; personal rights; question; silent; civil liberties

C. balance; privacy; detain; free; civil liberties

D. balance; personal rights; question; silent; privacy

2. Which of the following statements most accurately explains 'delegated bodies'?

A. 'Delegated bodies' are specific institutions that the government establishes to represent the police force in court proceedings.

B. 'Delegated bodies' refers to the practice of police forces being concentrated in high-crime areas as a means of crime prevention.

C. 'Delegated bodies' refers to all those institutions that make and enforce the criminal law.

D. 'Delegated bodies' are specialised institutions that have been given authority to make and enforce law in a specific area.

3. Consider the following hypothetical scenario.

Connor, 16, had called the police to report a fight that was taking place at the bus stop across the road from his house. The two men involved in the confrontation had been arguing and physically threatening one another for a few minutes prior to the fight breaking out, at which point a series of punches were thrown and a nearby fence damaged. By the time the police arrived the two men had left the scene, but Connor had taken video of the altercation which he willingly shared with police once they began questioning him about the incident.

The role of the police that is most evident in this scenario is:

A. Investigating criminal behaviour.

B. Preventing criminal behaviour.

C. Prosecuting criminal behaviour.

D. None of the above.

LEVEL 2:
Describe and explain

4. Using an example, briefly explain Victoria Police's responsibility to prevent crime. (2 MARKS)

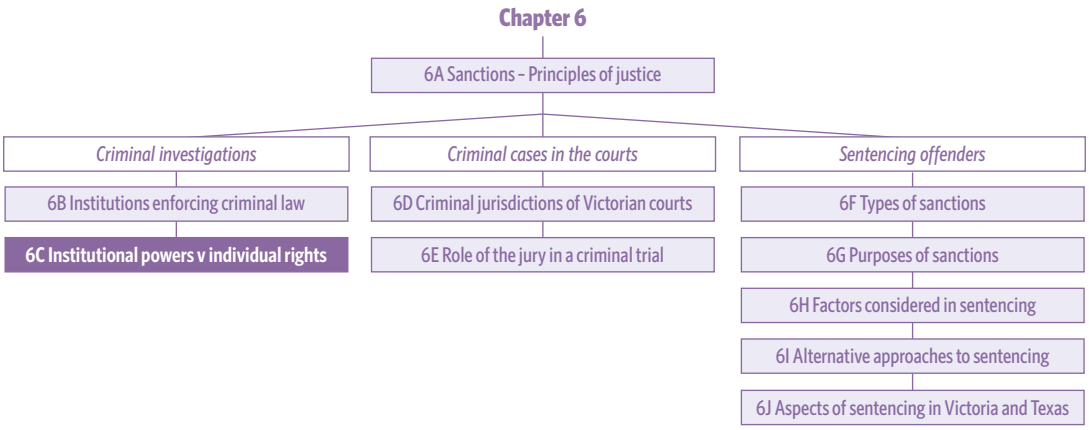
5. In a recent debate on a TV talk show, a political commentator stated that 'the police ought to have much more power to investigate and prevent crime. Criminals have far too many individual rights that simply interfere with the ability of police to do their job'.

Explain the reason for establishing individuals' rights when engaging with the police. Provide one example of these rights. (3 MARKS)



6C Institutional powers v individual rights

The criminal justice system exists to ensure that society can operate in a peaceful manner, where all individuals can feel safe and protected by law. Strict rules and regulations ensure that social cohesion is maintained, but when do these rules start to become too harsh and cause the criminal justice system to have too much power over individuals? Is there any way to balance these powers against an individual's right to personal liberty?



In this lesson you will be learning about the various powers provided to institutions and individuals. Specifically, the way in which these powers are balanced against each other to ensure the criminal justice system can operate effectively without infringing on the rights of individuals.

Study design dot point

- The balance between institutional powers and individual rights

Key knowledge units

Institutional powers	2.1.3.1
Individual rights	2.1.3.2

Institutional powers 2.1.3.1

OVERVIEW

The main institutions in the criminal justice system are the police and the courts. Police have a number of investigative powers to allow for the administration of justice. The courts determine which accused persons are guilty of a crime and will impose a sanction if the accused is found guilty.

DETAILS

Police powers

The police have a number of investigative powers that are provided by legislation. These are provided to ensure police have the ability to effectively investigate and prosecute individuals suspected of committing a criminal offence. See Lesson 6B for a more detailed description of police powers.

Some police powers include (but are not limited to):

- The right to arrest a suspect if they have a warrant (a legal document authorising an action relating to the administration of justice).
- The right to arrest a suspect without a warrant if they have grounds to reasonably believe that person has committed a serious offence or is a danger to themselves and/or society and to make sure they attend court.
- The right to obtain a person's name and address if they are driving a motor vehicle or if they believe the person is a witness to or involved in a criminal offence.
- The right to question the alleged offender who is in custody.

Courts' powers

The courts are empowered to conduct criminal trials and various pre-trial procedures such as bail applications and will impose a sanction if the accused person is found guilty of an offence. The courts are given many powers to ensure they can effectively conduct criminal matters and provide the most just outcome for all parties.

Some court powers include (but are not limited to):

- The power to decide which evidence is admissible, to determine whether an offender is guilty and impose a sanction if the accused is found guilty.
- During the pre-trial process, the prosecution can request that the offender remains in custody if they pose a threat to the community. The court has the ability to decide whether they should remand the accused or grant him or her bail.
- In the trial process, the Office of Public Prosecutions has the right to prosecute the alleged offender, present evidence and witnesses to support their cases and cross-examine the accused's witnesses to test the reliability of their evidence.

Individual rights 2.1.3.2

OVERVIEW

Individuals have a number of rights aimed at balancing and protecting against the institutional powers provided above. If individuals were not provided with specific rights, the institutions that enforce the criminal law could hold too much power, which may lead to unjust outcomes and corruption within the criminal justice system.

DETAILS

Individual rights when dealing with police

Interacting with the police can be an intimidating experience for individuals. Specific rights are provided to help protect individuals against the police powers and reduce the stress of dealing with police. Some of the rights that individuals have when dealing with the police include (but are not limited to):

- When an accused is arrested, they do not have to answer any questions (other than providing their name and address).
- Anyone under the age of 18 must have a parent or guardian present during questioning.
- The right to contact a friend or legal representative when in custody.
- The right to meet with a lawyer in private.
- The right for their case to be brought before the court in a timely manner.

Individual rights during court proceedings

When a trial commences, this can be a difficult process for individuals, especially considering the potential consequences if they are found guilty. To reduce this anxiety, individuals are provided various rights during pre-trial and trial processes. Some of the rights individuals have during court proceedings include (but are not limited to):

- The right to have a trial conducted by an impartial third-party (the judge).
- The right to have a trial heard by an impartial jury for indictable offences.
- The right to have fair and consistent rules of evidence and procedure.
- The right to have a bail hearing.
- The presumption of innocence.
- The right to have legal representation (and if they are unable to afford it, in certain cases Legal Aid will provide legal representation).
- The right to an interpreter (if needed).
- The right to present evidence, witnesses and cross-examine the prosecution's witnesses.



Table 1 The balance between police and individual rights

Police powers	Individual rights
Police have the right to obtain a person's name and address if they are driving a motor vehicle or if they believe the person is a witness to or involved in a criminal offence. The police also have the right to question the alleged offender who is in custody. This gives police the opportunity to obtain evidence from the accused and/or witnesses that can be used in a trial.	When an accused is arrested, they do not have to answer any questions (other than providing their name and address). In addition, minors are required to have a parent or guardian present during questioning. This ensures that individuals do not feel pressured by police to answer a question that may implicate them.
Police have the right to arrest a suspect if they have a warrant. Police also have the right to arrest a suspect without a warrant if they have grounds to reasonably believe that person has committed a criminal offence and/or is a danger to themselves and society and to make sure they attend court. This gives the police the ability to arrest an individual suspected of committing a crime to ensure the administration of justice.	After being arrested, individuals have the right to contact a friend or legal representative when in custody, the right to meet with a lawyer in private and the right to have their case brought to the court in a timely manner. This gives individuals a number of rights after being arrested to ensure they are given the best opportunity to prepare for any legal proceedings that may follow their arrest.

Table 2 The balance between court powers and individual rights

Court powers	Individual rights
Judges have the power to deal with criminal matters and impose a sanction if the accused is found guilty. This gives the courts the power to ensure justice is upheld.	Individuals have the right to have a trial heard by an impartial third-party and jury. Individuals also have the right to have fair and consistent rules of evidence and procedure.
During pre-trial process, the prosecution can request that the offender remains in custody if they pose a threat to the community. The court then has the ability to decide whether they should remand the accused or grant him or her bail.	During the pre-trial process, individuals have the right to apply for bail to await trial within the community as opposed to being held in remand.
During the trial process, the Office of Public Prosecutions has the right to prosecute the alleged offender, present evidence and witnesses to support their cases and cross-examine the accused's witnesses.	During the trial process, the accused is presumed innocent until otherwise proven guilty, has the right to have legal representation (and if they are unable to afford it, he or she can apply for assistance from Legal Aid) and the right to an interpreter (if needed). Individuals also have the right to present evidence, witnesses and cross examine the prosecution's witnesses. In addition, the accused has the benefit of the burden of proof resting with the prosecution, so he or she can remain silent and present no specific defence if they so choose.

Keen to learn more?

Victoria Legal Aid, https://www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights

Victoria Police, https://www.police.vic.gov.au/policies-procedures-and-legislation

QUESTIONS 6C Institutional powers v individual rights

LEVEL 1:
Define and understand

1. Which of the following is an example of a police power?

A. The right to question the alleged offender while in custody.

B. The power to deal with criminal matters and impose a sanction if the accused is found guilty.

C. The ability to remand the offender or grant bail.

D. The right to require an accused person to answer questions.

2. Which of the following is not an example of a power individuals have when dealing with police?

A. The right to contact a friend or legal representative when in custody.

B. The right to meet with a lawyer in private.

C. Anyone under the age of 18 must have a parent or guardian present during police questioning.

D. The right to always refuse police questioning, including refusing to provide their name and address.

3. Which of the following is an example of a power the courts have?

A. The right to arrest a suspect if they have a warrant.

B. The ability to remand an offender or grant their bail.

C. The right to arrest a suspect without a warrant.

D. The right to question an alleged offender in custody.

4. Which of the following is not an example of a power individuals have during court proceedings?

A. The right to refuse a trial.

B. The right to silence.

C. The right to be presumed innocent until proven guilty.

D. The right to consistent rules of evidence and procedure.

LEVEL 2:
Describe and explain

5. Describe one police power and explain an individual right that balances against this. (3 MARKS)

6. Explain two rights an individual has during court proceedings. (4 MARKS)

LEVEL 3:
Apply and compare

7. Felix has been charged with theft and is taken to a nearby police station for questioning. Felix is concerned about the power that the police have over him, and is particularly concerned about having to answer any questions they may ask.

Using two examples, explain the balance between police powers and Felix's rights. (6 MARKS)

8. Aston's trial for an indictable offence is about to commence in the County Court of Victoria. The judge hearing Aston's trial happens to be his ex-girlfriend and he has been informed that there is insufficient funds to empanel a jury for his case. To compensate for this, the prosecution has not been allowed to provide any witnesses despite their case being developed completely around an elderly woman who saw the incident occur.

Identify the institutional powers and individual rights that were not upheld and explain what should have occurred. (6 MARKS)



6D Criminal jurisdictions of Victorian courts

When an accused person pleads not guilty to an offence, they will face a trial in the courts to determine whether or not they are guilty beyond reasonable doubt.

How does the justice system decide which courts will hear and sentence a particular case? Can a criminal case be heard in any Victorian court, or is each court limited to determining certain types of cases?



In this lesson you will be learning about the Victorian court hierarchy and in particular, the different criminal jurisdictions of each court. You will learn about the power of each court to hear cases in the first instance (original jurisdiction), and on appeal (appellate jurisdiction).

You will also learn about the role of the courts in resolving criminal matters and the reasons for having a court hierarchy.

Study design dot point

- An overview of the role and criminal jurisdictions of the Victorian courts

Key knowledge units

Overview of criminal jurisdictions in Victoria	2.1.4.1
Role of criminal jurisdictions in Victoria	2.1.4.2

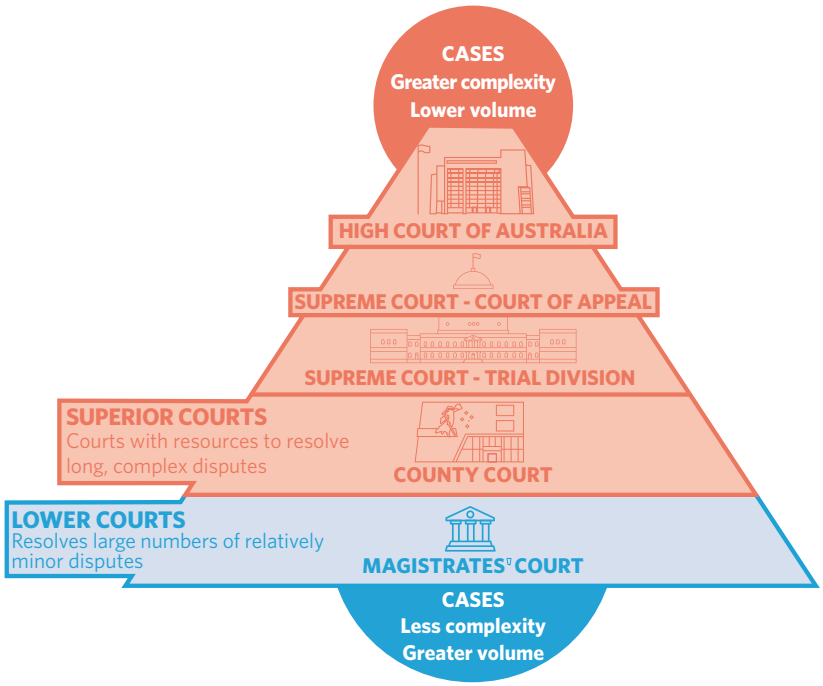


Figure 1 Overview of the Victorian court hierarchy

Overview of criminal jurisdictions in Victoria 2.1.4.1

OVERVIEW

A hierarchy is a system in which courts are ranked according to their relative status or authority. The court hierarchy ranks each court according to which types of cases it has the authority to determine, which is known as the court's **jurisdiction**.

DETAILS

A court can have two types of criminal jurisdiction: original jurisdiction and appellate jurisdiction:

- **Original jurisdiction refers to** the court's power to hear a case **at first instance** (that is, to conduct a trial when a case has not been to court before).
- **Appellate jurisdiction refers to** the court's power to hear a case on **appeal** (that is, once a case has been determined and a party seeks a review of some aspect of the decision).

An appeal is a request to a superior court to review and change an aspect of the decision made in the original court. In a criminal matter, appeals may take a variety of forms:

- The prosecution or a convicted offender seeking a **review of the sanction** that has been imposed by the original court, arguing that it is insufficient or excessive (depending on who appeals).
- The prosecution or a convicted offender appealing on the basis that **the law has been incorrectly applied or interpreted** to reach the decision given in the original court.
- The convicted offender appealing **the conviction** on the basis that a particular fact has been misinterpreted or incorrectly applied to reach the decision given by the original court.

The Supreme Court of Victoria

The Supreme Court of Victoria has two divisions - the Court of Appeal and the Trial Division. All criminal cases are initiated in the Trial Division by the State of Victoria through the Director of Public Prosecutions (DPP) on behalf of the community, while the Court of Appeal hears and determines a variety of cases on appeal.

Table 1 The two divisions of the Supreme Court of Victoria

Supreme Court – Trial Division	Supreme Court – Court of Appeal
• Has jurisdiction to hear all offences, but usually hears the **most serious indictable offences** in Victoria. • This includes cases such as **murder, attempted murder and treason**. • If the accused pleads 'not guilty' the case will be heard before a **judge and jury**. If the accused pleads 'guilty', the accused will be sentenced by a **judge alone**. • The Trial Division can also hear criminal appeals from the Magistrates' Court **on a question of law**.	• **Only hears appeals**. No original jurisdiction. • Hears appeals from criminal cases heard in the **County Court** and **Supreme Court – Trial Division**. • An appeal is usually heard before **three Supreme Court justices**, and may review the verdict given, the severity of the sentence imposed or a question of law. • A right to appeal is not automatic. An offender or the prosecution must first receive **leave (permission)** from the Court of Appeal before having their case heard.

USEFUL TIP

Remember that while the Court of Appeal and the Trial Division are separate in the Victorian court hierarchy, they are both divisions of the Supreme Court and are not to be described as separate courts altogether. The Court of Appeal sits higher than the Trial Division in the hierarchy – be sure to remember this, as the location of each court in the hierarchy is a common issue in the Units 3&4 Legal exam!

USEFUL TIP

The Supreme Court – Trial Division conducts trials for serious indictable offences. It isn't enough to simply say indictable offences or serious offences.



The County Court of Victoria

Original Jurisdiction

The County Court has original jurisdiction to hear **all indictable offences, except those very serious cases such as murder and treason** which are reserved for the Supreme Court - Trial Division.

Some examples of the indictable offences tried by the County Court include:

- Culpable driving
- Armed robbery
- Sexual offences
- Drug trafficking
- Arson.

Appellate Jurisdiction

The County Court has the power to hear criminal appeals from the Magistrates' Court against either a conviction or a sentence.

When an offender who has been found guilty and sentenced in the Magistrates' Court appeals to the County Court, the County Court will conduct the hearing again. This means that all parties to the case must give evidence again. This new hearing in the County Court is known as a 'de novo' appeal.

The Magistrates' Court

The Magistrates' Court is responsible for hearing a large number of minor criminal cases (over 90% of all criminal matters in Victoria). According to the Sentencing Advisory Council, in the 14 years between 2004 to 2018, the Magistrates' Court sentenced an average of 84,417 cases each year.

Source: Cases Sentenced in the Magistrates' Court, Sentencing Advisory Council.

To manage this large volume of cases, the Magistrates' Court includes a range of different divisions that each specialise in particular matters. These divisions include (but are not limited to):

- The Drug Court Division
- The Family Violence Court Division
- The Koori Court Division

Original Jurisdiction

The Magistrates' Court has original jurisdiction to hear:

- **All summary offences** such as minor traffic offences and assaults.
- **Indictable offences heard and determined summarily:**
  - Some indictable offences may be heard as if they are summary offences in the Magistrates' Court, provided both the court and the accused agree.
  - For an indictable offence to be heard summarily, it must be punishable by **no more** than 10 years imprisonment (e.g. minor theft and burglary). See Lesson 2E for further details.
- **Committal proceedings:**
  - A committal proceeding is only held for accused persons charged with an **indictable offence** who have pleaded 'not guilty' or not yet entered a plea.
  - These are hearings held to determine if the prosecution's evidence is of sufficient weight to support a conviction at trial. If so, the accused will be directed to stand trial in the County Court or the Supreme Court.
- **Bail and warrant applications.**

Appellate Jurisdiction:

Being the lowest court in the Victorian court hierarchy, the Magistrates' Court does not have the power to hear any appeals from other courts and therefore has no appellate jurisdiction.

USEFUL TIP

Remember that culpable driving is an indictable offence and falls within the jurisdiction of the County Court. It cannot be heard summarily and therefore cannot be heard by the Magistrates' Court (which can hear minor driving offences).

USEFUL TIP

The High Court does have a broad original jurisdiction including disputes between states and cases regarding the Australian Constitution, however it will not conduct trials for criminal matters.

It may hear appeals arising from criminal matters heard in the Victorian Court of Appeal (and other state courts). A party dissatisfied with a decision in the Court of Appeal does not have an automatic right to appeal to the High Court - the High Court will only hear such an appeal if:

- the case involves complex areas of law that have previously been decided inconsistently in lower courts,
- the criminal case is of significant public importance, or
- the outcome of the case will impact other criminal proceedings.

Table 2 Summary of the criminal jurisdiction of the courts in the Victorian court hierarchy

	Original jurisdiction	Appellate jurisdiction
Supreme Court – Court of Appeal	No original jurisdiction.	All appeals from the County Court or the Supreme Court – Trial Division (with leave).
Supreme Court – Trial Division	Unlimited criminal jurisdiction, though in practice only the most serious indictable offences such as murder or treason.	Appeals from the Magistrates' Court, specifically on a question of law.
County Court of Victoria	All indictable offences, except those reserved for the Supreme Court.	Appeals from the Magistrates' Court either on: • A conviction • A sentence
Magistrates' Court of Victoria	• All summary offences, such as speeding and petty theft. • Indictable offences heard summarily. • Committal hearings.	No appellate jurisdiction.

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!

For example, in the 2012 VCE Legal Studies Exam, Question 3B asked students: Using the Magistrates' Court as an example, explain the term 'original jurisdiction'.

The Examiners' Report for this exam found that the most common error seen in response to this question 'was an inadequate explanation of the term 'original jurisdiction'. Many students defined 'jurisdiction' without defining 'original jurisdiction' in detail.

Role of courts in Victoria 2.1.4.2

OVERVIEW

Why have a court hierarchy? What benefit does separating criminal jurisdictions have on the functionality of the Victorian criminal justice system?

DETAILS

In evaluating the role of the Victorian court hierarchy and the different criminal jurisdictions in Victoria, it is necessary to consider what it would be like to have one large, all-encompassing court.

Assume a long and complex murder trial was held up by a large number of small matters such as driving offences or minor thefts. What would this mean for the resolution of criminal cases?

The role of the Victorian courts in criminal cases can be broken into two overarching responsibilities:

1. To **determine the case** by deciding whether the accused is guilty.
2. To **impose an appropriate sanction** if the accused is found to be (or has pleaded) guilty.
   Having a court hierarchy with clearly established jurisdictions assists the criminal justice system in effectively satisfying these responsibilities.

Reasons for a court hierarchy

Separating criminal jurisdictions across different Victorian courts allows for:

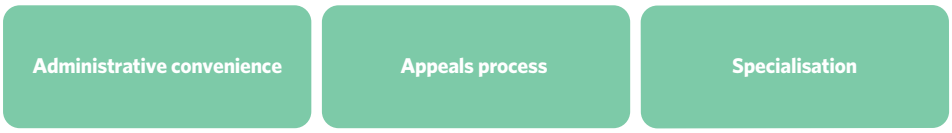


Figure 2 The benefits of a court hierarchy

Administrative Convenience

Administrative convenience comes from separating summary offences and minor criminal matters that are heard by the lowest court from the more serious, complex and time-consuming cases that are heard in higher courts.

Benefits of administrative convenience: Administrative convenience allows for the administration of justice to be as efficient as possible by avoiding a backlog of cases in particular courts. Processing cases across different courts increases access to the justice system by reducing delays and associated costs:

- The superior courts (such as the Supreme Court - Trial Division) are able to devote more time and resources to long and complex disputes without the court being 'clogged up' with the responsibility of also resolving minor disputes.
- The lowest court (the Magistrates' Court) can quickly resolve a large number of relatively minor criminal disputes, minimising delays for accused persons and victims of crime.

Appeals Process

An appeals process is only possible within a court hierarchy, where decisions made in lower courts can be appealed to superior courts if a party is dissatisfied with the original decision. Grounds for an appeal include appealing on points of law, questions of fact or the sentence imposed.

Benefits of an appeals process: The appeals process promotes fairness in the administration of justice as decisions can be reviewed and mistakes corrected.

USEFUL TIP

An appeal is not an automatic right. Typically, an appellant (the party seeking an appeal) must prove that they have sufficient grounds to appeal and receive leave (permission) to have their case reviewed on appeal in a superior court.

CASE STUDY

***DPP (CTH) v Paul Robert Munro* [2019] VSCA 89**

Munro pleaded guilty to six charges involving the importation of dangerous firearms, including fully automatic machine guns. The County Court sentenced him to 10 years and 3 months' imprisonment, with a non-parole period of 6 years.

The Commonwealth Director of Public Prosecutions appealed to the Supreme Court - Court of Appeal against the sentence imposed by the County Court, claiming it was manifestly inadequate.

The Court of Appeal allowed this appeal and resentenced Munro to a total effective sentence of 15 years, with a non-parole period of 11 years. In resentencing the offender, the Court said that general deterrence was of the highest importance in this case, considering the importation of such dangerous weapons is a very serious offence.

This is an example of how organising the courts into a hierarchy allows for superior courts to review the decisions of lower courts (and if needed correct errors made in lower courts).

Specialisation

Specialisation refers to the expertise developed by each of the courts in hearing certain types of criminal cases. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction – a set of criminal offences that each court hears regularly. For example:

- A judge in the Supreme Court would regularly conduct trials for murder and therefore become increasingly familiar with laws relating to murder and directing a jury.
- A magistrate in the Magistrates' Court would be familiar with specific laws and the evidence presented by the police relating to driving offences such as speeding and drink-driving.

Benefits of specialisation: Specialisation promotes fairness in decision-making by ensuring criminal cases are heard by experienced legal professionals who have expert knowledge of the law pertaining to those particular cases. The skill and expertise developed by regularly conducting similar cases allows for a more fair and accurate outcome and a more timely resolution of cases.

USEFUL TIP

It is important to remember that specialisation 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 and the principles of justice

Table 3 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of the courts and court hierarchy - how fairness is promoted	**Weaknesses of the courts and court hierarchy - limitations in achieving fairness**
Specialisation. The specialisation created by separating cases across the court hierarchy allows for different cases to be presided over by skilled and knowledgeable judges and magistrates who are therefore more able to ensure a fair and correct outcome. **Administrative convenience.** The administrative convenience of having a court hierarchy promotes fairness by reducing the backlog of cases in particular courts and minimising unnecessary delays and costs associated with taking a matter to court. As delays add to the suffering of victims of crime and the anxiety felt by accused persons and victims, promoting timely resolution of cases increases fairness for these parties. **Appeals.** The court hierarchy promotes fairness by enabling superior courts to review the decisions of lower courts. This appeals process allows for mistakes to be corrected, which is fair. **Independent and public.** Trials in all courts in the hierarchy are conducted in public (except in exceptional circumstances), by judges and magistrates who are independent of the parties. This ensures decisions are based on the facts and the law, rather than being politically motivated or based on some bias/prejudice toward one of the parties.	**Appeal cost.** 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 to prepare and present an appeal, limiting their ability to have mistakes corrected. In such cases the hierarchy does not deliver fairness for these offenders.

Table 4 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve access

Principle of justice: *Access*	
Strengths of the courts and court hierarchy - how access is promoted	**Weaknesses of the courts and court hierarchy - limitations in achieving access**
Appeals process. The organisation of courts into a hierarchy promotes access to justice by facilitating the review of judicial decisions and providing parties with an avenue to have their case reheard. **Published online.** Each court publishes information online regarding its criminal jurisdiction, assisting accused persons who may be unable to engage legal representation to understand the procedures used in court.	**Appeals process.** An appeal is not an automatic right. Grounds for appeal must exist and be considered strong enough to warrant a review by a superior court. This may render some cases ineligible for an appeal, meaning access to such appeals is limited. Some offenders may not be able to appeal to the higher courts if they cannot afford the fees associated with lodging an appeal and engaging legal representation. **Intimidating procedures.** The strict procedures used in the courts may discourage some victims of crime from reporting crimes to the police due to the fear of giving evidence in a public forum. These procedures become even more complex and formal in higher courts.

Table 5 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve equality

Principle of justice: *Equality*	
Strengths of the courts and court hierarchy – how equality is promoted	**Weaknesses of the courts and court hierarchy – limitations in achieving equality**
Specialisation. The specialisation of different courts allows each accused person to understand exactly which court is likely to hear their case, and know that all other cases of the same nature will likely be heard in the same court and in a similar way.	**Appeals process.** The court hierarchy does not deliver equal access to appeals for all offenders due to the costs associated with an appeal, and the fact that not everybody may be entitled to an appeal.

USEFUL TIP

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

For example, consider Question 1C from the 2017 VCAA exam:

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.

The VCAA Examiner's report for that year stated 'The reference to the case needed to be meaningful, for example, an explanation of how specialisation might assist Simon or the case generally.'

Notice that specific reference to Simon and his case was necessary to gain full marks for this question. For example, a good answer might say that 'as a judge in the County Court, the judge in Simon's case would be specialised in hearing indictable offences such as kidnapping. This would lead to a fair trial, as this judge has skills and expertise in the particular legal issues that arise in such a case.'

USEFUL TIP

When describing the reasons for a court hierarchy, be careful not to simply state that a hierarchy allows for appeals/specialisation/administrative convenience. Instead, be sure to explain how the actual ranking of the courts based on jurisdiction provides for that reason. That is, be sure to highlight how the structure of the Victorian court hierarchy establishes each benefit, as opposed to not having a hierarchy at all.

For example, a complete answer might build as follows:

Statement + **Explaining how**

The Victorian court hierarchy provides for an appeals system, which allows decisions made in lower courts to be appealed to superior courts if a party is dissatisfied with the original decision.

This is only possible within a court hierarchy, which establishes a ranking of the courts according to their authority and outlines the appellate jurisdiction of superior courts of record. Without a court hierarchy, there would only be one level of courts and no superior court to review the decisions of lower courts.

This response includes the following:

1. Stated that a hierarchy provides for an appeals system.
2. Briefly defined 'appeals'.
3. **Shown how this benefit is possible by organising the courts into a hierarchy, as opposed to not having a hierarchy.**

Keen to learn more?

Magistrates' Court, https://www.mcv.vic.gov.au/

County Court of Victoria, https://www.countycourt.vic.gov.au/

Supreme Court of Victoria, https://www.supremecourt.vic.gov.au/

QUESTIONS 6D Criminal jurisdictions of Victorian courts

LEVEL 1:
Define and understand

1. Fill in the blank spaces:

A court's _____ jurisdiction refers to the power it has to hear a case _____, whereas the same court's _____ jurisdiction refers to the power it has to hear a _____ on appeal.

- **A.** appellate; on appeal; original; summary offence
- **B.** original; at first instance; appellate; summary offence
- **C.** original; at first instance; appellate; case
- **D.** judicial; on appeal; original; dispute

2. Which of the following statements about the Court of Appeal is incorrect?

- **A.** The Court of Appeal is a superior court of record and therefore has original jurisdiction to hear all indictable offences, regardless of their complexity. The Court of Appeal also deals with a large number of cases on appeal, especially from the Magistrates' Court as this is where a majority of criminal matters are heard at first instance.
- **B.** The Court of Appeal will hear criminal appeals from both the County Court and the Supreme Court (Trial Division).
- **C.** An appeal to the Court of Appeal is not an automatic right. An offender must first receive leave from the Court of Appeal to have their appeal heard in this court.
- **D.** None of the above.

3. Which of the following is not a benefit of having a court hierarchy?

- **A.** Appeals process
- **B.** Administrative convenience
- **C.** Specialisation
- **D.** Trial by peers



4. Georgie wishes to appeal a decision made by the Magistrates' Court. She believes that the presiding magistrate made a mistake when interpreting the law and therefore plans to appeal on the grounds of 'a question of law'. In which of the following courts will Georgie's appeal be heard?

A. The County Court.

B. The Supreme Court - Trial Division.

C. The Supreme Court - Court of Appeal.

D. None of the above, Georgie does not have the right to question a magistrate's interpretation of the law.

LEVEL 2:
Describe and explain

5. Describe the term 'original jurisdiction'. In your answer, outline the original jurisdiction of the County Court to hear criminal cases and provide an example of one type of case this court typically hears. (3 MARKS)

6. Khmer has been found guilty of shoplifting and has been fined. In which court is this case likely to have been heard? Justify your answer. (2 MARKS)

Adapted from VCAA Exam 2010 Question 2a

LEVEL 3:
Apply and compare

7. Nick, 47, was charged with murder. His trial was heard in the Supreme Court - Trial Division where he was found guilty and sentenced. Nick wishes to appeal the decision. Other than allowing for Nick's appeal, explain one reason for a court hierarchy in this case. (3 MARKS)

Adapted from VCAA Exam 2017 Question 1C

8. Duncan, 27, was charged with driving while disqualified. Despite pleading 'not guilty' Duncan was found guilty in the Magistrates' Court and sentenced to a 12-month community corrections order. Duncan intends to appeal against his conviction.

Which court in the Victorian court hierarchy is likely to hear Duncan's appeal? In your answer, outline the criminal appellate jurisdiction of this court. (3 MARKS)

Adapted from VCAA Exam 2017 Question 1B.

9. The following hypothetical scenario contains errors in the way in which the trial has been conducted.

Corey, 33, was charged with multiple murders and his case was sent directly to the Supreme Court - Trial Division. The presiding magistrate found Corey guilty 'beyond reasonable doubt' and sentenced him to a lengthy term of imprisonment. Dissatisfied with the decision, Corey decided to exercise his automatic right to appeal in the Supreme Court - Court of Appeal. Corey's legal representatives made the point of thanking the court for hearing his appeal, explaining that the appeals process promotes fairness and equality in our criminal justice system.

Identify three errors in the scenario and explain the correct process which should have occurred during Corey's trial. (6 MARKS)

10. Following a lengthy three month trial, Davies (who represented himself) was convicted of five counts of arson and sentenced to a total effective sentence of 14 years and 6 months' imprisonment. Dissatisfied with the outcome, Davies was granted leave to appeal in the Supreme Court - Court of Appeal, where he decided to appeal the following:

- Against his conviction - on the grounds of the jury's verdict, alleged bias of the judge and disadvantage arising out of his self-representation.
- Against his sentence - on the grounds that it was manifestly excessive.

In *Davies v The Queen* [2019] VSCA 66, the Court of Appeal refused Davies' appeal against his conviction, but allowed his appeal against sentence. As a consequence of the errors of the sentencing judge, the Court of Appeal reduced Davies' sentence to a new total effective sentence of 12 years and 3 months' imprisonment.

a) In which court is the original decision most likely to have been made? Justify your answer. (2 MARKS)

b) This case highlights how the existence of a court hierarchy allows for the appeals process to occur, promoting fairness in our criminal justice system. Other than the appeals process, describe one reason for the court hierarchy and show how this might have benefited Davies in this case. (3 MARKS)

LEVEL 4:
Discuss and evaluate

11. The existence of a Victorian court hierarchy promotes the principle of fairness in our criminal justice system. Discuss the extent to which you agree. (5 MARKS)

12. A recent letter in a local newspaper stated the following:

> The existence of a court hierarchy is confusing and unnecessary. Our criminal justice system would be better off with just one, large court where all cases are heard. That way every average Joe Citizen would know exactly where to go and wouldn't feel confused with all these names and titles. Supreme Court this, County Court that...

Do you agree with this statement? Justify your answer. (7 MARKS)

6E Role of the jury in a criminal trial

After a person is charged with an indictable offence, a jury trial will be conducted to determine whether or not the accused person is guilty. Jury trials are a central feature of Victoria's criminal justice system.



In this lesson you will be learning about the role of the jury in a criminal trial, including when a jury is used, its composition and how it is empanelled. You will also explore the strengths and weaknesses of using a jury in resolving a criminal matter.

Study design dot point

- The role of the jury in a criminal trial

Key knowledge units

When a jury is used in criminal matters	2.1.5.1
Composition of a criminal jury	2.1.5.2
Jury empanelment process	2.1.5.3
The role of the jury in a criminal trial	2.1.5.4
Strengths and weaknesses of juries in criminal matters	2.1.5.5

When a jury is used in criminal matters 2.1.5.1

OVERVIEW

A jury is a group of randomly selected individuals chosen from the electoral roll, who are required to deliver an impartial and unbiased verdict in court. A jury is chosen at random to represent a cross–section of the broader community and deliver unbiased decisions.

LEGISLATION *The Juries Act 2000* (Vic) sets out laws regulating the use of criminal and civil juries in Victoria. The Act outlines the process of empanelment for a jury, juror eligibility and the responsibilities of a jury.

LEGISLATION According to the *Criminal Procedure Act 2009* s. 27, anyone who is charged with an indictable offence must have their case heard and determined by a jury (unless the court allows for the indictable offence to be heard in the Magistrates' Court as though it was a summary offence; as stated in Lesson 2E, only some indictable offences can be tried summarily).

DETAILS

A jury is used to deliver a verdict in criminal trials that take place in the original jurisdiction of both:

- The County Court
- The Supreme Court

This means that criminal juries are only used to determine the guilt or innocence of an accused person charged with **an indictable offence.**

A jury is therefore only used in a very small proportion of criminal matters:

- 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.
  Source: County Court of Victoria Annual Report 2016/17
- Most criminal offences committed in Victoria are summary offences, resolved in the Magistrates' Court (without a jury).

A jury is not used in:

- The Magistrates' Court (resolved by a magistrate sitting alone).
- Cases on appeal.
- When a person has already pleaded guilty to the offence.

Composition of a criminal jury 2.1.5.2

OVERVIEW

A criminal jury will usually consist of twelve members. In cases where the trial is expected to be particularly long, up to fifteen jurors may be empanelled. However, if this is the case, additional jurors will be excused before the deliberations. Thus, the verdict will be decided by a jury of twelve.

DETAILS

A person is **qualified and liable** for jury service if they are:

1. 18 years or older; and
2. Enrolled to vote in Victoria.

> **LEGISLATION** Section 5 of the *Juries Act 2000* (Vic) outlines the requirements for a person to become liable for jury service:
>
> (1) Subject to this Act, every person aged 18 years or above who is enrolled as an elector for the Legislative Assembly and Legislative Council is qualified and liable for jury service.
>
> (2) A person referred to in Schedule 1 is disqualified from jury service.
>
> (3) A person referred to in Schedule 2 is ineligible for jury service.

However, this does not mean that everyone who satisfies these two criteria is liable for jury service. Instead, there are some people who will not sit on a jury because they fit into one of the following three categories:

1. People that are **disqualified** from jury service
2. People that are **ineligible** for jury service
3. People that are **excused** from jury service

Disqualified

Individuals disqualified from jury service include:

- A person who has been convicted of an indictable offence and sentenced to a term of imprisonment of 3 years or more.
- A person who, within the last 10 years, has been sentenced to a term of imprisonment of 3 months or more.
- A person who, within the last 5 years, has received a Community Corrections Order (CCO).
- A person who has been charged with an indictable offence and was released on bail in respect to that offence.
- A person who is remanded in custody in respect of an alleged offence.
- A person who has been declared bankrupt and has not obtained a discharge.

These people are seen as having an adverse relationship with the criminal justice system and may find it difficult to be impartial and unbiased.

Source: Juries Act 2000 (Vic) Sch 1.



Ineligible

Individuals who are ineligible for jury service include:

- Individuals **within the legal profession** who are seen to have a level of expertise or knowledge that could jeopardise their ability to act as an unbiased representative of broader society. This includes people who are (or were in the last 10 years):
  - The Governor or the Official Secretary to the Governor.
  - A judge, a magistrate or the holder of any other judicial office.
  - An Australian lawyer.
  - A police officer.
  - A member of the Legislative Assembly or Legislative Council.
- Individuals who **may not be able to perform the necessary tasks of a juror due to a personal reason.** This includes:
  - A person who has a physical disability that renders the person incapable of performing the duties of jury service.
  - A person who is unable to communicate in or understand the English language adequately.

Source: Juries Act 2000 (Vic) Sch 2.

Excused

The Act also states that potential jurors may apply to be excused from jury service. This can occur at two different stages:

- When potential jurors are first selected from the electoral roll and sent a questionnaire to determine whether they will be required to attend jury service; or
- On the day of trial during the empanelment process.

The court or the Juries Commissioner may excuse a person from jury service (or defer their jury service) if that person:

- Is **unable** to consider the case **impartially** – perhaps they know someone in the trial or have experienced that particular crime in the past. This will only be determined during the empanelment process (see below).
- Is **unable** to serve on the jury for any **other legitimate reason** – perhaps they are seriously ill, of advanced age, or need to take care of someone at home and are unable to sit on a jury for a particularly long trial; this may be determined when the questionnaire is first sent to a potential juror or during the empanelment process.

Jury empanelment process 2.1.5.3

OVERVIEW

How are jurors selected for a criminal trial? Who determines which 12 individuals will sit on the jury?

DETAILS

A jury pool is a group of people who attend court in response to a summons for jury service.

Prior to attending court:

Prior to a trial in court, there needs to be a method for selecting a list of potential jurors. This process of selecting a jury for a criminal trial is set out in the *Juries Act 2000* (Vic).

1. The Victorian Electoral Commission prepares a **jury roll** of randomly selected names from the electoral roll.
2. The Juries Commissioner will send a **questionnaire** to those individuals who have been randomly selected, and use the answers to determine which individuals may be qualified and liable for jury service.
   - The questionnaire will check if a person is **disqualified** or **ineligible** for jury service by asking questions relating to their criminal history, employment history and mental and physical capabilities.
   - The questionnaire will also provide an opportunity for people to ask to be **excused** from jury service (or have such service deferred until a later time) if they have a valid reason. For example:

- They are operating a small business.
- They are the primary care–giver for a child/children.
- They live too far away from where they are required for jury service.

3. Once a list of potential jurors has been finalised, a **summons** is sent at least 10 days before the person is required for jury service. The summons will specify the date, time and location where the individual is required to attend.

1. Can you understand and communicate in English well enough to undertake jury service?

2. I am applying to be permanently excused from jury service due to:
   a. advanced age
   b. medical reasons

3. I am unable to complete jury service because:
   a. I have been found guilty of an offence at court.
   b. I am currently on bail or on remand.
   c. I have been sentenced to a term of imprisonment or detention.
   d. I am an undischarged bankrupt.

Source: Juries Commissioner's Office, http://www.courts.vic.gov.au/jury-service

Figure 1 Extract of questionnaire to Victorians used in jury selection

At court – jury selection process

After a **jury pool** has been formed and arrived at the court, a **jury panel** must be selected to enter the courtroom and go through final selection to sit on the jury for a specific trial. Figure 2 shows the step by step process taken to choose a jury.

Step 1: Random Selection
Before the criminal trial begins, a panel of people are randomly chosen from the jury pool present.

Step 2: Entering the courtroom
The judge will provide basic information regarding the case, including length of the trial, the names of the parties involved and the nature of the charges.

Step 3: Asking to be excused
At this stage, if a juror has a legitimate reason why they should not be on the jury, they may apply to the judge to be excused (for example they may know a party involved).

Step 4: Empanelling the jury
Each panel member is assigned a number. Numbers are chosen at random from the remaining jury panel until 12 jurors are selected to form the jury.

Step 5: Challenges
At this point, both the defence and the prosecution have the right to challenge particular jurors - this means they can exclude people from sitting on the jury.

Peremptory challenges (accused)

Right to 'stand aside' (prosecution)

Challenges for cause (both)

Step 6: If you have been selected
If selected as a member of the jury, you must now take an oath or affirmation to confirm that you will carry out your duty honestly and in good faith.

Step 7: If you have not been selected
You are taken back to the jury pool room where you may be requested for another trial later in the day. If not selected by the end of the day, your jury service is usually complete.

Figure 2 Jury selection process in court

Challenges

1. **Challenges for cause**
   Both parties are entitled to challenge any number of potential jurors provided they do so **with a valid reason** (a 'challenge for cause'). A challenge for cause may be granted by the court if:
   - **a)** There is a risk that a potential juror is not impartial; or
   - **b)** A potential juror is not qualified to sit as a juror.
2. **Peremptory challenges (accused)**
   An accused person is allowed to challenge a set number of potential jurors **without needing to provide a reason** (a 'peremptory challenge'). A peremptory challenge results in the immediate and permanent exclusion of the potential juror.
3. **Right to stand aside (prosecution)**
   Similar to a peremptory challenge, the prosecution has the right to 'stand aside' potential jurors **without needing to provide a reason.** A potential juror stood aside by the Crown returns to the jury pool and must not be empanelled on the jury in that trial. The prosecution has the right to stand aside as many potential jurors as the accused person has peremptory challenges.

Table 1 Challenges against potential jurors

Challenge?	Relevant party?	Reason needed?	Number available?
Challenge for cause	Both parties	Yes	No limit
Peremptory challenge	Accused	No	• 3 if there is only one accused • 2 each if there are two or more accused
Right to stand aside	Prosecution (Crown)	No	• 3 if there is only one accused • 2 for each accused in the trial

LEGISLATION

The following is an extract from the *Juries Act 2000* (Vic) that shows the oath and affirmation taken by jurors in a criminal trial:

Oath:

'You (or, if more than one person takes the oath, you and each of you) swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that you will faithfully and impartially try the issues between the Crown and [name of accused] in relation to all charges brought against [name of accused] in this trial and give a true verdict according to the evidence.'

Affirmation:

'You (or, if more than one person affirms, you and each of you) solemnly and sincerely declare and affirm that you will faithfully and impartially try the issues between the Crown and [name of accused] in relation to all charges brought against [name of accused] in this trial and give a true verdict according to the evidence.'

The role of the jury in a criminal trial 2.1.5.4

OVERVIEW

The main responsibility of the jury is to **determine whether the accused is guilty** of the charge against them (this is referred to as the 'verdict' given by the jury).

DETAILS

When determining the verdict, a jury must aim to reach a unanimous decision – that is, all 12 jurors agree that the accused is either:

- **'Guilty'** beyond reasonable doubt; or
- **'Not guilty',** meaning all jurors have determined they are **not** satisfied beyond reasonable doubt that the accused person is guilty.

In some cases a court may accept a majority verdict in which 11 of the 12 jurors agree that the accused is guilty (or 11 of the 12 agree the accused is not guilty).

However, majority verdicts are not permitted in trials for murder or serious drug offences.

In reaching this verdict, other key responsibilities of the jury in a criminal trial include:

- To **listen attentively** to the evidence presented during the trial, including all submissions from both parties and any directions given to them by the judge.
- To be **objective and unbiased** when reaching decisions. This involves disregarding any media reports or personal assumptions and relying only on the evidence presented.
- To **select a foreperson** to communicate on behalf of the entire jury.

USEFUL TIP

If asked a question about the responsibility of the jury in a criminal trial, make sure to include a brief sentence explaining the responsibility in more detail. It is not enough to simply name the responsibility!

For example, rather than simply stating that 'One responsibility of the jury is to listen attentively to the evidence presented during trial' – make sure to add that this 'includes all submissions from both parties as well as any directions given to them by the judge'.

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.

Strengths and weaknesses of juries in criminal matters 2.1.5.5

OVERVIEW

According to Court Services Victoria, the greatest strength of having a jury 'is giving members of our community the opportunity to participate in, and contribute to, the administration of justice'. However, just how important is jury service to the effectiveness of Victoria's criminal justice system?

DETAILS

Table 2 Strengths and weaknesses of juries in criminal matters and their ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of the jury system – how fairness is promoted	**Weaknesses of the jury system – 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 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. **Democratic.** Trial by peers also protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair. **Independence.** Juries are independent of all parties to a dispute. They are randomly selected from the community, have no connection to the victim, accused or witnesses. Further they 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.	**Influence and prejudice.** 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). **Complexity.** 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 that they have actually applied the law to the facts correctly. This could be unfair on accused persons and victims of crime. **Delay.** 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. **Few in number.** Juries are used in a very small proportion of criminal cases – juries promote fairness in relatively few cases.



Table 3 Strengths and weaknesses of juries in criminal matters and their ability to achieve access

Principle of justice: *Access*	
Strengths of the jury system – how access is promoted	**Weaknesses of the jury system – 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 that the accused can understand the processes being used against them, which promotes access to justice (by improving understanding of the legal process).	**Very few accused.** Very few matters are tried by jury, as most criminal offences are summary offences resolved in the Magistrates' Court – so relatively few accused persons can access trial by peers.

Table 4 Strengths and weaknesses of juries in criminal matters and their ability to achieve equality

Principle of justice: *Equality*	
Strengths of the jury system – how equality is promoted	**Weaknesses of the jury system – limitations in achieving equality**
Used in all indictable offences. All accused persons charged with an indictable offence who have pleaded not guilty will have the same opportunity for their case to be heard and determined by a jury.	**Not available for all types of offences.** Jury trials are only available for cases where the accused person has pleaded not guilty to an indictable offence and will have their case heard in the County Court or the Supreme Court. Accused persons charged with summary offences, or indictable offences that they wish to have heard in the Magistrates' Court as a summary offence, will not have the opportunity for their case to be heard and determined by a jury.

Keen to learn more?

Court Services Victoria, https://www.courts.vic.gov.au/jury-service/jury-selection-process

Victorian Law Reform Commission, https://www.lawreform.vic.gov.au/all-projects/jury-empanelment

The Judicial College of Criminal Proceedings Manual, http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm

QUESTIONS 6E Role of the jury in a criminal trial

LEVEL 1:
Define and understand

1. Which of the following options most accurately describes when a jury is used in a criminal trial?

A. A jury will be used in any of the Victorian courts provided the criminal matter is complex enough to require an impartial and independent body of 12 citizens.

B. A jury will only be used to determine serious criminal cases in the Supreme Court, and in cases on appeal, as these types of cases are very complex and require an impartial and independent body of 12 citizens.

C. A jury will only be used to determine summary offences heard in the Magistrates' Court. Any cases in the County Court or Supreme Court are seen as far too complex and are left with the judge to determine.

D. A jury will be used for criminal trials that are conducted in the original jurisdiction of the County Court and Supreme Court, to determine the guilt of an accused person charged with an indictable offence.

2. Which of the following is not a responsibility of the jury in a criminal trial?

A. To listen attentively to the evidence presented during the trial, including all submissions from both parties and any directions given to them by the judge.

B. To be objective and unbiased when reaching decisions.

C. To determine the overall verdict, that being whether the accused is guilty or not guilty beyond a reasonable doubt.

D. To determine the most appropriate sanction after reaching a guilty verdict.

3. The jury system has been described as 'the community's guarantee of sound administration of criminal justice' *(Brown v R* [1986] 160 CLR 171). How is a list of potential jurors chosen from the community?

A. People with a legal background, including ex–policeman and ex–lawyers, make for ideal jurors due to their knowledge of the criminal justice system. As such, the courts seek out these individuals and invite them to attend jury service.

B. People who are interested in participating in the legal system are able to apply for jury service, provided they are 18 years of age and are enrolled to vote.

C. People are chosen at random from the electoral roll and added to a 'jury roll' by the Victorian Electoral Commission.

D. None of the above.

4. Jack is bankrupt and therefore cannot participate as a juror. Which of the following best explains why Jack cannot be a juror?

A. Jack is disqualified from jury service, pursuant to Schedule 1 of the *Juries Act 2000* (Vic).

B. Jack is ineligible for jury service, pursuant to Schedule 2 of the *Juries Act 2000* (Vic).

C. It is likely that the judge will excuse Jack from jury service.

D. Jack will not be able to act impartially in this case, considering his bankruptcy.

5. Which of the following most accurately describes the difference between the jury pool and the jury panel?

A. People who have been sent a summons and have attended court on the day of the trial form what is known as the jury pool. It is from this jury pool that a jury panel is taken to a courtroom, from which a jury is then selected to hear the case.

B. A jury panel is all those potential jurors who have answered the questionnaire from the Juries Commissioner, whereas the jury pool refers to those potential jurors who have attended court on the nominated day.

C. A jury pool refers to all individuals above the age of 18 who are registered to vote and may be randomly selected for jury service. On the other hand, a jury panel refers to those potential jurors who are actually selected to listen to the trial and determine a verdict.

D. All of the above.

6. Which of the following types of challenges may be exercised by either party in a criminal matter?

A. Peremptory challenges

B. Challenge for cause

C. Right to stand aside

D. None of the above

7. What type of challenge has the following characteristics?

- Exercisable by the accused party.
- Does not require a reason.
- Results in the immediate and permanent exclusion of the potential juror from the jury panel.

A. Challenge for cause.

B. Ineligibility for jury service.

C. Right to stand aside.

D. Peremptory challenge.



8. Which of the following is not likely to be a strength of having a jury in a criminal trial?

A. A jury is only required to determine a guilty/not guilty verdict and is not required to give reasons for their decision.

B. Having a jury takes sole decision–making power out of the hands of the judge and spreads it across a group of people. If a group of individuals all reach the same verdict regarding an accused person, it is probably correct.

C. Jurors are independent and impartial members of the community.

D. Having a jury allows the community to be involved in the legal decision making process.

LEVEL 2:
Describe and explain

9. Outline two responsibilities of the jury in a criminal trial. (4 MARKS)

Adapted from VCAA Exam 2018 Section A Question 1

10. Schedule 2 of the *Juries Act 2000* states that certain people may be deemed ineligible for jury service. Describe two reasons why someone may be deemed ineligible. (4 MARKS)

11. Distinguish between a peremptory challenge and a challenge for cause. (4 MARKS)

12. The following is the oath taken by jurors before sitting on the jury in a criminal trial:

You *(or, if more than one person takes the oath, you and each of you)* swear *(or the person taking the oath may promise)* by Almighty God *(or the person may name a god recognised by his or her religion)* that you will faithfully and impartially try the issues between the Crown and *[name of accused]* in relation to all charges brought against *[name of accused]* in this trial and give a true verdict according to the evidence.

Source: Juries Act 2000 (Vic) – Schedule 3

Other than being an impartial and independent decision–maker, describe one strength of the role of the jury in a criminal trial. (2 MARKS)

LEVEL 3:
Apply and compare

13. The following scenario contains several errors in the way this trial has been conducted.

Nicholas, aged 47, was charged with murder and had his case heard in the Supreme Court of Victoria. After listening to all of the evidence presented, a jury of 12 delivered a unanimous guilty verdict and sentenced Nicholas to 20 years in prison. The judge elected Scott as the foreperson of the jury, because Scott is a lawyer by profession and has extensive legal knowledge. One of the other jurors also knew Nicholas' wife very well through work, and therefore has knowledge of Nicholas' personality which helped aid the jury in reaching a decision.

Identify three errors in the scenario and explain the correct procedure which should have occurred. (6 MARKS)

Adapted from VCAA Exam 2008, Question 6

14. Jason, 34, is an experienced police officer who has been randomly selected for jury service from the electoral roll. He has been sent a questionnaire from the Juries Commissioner and is excited to put his knowledge of the criminal justice system to good use as a member of a jury.

Advise Jason whether or not he is likely to receive a summons for jury service after completing the questionnaire. Justify your answer. (3 MARKS)

15. Jennie, 21, was called into the courtroom from the jury pool and could potentially sit on the jury for a high–profile murder case. After being told of the particulars of the case, Jennie is confident she can be impartial and doesn't need to ask to be excused. When Jennie's juror number and occupation are called out she is challenged by the accused, who doesn't provide a reason for the challenge.

What type of challenge was used with respect to Jennie in this case?
Justify your answer. (3 MARKS)

16. During the jury empanelment process, both the accused and the prosecution each have the right to challenge particular jurors. Other than the opportunity to challenge, identify and describe three stages of the jury empanelment process. (6 MARKS)

LEVEL 4:
Discuss and evaluate

17. The Guardian recently published the comment 'our jury system has always been, and may continue to be, flawed.'

Evaluate the extent to which you agree with this statement. (6 MARKS)

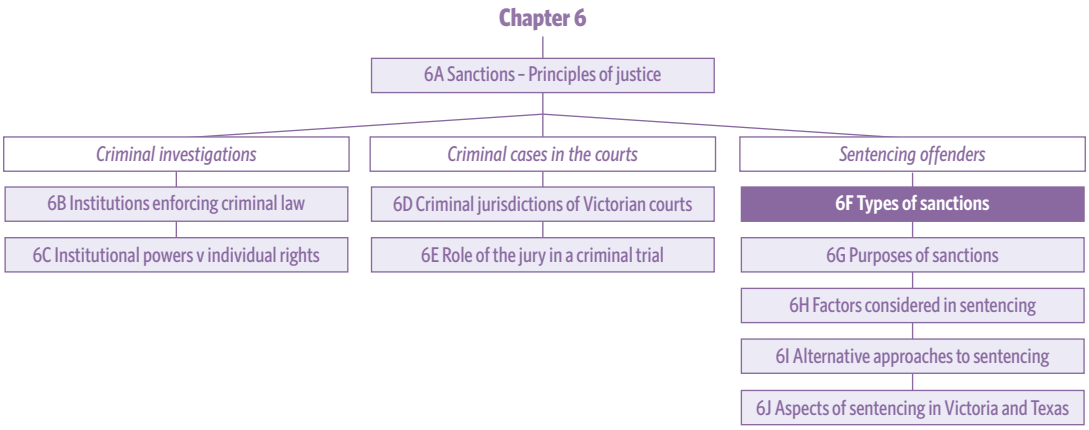
Source: Lee, B. Juries are often prejudiced, just like society. Should we get rid of them? | The Guardian (2018)

18. Discuss the extent to which the use of a jury in a criminal trial helps the justice system achieve the principle of fairness. (6 MARKS)



6F Types of sanctions

You often see the worst types of crimes in the news and on TV, and criminals who are usually sent to prison as punishment. This can't be the only consequence for criminal activity, can it? Especially when you consider that not all offences are as serious as those usually shown in the media.



There are many sanctions the courts may impose upon those who plead guilty to (or are found guilty of) criminal offences. In this lesson you will be learning about three of these sanctions.

Study design dot point

- Types of sanctions such as fines, community correction orders and imprisonment

Key knowledge units

Fines	2.1.6.1
Community correction orders	2.1.6.2
Imprisonment	2.1.6.3

Fines 2.1.6.1

OVERVIEW

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

A fine is calculated in **penalty units** – the current value of a penalty unit is $165.22 (from 1 July 2019 to 30 June 2020). For example, if an offender is required to pay a fine of two penalty units for shoplifting, the amount they must pay would be $330.44 (2x $165.22).

USEFUL TIP

According to Chapter 15 of the Victorian Sentencing Manual (Judicial College of Victoria, 2019), a fine is less severe than imprisonment or a community correction order, and sits relatively low in the hierarchy of sentencing orders.

DETAILS

When and how a court can impose a fine

The restrictions on the courts when imposing a fine include:

- A fine may not be imposed if the same purpose(s) can be achieved by a dismissal or adjournment (for more information on the purposes of sanctions refer to the next Lesson 6G).
- The fine must not exceed the maximum penalty units specified for the offence. 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 and/or imprisonment for 4 months.
    - Subsequent offences: 240 penalty units and/or imprisonment for 2 years.

- The fine must be in proportion to the offence. That is, the severity of the fine must match the severity of the crime committed.
- The fine must take into account an offender's ability to pay.

LEGISLATION

Section 49 of the *Sentencing Act 1991* (Vic) provides a general power to fine upon a finding of guilt:

If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

Community correction order (CCO) 2.1.6.2

OVERVIEW

A community correction order (CCO) is a sanction that the guilty offender must serve whilst remaining in the community, and involves specific conditions the offender must follow.

The conditions are chosen based on the individual circumstances of the offender and will often aim to address the underlying causes of the criminal behaviour.

DETAILS

Possible conditions of a CCO

The conditions imposed upon an offender through a CCO come in two forms:

1. **Mandatory conditions** – these are conditions which apply to every offender who is given a CCO.
2. **Optional conditions** – these are conditions that are specific to the circumstances of the offender.

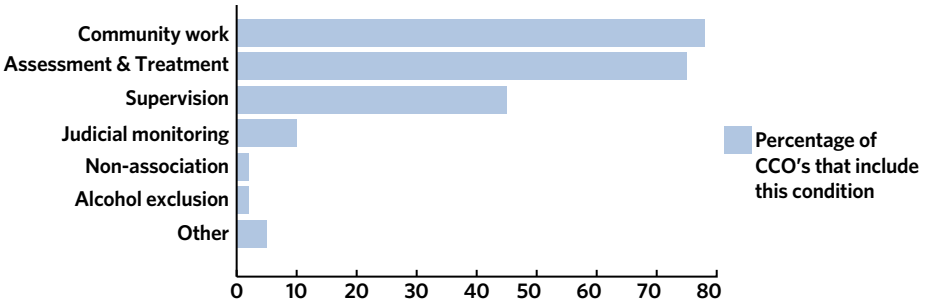
When imposing a CCO the court will determine which optional conditions to impose based on a range of factors described in Lessons 6G and 6H. Table 1 highlights some of the mandatory and optional conditions available to the courts.

Table 1 Mandatory and optional conditions applied to CCOs

Mandatory Conditions	Optional Conditions
Continuous reporting. Must continually report to a community corrections officer during the period of the CCO.	**Treatment and rehabilitation.** To undergo specific treatment with the aim of rehabilitating an underlying cause of the crime (often drug or alcohol dependence).
Change of address/employment. Must notify the community corrections centre of any change of address or employment during the period of the CCO.	**Unpaid community work.** Must undergo a certain number of hours of unpaid community work, such as picking up rubbish on the beach.
Serious offences. Must not commit an offence punishable by imprisonment during the period of the CCO.	**Non-association.** Must not contact or associate with a particular person or group of persons (EG: an outlaw motorcycle gang).
Remain in the state. Must not leave Victoria without express permission to do so.	**Curfew.** Must remain at a particular location between certain hours, such as being home by 9:00pm.
Visiting the CCC. Must report to the community corrections centre (CCC) within 2 business days after the CCO comes into force.	**Place exclusion.** Must not enter or visit a certain place, such as a bar or nightclub.
Compliance. Must comply with any direction given during the period of the CCO.	**Electronic monitoring.** Must wear a monitoring device for a particular length of time.

Imposing CCOs – statistics

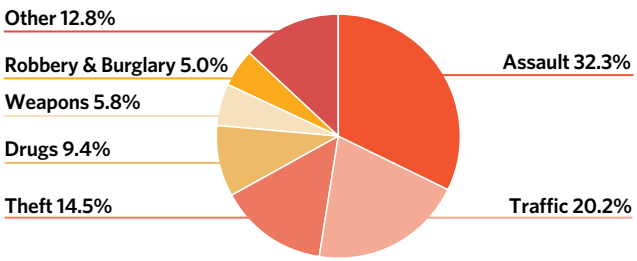
Figure 1 provides an insight into which optional conditions are most frequently imposed by the courts. Clearly, most CCOs include an emphasis on unpaid community work, treatment for underlying issues leading to criminal behaviour and supervising the offender while they are in the community.



Source: Sentencing Advisory Council, community correction orders Third Monitoring Report (2016)

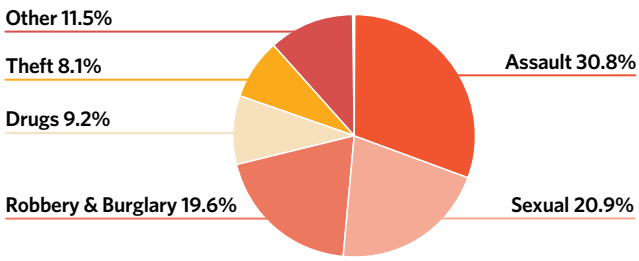
Figure 1 Percentage of CCOs by condition given (Magistrates' Court 2015)

Figures 2 and 3 outline what proportion of CCOs are imposed for particular types of offences. There are slight differences between the Magistrates' Court and higher courts in the Victorian hierarchy. As the data demonstrates, most CCOs are imposed in response to assaults and various theft/robbery offences.



Source: Sentencing Advisory Council, Community Correction Orders Third Monitoring Report (2016)

Figure 2 Percentage of CCO sanctions by offence, Magistrates' Court (2015)



Source: Sentencing Advisory Council, Community Correction Orders Third Monitoring Report (2016)

Figure 3 Percentage of CCO sanctions by offence in higher courts (2015)

CASE STUDY

Chapter 14 of the Victorian Sentencing Manual says the following about community corrections orders (CCO):

'In the hierarchy of sanctions a community correction order is more severe than a fine, and less severe than a drug treatment order or imprisonment'.

Source: Judicial College of Victoria, Victorian Sentencing Manual (2019)

CASE STUDY

***DPP v Borg* (2015), County Court of Victoria (UNREPORTED)**

Borg, 22, pleaded guilty in the County Court to two charges of dangerous driving causing death and two charges of dangerous driving causing serious injury. He was sentenced to a total effective sentence of a 5 year Community Correction Order with the following conditions:

- 500 hours of unpaid community work
- Continuous court supervision
- Various treatment and rehabilitation conditions
- An additional court order disqualifying him from obtaining a licence for two years.

In his sentencing remarks, the judge noted that Borg was to receive the benefit of his guilty plea and avoid a prison sentence as a result. His Honour accepted that Borg was also genuinely remorseful and felt shame for what he had done, 'accepting responsibility from the outset'.

Imprisonment 2.1.6.3

OVERVIEW

Imprisonment involves restricting the offender's freedom and personal liberties by removing them from the community for a set period of time and placing them under the control and supervision of the state. This is the most severe sanction available to Australian courts.

Imprisonment is the 'sanction of last resort' and is only to be imposed when there is no other penalty available that is appropriate to achieve the relevant aims/purposes of sentencing.

DETAILS

When a court imposes a prison term it will usually:

- set a maximum prison term to be served (often known as the 'head sentence') ; and
- provide a minimum period of imprisonment, after which an offender can apply for parole (conditional release from prison).

In some cases of very serious offending/repeat offending, a court may decide to:

- not impose a minimum period of imprisonment, instead imposing life imprisonment without the ability to apply for parole; or
- impose an indefinite period of imprisonment.

After the minimum period has been served (if a non–parole period has been set), a prisoner may request parole. A prisoner may be granted parole if they:

- have shown signs of rehabilitation;
- have behaved well in prison; and
- are no longer regarded as a threat to public safety.

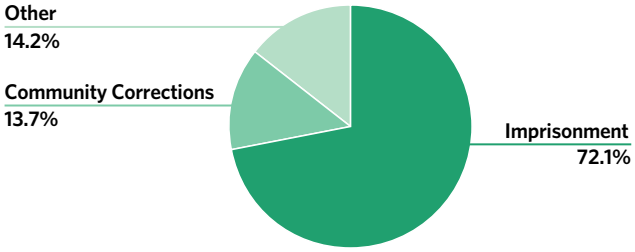
A prisoner granted parole and released into the community will be supervised in some way to ensure they do not reoffend. However, of people released from prison in Victoria, approximately 40% will return to prison within two years of their release (which is comparable to the national average of 44.8%). This is described further in Lesson 6G.

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 6G), 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.'

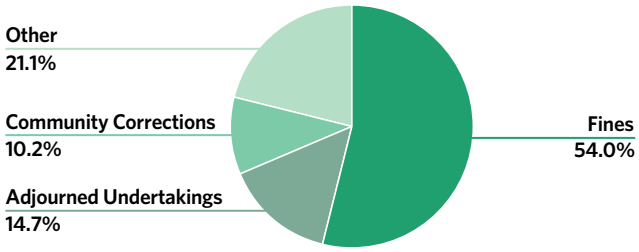
Imprisonment is still a small % of all sanctions imposed overall:

- The majority of offenders sentenced in the County Court and Supreme Court receive a prison sentence (as shown in Figure 4), however it's important to remember these courts sentence a relatively small number of offenders (for very serious crimes).
- The majority of offenders sentenced in the Magistrates' Court receive a fine, as shown in Figure 5; this court resolves a very high volume of less serious criminal cases.



Source: Sentencing Advisory Council, Sentencing Outcomes in the Higher Courts

Figure 4 Sentencing outcomes by percentage in the higher courts (Supreme Court (Trial Division) and County Court)



Source: Sentencing Advisory Council, Sentencing Outcomes in the Magistrates' Court

Figure 5 Sentencing outcomes by percentage in the Magistrates' Court

Keen to learn more?

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

Judicial College of Victoria – Victorian Sentencing Manual, http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm

QUESTIONS

6F Types of sanctions

LEVEL 1:
Define and understand

1. Promising young law student Matilda was out at a nightclub in Fitzroy celebrating her success in an exam. While under the influence of drugs, Matilda got into a fight with another person in the bathroom and is now facing some minor assault charges.
After appearing in the Magistrates' Court, the magistrate believes that Matilda has a drug problem that needs to be addressed to prevent further offending. In this case, do you think a CCO would be an appropriate sanction for Matilda if she is convicted?

A. It is likely that a CCO would be imposed in this case given that Matilda's assault charges are too serious to be appropriately sanctioned by a fine alone, but are not so serious to warrant a term of imprisonment. As the magistrate believes that Matilda needs counselling for her drug addiction, it is likely that a court would incorporate this into a community–based sentence in Matilda's case.

B. It is likely that a term of imprisonment would be imposed, given that Matilda's assault charges are too serious for a CCO. Matilda will receive adequate counselling for her drug problem while in prison.

C. It is likely that a CCO would be imposed in this case given that Matilda's assault charges are too serious to be appropriately sanctioned by a fine alone, but are not so serious to warrant a term of imprisonment. As the magistrate believes that Matilda needs counselling for her drug addiction, the jury is likely to incorporate a drug treatment plan into a custodial sentence in Matilda's case.

D. It is likely that a fine would be imposed in this case given that Matilda's assault charges are minor. The magistrate is likely to see that Matilda was under the influence of drugs and therefore acting out of character.

2. Scott, 35, has been convicted of aggravated burglary after he stole from a store with a shotgun. The judge in Scott's case is trying to determine what is an appropriate sanction to impose considering:

- the violent nature of the crime
- Scott's extensive criminal history
- Scott's connection with a local bikie gang (who are often reported as violent by police).

Would a term of imprisonment be appropriate in Scott's case?

A. No. A term of imprisonment is seen as the sanction of 'last resort' and is only to be imposed when there is no other penalty available that is appropriate for the circumstances. A hefty fine is more likely to be imposed by the judge in this case rather than a term of imprisonment.

B. Yes. A term of imprisonment is appropriate given Scott's extensive criminal history and the violent nature of his crimes. Scott poses a significant risk to society and ought to be removed from the community.

C. No. A term of imprisonment is seen as the sanction of 'last resort' and is only to be imposed when there is no other penalty available that is appropriate for the circumstances. A CCO is more likely to be imposed by the judge in this case rather than a term of imprisonment, as this will allow for the judge to monitor Scott's behaviour by imposing particular conditions such as a curfew and stopping his association with the bikie gang.

D. None of the above.

3. The following passage may contain errors.

A fine is a monetary payment the court will order an offender to make, as a penalty for a criminal offence. A fine is calculated in penalty units, with the current value of a penalty unit being $165.22. The fine must not exceed the maximum penalty units specified for the offence. In the hierarchy of sentencing orders, a fine is seen as more severe than a CCO but less severe than a term of imprisonment, considering that imprisonment involves removing an individual from the community without the possibility of early release. Which of the following options corrects all of the errors in the statement?

A. The current value of a penalty unit is $322.38.
The fine may exceed the maximum penalty units only if the judge thinks that is fair.

B. A fine is less severe than both a CCO and imprisonment.
A term of imprisonment may provide the possibility for release through parole.

C. The fine may exceed the maximum penalty units only if the judge thinks that is fair.
A term of imprisonment may provide the possibility for release through parole.

D. There are no errors in the statement.

LEVEL 2:
Describe and explain

4. Define 'fine' as an example of a sanction. (2 MARKS)

5. Ellanora, 19, was found with 30 grams of cocaine in her car and 12 stolen smartphones which she intended to sell (for cash). Ellanora has no prior convictions but did admit to a drug addiction. The prosecution believe that given the seriousness of her offending Ellanora should be sentenced to a term of imprisonment.

Identify and define one sanction that may be appropriate in this case if Ellanora is found guilty. Justify your response. (4 MARKS)

6. In *R v Da Costa* [2014], Justice Lasry of the Supreme Court sentenced the offender for culpable driving causing death and 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.'

Define 'imprisonment'. In your answer, provide one reason why Da Costa may be released on parole after he serves 11 years. (3 MARKS)

LEVEL 3:
Apply and compare

7. James, 21, has been convicted of possession of a commercial quantity of an illicit substance with the intention to traffick this drug. He was caught with a significant quantity of marijuana in his car. The only other involvement James has had in the past with the criminal justice system was a minor assault charge at the age of 18, for which he was found guilty and fined. Since that time, James has admitted to developing a drug dependency, and has dropped out of university as a result.

The judge in James' case is trying to determine what is an appropriate sanction to impose. Advise the judge on an appropriate community–based sanction and justify your suggestion. In your answer, provide a definition for the sanction you have chosen. (5 MARKS)



6G Purposes of sanctions

Following a conviction at trial or a guilty plea, an offender will proceed to sentencing, where an appropriate sanction will be imposed on them by the courts.



When imposing a sanction on an offender, the courts will aim to achieve one (or several) of the five purposes of criminal sanctions, though it is not always possible for a particular sanction to fulfil all purposes. The five purposes of sanctions are outlined in section 5(1) of the *Sentencing Act 1991* (Vic).

Study design dot point

- The purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation

Key knowledge units

Just punishment	2.1.7.1
Protection of society	2.1.7.2
Rehabilitation	2.1.7.3
Deterrence	2.1.7.4
Denunciation	2.1.7.5
Ability of sanctions to achieve their purposes	2.1.7.6

Just punishment 2.1.7.1

OVERVIEW

Have you ever wondered how the criminal justice system ensures offenders face consequences for the negative impact of their crimes? How do the courts achieve justice for society and victims of crime so that they do not have to take justice into their own hands?

DETAILS

The purpose of punishment is to make sure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.

LEGISLATION

***Sentencing Act 1991* (Vic)**

Section 5 - SENTENCING GUIDELINES

(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.

What is just punishment?

In order for punishment to be considered 'just', the sentence imposed should reflect the gravity and impact of the offender's crimes.

Why punish?

- To achieve adequate retribution for the harm caused to the victim/society as a whole.
- To achieve 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 sentencing

A court aiming to punish will impose a more severe sanction (such as a larger fine; imprisonment rather than a community correction 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.

Protection of society 2.1.7.2

OVERVIEW

Some crimes will lead to a term of imprisonment for the offender, while others do not. Do some offenders pose a greater threat to society than others?

DETAILS

The purpose of protection is to ensure that offenders who pose a significant risk to the welfare of society (and/or their victims and/or witnesses to an offence) are restricted from engaging in further criminal behaviour through the sanction that is imposed. 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 that this purpose serves one 'utilitarian' benefit of criminal sanctions: that is, depriving one dangerous offender of their freedom to ensure the protection of wider society aims to bring about 'the greatest amount of good for the greatest number of people'.

Source: Driver, J. The history of utilitarianism. The Stanford Encyclopedia of Philosophy

Impact on sanctioning

A court aiming to protect will usually impose one of the following:

- A term of imprisonment rather than a CCO or a fine;
- A longer term of imprisonment;
- A CCO which restricts the offender's actions (for example, an alcohol exclusion, curfew, ban on entering specific place or area).

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.

cont'd



As a result, when addressing Phillips at his sentencing 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.

Rehabilitation 2.1.7.3

OVERVIEW

Why do some offenders not face imprisonment for their crimes? Is there a better way to sentence some offenders, so they are not only punished but the underlying causes of their offending are addressed?

DETAILS

The purpose of rehabilitation is to sentence offenders in a manner that breaks 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 or alcohol abuse) to prevent future offending. A CCO can be highly customised to meet the rehabilitation needs of the offender as well as other purposes of criminal sanctions.

Impact on sentencing

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 a 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. A CCO can be highly customised to meet the rehabilitation needs of the offender as well as other purposes of criminal sanctions.
- **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

***DPP v Horsfield* [2018] VCC 1931**

In 2018 Michael Horsfield pleaded guilty to one charge of armed robbery in the County Court of Victoria, after having entered a taxi and demanded money from the driver, whilst brandishing a kitchen knife. The offender had been found guilty of several prior offences in the Children's Court and the Magistrates' Court.

Judge Lawson of the County Court noted the severity of the type of offence, yet concluded that this particular style of offending fell towards the lower end of the scale of seriousness for this sort of offence. She also pointed out that the offender was still relatively young (25) and had experienced psychological disturbance due to the death of his father, leading to substance abuse.

In sentencing Horsefield, Judge Lawson stated:

> There is significant community interest in maintaining your progress that you have achieved whilst on bail, so as to ensure ultimately the best protection for the community, but also to offer you individually the best hope for rehabilitation in the future.

In consequence, the offender was sentenced to a three year community corrections order with the conditions of supervision, and treatment and rehabilitation programs for drug and alcohol, as well as other offending behaviour, and 250 hours community work.

Judge Lawson gave this reason for the sentence:

> In this instance I consider that a community corrections order is the most appropriate sentencing disposition. It will enable all the purposes of punishment to be served simultaneously in a coherent and balanced way in preference to the option of imprisonment, which is skewed towards retribution and deterrence.

While the judge in this case refers to multiple purposes in sentencing the offender, including punishment and protection, the imposition of a CCO as opposed to imprisonment is indicative of the judge's decision to prioritise the rehabilitation of this offender.

Deterrence 2.1.7.4

OVERVIEW

Have you ever wondered why some offenders receive particularly harsh sentences for their crimes? Do certain types of crimes need to be discouraged more than others?

DETAILS

The purpose of deterrence is to impose a sanction which will 'make an example' of the offender, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.

Table 1 Types of deterrence

Specific deterrence	General deterrence
• When the **offender** is personally discouraged from committing offences of the same or similar character through the provision of a sanction.	• 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 sanctioning

A court aiming to deter will impose a more severe sanction (such as a larger fine; imprisonment rather than a community correction order; a longer period of imprisonment rather than a shorter period). This will usually be accompanied by comments from the court stating the harsher 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.

Denunciation 2.1.7.5

OVERVIEW

To denunciate is to publicly condemn or criticise the offender's criminal behaviour.

DETAILS

The purpose of denunciation is to illustrate the court's disapproval for the criminal behaviour of the offender. Essentially, it is to highlight the extent to which the offender has violated the moral and ethical standards of society.

Impact on sanctioning

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 The Queen* [2012] VSCA 280**

In 2009 Latorre was sentenced to an 11-year prison term for a range of violent offences, such as assault, blackmail, property damage and multiple threats to kill 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.

Ability of sanctions to achieve their purposes 2.1.7.6

OVERVIEW

Each type of sanction available to the courts aims to achieve some, or all, of the purposes of sanctions. However, some sanctions may be able to address a particular purpose more effectively than others.

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 the purposes of sanctions and ways in which it might not.

DETAILS

Table 2 The ability of fines to achieve the purposes of sanctions

Purpose	How it is achieved	How it isn't achieved
Punishment	• 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 (considering their wealth/income). • The offender must forego the goods and services they would have purchased with the money paid to the state. • Fines must usually be paid in a short time frame, meaning the punishment the offender feels is almost immediate.	• The setting of fines to reflect each offenders' capacity to pay could be seen as unjust treatment of offender's who commit the same offence. • 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*. • 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.
Protection	N/A	• Community protection is not achieved by a fine, because an offender is not removed from the community, nor is their behaviour restricted in any way.
Rehabilitation	N/A	• 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.
General and specific deterrence	• The economic loss caused by a fine does discourage an offender and other members of the community from similar offences.	• The imposition of fines in the Magistrates' Court for summary offences is often not publicised, reducing the extent to which general deterrence is achieved by fines. • 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.*
Denunciation	• If a court imposes a very large fine, this will communicate the court's disapproval and condemnation of the offender's behaviour.	• The maximum fine a court is able to impose for a particular offence may not be high enough to 'send a message' about the court's condemnation of the offender. • A court will not impose a fine so large that the offender cannot pay the fine; if an offender has very limited income or assets to pay a fine, the court will not impose a large fine which won't achieve denunciation.



CASE STUDY

***ASIC v Westpac Banking Corporation (No 3)* [2018] FCA 1701**

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 attempted 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.

Table 3 The ability of CCOs to achieve the purposes of sanctions

Purpose	How it is achieved	How it isn't achieved
Punishment	• A CCO can restrict an offender's movements/actions. • The inconvenience of completing many hours of unpaid community work also provides some retribution for the offender's conduct.	• If the impact of an offence is very severe (such as a violent assault), a CCO may not punish an offender sufficiently. • Victims, their families and the community may feel that the punishment is not just (compared to the more severe sanction of imprisonment).
Protection	• The offender can be restricted from attending certain places/contacting certain people (including victims and co-offenders), promoting community safety. • The imposition of curfews, alcohol bans and preventing an offender from attending a licenced venue can protect society from alcohol-driven violence.	• 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.
Rehabilitation	• A CCO can include treatment for mental health issues and drug/alcohol addiction that cause criminal offending, reducing the risk of reoffending (recidivism). • Community work builds offenders' self-esteem and provides skills that may be useful in securing employment.	• Requires the offender to genuinely engage with the counselling or medical treatment imposed by the CCO. • If the offender does not actively participate in treatment or community work and/or corrections officers do not actively enforce the CCO's conditions rehabilitation is less likely.

cont'd

Purpose	How it is achieved	How it isn't achieved
General and specific deterrence	• Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans and other aspects of a CCO, it does discourage the offender and members of the community from offending. • 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.	• Some members of the wider community may not see a CCO as very severe/harsh (compared with imprisonment) and therefore may not be discouraged from criminal activity.
Denunciation	N/A	• 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.

Table 4 The ability of imprisonment to achieve the purposes of sanctions

Purpose	How it is achieved	How it isn't achieved
Punishment	• The offender is placed in a very harsh environment, with their movement restricted. • The offender loses most contact with family and friends. • The offender will usually lose any job they hold while in prison.	N/A
Protection	• The offender is removed from society and does not have access to the victims of their offending.	• Many prisoners who are released will reoffend, either because: – They are not specifically deterred from reoffending by their prison sentence (see below); and/or – Underlying reasons for offending such as mental health issues or drug/alcohol addiction are not addressed. As a result community protection in the long term may be limited.
Rehabilitation	• Prisons do provide some programs to address alcohol and drug dependencies, which cause many offenders to engage in criminal behaviour.	• Due to long waiting lists for prisons' rehabilitative services, many prisoners leave prison with alcohol or drug addiction issues remaining. • Rehabilitation services are often voluntary – if the offender is not willing to rehabilitate then they are unlikely to do so. • If an offender has mental health issues that contributed to their offending, removing offenders from family and friends in a harsh environment will often make such mental health issues worse.
General and specific deterrence	• Prison's harsh punishment will discourage offenders and members of the community from committing similar offences.	• 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 that prison is not an effective specific deterrent in many cases. • Research by the Sentencing Advisory Council suggests that as prison sentences become longer, there is no increase in the extent to which the general public is discouraged from offending.

cont'd



Purpose	How it is achieved	How it isn't achieved
General and specific deterrence		• Many crimes that lead to prison terms are committed spontaneously and/or when offenders are under the influence of drugs/alcohol. These offenders are not discouraged by a possible term of imprisonment at the time of their criminal conduct. • Prisons have been likened to 'crime school', as there are many serious offenders in the same contained space – allowing for the sharing of information and tactics, and the building of relationships that may be used upon release.
Denunciation	• It is the most severe/harsh sanction a court can impose. • Judges are able to impose a longer prison sentence to demonstrate their condemnation of the offender's criminal conduct.	• Legislation will sometimes provide a maximum term of imprisonment for certain offences, which may restrict the courts' ability to express outrage at the violation of community morals and ethics.

CASE STUDY

***DPP v O'Connor* [2018] VCC 1897**

In October 2018, Gary O'Connor pleaded guilty to one charge of culpable driving causing death. O'Connor was driving a motorcycle under the influence of alcohol when he failed to navigate a turn and ran off the road. Both O'Connor and his passenger, Shaun Biggs were gravely injured, resulting in the death of Mr. Biggs shortly after the accident.

Three months prior to the offence, O'Connor had experienced the death of his wife (the mother of his four children), causing him to develop anxiety, depression and a tendency towards alcoholism. O'Connor was found to have excellent prospects of rehabilitation and displayed a deep remorse for his actions.

In sentencing the offender, Judge Hogan stated:

> There can be no doubt that, in sentencing for this serious offence, which is unhappily so prevalent, the Court must denounce your conduct and emphasise general deterrence and just punishment. Many people who come before this Court on charges of culpable driving have no or minimal criminal history and excellent prospects of rehabilitation, and these factors cannot overshadow the primary emphasis in sentencing which must be upon general deterrence.

In consequence, the offender was sentenced to a term of imprisonment of 7 years and 9 months, with a non-parole period of 4 years and 9 months. Judge Hogan noted:

> I am satisfied that you will find serving a sentence of imprisonment very hard because of these factors and accept Mr Newton's assessment that, because of these factors, your self-esteem has been eroded and you are harshly self-critical. In addition, you suffer symptoms of post-traumatic stress disorder relating to the collision. I accept that this constellation of factors put you at risk of developing further psychological difficulties in custody.

This case demonstrates the inability for imprisonment to achieve all of the purposes of sanctions. While it is often able to achieve punishment and general deterrence, it can have a very negative impact on the rehabilitation of the offender. This makes it difficult for the courts to focus on rehabilitation in cases where a term of imprisonment is unavoidable due to the nature of the offence.

USEFUL TIP

When defining legal terminology, don't repeat the term you are defining. For example, in the 2010 VCAA Examiners' Report, a common error was to define imprisonment as 'going to prison'.

USEFUL TIP

When discussing the ability of 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.

Keen to learn more?

The Sentencing Advisory Council, https://www.sentencingcouncil.vic.gov.au/

The Judicial College of Victoria's Sentencing Manual, https://resources.judicialcollege.vic.edu.au/article/669236

QUESTIONS 6G Purposes of sanctions

LEVEL 1:
Define and understand

1. Which of the following options correctly matches each of the purposes of sanctions with their definitions.

I) To make sure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.

II) To ensure that offenders who pose a significant risk to the welfare of society (and/or their victims) are prevented from engaging in further criminal behaviour.

III) To sentence the offender in a way which aims to prevent reoffending by addressing the underlying causes of their criminal behaviour.

IV) To impose a sanction which will 'make an example' of the offender, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.

V) To illustrate the court's disapproval for the criminal behaviour of the offender, and to highlight the offender's transgression of moral and ethical codes.

A. I) denunciation; II) deterrence; III) protection; IV) punishment; V) rehabilitation

B. I) punishment; II) protection; III) rehabilitation; IV) deterrence; V) denunciation

C. I) protection; II) rehabilitation; III) deterrence; IV) punishment; V) denunciation

D. I) punishment; II) protection; III) rehabilitation; IV) denunciation; V) deterrence

2. Ben has been found guilty of sexual assault in the County Court. The County Court judge sentenced Ben to a term of imprisonment of 9 years, with a minimum non-parole period of 7 years. In the sentencing remarks, the judge stated, 'In sentencing you today, I take into consideration not only the evident threat that you pose to society, but also the need to discourage crimes of a similar nature within the Victorian community. The acts that you have committed are not tolerated in this society and thus elicit the utmost disapproval of the Victorian courts.' This statement suggests the sanction seeks to:

A. Punish the offender, rehabilitate the offender, generally deter would-be offenders.

B. Punish the offender only.

C. Protect society from the offender, generally deter would-be offenders, denunciate the crime, punish the offender.

D. Specifically deter the offender, rehabilitate the offender, protect society from the offender.

3. Which of the following is not true regarding the purpose of rehabilitation?

A. Rehabilitation aims to stop the cycle of serial criminality.

B. Rehabilitation prioritises the treatment of the offender over the protection of society.

C. Recidivism statistics suggest that offenders who have undergone some kind of rehabilitation have a better chance of integrating back into society.

D. Rehabilitation of an offender can enable the future protection of society.



4. Which of the following best describes the reasons for punishing an offender?

A. To prevent crimes of a similar nature in society.

B. To prevent victims/family members of victims from taking matters into their own hands and seeking revenge.

C. To achieve adequate retribution for the harm caused to society and to the victims/family members of victims, so that revenge against the offender is not sought outside of the courts.

D. To make the offender feel bad about what they did.

5. Susan has been convicted of multiple charges of murder in the Supreme Court of Victoria. The manner in which the crimes were committed was excessively violent and suggested a significant level of planning and premeditation. Susan will now face sentencing. Which purposes of sanctions should be addressed most heavily in the sentence imposed on Susan, and what would be the most appropriate sanction to achieve these purposes?

A. Generally deterring would-be offenders from committing crimes of a similar nature; rehabilitating the offender to prevent re-offending. A CCO would be the most appropriate sanction to achieve these purposes.

B. Rehabilitating the offender to prevent re-offending; punishment of the offender to achieve justice and retribution for the impact of her crimes. Imprisonment would be the most appropriate sanction to achieve these purposes.

C. Ensuring the protection of wider society by removing the offender from the community; denouncing the crime committed by the offender. A fine would be the most appropriate sanction to achieve these purposes.

D. Ensuring the protection of wider society by removing the offender from the community; punishment of the offender to achieve justice and retribution for the impact of her crimes. Imprisonment would be the most appropriate sanction to achieve these purposes.

6. Following a murder case in the Supreme Court of Victoria, Sam has been sentenced to a term of imprisonment of 25 years. Imprisonment, known as the 'sanction of last resort', is often only able to achieve some of the purposes of sanctions. Which of the following statements is not true of imprisonment?

A. Imprisonment is able to achieve punishment by restricting the movement and freedom of the offender, thus achieving retribution for the detrimental impact of their actions. However, imprisonment is often limited in its ability to achieve rehabilitation due to the harsh environment of the prison system and the offender's continued exposure to other criminals.

B. Imprisonment will usually achieve some specific and general deterrence due to the harsh nature of the sanction, discouraging the offender and would-be offenders from committing crimes of a similar nature. However, recidivism rates in Victoria suggest that imprisonment is not always an effective specific deterrent.

C. Imprisonment always achieves ongoing protection for society because it involves the removal of the offender from the community.

D. Imprisonment will often achieve denunciation because it is the harshest sanction that can be imposed on an offender.

7. Andrew, 22, pleaded guilty to one charge of armed robbery in the County Court, after threatening a delivery driver with a kitchen knife to avoid paying for his order. Andrew has a history of drug addiction and minor offences. Since his arrest, Andrew has been cooperating with police and has shown good prospects for rehabilitation. The maximum penalty for armed robbery is 25 years' imprisonment, or a fine of up to 3,000 penalty units. However, Andrew's barrister has suggested that a CCO would be the most appropriate sanction for the judge to impose. Based on the information provided, would a CCO be an appropriate sanction?

A. A CCO would be appropriate in this case as it would allow the offender, who is relatively young, to be treated for the underlying factors that have contributed to his criminal behaviour, thus achieving rehabilitation as well as punishing the offender for the impact of his crime. This is more appropriate than a term of imprisonment or the imposition of a fine because neither of these sanctions could effectively rehabilitate the offender.

B. A CCO would not be appropriate because it would not achieve any degree of protection for the community and does not adequately punish the offender. The offender in this case poses a severe threat to society and should therefore be removed from the community through a sentence of imprisonment.

C. A CCO would not be appropriate because it would not achieve general or specific deterrence. In order to discourage others in the community from committing crimes of a similar nature, the courts must deprive the offender of their liberty through a term of imprisonment or a large fine. Likewise, CCOs cannot prevent the offender from committing further crimes because they do not cause any inconvenience for the offender.

D. A CCO would be appropriate because it would allow the court to achieve denunciation by illustrating the court's condemnation of the crime committed. This cannot be achieved through imprisonment or a fine because both sanctions focus on punishing the offender.

LEVEL 2:
Describe and explain

8. Describe 'denunciation' as a purpose of criminal sanctions. (2 MARKS)

9. Outline two reasons why punishment is a necessary purpose of criminal sanctions. (2 MARKS)

10. Ben has been found guilty of a charge of murder in the Supreme Court of Victoria. In sentencing Ben, the Supreme Court justice points out the particularly violent nature of the offence and states: 'In sentencing this offender it will be necessary to ensure that both the offender and the community at large are deterred from committing crimes of a similar nature in the future'. Ben is sentenced to a term of imprisonment of 25 years, with a non-parole period of 20 years.

Distinguish between specific and general deterrence, and discuss whether each is achieved by the sanction imposed in Ben's case. (4 MARKS)

11. Describe 'rehabilitation' as a purpose of criminal sanctions and explain how one criminal sanction is able to achieve this purpose. (3 MARKS)

12. Robert is a serial offender who has been found guilty of multiple sexual offence charges. He has been sentenced in the County Court to a term of imprisonment of 11 years, with a non-parole period of 7 years and 9 months.

Describe 'protection' as a purpose of criminal sanctions and discuss whether the sanction imposed on Robert is likely to achieve this purpose. (4 MARKS)

LEVEL 3:
Apply and compare

13. In 2019, Daniel Tripp pleaded guilty to one count of armed robbery in the County Court of Victoria. Tripp had been charged with the offence after entering a taxi and threatening the driver with a box cutter in order to reclaim the $50 that he had paid as the fare. The offender had a long history of mental health problems, as well as alcohol and drug abuse. Since the offence was committed, Tripp had abstained from alcohol consumption and attended a counselling program at Windana Drug & Alcohol Recovery. The offender had no prior criminal convictions and expressed genuine remorse for his actions. Judge Cahill of the County Court imposed a community correction order (CCO) of 2 years and 6 months, with conditions of 250 hours unpaid community work, as well as treatment for alcohol abuse and mental health treatment.

Source: DPP v Tripp [2019] VCC 395



a) Which purpose of criminal sanctions does Judge Cahill emphasise in sentencing this offender? Justify your answer. (2 MARKS)

b) With reference to the case, explain the ability of a CCO to achieve this purpose. (3 MARKS)

14. In 2017, Raphael Augusto dos Santos pleaded guilty to one charge of importing a commercial quantity of cocaine. He was sentenced to a term of imprisonment of 7 years and 6 months, with a minimum non-parole period of 4 years. In sentencing remarks, Judge Bourke stated: 'considerations of deterrence, your moral culpability, the need to denunciate and impose proportionate punishment are all relevant. General deterrence, perhaps particularly related to couriers as you were, is a primary sentencing purpose.'

Source: DPP v Santos [2017] VCC 601

Describe 'general deterrence' and distinguish this purpose of criminal sanctions from 'denunciation'. Explain the impact the judge's desire to achieve general deterrence would have had on the sanction imposed. (4 MARKS)

15. Simone has been charged with murder. She has pleaded not guilty.

a) Identify and describe the most appropriate sanction for the judge in this case to impose on Simone if she is found guilty. Briefly justify your response. (3 MARKS)

b) With reference to the case, explain how this sanction achieves two of the purposes of sanctions. (4 MARKS)

Adapted from VCAA Exam 2012 Question 5B

LEVEL 4:
Discuss and evaluate

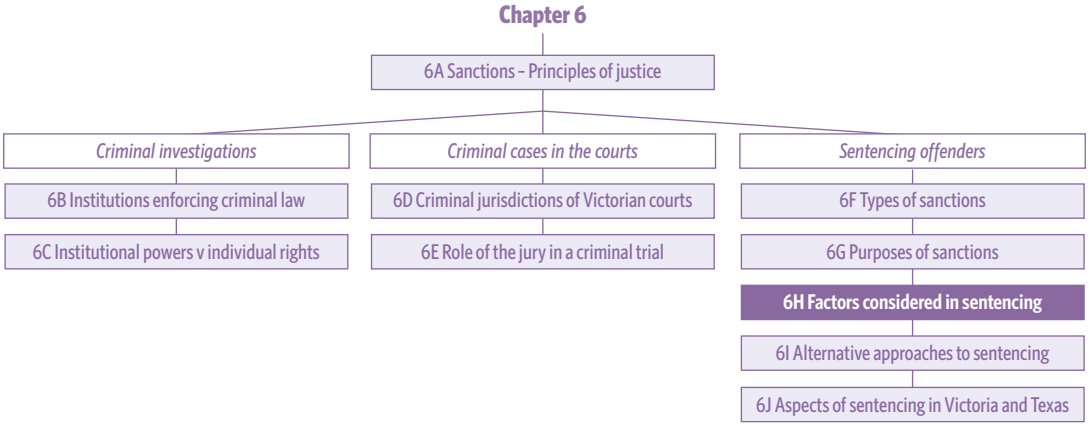
16. Sue has been found guilty of a summary offence in the Magistrates' Court. The sentencing magistrate points out the need to impose a sanction that will 'achieve both general and specific deterrence'.

Select one criminal sanction that could be imposed on this offender and discuss its ability to achieve general and specific deterrence. (5 MARKS)

17. 'Imprisonment is the best sanction to ensure that the community is protected from serious criminal offenders'. With reference to the statement, discuss the ability of imprisonment and one other sanction to achieve the purpose of protection. (6 MARKS)

6H 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 what the purpose of the sanction is, which sanction to impose and how severe the sanction ought to be.



In this lesson you will be learning about factors that may increase or reduce the severity of the sanction imposed on the offender, including:

- Aggravating factors
- Mitigating factors
- Guilty pleas
- Victim impact statements

These factors are considered in conjunction with the purposes of sanctions to ensure that the most appropriate sanction is imposed for each specific offender/offence.

Study design dot point

- Factors considered by judges in sentencing

Key knowledge units

Aggravating factors	2.1.8.1
Mitigating factors	2.1.8.2
Guilty pleas	2.1.8.3
Victim impact statements	2.1.8.4

Aggravating factors 2.1.8.1

OVERVIEW

In some cases there are factors that increase the seriousness of the offence. The courts will consider these when sentencing an offender.

LEGISLATION

***Sentencing Act 1991* (Vic)**

Section 5 – SENTENCING GUIDELINES

(2) In sentencing an offender a court must have regard to—

(daa) the impact of the offence on any victim of the offence; and

(da) the personal circumstances of any victim of the offence

(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and

(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.



DETAILS

Aggravating factors are aspects of the offence and/or offender that increase the culpability of the offender.

Impact on sentencing

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

Some examples of aggravating factors include (but are not limited to):

- The crime was planned.
- A weapon was used in the commission of a crime.
- The crime was based on prejudice towards a group (such as religious or ethnic group).
- The crime was committed by a group of offenders upon an outnumbered victim.
- The victim of the offence was a vulnerable person (such as an elderly person, a disabled person or child).
- The offender has a history of similar offences.

USEFUL TIP

When defining 'aggravating factors', be sure to use an example!

CASE STUDY

***R v Da Costa* [2014] VSC 458**

In 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, disobeying traffic rules, 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:

> 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
> - degree of sleep deprivation.
>
> ...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 2.1.8.2

OVERVIEW

In some cases there are factors that decrease the seriousness of the offence. The courts will consider these when sentencing an offender.

DETAILS

Mitigating factors are aspects of the offence and/or offender that decrease the culpability of the offender.

Impact on sentencing

The presence of mitigating factors will work to reduce the severity of the sanction imposed by the court – for example, the imposition of a fine rather than a CCO, or a shorter period of imprisonment instead of a longer prison term.

Some examples of mitigating factors include (but are not limited to):

- Genuine remorse for their actions.
- The crime was due to provocation and not planned.
- The offender's age (may give leniency to younger offenders due to rehabilitative prospects).
- Traumatic personal history (such as family violence, drug addiction, alcoholism).
- Cooperating with police during investigations.
- Favourable prospects of rehabilitation (for example a drug-affected offender who commenced rehabilitation prior to drug offence).

USEFUL TIP

When defining 'mitigating factors', be sure to use 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 that 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 Younan's guilt without his admissions. With greater emphasis placed on these mitigating factors, Younan's sentence was reduced by the Court of Appeal.

Table 1 Distinguishing between mitigating and aggravating factors

Mitigating factors	Aggravating factors
Circumstances relating to the nature of the offence or the offender which **reduce** the gravity of the offence or the offender's culpability.	Circumstances relating to the nature of the offence or the offender which **increase** the gravity of the offence or the offender's culpability.
The presence of mitigating factors will generally result in the imposition of a **less severe** sentence on the offender.	The presence of aggravating factors should result in the imposition of a **harsher** sentence on the offender.

Judges will weigh the impact of any mitigating factors against any aggravating factors when imposing a sentence.

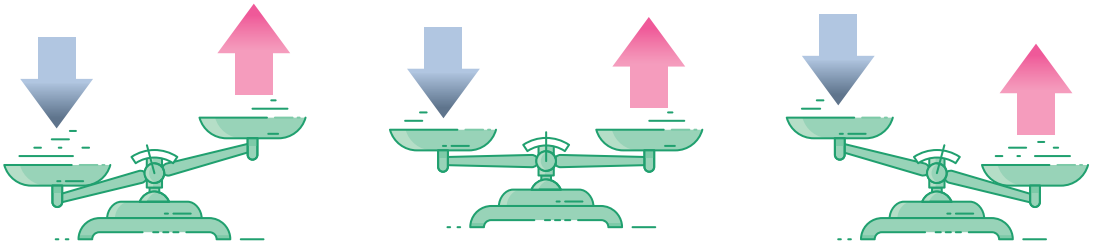


Image: Dmytro Bochkov/Shutterstock.com

Figure 1 Weighing the impact of mitigating and aggravating factors

Guilty plea 2.1.8.3

OVERVIEW

In many cases an offender may plead guilty to the offence rather than standing trial. In these situations, the courts will take this plea into consideration when imposing a sentence.

DETAILS

A guilty plea is a full admission by an accused person of an offence for which they have been charged.

Impact on sentencing

When an offender enters a guilty plea, the courts will usually reduce their sentence, which is known as a sentencing discount. When an offender receives a sentencing discount 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. This is done in accordance with s. 6AAA of the *Sentencing Act 1991* (Vic).

An accused person can change their plea at any stage during the pre-trial stages; in general, the sooner an accused person pleads guilty, the greater the sentencing discount applied.

LEGISLATION

***Sentencing Act 1991* (Vic)**

Section 6AAA – SENTENCE DISCOUNT FOR GUILTY PLEA

(1) If—

(a) in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

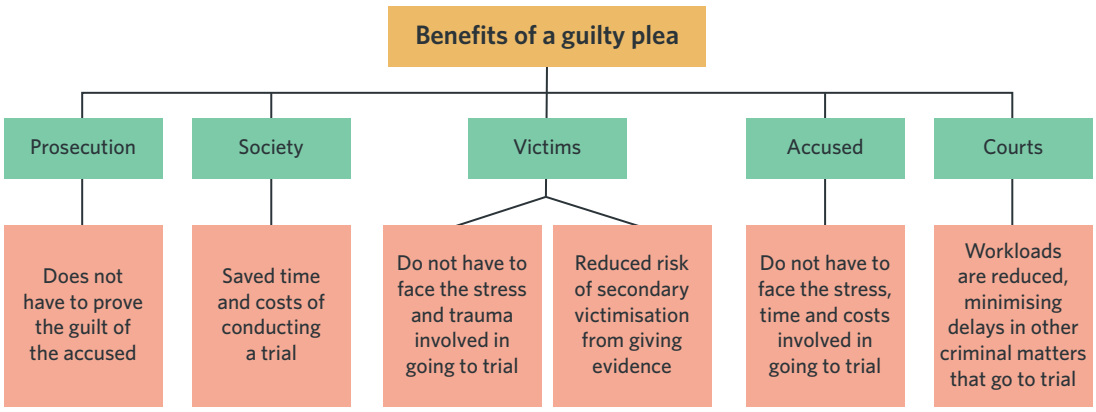
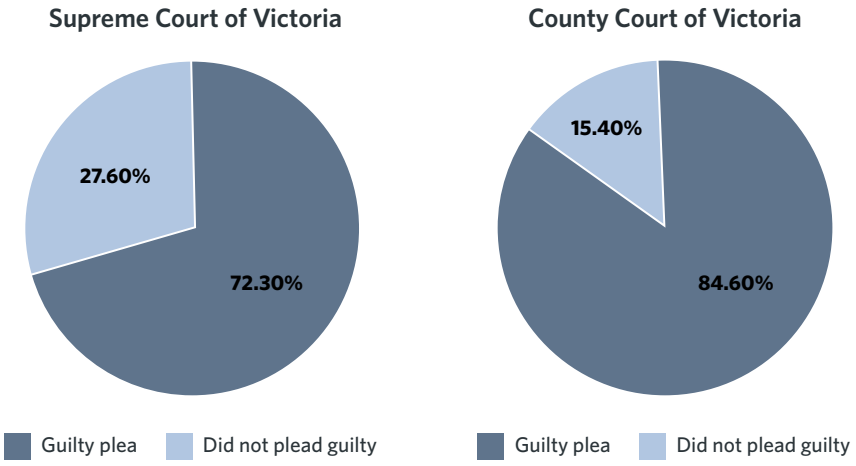


Figure 2 Benefits of a guilty plea

USEFUL TIP

When describing the impact of guilty pleas on sentencing, best answers will briefly explain why a guilty plea has that impact.

From 2009-10 to 2013-14 the guilty plea rate was recorded by the Sentencing Advisory Council (2015) as follows:



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

Figure 3 Guilty plea rate in the Supreme Court and County Court of Victoria

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 the cost and court time involved in 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 2.1.8.4

OVERVIEW

When sentencing an accused person, the courts will consider the impact of the offence on the victim(s) in order to determine the most appropriate sanction.

DETAILS

A victim impact statement (VIS) is a written and/or verbal statement to the court about the impact of an offence upon the victim(s). A VIS is delivered during sentencing after the accused is found guilty or enters a guilty plea.

Types of impacts considered:

- physical harm
- emotional harm
- financial harm.

Who is a victim?

A victim is anyone directly impacted by an offence and other individuals such as their family members.

Purpose of a VIS

A VIS assists the court to understand the impact of the crime. However a victim's statements about what might be an appropriate type of sanction (for example, imprisonment as opposed to a CCO) will not influence the court's sentencing decision.



Impact on sentencing

A VIS helps to inform the court of the severity of the offence:

- If a VIS indicates that the crime has had a very significant impact on the victim, this may lead the court to impose a more severe sanction. That is, the harm caused (as proven by the VIS) may be so severe it operates as an aggravating factor.
- If a VIS indicates the victim forgives the offender, this may result in the imposition of a less severe sanction.

The VIS assists the court to understand the severity of the offence, however this is only one factor used in deciding what sanction to impose. The impact of the crime is weighed alongside other mitigating and aggravating factors, the maximum sentence a court may impose for the offence, current sentencing trends for the offence in question and whether the court aims to punish, to deter and so on.

CASE STUDY

***DPP v Hassan* [2017] VCC 980**

In 2017 Hassan pleaded guilty to two counts of culpable driving in the County Court. 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 offence, 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

Clarifying a misconception about victim impact statements: 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.

USEFUL TIP

Remember the factors described above – aggravating factors, mitigating factors, guilty pleas and victim impact statements – influence sentencing a guilty person (that is, the type and severity of the sanction that is imposed) and should not be confused with the evidence considered by the court when deciding whether the accused is guilty or not guilty.

Keen to learn more?

Victims Support Agency, www.victimsofcrime.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, https://resources.judicialcollege.vic.edu.au/article/669236

QUESTIONS 6H Factors considered in sentencing

LEVEL 1:
Define and understand

1. Which of the following is the best example of something that would decrease an offender's sentence?

A. An aggravating factor such as the offence being committed with a weapon.

B. A mitigating factor such as the crime being planned.

C. A victim impact statement showing a serious effect of those impacted by the offence.

D. A mitigating factor such as genuine remorse for the offence.

2. Jason was charged with assaulting his neighbour after an altercation over their shared fence. Jason accepted responsibility for this offence and is awaiting sentencing. What is the most likely outcome of Jason's guilty plea on the sentence imposed?

A. It will increase Jason's sentence because the court now knows that he committed the crime.

B. It will decrease Jason's sentence because s. 5 of the *Sentencing Act 1991* (Vic) outlines that a guilty plea will decrease the sentence.

C. It will decrease Jason's sentence because the fence was shared which gave him the right to assault his neighbour.

D. It will have no impact on the sentence Jason receives.

3. Which of the following best describes aggravating factors and their impact on sentencing?

A. Aggravating factors are aspects of the offence/offender that increase the severity of the offence. The courts are likely to decrease the sentence imposed when aggravating factors are present.

B. Aggravating factors are aspects of the offence/offender that decrease the severity of the offence. The courts are likely to increase the sentence imposed when aggravating factors are present.

C. Aggravating factors are aspects of the offence/offender that increase the severity of the offence. The courts are likely to increase the sentence imposed when aggravating factors are present.

D. Aggravating factors are aspects of the offence/offender that decrease the severity of the offence. The courts are likely to decrease the sentence imposed when aggravating factors are present.

4. Which of the following is **not** true of a victim impact statement?

A. The courts will consider any loss the victim suffered in order to determine the most appropriate sanction.

B. A victim impact statement is an account of how the offender's actions influenced those affected.

C. The courts will consider any recommended sanctions from a victim impact statement when sentencing.

D. A victim impact statement may be written or oral.

5. Joey is 25 and was found guilty of assaulting an 86-year-old man. The offence was committed in a group and was in the 'spur of the moment'. Joey showed genuine remorse for his actions, but has a prior criminal history of similar offences. Joey had a traumatic personal history and grew up surrounded by family violence. What are the aggravating factors that the court will consider when sentencing Joey?

A. The outnumbered victim in a group attack, the crime not being planned and Joey's criminal history.

B. The victim's age, the victim being outnumbered in a group attack and Joey's criminal history.



C. Joey's traumatic personal history, genuine remorse and the crime not being planned.

D. Genuine remorse, Joey's criminal history and the victim's age.

6. Olivia is 17 and was found guilty of a criminal offence. She has no prior criminal history and was provoked. Which of the following is true regarding Olivia's sentencing?

A. The court will impose a more lenient sentence due to the presence of mitigating factors.

B. The court will impose a harsher sentence due to the presence of aggravating factors.

C. The court will not sentence Olivia as she is a child.

D. The judge will impose a standard sentence for this crime that does not consider these circumstances.

LEVEL 2:
Describe and explain

7. During sentencing the judge stated: 'There are mitigating factors present in this case and I will sentence you accordingly'.

Describe mitigating factors. Explain the impact of mitigating factors on the sentence imposed. (2 MARKS)

8. Describe aggravating factors and provide two examples. (3 MARKS)

9. Explain one factor that could reduce the severity of a sanction. (3 MARKS)

10. When presenting a victim impact statement to the court, William said: 'This offence has changed my life for the worst. I will never truly recover from the harm Justin inflicted upon me and my family'.

Describe what a victim impact statement is and explain the likely impact that William's VIS would have on Justin's sanction. (2 MARKS)

LEVEL 3:
Apply and compare

11. James, 22, has been found guilty of assaulting Frank, 67. The prosecution has advised the court that James was serving a community correction order (CCO) at the time of the offence. James stated that his actions were provoked by Frank and that he is remorseful.

Distinguish between aggravating and mitigating factors. Provide one example of each in James' case. (4 MARKS)

Adapted from VCAA Exam 2018 Section B Question 1B

12. In *Younan v R* [2017] VSCA 12, the court noted there were a number of factors present that would impact Younan's sentence.

Identify two of the mitigating factors in Younan's case and explain what effect they had on his sentence. (3 MARKS)

13. Alison is accused of murdering Erica and her case is being heard in the Magistrates' Court. A tourist who witnessed the incident presented a victim impact statement to help obtain a conviction. The prosecution was still concerned that the accused would not be found guilty, so they entered a guilty plea on Alison's behalf.

Identify two errors in this scenario and provide the correct procedure. (4 MARKS)

14. In 2006, William Craig Forde (49) was charged with raping and abducting single mother Jessica (23) after he kidnapped her for a period of 30 hours. Forde had three prior convictions of rape.

After he pleaded guilty, the following victim impact statement was presented by Jessica: '...This man, who does not deserve a name, hurt me in the most unimaginable of ways. Yes I survived. Yes I am alive, I just don't live. I am existing. I am empty...'

Source: Herald Sun. Jessica's victim impact statement (2008).

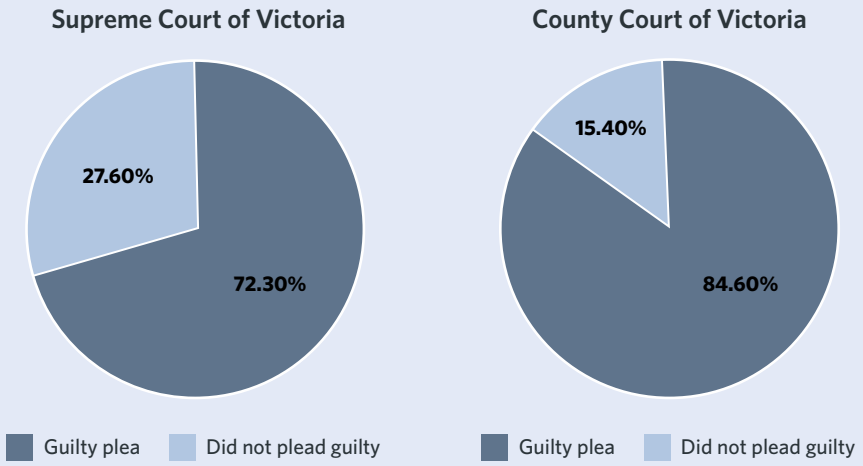
a) Explain the purpose of a victim impact statement. Justify the likely impact this victim impact statement would have had on Forde's sentence. (3 MARKS)

b) Forde was sentenced to an indefinite period of imprisonment. This was the harshest sentence given for a case like this in Victorian history.

Identify and explain one possible factor which may have resulted in such a severe sentence for Forde. (2 MARKS)

Source: Herald Sun. Rapist gets indefinite sentence (2008).

15. From 2009-10 to 2013-14 the guilty plea rate was as follows:



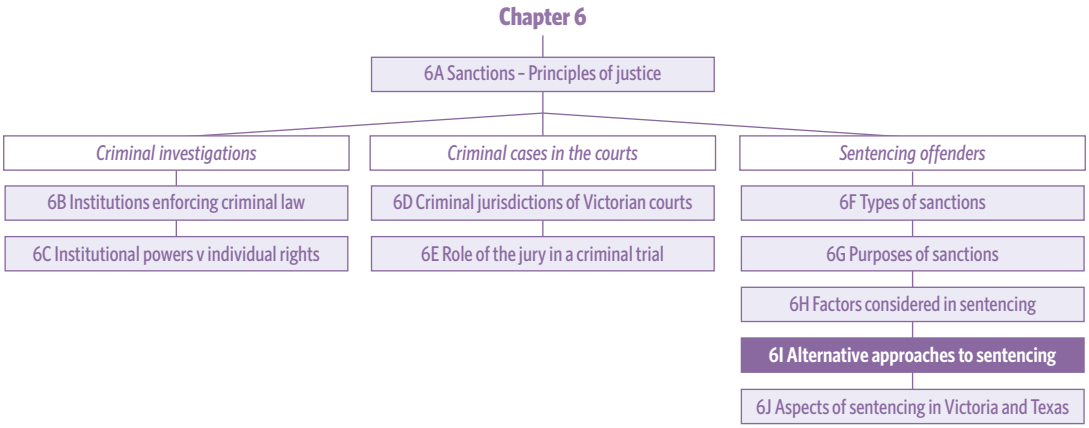
Source: Sentencing Advisory Council. Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts (2015).

Describe what a guilty plea is and provide two reasons that justify the high rate of cases resolved by guilty plea. (3 MARKS)

6I Alternative approaches to sentencing

Throughout this chapter, you have learned about the different courts and institutions of the Victorian criminal justice system. You have considered the types of sanctions available to the courts when sentencing an offender, the different purposes these sanctions serve and the factors that influence the severity of the sanction imposed in different criminal cases.

However, is there room for flexibility in regards to sentencing practises? How might the Victorian criminal justice system address the different needs of particular groups within society? Sometimes alternative approaches to sentencing are needed to account for the needs of particular offenders.



In this lesson you will learn about diversion programs as an alternative sentencing option, as well as two alternative approaches to sentencing adopted by specialist courts – the Drug Court and the Koori Court. You will learn the purposes of these specialist courts, and how alternative approaches to sentencing promote improved outcomes in the justice system.

Study design dot point

- Alternative approaches to sentencing, such as the use of the Drug Court, the Koori Court and diversion programs.

Key knowledge units

Diversion programs	2.1.9.1
Drug Court	2.1.9.2
Koori Court	2.1.9.3

Diversion programs 2.1.9.1

OVERVIEW

'A diversion program is a way to deal with your matter out of the court system and give you a chance to avoid a criminal record.'

Source: Diversion Programs, Victoria Legal Aid

Consider the following hypothetical scenario.

Alex, 19, was caught stealing headphones from a local electronics store. This was Alex's first offence and he was terrified by the idea of gaining a criminal record – he is worried it will affect his career in the future. Is there anything Alex can do to avoid this? What options does the legal system afford first-time, low-level offenders? One option could be **a court-ordered diversion program.**

Diversion programs allow low-level offenders to be diverted away from future criminal activity without obtaining a criminal record, provided they make amends for their wrongdoing.

Eligibility

Before a diversion can be recommended, the matter must first meet all of the following criteria:

- the offence must be a summary offence (or triable summarily);
- the offence must not be subject to a mandatory or fixed penalty (such as a minimum fine);

- the offender must acknowledge and take responsibility for the offence by pleading guilty;
- there must be sufficient evidence to gain a conviction should the matter proceed to trial; and
- the prosecution must agree to a diversion program.

While the diversion program is mainly used for first-time offenders, the existence of prior convictions does not automatically disqualify someone from the program. However, the court will take any prior convictions into account when deciding whether or not the diversion program is appropriate in the circumstances.

Process

Step 1: Is a diversion available?	Step 2: Attending court	Step 3: Diversion plan
1: The conditions above regarding eligibility must first be satisfied. **2: The prosecution (usually the police officer) must also consent to the diversion.** **If these two points are satisfied, the offender will be served a diversion notice and must attend a mention hearing in court.**	**1: Before the mention hearing, the court registrar will interview the offender and have them fill out a questionnaire.** **2: The registrar may also speak with the victim to see if they agree with diversion or not.** **This information will be given to the judicial officer in court, who will decide whether a diversion is appropriate.**	**If diversion is granted the court will create a diversion plan that involves certain conditions (detailed below).** **The matter will then be adjourned until a later date, where the offender must return for a completion hearing where evidence is heard as to whether the diversion plan has been followed.**

Figure 1 The process of obtaining a diversion

Conditions

Some of the **conditions** that a diversion plan may include are:

- An apology and/or compensation to the victim.
- Rehabilitation through counselling and/or treatment services.
- Performing volunteer work in the community.
- Donating money and/or time to charity or to a local community initiative (or similar).
- Attending a defensive driving course or road safety seminar (for driving offences).
- Any other conditions deemed appropriate by the court.

Benefits

Some of the possible **benefits** of a diversion plan may include:

- The offender's individual circumstances are reflected in the diversion plan, which promotes fairness.
- The offender is able to avoid a criminal record.
- The offender must engage in conditions that are aimed at reducing their likelihood of reoffending.
- Often the victim will receive an apology and restitution is made for the offence, which is fair.
- The local community benefits from voluntary work or donations from the offender.

USEFUL TIP

Consider how each of the alternative approaches to sentencing explored throughout this chapter promote the different purposes of sanctions described in Lesson 6G (such as rehabilitation and deterrence).

Results

Matter unsuitable	Conditions incomplete	Conditions complete
If the matter is deemed unsuitable for diversion, it will be referred back to the Magistrates' Court and may proceed to a hearing.	**If the conditions of the diversion plan are not complete, then the matter will be referred back to the Magistrates' Court and may proceed to a hearing.**	**If the conditions of the diversion plan are met, the offender is given a caution, the charges are dropped and no criminal conviction is recorded.**

Figure 2 The different outcomes available

The Drug Court 2.1.9.2

OVERVIEW

'The Drug Court of Victoria was established in May 2002 to further improve the safety of the community by focusing on the rehabilitation of offenders with a drug and/or alcohol dependency, and by providing assistance in reintegrating them into the community.'

Source: Evaluation of the Drug Court of Victoria, Magistrates' Court of Victoria (2014)

The Victorian Drug Court

As the quote above highlights, the main aim of the Drug Court is to rehabilitate offenders so as to improve the safety of the community by limiting their likelihood of reoffending. In doing so, the role of the Drug Court is to impose a particular order called a **Drug Treatment Order (DTO).** This order combines a term of imprisonment with drug/alcohol treatment, with the term of imprisonment being suspended while the offender undergoes treatment and supervision. The Drug Court is a division of the Magistrates' Court.

Eligibility

For an offender to be eligible for a DTO in the Drug Court division of the Magistrates' Court, they must:

- Have a dependency on drugs and/or alcohol that has directly contributed to their offending;
- Be facing a term of imprisonment of no more than two years;
- Have pleaded guilty to the offence;
- Be facing charges that are not sexual offences or involving the infliction of actual bodily harm; and
- Not be on parole.

Conditions

A DTO will consist of two separate features:

1. **Custodial sentence** – a maximum term of imprisonment of 2 years, which is suspended while the offender engages in treatment conditions. If the offender successfully completes the required drug treatment, they will not have to serve a custodial sentence.
2. **Treatment** – particular conditions aimed at addressing the underlying drug and/or alcohol dependency of the offender that contributed to their offending. These conditions may include (but are not limited to):

- Regular drug testing.
- Weekly attendances at the Drug Court.
- Counselling services for addiction and psychological problems.
- Attending educational and employment programs.
- Complying with curfew conditions and attending appointments.

Rewards and Sanctions

The Drug Court will use rewards and sanctions as a means of encouraging compliance:

- **Sanctions** are imposed each time the offender does not comply with the requirements of the DTO and can range from low severity (such as a verbal warning) to high severity (such as the DTO being cancelled and the offender serving the previously-suspended prison sentence).
- **Rewards** are given each time the offender follows their conditions and shows progress towards rehabilitation. They may be low level rewards (such as verbal praise), or higher level rewards (such as immediate DTO completion).

Benefits

Some of the benefits of the Drug Court division using a DTO to sanction offenders include:

- Having a suspended sentence allows the offender to remain in the community while dealing with the underlying reasons for their offending. This allows the offender to be with their family and support networks, often increasing their chances of rehabilitation (while also providing a strong incentive to adhere to the terms of the DTO).
- A DTO is able to address underlying drug and/or alcohol dependencies that often contribute to offending behaviour in addicted individuals.
- When successfully completed, a DTO will allow an offender to avoid being exposed to the negative environment of prison.

Results

Successful completion	Failure to comply
An offender who successfully completes the treatment outlined in their DTO will not have to serve any time in prison.	An offender who fails to abide by the conditions of the DTO may have additional conditions imposed and will likely serve time in prison.

Figure 3 Outcomes of compliance with the DTO

The Koori Court 2.1.9.3

OVERVIEW

Despite making up only 2% of the overall population in Australia, Aboriginal and Torres Strait Islander people account for almost 30% of the total prison population in the country.

Source: Corrective Services, Australia, June Quarter 2019 (Australian Bureau of Statistics)

In efforts to combat the alarming figures mentioned above, many reports such as the 'Bringing Them Home Report' have made strong calls for modified legal avenues that are more closely aligned with the cultural values of Indigenous Australians and better tailored to the needs of Aboriginal offenders and their communities.

Source: AHRC, Bringing them home report (1997)

An important question to consider is: how might the practices of the criminal justice system be contributing to these figures? Do court programs allow proper access to sentencing options for Aboriginal and Torres Strait Islander offenders?

The Koori Court

The Koori Court is an alternative sentencing court developed to take into account the different cultural values of Aboriginal and Torres Strait Islanders when sentencing offenders from these backgrounds. To be eligible, the accused must first plead guilty to the charges being held against them. Therefore, the Koori court only deals with the **sentencing** of Indigenous offenders, it cannot hear or determine the verdict of a case. It was originally established as a specialist division of the Magistrates' Court, but has since expanded to include the Children's Koori Court and County Koori Court.

In the Koori Court, the offender will sit at a round table with a variety of parties, including the magistrate or judge, Aboriginal elders from their community, their lawyer and their family. The approach of this court is much less formal and encourages an open dialogue between the parties (including the offender):

- **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 standard sentencing hearing. The magistrate or judge then imposes a sanction. In the County Koori Court in particular, the sanction imposed is often imprisonment.

The **sanctions imposed are not more/less severe** than those imposed in the Magistrates' Court or County Court after a traditional sentencing hearing, however the sentencing **process has proven effective at reducing reoffending.**

The Koori Court is a way of recognising that traditional court practices can be alienating for Indigenous offenders. The process adopted in the Koori Court aligns more closely with traditional Indigenous processes of law, including discussion and family engagement.

Objectives

Promote greater participation by the Aboriginal community in the sentencing process.	Increase accountability of the Aboriginal community in exploring sentencing alternatives and reducing incarceration.	Increase community awareness of the cultural needs and practices of Aboriginal people.	Encourage Aboriginal ownership over the administration of justice.

Source: Koori Court, Information for legal representatives brochure, Magistrates' Court of Victoria

Figure 4 Objectives of the Koori Court

Benefits

Some benefits of the Koori Court include:

- The Koori Court provides a more informal atmosphere when compared to other courts. This allows for greater participation by the offender and Indigenous leaders from the offender's community in the court process and promotes access to the justice system.
- The role of the magistrate or judge is slightly different to other courts, as he or she sits at a table and engages in conversation with all other participants, rather than sitting behind a raised bench (as occurs in a regular sentencing hearing).
- The offender is able to sit with a family member/support person during the discussions.
- The discussion will be in plain English, rather than using technical legal language. This promotes access to the justice system in that the Aboriginal community can better engage in the discussions taking place.
- The offender is able to talk about their past and provide reasons for their offending. The respected Indigenous leaders present will also often describe how the offender's behaviour has negatively affected their own family and the community. The discussion will also include what the offender can do to prevent further offending in the future as well as how their community can help.
- The process of discussing the crime, its causes and its impact lead to greater reflection by the offender on their conduct. The Koori Court divisions of the Magistrates' Court and the County Court have proven very effective at reducing re-offending.

Keen to learn more?

Diversion Programs, https://www.mcv.vic.gov.au/find-support/diversion

The Drug Court, https://www.mcv.vic.gov.au/about_us/drug-court

The Koori Court, https://www.mcv.vic.gov.au/about/koori-court

QUESTIONS 6I Alternative approaches to sentencing

LEVEL 1:
Define and understand

1. Which of the following is not a necessary criterion when determining a person's eligibility for a diversion program?

A. The offender must be a first-time offender. The existence of prior convictions will disqualify a person from the diversion program.

B. There must be sufficient evidence to gain a conviction should the matter proceed to trial.

C. The offence must be a summary offence, or triable summarily.

D. The offence must not be subject to a fixed minimum penalty.

2. Which of the following scenarios accurately describes the work of the Drug Court?

A. Tony, 23, was facing a maximum term of imprisonment of 5 years. The judge decided to impose a Drug Treatment Order (DTO) to assist him in dealing with his drug dependency.

B. Josh, 17, was caught with a small quantity of cocaine. At trial, Josh pleaded not guilty and explained that the cocaine was not his. Despite this, the court found Josh guilty and decided to issue him with a Drug Treatment Order (DTO).

C. Eliza, 34, was sentenced to a term of imprisonment but it was suspended as part of her Drug Treatment Order (DTO), and was required to attend counselling services to combat her alcohol addiction.

D. Orazio, 27, was on parole for a previous offence when he was caught shoplifting while under the influence of drugs. He was issued a Drug Treatment Order (DTO) and required to make weekly appearances at the Drug Court.

3. Fill in the blank spaces:

The Koori Court was originally established as a means of reflecting the different _____ of Aboriginal and Torres Strait Islander people. One of the main objectives of the Koori

Court is to increase the _____ of the Indigenous community in reducing incarceration rates by exploring sentencing alternatives. The Koori Court provides _____ atmosphere and allows for _____ participation by the Koori community in the court process.

A. crimes; fairness; a formal; greater

B. locations; awareness; an informal; lawful

C. cultural values; accountability; an informal; greater

D. decision; commitment; a formal; greater

LEVEL 2:
Describe and explain

4. Other than having committed a summary offence (or an indictable offence triable summarily), identify two other criteria that an individual must meet before being eligible for a diversion program. (2 MARKS)

5. Explain what a Drug Treatment Order (DTO) is. In your answer, outline the two separate features of a DTO. (4 MARKS)

LEVEL 3:
Apply and compare

6. Tony is the mayor of Illegalville, a small town enduring a petty crime wave. Many local businesses are having goods stolen and the outside of their shops tagged. As a result, businesses, community groups and charities are having difficulty retaining employees and volunteers and are in desperate need of more assistance.

Tony is frustrated about the state of his beloved town and had this to say at a recent meeting: 'Our town used to be so peaceful until these young adults began terrorising our streets. If only the legal system would stop using diversion programs and take a harsher stance on first time and low level offenders.' Some locals agree with Tony, but others understand the court's approach in favouring diversion programs.

Other than allowing an offender to avoid a criminal record, describe two benefits of diversion programs in this case. (4 MARKS)

7. In 2018, a Supreme Court ruling found that a magistrate had acted unlawfully in not allowing an Indigenous man to transfer his matter to the Koori Court.
Source: *Cemino v Cannan and Ors* [2018] VSC 535

Identify one of the objectives of the Koori Court. In your answer, outline two ways in which the Koori Court works to achieve this objective. (4 MARKS)

LEVEL 3:
Apply and compare

8. Consider the following hypothetical scenario.

Tom, 23, and Jerry, 25, were both charged with possessing a drug of dependence (methamphetamine) for a purpose other than trafficking (personal use). This is an offence with a maximum penalty of 1 year imprisonment and/or fine not exceeding 30 penalty units.

Tom – Despite other offences in the past, this was Tom's first drug related offence.
The prosecution found that Tom had developed a dependency on methamphetamine as a result of a relationship breakdown. Tom pleaded guilty to possessing methamphetamine and minor theft offences (as Tom has stolen some items to support his drug-taking).

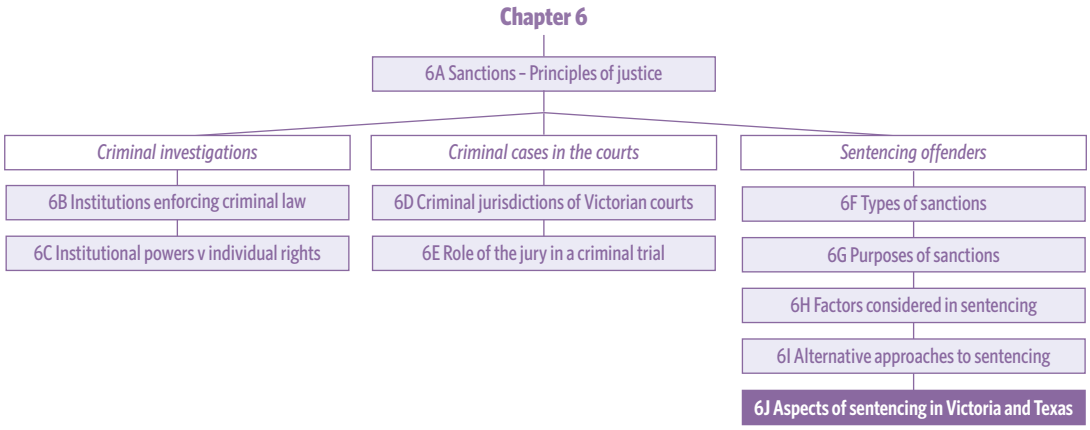
Jerry – Jerry was also dependent on methamphetamine at the time of his arrest.
The prosecution found that Jerry was on parole for a recent assault charge. Jerry pleaded not guilty.

a) Assume you are the presiding magistrate in each of Tom and Jerry's cases.
In your opinion, which offender would not be eligible for a Drug Treatment Order (DTO)? (3 MARKS)

b) Describe two ways in which a DTO could be beneficial for the eligible offender. (4 MARKS)

6J Aspects of sentencing in Victoria and Texas

In considering the sentencing of guilty offenders, you have learned about the different types of sanctions available, as well as the different purposes that sanctions serve in Victoria. However, is the sentencing of a guilty offender universally consistent? That is, are the sentencing approaches used by the courts here in Victoria the same as elsewhere in the world?



Different places around the world often have drastically contrasting values and practices to those here in Australia, including attitudes regarding justice and criminal punishment. In this lesson you will be learning about the aspects of sentencing in both Victoria and Texas (US) – specifically, you will consider similarities and differences between the two sentencing approaches.

Study design dot point

- Aspects of sentencing practices in Victoria and in one other jurisdiction

Key knowledge units

Similarities in sentencing practices between Victoria and Texas (US)	2.1.10.1
Differences in sentencing practices between Victoria and Texas (US)	2.1.10.2

Similarities in sentencing practices between Victoria and Texas (US) 2.1.10.1

OVERVIEW

How do the sentencing practices of Texas compare with those of Victoria? While there are many similarities in the sentencing processes used by both states, this lesson will focus on four similarities in particular:

1. Categorising offences
2. Determinate sentencing
3. Mitigating and aggravating factors
4. Specialised courts as alternative sentencing options

DETAILS

Categorising offences

In both Victoria and Texas, categorising crimes according to their severity assists the courts in sentencing criminal behaviour, including determining the severity of the punishment to be imposed.

Table 1 Types of offences in Victoria and Texas

Victoria	Texas
In Victoria, the least serious criminal offences are classified as **summary offences** (such as minor assaults) and can be heard by a magistrate sitting alone, rather than a judge and jury. The most serious offences are classified as **indictable offences** (such as aggravated burglary and murder) and must be heard in the presence of the accused person at court. Indictable offences are usually heard first in the Magistrates' Court during a committal hearing, and then may be committed for a trial judge in the County or Supreme Court. For more information refer back to Lesson 2E – Summary and indictable offences.	In Texas, the least serious criminal offences are classified as **misdemeanors**, which are each sorted into three classes based on severity: Class A, Class B and Class C. Class A misdemeanors (such as carrying a weapon unlawfully) are the most serious and can involve a sentence of up to 1 year in county jail and/or a fine of up to $4,000. The most serious offences are classified as **felonies**, which are each broken into different 'degrees' based on the seriousness of the offence and the severity of the punishment associated. Capital felonies (such as premeditated murder) are the most serious and can involve the death penalty.

Determinate sentencing

Both Victoria and Texas have adopted a form of **determinate sentencing**, which refers to the use of detailed sentencing guidelines that assist in determining which sentence should be imposed for a particular crime. The severity of punishment is usually defined by statute in minimum and maximum terms. Determinate sentencing helps establish a consistent practice of sentencing offenders, where individuals are aware of the maximum sentence they might receive for a particular crime. For example, in Victoria, the current maximum penalty for theft under s.74 of the *Crimes Act 1958* is level 5 imprisonment (10 years). Similarly, in Texas, maximum penalties vary depending on the seriousness of the felony committed.

LEGISLATION

The following list outlines offence classification under the Texas Penal Code:

(1) Third Degree Felony
- Prison time of 2 to 10 years and a fine of up to $10,000.
- Includes crimes like stalking and indecent exposure to a child.

(2) Second Degree Felony
- Prison time from 2 to 20 years and a fine of up $10,000.
- Includes crimes such as human trafficking and manslaughter.

(3) First Degree Felony
- Prison time of 5 to 99 years and a fine of up to $10,000.
- Includes crimes such as sexual assault against a child and aggravated robbery.

(4) Capital Felony
- Prison time of life imprisonment or death.
- Includes crimes such as premeditated murder and treason.

LEGISLATION

In Victoria, maximum penalties for most criminal offences are set according to a penalty scale (*Sentencing Act 1991*). The penalty scale for imprisonment has 9 levels:

Level	Maximum term	Examples
1	Life imprisonment	• Murder • Trafficking in a large commercial quantity of a drug of dependence (D.O.D) such as methamphetamine or cocaine
2	25 years	• Rape • Armed robbery
3	20 years	• Manslaughter • Culpable driving causing death
4	15 years	• Trafficking in a D.O.D (not commercial quantity) • Recklessly causing serious injury
5	10 years	• Threats to kill • Possessing child pornography
6	5 years	• Recklessly causing injury • Possessing a D.O.D for the purpose of trafficking
7	2 years	• Going equipped to steal
8	1 year	• Possession of a D.O.D (not for the purpose of trafficking)
9	6 months	• Concealing the birth of a child

Similarly, fines are also set out in a penalty scale. The maximum fine for particular offences are defined in penalty units – which is an amount of money set by parliament that increases each year. For the period of 1 July 2019 to 30 June 2020, the value of a penalty unit is $165.22.

Level	Penalty units	Monetary value (2019–20)
1	No fine.	
2	3,000	$495,660.00
3	2,400	$396,528.00
4	1,800	$297,396.00
5	1,200	$198,264.00
6	600	$99,132.00
7	240	$39,652.80
8	120	$19,826.40
9	60	$9,913.20
10	10	$1,652.20
11	5	$826.10
12	1	$165.22

Source: Sentencing Advisory Council

Mitigating and aggravating factors

While both states employ sentencing guidelines and determinate sentencing methods to ensure consistency in sentencing, there are special sentencing circumstances that are considered that often alter the punishment that is specified by the guidelines. These are known as mitigating and aggravating factors, which you learned about in Lesson 6H – Factors considered in sentencing. For example, in Texas, hate crimes, calculated premeditation and repeat offending each constitute grounds for enhanced punishment (aggravating factors).

CASE STUDY

***Bigby v Dretke* 402 F.3D 551 (5th Cir. 2005) (TEXAS)**

A jury in the District Court of Texas found James Bigby guilty of capital murder in a double homicide of a male victim and his infant son, both of whom were known to Bigby. Bigby was sentenced to the death penalty.

During the trial, Bigby used the insanity defence with several psychiatrists concluding that he had committed the murders as a direct result of paranoid schizophrenia that had prevented him from distinguishing between right and wrong. During a break in trial, Bigby seized a gun from an unoccupied bench in the courtroom and aimed the gun at the judge's head in an effort to escape.

Despite Bigby's defence calling for the judge's removal from the trial, the trial was allowed to continue after the judge testified that Bigby's actions had not biased him. During the trial, the judge allowed the prosecution to introduce testimony regarding Bigby's threatening of the judge and attempted escape as further evidence that he was aware of his guilt and that the insanity defence should not stand.

Bigby appealed directly to the Texas Court of Criminal Appeals stating that the trial court had given the jury unconstitutional instructions. The Court of Criminal Appeals denied the appeal and affirmed the conviction and sentence.

A later appeal to the United States Court of Appeals for the Fifth Circuit (US Federal Court) overturned this decision, vacating Bigby's sentence and ordering a retrial in the district court, with new instructions to be given to the jury (this retrial produced the same result and Bigby was executed by lethal injection in 2017 – 30 years after the original crime).

This case was significant as it established that a defendant's mental illness must be considered as a mitigating factor in sentencing a death penalty case in Texas, even if the mental illness was not discussed during trial. Jury instructions that do not consider mitigating factors are unconstitutional – the jury must be instructed to consider all mitigating factors, including the defendant's social, medical and psychological state.

Source: Romeo, A. Mitigating Factors in the Death Penalty (2006)

Specialised courts as alternative sentencing options

In Lesson 6I – Alternative approaches to sentencing – you learned about specialised courts in Victoria such as the Drug Court and the Koori Court. Texas adopts a similar approach, using a range of specialist courts such as Drug Courts, Veterans' Courts and Mental Health Courts as alternative sentencing options to promote fairness in their pursuit of criminal justice. Jerry Madden, a former Republican member of the Texas House of Representatives, stated that specialist courts 'are there to provide help, but at the same time, structure. You have a problem and we're going to help you with your problem'.

CASE STUDY

The Texas Association of Specialty Courts (TASC)

The TASC operates in Texas as a means of:

- Increasing local and statewide political, media and community awareness of the existence and success of drug courts;
- Supporting legislation authorising funding for the operation of drug courts; and
- Providing support for jurisdictions wanting to establish drug courts.

Drug Courts attempt to solve some of the underlying problems leading to criminal behaviour by forcing offenders to deal with their substance abuse problems. The design and structure of Drug Court programs are developed at the local level and reflect the unique strengths and needs of each community.

Source: Texas Association of Specialty Courts, About TASC

Differences in sentencing practices between Victoria and Texas (US) 2.1.10.2

OVERVIEW

As well as a number of similarities between the sentencing practices of Victoria and Texas, there are also a number of differences in approaches. In particular, the two you will consider in this lesson are the use of capital punishment (death penalty) and the differences in incarceration rates and trends.

DETAILS

Capital punishment

Victoria formally abolished capital punishment (death penalty) in 1975, 8 years after Ronald Ryan became the last person to be executed by the state at Pentridge Gaol, Melbourne, for the murder of a prison officer. On the other hand, Texas is still known today as 'the death-penalty capital' of America, leading the nation in the sentencing and carrying out of state executions. According to the Death Penalty Information Centre in Washington, DC, Texas has executed a total of 561 people since 1976, far and away the highest number of any state in the US (Virginia is second with 113 across the same period). Additionally, Texas executed 13 people in 2018 which accounted for more than half of the 25 US executions that year.

CASE STUDY

Death penalty – a successful deterrent?

In 2016, a study conducted by the FBI found that the southern states of America (including Texas) accounted for over 80% of executions nationally, yet still had the highest murder rate of any part of the United States. Comparatively, the northeast states of America, which account for less than 1% of all executions, had the lowest murder rate.

A report by the National Research Council (NRC) in the US focused on the deterrent properties of the death penalty found that studies claiming that the death penalty has a deterrent effect on minimising murder rates are 'fundamentally flawed'. Further, a survey conducted with some of the country's leading academic criminologists found that 88% of experts disagree with the notion that the death penalty acts as a deterrent to murder.

Source: Facts about the death penalty, Death Penalty Information Center (2019)

CASE STUDY

Death penalty – opposing viewpoints?

One side of the death penalty debate in Texas argues that irrespective of whether capital punishment has deterrent properties or not, a major advantage of the death penalty as a sentencing option is that it is efficient and more cost-effective than imposing a term of life imprisonment (Sorenson and Pilgram, 2006). The rate of reversals following appeals has drastically declined over the years, which many proponents of capital punishment suggest improves efficiency and upholds the strict criminal justice of the Texas legislature.

In response, many criminologists such as Nicole Casarez have questioned whether Texas' low rate of death penalty reversals is a product of insufficient reviews by appeal courts. These opponents argue that a dependence on capital punishment could lead to oversight of mitigating factors, and result in unjustified death sentences.

Source: Casarez, N. Review of Lethal Injection: Capital Punishment in Texas During the Modern Era (2007)

Incarceration rates

Table 2 The incarceration (imprisonment) rates per 100,000 people for each state in 2018

Victoria	Texas
• 152 per 100,000 people. *Source:* Corrections statistics: quick reference | Corrections, Prisons and Parole (2019)	• 891 per 100,000 people. *Source:* Wagner, P., & Sawyer, W. States of Incarceration: The Global Context 2018 (2018)

USEFUL TIP

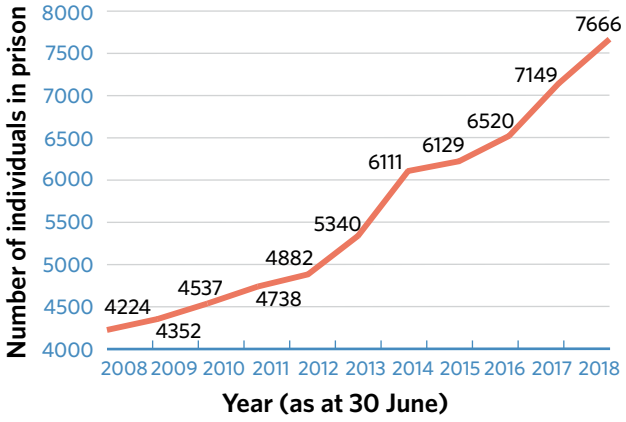
Be careful comparing statistics across different communities. Comparing incarceration rates is an appropriate way to allow for the different populations in Victoria and Texas (6 million vs 30 million, respectively). Keep this in mind when looking at prison population data, such as that in Figure 1 and Figure 2.

Incarceration trends

Rather than simply looking at the figure of incarceration rates, there is perhaps a more important consideration: what are the trends of incarceration? Are prison populations increasing or decreasing, and why?

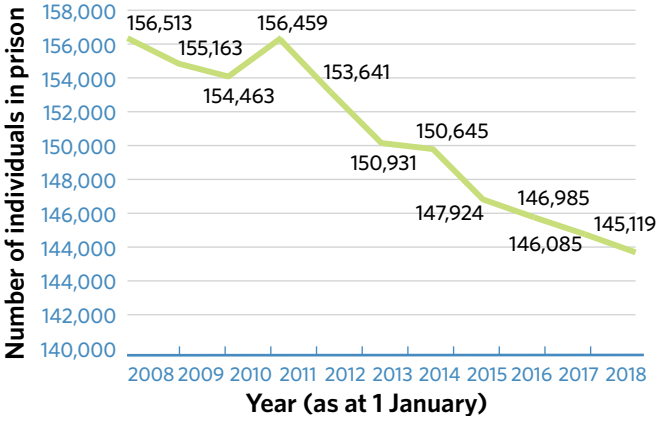
Table 3 Incarceration statistics in Victoria and Texas

Victoria	Texas
According to corrections statistics supplied by the Victorian Government, there were a total of 7,666 prisoners in the **Victorian** prison system as of 30 June 2018. This represented an **increase of 81.5%** over a ten year period based on the corresponding figure on 30 June 2008 of 4,224. Victoria's population has increased by only 20% (from 5.3 million to 6.4 million) over this period.	In comparison, according to statistics published by The Legislative Budget Board, the total prison population in Texas state prisons dropped by 7.28% across the same ten year period. Furthermore, the juvenile incarceration rate fell by nearly three-quarters.



Source: Sentencing Advisory Council (2018)

Figure 1 Victoria's prison population (2008–18)



Source: Legislative Budget Board (2019)

Figure 2 Texas' prison population (2008–2018)

It is important to be mindful that behind these statistics exists a number of different contributory factors, including crime rates and economic resourcing. For example, across the same period detailed above, the crime rate dropped by 27 percent in Texas which directly resulted in a smaller incarceration rate. Nonetheless, the difference in incarceration trends highlights potential differences in the way both states approach the purposes of sanctions and the rationale behind their approach to criminal justice. In particular, the statistics invite questions about the extent to which governments in each state focus on **rehabilitation** and reducing **recidivism** rates:

Table 4 Recidivism rates in Victoria and Texas

Victoria	Texas
Of the prisoners who were released from prison in Victoria throughout 2015–16, 43.7% had returned to prison within two years of release. *Source:* Report on Government Services 2019 – Council of Australian Governments (COAG)	Since enacting widespread reforms in 2015, Texas has seen the closure of three prisons and a 25 percent reduction in its recidivism rate. *Source:* Rosenburg, T. Opinion | Even in Texas, Mass Imprisonment Is Going Out of Style (2017)

Over time, the Texas legislature has set about identifying ways to minimise prison growth while maintaining public safety. As a result, the state realised that short-term investment would avert greater spending in the long-term, and committed a total of $241 million in evidence-based programs focused on rehabilitating offenders to reduce recidivism. According to The New York Times, this investment has saved Texas taxpayers nearly $3 billion in prison costs and has helped achieve the lowest crime rate in the state since 1968.

Summarising similarities and differences

The table below summarises the different similarities and differences between the sentencing practices of Victoria and Texas, as discussed throughout this lesson:

Table 5 Similarities and differences between sentencing in Victoria and Texas

Similarities	Differences
• **Categorising offences.** In both states, categorising crimes according to their severity assists the courts in sentencing criminal behaviour, including determining the severity of the punishment to be imposed.	• **The use of capital punishment.** Unlike in Victoria, Texas still use the death penalty as a sentencing option, carrying out a high number of state executions for the most serious crimes (capital felonies).
• **Determinate sentencing.** In both states, detailed sentencing guidelines are used to help determine which sentence should be imposed for particular crimes. Additionally, the severity of the available punishment is defined in minimum and maximum terms through statute.	• **Incarceration rates.** Texas has a much higher incarceration rate per 100,000 people than Victoria (891 in Texas vs 152 in Victoria).
• **Mitigating and aggravating factors.** In both states, special sentencing circumstances are considered that often alter the punishment that is specified by the guidelines.	• **Incarceration trends.** While Victoria has seen a significant increase in incarceration rates in recent times, Texas has experienced a drop in imprisonment across the same period.
• **Specialised courts as alternative sentencing options.** In both states, specialised courts (e.g. drug courts) have been established as alternative sentencing options to promote fairness in the pursuit of criminal justice.	

Keen to learn more?

Prison Policy Initiative, www.prisonpolicy.org/global/2018.html#methodology

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

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

QUESTIONS 6J Aspects of sentencing in Victoria and Texas

LEVEL 1:
Define and understand

1. Which of the following statements most accurately summarises the practice of determinate sentencing?

A. Determinate sentencing refers to the use of the jury in determining not only the guilt of the accused, but also the sentence that is to be imposed.

B. Determinate sentencing refers to the higher courts determining what sentence ought to be imposed for a particular crime, and the lower courts then following this determination when hearing similar cases.

C. Determinate sentencing refers to the practice of the courts using sentencing guidelines and a defined range of punishments to establish consistent sentencing practices.

D. Determinate sentencing refers to each crime within a particular class receiving the same sentence length as each other crime in that class. This promotes fairness and allows for individuals to be aware of the exact sentence that they will receive if they are found guilty of a particular crime.

2. Which of the following is not a similarity between the sentencing aspects of Victoria and Texas?

A. Both states categorise criminal offences in order of their severity. This classification helps guide sentencing practices.

B. Both states treat an offender's mental health at the time of offence as a relevant consideration when sentencing that offender.

C. Both states make use of alternative sentencing through the use of specialised courts. These courts are designed to promote fairness for all individuals when dealing with the criminal justice system.

D. Both states are experiencing a clear decrease in incarceration rates in recent times, with Victoria experiencing the larger decrease.

3. Below are a series of hypothetical arguments regarding the operation of the death penalty in Texas. Which argument is similar to that presented by Nicole Casarez in her article – *Review of Lethal Injection: Capital Punishment in Texas During the Modern Era*?

A. Over time, the amount of instances where a death penalty sentence is overturned on appeal has drastically declined. This is worrisome, as it suggests that the appeal courts could be relying too heavily on capital punishment rather than acknowledging potential mitigating factors during the review process.

B. Capital punishment may or may not be a deterrent for serious criminal behaviour. However, one thing is certain – it is much more cost effective then locking a criminal up for life.

C. Some crimes, such as murder and terrorism, are simply too henious to be treated lightly. The death penalty is really the only morally fit option in these cases.

D. Frankly, imposing the death penalty is simply too dangerous a sentence. Human error is real, and the possibility of incorrectly sentencing someone to death is just too substantial.

4. Consider the statements regarding incarceration statistics. Which of these statements is not supported by the statistics provided throughout this lesson?

A. Per capita, Texas sentences far more people to a term of imprisonment then Victoria does.

B. Over time, Texas is experiencing a reduction in repeat offenders returning to prison.

C. The Victorian prison population is increasing.

D. The crime rate in both Victoria and Texas is decreasing over the last 10 years.

LEVEL 2:
Describe and explain

5. Other then determinate sentencing, describe one similarity between the sentencing practices of Victoria and Texas. (2 MARKS)

LEVEL 3:
Apply and compare

6. Kyle, 22, was driving 32km/h over the speed limit when he attempted to overtake a large truck that was also speeding. As he moved to go around the truck, Kyle rear-ended a smaller vehicle that had been hidden to him while behind the truck. The collision caused the death of the driver of the smaller vehicle. Kyle was charged with culpable driving causing death and his trial will be heard in the County Court of Victoria.

This charge is a level 3 offence under Victorian statute. Identify the maximum sentence Kyle could receive. In your answer, briefly describe what is meant by the term 'determinate sentencing'. (3 MARKS)

7. Explain the difference in incarceration trends between Victoria and Texas. In your answer, describe Texas' focus on reducing recidivism rates. (4 MARKS)

LEVEL 4:
Discuss and evaluate

8. 'The sentencing practices in Victoria and Texas are completely dissimilar'.

Discuss the extent to which you agree with this statement. (6 MARKS)

REVIEW QUESTIONS

06 Sanctions

LEVEL 5: Bringing it all together

1. Ethan, 24, has been charged with culpable driving causing death. The prosecution alleges that:

- Ethan drove through a red light and collided with Liam's car, causing Liam's immediate death.
- Ethan had a blood alcohol concentration (BAC) of 0.12, more than twice the legal limit and was speeding excessively at the time of the collision.
- Ethan was serving a community correction order (CCO) at the time that the offence was committed.

Ethan claims that he was not driving 'culpably' before the collision and that he failed to stop at the red light only because the brakes in his car were faulty. Ethan has been cooperative with police throughout the investigation process.

Ethan has had several prior convictions relating to drink driving and assault charges, 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. Ethan 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 Ethan's case. (3 MARKS)

c) Distinguish between aggravating and mitigating factors in sentencing, and provide an example of each in Ethan's case. (4 MARKS)

d) Discuss the ability of imprisonment to both rehabilitate Ethan and protect the community if Ethan is found guilty and sentenced to a term of imprisonment. (6 MARKS)

Adapted from 2018 VCAA Exam Section B Question 1

2. Damien, 32, has been charged with robbery after breaking into his neighbour's house and taking a $1500 laptop. He has decided to plead 'not guilty' to the offence.

His friend Hilary tells him that:

- even though Damien has committed an indictable offence, he could have it heard in the Magistrates' Court if he wanted to; however
- there are benefits of both options – having a jury trial or instead being tried in the Magistrates' Court – that Damien should consider.

Do you agree with Hilary's advice? Give reasons for your answer. (8 MARKS)

Adapted from 2007 VCAA Exam Question 6

3. Evaluate the extent to which one of the following achieves the purposes of sanctions:

- Diversion program
- Drug treatment order (DTO). (5 MARKS)

Unit 2, Area of study 1

CHAPTER 7

RECENT CRIMINAL CASES

07

Previous chapters describe serious criminal offences and the processes used in the Victorian criminal justice system to resolve such matters. In practice, criminal matters are resolved in a wide range of ways – some individuals plead guilty, some accused persons are sentenced after a jury trial and others still are sentenced in a specialist court. In these real-world scenarios, does the Victorian legal system deliver fairness, equality and access to justice?

By the end of this chapter, you will know:

- The facts giving rise to two serious criminal cases.
- How each criminal case proceeded through the courts.
- The sanctions imposed in each matter, why the courts imposed such sanctions and the extent to which justice was achieved in each case.

UNIT 2 AOS 1 – KEY KNOWLEDGE
the principles of justice: fairness, equality and access
institutions that enforce criminal law, such as the police and delegated bodies
the balance between institutional powers and individual rights
an overview of the role and criminal jurisdictions of the Victorian courts
the role of the jury in a criminal trial
the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
types of sanctions such as fines, community correction orders and imprisonment
factors considered by judges in sentencing
aspects of sentencing practices in Victoria and in one other jurisdiction
alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs law in developing the elements and defences
two recent criminal cases and for each case:
– an overview of the charges and the central facts of the case
– courts that may be or were involved
– sanctions that could be or were imposed and their appropriateness
– factors that may be or were taken into consideration in sentencing
– possible avenues of appeal
– the extent to which the principles of justice could be or were achieved.

UNIT 2 AOS 1 – KEY SKILLS
define and use legal terminology
research, analyse and apply information in relation to criminal law and two recent criminal cases
describe the institutions that enforce criminal law
explain the role of the Victorian courts and juries in criminal cases
discuss the principles of justice in relation to the enforcement of criminal law and sanctions
discuss the ability of sanctions to achieve their purposes
discuss approaches to sentencing
analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases.

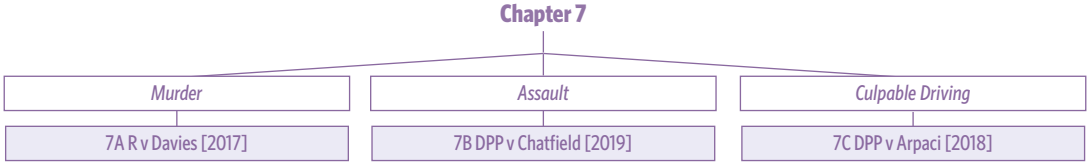
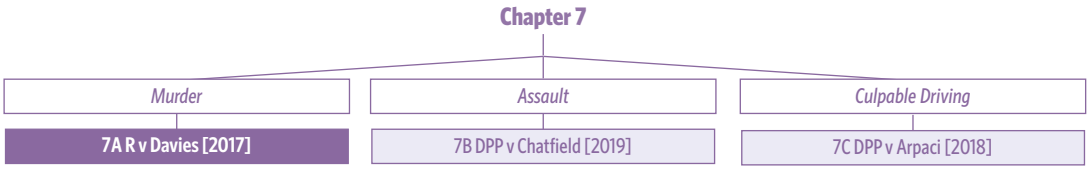


Image: J Dennis/Shutterstock.com

7A R v Davies [2017]

Having previously learned about the offence of murder in extensive detail, you will now look at a real life example of this offence.



In this lesson you will study the case of *R v Davies*, a Victorian murder case where the accused recently pleaded guilty and was sentenced in the Supreme Court.

Study design dot point

- Two recent criminal cases and for each case:
  - an overview of the charges and the central facts of the case
  - courts that may be or were involved
  - sanctions that could be or were imposed and their appropriateness
  - factors that may be or were taken into consideration in sentencing
  - possible avenues of appeal
  - the extent to which the principles of justice could be or were achieved.

Key knowledge units

An overview of the charges and the central facts of the case	2.1.11.1
Courts that may be or were involved	2.1.11.2
Sanctions that could be or were imposed and their appropriateness	2.1.11.3
Factors that may be or were taken into consideration in sentencing	2.1.11.4
Possible avenues of appeal	2.1.11.5
The extent to which the principles of justice could be or were achieved	2.1.11.6

An overview of the charges and the central facts of the case 2.1.11.1

OVERVIEW

Kylie Maybury was six years old when she went for a walk to a local shop in 1984 and did not return. Kylie was raped and murdered and her body was found the following day.

DETAILS

On 6 November 1984, Kylie Maybury walked 140 metres from her home in East Preston to a nearby food store to buy a bag of sugar. Kylie was seen by witnesses leaving the store at around 5.30pm as she began walking along the footpath to her home. About ten minutes after she left, it was noticed that Kylie had not returned from the shop. Upon finding out from the store owner that Kylie had been to and left the store, Kylie's mother began searching the surrounding area and eventually notified police that her daughter was missing. However, Kylie could not be located.

The following morning, a member of the public came across Kylie's body lying in a gutter approximately 650 metres from her home. A post-mortem revealed that Kylie had been drugged, raped and strangled to death. Although police had several suspects, no charges were laid at the time and the case went cold until April 2016.

In 2016, new evidence came to light that made Gregory Keith Davies (who was 74 years of age at this time) a person of interest. He provided a DNA sample which matched DNA evidence found on Kylie's body. Davies was subsequently charged with one count of rape, one count of murder and one count of false imprisonment. He was remanded in custody to await trial. At his committal hearing in May 2017 he pleaded guilty to rape and murder. The charge of false imprisonment was dropped. In November 2017, he was sentenced to life imprisonment for murder and 8 years for rape. A non-parole period was set at 28 years.

Courts that may be or were involved 2.1.11.2

OVERVIEW

Davies' case involved hearings in both the Magistrates' Court and the Supreme Court of Victoria.

DETAILS

Magistrates' Court

- The committal hearing was heard in the Melbourne Magistrates' Court.
  - A committal hearing is a pre-trial procedure in which the police/prosecution present their evidence to a magistrate who then determines if a "prima facie" case exists. In other words, the magistrate determines whether there is enough evidence, on the face of it, to convict the accused if the case proceeds to trial in a higher court.
  - Davies pleaded 'guilty' at his committal hearing and his case therefore did not need to go to a jury trial. Instead, his matter proceeded straight to sentencing.

Supreme Court of Victoria

- The pre-sentencing and sentencing hearing were heard in the Supreme Court – Trial Division.
  - If Davies had pleaded 'not guilty' his trial would have been heard in the Supreme Court – Trial Division by a jury of twelve.
  - If he were to appeal the length of his sentence, the appeal would have been heard in the Supreme Court – Court of Appeal.

Sanctions that could be or were imposed and their appropriateness 2.1.11.3

OVERVIEW

Justice Lex Lasry of the Supreme Court sentenced Davies to life imprisonment with a non-parole period of 28 years.

DETAILS

Appropriateness of the sanction

- Murder is a Category 1 offence and therefore Justice Lasry had no choice but to impose a term of imprisonment.
- The maximum penalty for murder is life imprisonment. Based on the severity of the offence and other aggravating factors, life imprisonment was an appropriate sentence for Davies.
- In most cases, a non-parole period should be set when an offender is imprisoned. However, if the crime is at the extreme end of offending – such as this case – the judge does not have to fix a minimum term and could sentence an offender such as Davies to life imprisonment with no prospect of parole. However, due to the offender's advanced age Justice Lasry deemed it appropriate to fix a non-parole period; Davies is therefore eligible to apply for parole after he has served at least 28 years.

Factors that may be or were taken into consideration in sentencing 2.1.11.4

OVERVIEW

Justice Lasry considered a number of mitigating and aggravating factors, as well as the purposes of sanctions, in sentencing Davies.

DETAILS

Aggravating factors (increased the sentence)

- The **heinous nature of the offending**; raping and murdering a child is amongst the worst kind of offending. The victim impact statements demonstrate the severity and impact of this offending, with Justice Lasry's sentencing remarks including the following:

  > These people have had to endure not only the death of this child but the extended time since while you kept your secret. The fact that the person who killed Kylie was still at large was obviously a matter of concern and fear for them. There is little or nothing the Court can say that will lessen the suffering of these people. The victim impact statements highlight the catastrophe that is a case like this. They show that the effect of your fatal and violent actions will last a lifetime for these people and highlight the suffering they have already endured.

- The fact that **Davies did not come forward** in the 33 years between when the crime occurred and when he pleaded guilty.
- Davies had **previous criminal convictions** for sexual assault.

Mitigating factors (decreased the sentence from life imprisonment with no parole to life with minimum 28 years)

- Davies' **advanced age**.
- The early **guilty plea**. Justice Lasry noted that the early guilty plea spared the victim's family from having to face a trial and stated that it was a key reason why he decided to set a parole period after 28 years. If not for the guilty plea, Justice Lasry would have sentenced Davies to life imprisonment with no parole. His honour stated:

  > I have come to the conclusion that given your history, age and plea of guilty I should not exclude some slight element of mercy and hope from your sentence, however remote that may seem to you.

Purposes of sanctions

- **Punishment** – given the terrible nature of the offence committed by Davies, just punishment was a key consideration in the sentence imposed. Justice Lasry highlighted the need to 'severely' punish Davies for his actions.
- **Denunciation** – a maximum sentence of life imprisonment was imposed to condemn Davies' conduct and demonstrate the extreme disapproval of the courts.
- **Protection** – the need to protect the community was deemed less significant in the sentencing due to Davies' advanced age and the limited likelihood of him committing further offences.
- **Rehabilitation** – in considering rehabilitation, Justice Lasry stated:

  > In many respects the question of your rehabilitation is intangible. You are already advanced in age and by the time of any release on parole, if that occurred, you would be extremely old. Likewise, any risk that you posed in the past and would pose in the future is virtually now non-existent. To the extent that rehabilitation involves your restoration to a normal life, clearly that would not happen. However, to the extent that your life and state of mind can be improved by an overt acknowledgement of what you have done, ultimately that is something for you to consider.

- **Specific and general deterrence** – while specific deterrence was not prioritised in sentencing due to the age of the offender, general deterrence was particularly important given the need to show the community that sentences for these severe offences will be very heavy.

Possible avenues of appeal 2.1.11.5

OVERVIEW

Davies could have appealed the severity of his sentence. However, given his age it is unlikely that he will ever be released from prison, even if a successful appeal had been lodged.

DETAILS

If Davies had appealed his sentence:

- He would have had to apply for leave to do so in the Supreme Court – Court of Appeal. The right to appeal is not automatic and the Court of Appeal would have considered his application before deciding to hear it.
- If Davies had intended to appeal against the sentence imposed he had 28 days from the time of his sentencing to submit an application to the Court of Appeal (a time limit imposed by the *Criminal Procedure Act 2009* (Vic)).
- The Court of Appeal in considering such an appeal would have been permitted to reduce the sentence if they deemed it to be too harsh, leave it the same or increase it.

The extent to which the principles of justice could be or were achieved 2.1.11.6

OVERVIEW

The principles of justice were upheld in a number of ways during Davies' encounter with the criminal justice system.

DETAILS

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Fair processes. He was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations. Had he pleaded 'not guilty' he would have been entitled to challenge the accuracy and reliability of the evidence presented by the prosecution.
Sentence reflected guilty plea. Once he pleaded 'guilty' the sentencing judge carefully explained all of his reasons for imposing the sentence that he did, and took into account this early guilty plea.
Protection. The judge also suggested that Davies be placed in protection for his own safety.

Table 2 The principle of access in this case

Principle of justice: *Access*
Legal representation. Davies had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
Rights of the accused. Davies was afforded all of the rights that an accused person has in Victoria. The police investigation and the court procedures were consistent with the rules of procedures that are followed in all cases. He would not have been treated any differently than any other person despite the horrendous nature of his crimes.

Keen to learn more?

***The Queen v Davies* [2017] VSC 800 (21 December 2017)**

QUESTIONS 7A R v Davies [2017]

LEVEL 1:
Define and understand

1. The following passage contains errors:

In 2016, Gregory Keith Davies was charged with one count of murder, one count of rape and one count of false imprisonment, after new evidence was brought to light surrounding the death of six-year-old Kylie Maybury. Davies' trial was heard in the Supreme Court by a jury of twelve. He was found guilty. Justice Lasry sentenced Davies to a term of imprisonment of 20 years, the maximum sentence for murder. If granted leave, Davies may choose to appeal this sentence through the High Court of Australia.

Which of the following options corrects the errors in the passage?

A. Davies was not charged with murder, rape and false imprisonment; he was only charged with murder, Davies' trial was not heard in the Supreme Court; it was heard in the County Court, Davies was not sentenced to 20 years; he was sentenced to life imprisonment.

B. Davies did not have a trial as he pleaded guilty at the committal hearing; Davies was not sentenced to 20 years; he was sentenced to life imprisonment; if Davies had chosen to appeal, it would not go to the High Court of Australia; any such appeal would have been heard by the Court of Appeal.

C. Davies was not charged in 2016; he was charged in 1984 when the crime occurred, Davies' trial was not heard in the Supreme Court; Davies did not have a trial as he pleaded guilty at the committal hearing, Davies cannot choose to appeal his sentence; sentences cannot be the subject of an appeal, only verdicts.

D. Davies was not charged with murder, rape and false imprisonment; he was only charged with murder, Davies was not tried by a jury of twelve; he was tried by a jury of six as this is a criminal case, Davies was not sentenced to 20 years; he was sentenced to life imprisonment.

2. Which of the following best describes a 'committal hearing'?

A. The hearing where the accused enters their plea.

B. The sentence hearing.

C. The hearing after the trial but before sentencing where the accused's legal representatives make submissions about what they think the sentence should be.

D. A pre-trial procedure in which the prosecution present their evidence to a magistrate who then determines if there is sufficient evidence to convict the accused if the case proceeds to trial in a higher court.

3. Was life imprisonment an appropriate sanction for Davies?

A. Yes, because Davies committed multiple serious offences which, when combined, warrant a severe sentence.

B. No, because Davies was much older than a typical offender and he committed the crime 33 years ago. He should have been shown more leniency due to his particular circumstances.

C. Yes, because murder is a level one offence and the maximum term of imprisonment for murder is life. Davies' offending was on the more severe end and he therefore deserved the maximum sentence.

D. No, because Davies pleaded guilty to the offence, demonstrating remorse and saving the victim's family from having to face a trial. Davies' sentence should have been further reduced to reflect this guilty plea.

4. Which of the following was not an aggravating factor in Davies' sentencing?

A. Davies' advanced age.

B. The horrific nature of the offending; raping and murdering a child is amongst the worst kind of offending.

C. The fact that Davies did not come forward in the 33 years between when the crime occurred and when he pleaded guilty.

D. Davies had previous criminal convictions for sexual assault.

5. Which of the following is an example of access being upheld in Davies' case?

A. Davies was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations.

B. Davies had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights.

C. Once Davies pleaded guilty, the sentencing judge carefully explained all of his reasons for imposing the sentence that he did.

D. Davies was afforded all of the rights that an accused person has in Victoria.

LEVEL 2:
Describe and explain

6. In sentencing Davies, Justice Lasry stated 'your plea is not reflective of any remorse on your behalf. The case against you was a strong circumstantial case supported by important forensic evidence.'

Provide one reason why Davies' guilty plea resulted in a less severe sentence. Describe one other benefit that guilty pleas can have in the criminal justice system. (3 MARKS)

7. Identify the two courts that heard Davies' case and for those courts:

- Outline their criminal jurisdiction.
- Describe what occurred in this case. (4 MARKS)

8. 'If Davies had pleaded not guilty, he would have been required to prove his innocence by providing evidence at trial.'

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

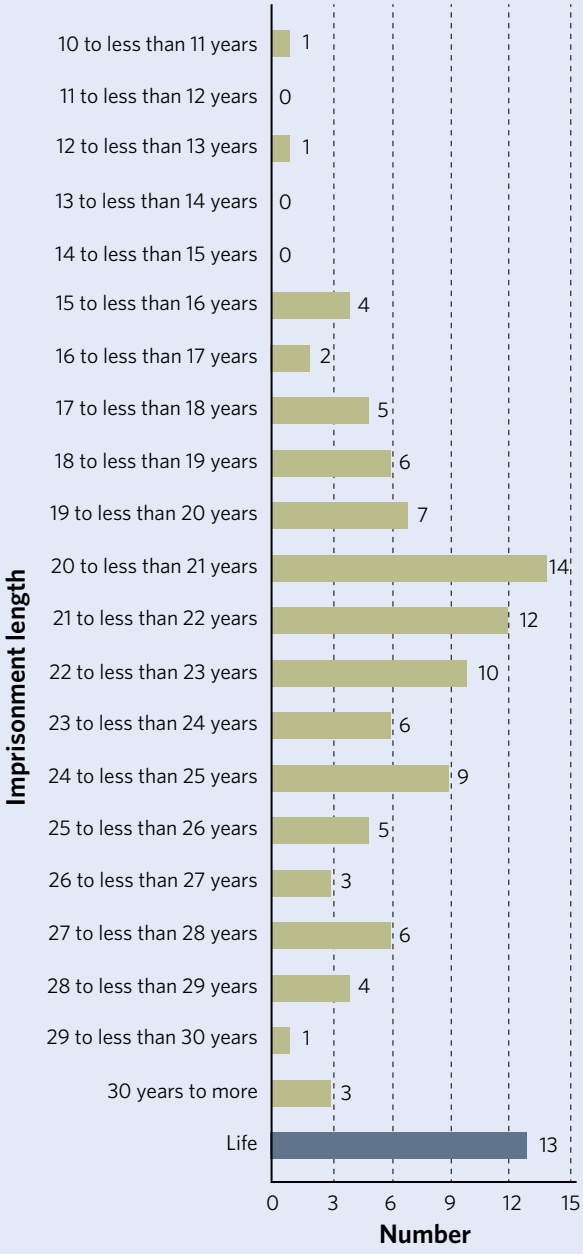
9. Describe two purposes of sanctions and explain why they were or were not a priority in sentencing Davies. (4 MARKS)

10. Describe two ways in which fairness was achieved in Davies' case. (4 MARKS)

11. One purpose of the Victorian court hierarchy is to allow for appeals. Describe this and one other reason for the court hierarchy with reference to Davies' case. (4 MARKS)

LEVEL 3:
Apply and compare

12. The figure shows the number of people sentenced to imprisonment for murder by the length of imprisonment term from 2013-14 to 2017-18.



Source: Sentencing Snapshot 223: Sentencing Trends for Murder in the Higher Courts of Victoria 2013-14 to 2017-18, Sentencing Advisory Council (2019)

The average length of imprisonment that was imposed for murder in 2017-2018 was 23 years and 7 months. Suggest two reasons why Davies' sentence was significantly longer than the average sentence for murder. (4 MARKS)

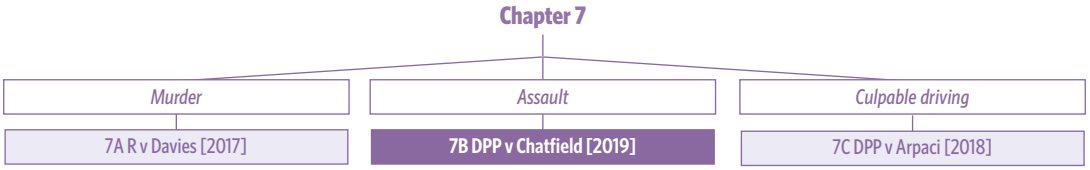
LEVEL 4:
Discuss and evaluate

13. Assume Davies came forward and pleaded guilty in 1984, immediately after he committed the crime. With reference to the purposes of sanctions, discuss whether it is likely that Davies would receive a more or less severe sentence. (6 MARKS)

14. Discuss the extent to which imprisonment achieves the purposes of sanctions in this case. (8 MARKS)

7B DPP v Chatfield [2019]

Having previously learned about various assault offences in detail, you will now look at a real life example of such an offence.



In this lesson you will study the case *DPP v Chatfield,* a Victorian assault case in which two co-accused pleaded guilty and were sentenced in the Koori Court division of the County Court. In this lesson you will focus primarily on the case of one of these accused men, Donald Chatfield.

Study design dot point

- Two recent criminal cases and for each case:
  - an overview of the charges and the central facts of the case
  - courts that may be or were involved
  - sanctions that could be or were imposed and their appropriateness
  - factors that may be or were taken into consideration in sentencing
  - possible avenues of appeal
  - the extent to which the principles of justice could be or were achieved.

Key knowledge units

An overview of the charges and the central facts of the case	2.1.11.7
Courts that may be or were involved	2.1.11.8
Sanctions that could be or were imposed and their appropriateness	2.1.11.9
Factors that may be or were taken into consideration in sentencing	2.1.11.10
Possible avenues of appeal	2.1.11.11
The extent to which the principles of justice could be or were achieved	2.1.11.12

An overview of the charges and the central facts of the case 2.1.11.7

OVERVIEW

In March 2017, two Aboriginal men broke into the house of a family member and assaulted him in front of his partner and six-year-old child.

DETAILS

On the night of 12 March 2017, Donald Chatfield and his uncle Jamie Chatfield drove to the home of Nathan Chatfield, Donald's cousin, where he lived with his partner and six-year-old daughter. Donald was allegedly upset with Nathan because he had taken some property from Donald's home and refused to return it. Upon their arrival, Donald and Jamie unscrewed the outside light and smashed an outside camera. They also turned off the power before entering Nathan's house. Donald was armed with an axe.

When Nathan's partner, Ms Cox, and their child noticed the men in the living room, they went to hide in the bedroom and Ms Cox rang the property's landlord, Daniel Thompson. In the meantime, Donald began to punch and threaten Nathan. He cut Nathan across the chest with the axe and demanded drugs, guns and money. He also made violent threats, while Jamie Chatfield stood behind him. The assault continued until Daniel Thompson arrived at the property. Donald had a conversation with Thompson before returning to the assault of his cousin, at which point Jamie also assaulted the victim. Shortly after, both Donald and Jamie fled the scene.

Donald was arrested two days later and pleaded guilty to one charge of home invasion, one charge of intentionally causing injury, and one summary charge of committing an indictable offence while on bail.

On 22 February 2019, Donald was sentenced to 4 years and 9 months' imprisonment with a non-parole period of 3 years.

Jamie Chatfield also pleaded guilty and was sentenced to 4 years' imprisonment with a non-parole period of 3 years.

Courts that may be or were involved 2.1.11.8

OVERVIEW

Chatfield's case involved hearings in both the Magistrates' Court and the Koori Court division of the County Court of Victoria.

DETAILS

Magistrates' Court

- The committal hearing was heard in the Magistrates' Court.
  - A committal hearing is a pre-trial procedure in which the police/prosecution present their evidence to a magistrate who then determines if a 'prima facie' case exists.
  - In other words, the magistrate determines whether there is enough evidence, on the face of it, to convict the accused if the case proceeds to trial in a higher court.
  - Chatfield's legal representatives challenged some of the evidence presented during the committal, however he ultimately pleaded guilty to the charges.

County Koori Court

- The sentencing hearing took place in the County Koori Court.
  - The Koori Court is an alternative sentencing court developed to take into account the different cultural values of Aboriginal and Torres Strait Islanders when sentencing offenders from these backgrounds.
  - To be eligible, the accused must first plead guilty to the charges being laid against them. Therefore, the Koori Court only deals with the sentencing of Indigenous offenders, it cannot hear or determine the verdict in a case.
  - Chatfield was able to choose to be sentenced in the Koori Court as he is an Aboriginal man who pleaded guilty to the charges against him. If he had pleaded not guilty, his case would not have gone to the Koori Court as it is only a sentencing court. He would instead have faced a jury trial in the County Court.
  - 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.

Sanctions that could be or were imposed and their appropriateness 2.1.11.9

OVERVIEW

Judge Grant of the Koori Court sentenced Chatfield to 4 years and 9 months' imprisonment with a non-parole period of 3 years.

DETAILS

Sentence breakdown

For home invasion – 4 years and 6 months.

For intentionally causing injury – 9 months.

On the summary offence – 1 month.

- Judge Grant ordered that three months of the sentence on the charge of intentionally causing injury be served cumulatively upon the sentence on home invasion.

Appropriateness of the sanction

- The maximum penalty for intentionally causing injury is 10 years' imprisonment. It is therefore generally accepted that this sort of offence will often result in a term of imprisonment.
  - Approximately 25% of prisoners sentenced for intentionally causing injury receive a prison term.
- The judge could have chosen to impose a CCO instead (around 33% of those sentenced for intentionally causing injury receive a CCO). However, the gravity of the offence, the offender's prior criminal history and the fact that Chatfield was charged with other crimes as well meant that a term of imprisonment was the only appropriate sanction.
  - Over 70% of those charged with aggravated burglary (the charge pursued following a violent home invasion) receive a prison term.

Factors that may be or were taken into consideration in sentencing 2.1.11.10

OVERVIEW

Judge Grant considered a number of mitigating and aggravating factors, as well as the purposes of sanctions, in sentencing Chatfield.

DETAILS

Aggravating factors (increased the sentence)

- The offence **took place in the presence of a child**. Judge Grant pointed out that Chatfield knew it was likely that the victim's partner and child would be home and still entered the property with the intention to carry out an assault. The six-year old daughter of Nathan Chatfield was emotionally traumatised by the event.
- **Victim impact statements detail the harm caused** by Chatfield. The victims Nathan Chatfield and his partner both submitted victim impact statements, and a statement was also submitted on behalf of their daughter. Judge Grant took into consideration the emotional and psychological impact the offence had on each family member, as well as the physical pain experienced by Nathan Chatfield.
- Chatfield was in **possession of a weapon**. Chatfield brought an axe with him and used it to threaten and physically injury Nathan Chatfield.
- Chatfield was **on bail** when he committed the offence.
- Chatfield had **relevant prior convictions**. Chatfield had been charged and imprisoned on numerous counts of assault as well as possessing a firearm.

Mitigating factors (decreased the sentence)

- **Guilty plea**. Chatfield allowed the victims to avoid a trial by pleading guilty. Though he didn't plead guilty at the committal hearing, Judge Grant thought it likely that Chatfield always intended to plead guilty. The judge stated:

  > In these circumstances, you are entitled to an appropriate sentencing discount for your plea of guilty. The plea is also an acceptance of responsibility and it is indicative of your remorse. In addition, it has saved the victims from the trauma of giving evidence at a trial, and saved the community the cost involved in running a criminal trial. You will be given credit for all of these matters.

  His Honour stated that without the guilty plea, Chatfield would have been sentenced to 6.5 years' imprisonment (if convicted by a jury).
- **Remorse**. Chatfield's guilty plea indicated that he was remorseful for his actions. Observing Chatfield's participation in the Koori Court process, Judge Grant also noted: 'It was obvious to me from the way you participated in the process that you were sorry for what you had done, and that you do have insight into the issues in your life which you need to address.'

Purposes of sanctions

Punishment – due to the array of aggravating factors in this case, the offence did fall towards the more severe end of this type of crime. It was therefore necessary to impose a harsh sentence in order to achieve just punishment.

Denunciation – a lengthy term of imprisonment was imposed to convey the court's condemnation of Chatfield's offence.

Protection – Chatfield has a long history of similar offences, many involving assault. He has therefore shown himself to be a threat to the community, requiring Judge Grant to impose a sanction which would remove Chatfield from society for a period of time. Judge Grant noted: 'Your criminal history means that the principles of specific deterrence and community protection are also relevant sentencing considerations.'

Rehabilitation – Chatfield has a history of drug and alcohol abuse, closely linked to his offending. Despite some treatment and attempts to address problem areas in the past, Chatfield repeatedly relapsed back into substance abuse, leading to further offending. This made rehabilitation less of a priority in Chatfield's sentence, as Judge Grant stated: 'It is this history and your inability to use community supports to break this pattern of behaviour that explains why I am guarded about your prospects for rehabilitation.'

Specific and general deterrence – both specific and general deterrence were prioritised in Chatfield's sentencing. Specific deterrence was significant because of Chatfield's array of prior convictions of a similar nature. This repeated offending suggests that other, less severe sanctions imposed in the past did not achieve specific deterrence. General deterrence was also a key consideration in sentencing, as highlighted by Judge Grant:

In this case, general deterrence – that is, the need to send a strong message to others in the community who might be tempted to behave in the way that you did – is a paramount sentencing consideration. Just punishment and denunciation are also relevant sentencing considerations.

Possible avenues of appeal 2.1.11.11

OVERVIEW

Chatfield could have appealed the severity of his sentence to the Court of Appeal.

DETAILS

If Chatfield had appealed his sentence:

- He would have had to apply for leave to do so in the Supreme Court – Court of Appeal. The right to appeal is not automatic and the Court of Appeal would have considered his application before deciding to hear it.
- If Chatfield had intended to appeal against the sentence imposed he had 28 days from the time of his sentencing to submit an application to the Court of Appeal (a time limit imposed by the *Criminal Procedure Act 2009* (Vic)).
- The Court of Appeal in considering such an appeal would have been permitted to reduce the sentence if they deemed it to be too harsh, leave it the same or increase it.

The extent to which the principles of justice could be or were achieved 2.1.11.12

OVERVIEW

The principles of justice were impacted in a number of ways during Chatfield's encounter with the criminal justice system.

DETAILS

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Fair processes. Chatfield was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations. He also had the opportunity to test the reliability and accuracy of the evidence presented by the prosecution during the committal hearing.
Delays. Chatfield did face some delay in his case going to trial. He committed the offence in March 2017 and was not sentenced until February 2019.
Koori Court process. The Koori Court sentencing discussion allows for the court to fully understand Chatfield's personal circumstances when deciding the appropriate sanction. It is fair for an offender to have the specifics of his or her state of affairs taken into consideration during sentencing.

Table 2 The principle of access in this case

Principle of justice: *Access*
Legal representation. Chatfield had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights.
Koori Court. Chatfield elected to have his case heard in the Koori Court. The Koori Court operates as a sentencing court for Aboriginal and Torres Strait Islander people who have pleaded guilty to an offence that falls under the County Court's jurisdiction. The Koori Court provides a more informal atmosphere when compared to other courts. This allows for greater participation by the offender and Indigenous leaders from the offender's community in the court process and promotes access to the justice system.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
Rights of the accused. Chatfield was afforded all of the rights that an accused person has in Victoria. The police investigation and the court procedures were consistent with the rules of procedure that are followed in all cases.

Keen to learn more?

***DPP v Chatfield* [2019] VCC 210 (22 February 2019)**

Sentence Sentencing Snapshot 215: Sentencing Trends for Causing Injury Intentionally in the Higher Courts of Victoria 2012-13 to 2016-17, www.sentencingcouncil.vic.gov.au/snapshots/215-causing-injury-intentionally

QUESTIONS 7B DPP v Chatfield [2019]

LEVEL 1:
Define and understand

1. Which of the following is not true?

- **A.** Donald Chatfield was charged with home invasion, intentionally causing injury and a summary offence.
- **B.** Intentionally causing injury is an assault charge.
- **C.** Donald Chatfield pleaded guilty to all of the charges against him.
- **D.** Donald Chatfield was sentenced to 4 years and 9 months' imprisonment on the assault charge.

2. Why was Chatfield eligible to be sentenced in the Koori Court?

- **A.** Chatfield pleaded not guilty to the offences he was charged with.
- **B.** Chatfield is an Aboriginal man who pleaded guilty to offences which fall under the jurisdiction of the County Court.
- **C.** Chatfield is Aboriginal and all Aboriginal people have the right to a hearing in the Koori Court.
- **D.** Anyone who applies can be sentenced in the Koori Court.

3. Which of the following purposes of sanctions was not a very high priority in Chatfield's sentencing?

- **A.** General deterrence
- **B.** Punishment
- **C.** Protection
- **D.** Rehabilitation

4. Assume Chatfield wanted to appeal his sentence. Which of the following is not correct?

- **A.** Appeals are automatically granted to all offenders.
- **B.** Chatfield had 28 days from the time of his sentencing to submit an application to the Court of Appeal.
- **C.** Chatfield's appeal would have gone to the Court of Appeal.
- **D.** Chatfield pleaded guilty so the only thing that he could appeal was the severity of his sentence.

5. Which of the following is an example of access being upheld in Chatfield's case?

- **A.** Chatfield was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations.
- **B.** Chatfield was afforded all of the rights that an accused person has in Victoria.
- **C.** Chatfield was able to be sentenced in the Koori Court.
- **D.** Chatfield faced some delays in his case going to trial. He committed the offence in March 2017 and was not sentenced until February 2019.

LEVEL 2:
Describe and explain

6. Identify whether the offences committed by Chatfield were summary or indictable offences. Give reasons for your answer. (3 MARKS)

7. Chatfield's guilty plea acted as a mitigating factor in this case. Describe two benefits that a guilty plea has in the criminal justice system. (4 MARKS)

8. Identify the two courts that heard Chatfield's case and for those courts:
- Outline their criminal jurisdiction.
- Describe what occurred in this case. (4 MARKS)

9. Choose two purposes of sanctions and for each:
- Describe the purpose.
- Explain why it was or was not a priority in Chatfield's sentencing. (6 MARKS)

10. Describe two ways in which the principle of access was upheld in this case. (4 MARKS)

LEVEL 3:
Apply and compare

11. While imprisonment is a common sentence imposed for an assault charge, community correction orders (CCOs) are also used in sentencing for assault charges. CCOs prioritise the rehabilitation of the offender and may therefore be a more effective sanction in the long run. Suggest two reasons why Chatfield was given a term of imprisonment rather than a CCO for the charge of intentionally causing injury. (4 MARKS)

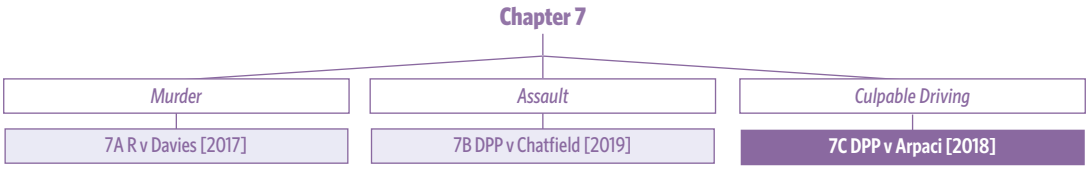
LEVEL 4:
Discuss and evaluate

12. 'Imprisonment is not an appropriate sanction in this case as the only purpose that it achieves is punishment. The other purposes of sanctions are neglected by a term of imprisonment.'

Do you agree with this statement? Give reasons for your answer. (6 MARKS)

7C DPP v Arpaci [2018]

Having previously learned about the offence of culpable driving causing death, you will now look at a real life example of the offence.



In this lesson you will study the case *DPP v Arpaci,* a recent Victorian culpable driving case in which the accused was found guilty and sentenced in the County Court.

Study design dot point

- Two recent criminal cases and for each case:
  - an overview of the charges and the central facts of the case
  - courts that may be or were involved
  - sanctions that could be or were imposed and their appropriateness
  - factors that may be or were taken into consideration in sentencing
  - possible avenues of appeal
  - the extent to which the principles of justice could be or were achieved.

Key knowledge units

An overview of the charges and the central facts of the case	2.1.11.13
Courts that may be or were involved	2.1.11.14
Sanctions that could be or were imposed and their appropriateness	2.1.11.15
Factors that may be or were taken into consideration in sentencing	2.1.11.16
Possible avenues of appeal	2.1.11.17
The extent to which the principles of justice could be or were achieved	2.1.11.18

An overview of the charges and the central facts of the case 2.1.11.13

OVERVIEW

On 27 January 2016, two cars were drag-racing along the Western Ring Road when one car hit a barrier on the EJ Whitten Bridge and burst into flames, resulting in the tragic death of its two occupants.

DETAILS

On this evening in 2016, Adem Arpaci (21 at the time of incident) and Harley Churchill (19) had both (separately) attended illegal car events in various locations. Arpaci admitted attending Northern Skids, a street drag-racing event. There was evidence from other drivers that, while driving along the Western Ring Road, Arpaci was attempting to challenge several other vehicles to a race. Churchill's vehicle then drove past at high speed and Arpaci decided to begin racing the vehicle. Witnesses described the two cars as:

- Being side-by-side.
- Driving at high speed.
- Quickly putting distance on other vehicles.
- Weaving in and out between cars.
- Overtaking at high speed, as though they were in a race.

Expert evidence suggests that the cars were travelling at an approximate speed of 180km/h (80km/h above the speed limit) when Churchill attempted to overtake a truck on the EJ Whitten Bridge and the rear tyre of his car blew. Churchill's vehicle collided with a barrier, became airborne and burst into flames as it crashed into the valley below the bridge. Both Churchill and his passenger Ivana Clonaridis (18) were killed in the collision. Arpaci fled the scene.

On 3 February 2016, police attended Arpaci's home in a routine investigation searching for the other drag racer that had been seen by witnesses. Arpaci signed a false statement claiming that he had no involvement in the incident, although he did provide police with the contact details of his passenger; his dishonesty did not influence the police investigation. After making this statement, Arpaci attempted to contact police the same evening and the following day to admit his involvement. He was able to speak to a detective and identify himself as the other driver on 4 February.

Arpaci was charged with two counts of culpable driving causing death and one count of perjury (for the false statement). He pleaded 'guilty' to the charge of perjury but 'not guilty' to the charges of culpable driving. Whilst he did not contest that he was driving his vehicle, he did challenge aspects of the evidence presented by witnesses regarding his driving prior to the collision.

In his first trial, the jury could not reach a unanimous verdict; due to this hung jury he was tried again in the County Court. At the second trial, the jury found him guilty on both counts of culpable driving causing death.

On 16 March 2018, he was sentenced to a maximum term of imprisonment of 14 years with a non-parole period of 9 ½ years.

Courts that may be or were involved 2.1.11.14

OVERVIEW

Arpaci's case involved hearings in both the Magistrates' Court and the County Court of Victoria.

DETAILS

Magistrates' Court

- A bail application was made by Arpaci on 5 February. The Court granted Arpaci bail; he was banned from driving whilst on bail awaiting trial.
- The committal hearing was heard in the Magistrates' Court in December 2016.
  - A committal hearing is a pre-trial procedure in which the police/prosecution present their evidence to a magistrate who then determines if a 'prima facie' case exists. In other words, the magistrate determines whether there is enough evidence, on the face of it, to convict the accused if the case proceeds to trial in a higher court.

County Court of Victoria

- The trial and sentencing hearing were both conducted in the County Court.
  - The original jurisdiction of the County Court includes all indictable offences (except the most serious), such as culpable driving causing death.
  - Arpaci pleaded not guilty to two counts of culpable driving which meant he had a trial by jury.
    - In his first trial (November 2017), the jury couldn't reach a verdict – it was a hung jury.
    - This meant he underwent a second trial with a new jury in February 2018. At the second trial, the jury found him guilty.
  - He was taken into custody and Judge Hogan then sentenced him in a separate hearing one month later.

Sanctions that could be or were imposed and their appropriateness 2.1.11.15

OVERVIEW

Judge Hogan of the County Court sentenced Arpaci to 14 years' imprisonment with a non-parole period of 9 ½ years.

DETAILS

Sentence breakdown

For the culpable death of Ivana Clonaridis – 10 years.

For the culpable death of Harley Churchill – 10 years.

- The Judge ordered that four years of that term be served cumulatively.
- She sentenced Arpaci to 6 months for perjury but ordered that this be served concurrently.

Arpaci's licence was cancelled.

Appropriateness of the sanction

- For this type of crime, it is generally accepted that a custodial sentence (imprisonment) is the most appropriate sanction. The maximum penalty for culpable driving is 20 years' imprisonment.
- In this particular case, the level of culpability was found to be very high and so the only appropriate sentence was a lengthy term of imprisonment:
  - In 2017/18, 15 individuals were sentenced for culpable driving causing death, with an average prison term imposed of 7 years and 8 months.
  - Due to Arpaci being convicted on two counts of this offence and the aggravating factors below, a comparatively long term of imprisonment was appropriate.
- The licence cancellation was also appropriate. Section 89(1) of the *Sentencing Act 1991* (Vic) requires that a person sentenced for culpable driving causing death must have their licence cancelled.

Factors that may be or were taken into consideration in sentencing 2.1.11.16

OVERVIEW

Judge Hogan considered a number of mitigating and aggravating factors, as well as the purposes of sanctions, in sentencing Arpaci.

DETAILS

Aggravating factors (increased the sentence)

- The **gravity of the offence**. Judge Hogan said that this was on the upper end of this type of offending and that while they didn't plan to kill anyone, given the high speeds (180km/hour) and criminally negligent nature of the driving, it should have been known that it was highly likely that something would go wrong and that the extent of the harm that would occur was likely to be very high. Judge Hogan stated:

  > Just because you kept control of your vehicle and did not crash into anyone does not mean that you are not liable for the deaths that occurred. The jury have found that you (Arpaci) and Mr Churchill mutually encouraged each other to drive in a grossly negligent manner and the high speed of Mr Churchill at the time he lost control was all part of the race in which the two of you engaged.

- Several members of the victims' families submitted **victim impact statements** which were taken into account. These demonstrate the horrific suffering caused by Arpaci's criminal conduct. For example, Judge Hogan's sentencing remarks included the following summary of the suffering endured by Ivana's sister (Cassandra) and Cassandra's husband (Jake Cachia):

  > Mr Cachia describes how he and Cassandra were to have been married one month after Ivana died. Instead of celebrating that event, with Ivana as a bridesmaid, they ended up having to identify Ivana using dental records, and view her remains in the most horrific way, which has emotionally scarred both of them. They suffered financial loss through cancelling their wedding and also through funding Ivana's funeral. Mr Cachia states that, apart from missing Ivana, he suffers deep sadness seeing his wife's distress going through life without her only sister. He states that the hurt is like having the air taken out of their lungs.

Mitigating factors (decreased the sentence)

- Arpaci had **no previous criminal history** and had never been in trouble with the law.
- Arpaci was **employed**, was a **family man** and was involved in charitable activities.
- The Judge said that Churchill's own driving and the **mutual encouragement** of each other were mitigating factors although she said that this was very minor:

  > Having carefully examined all of the evidence and the surrounding circumstances of your offending, although I accept that there is some reduction of your moral culpability because Mr Churchill's driving was partly responsible for the manner of your driving, I do not consider that that reduction should be very considerable.

- Arpaci displayed **remorse** for his actions. Judge Hogan noted: 'You are extremely remorseful for what has happened and have allegedly apologised to the families of the two victims, as well as your own family.'

Purposes of sanctions

Punishment – due to the gravity of the offence and the high level of negligence displayed by Arpaci in regards to the lives of other drivers, just punishment was a key consideration in the sentence. Judge Hogan highlighted the need to 'appropriately' punish Arpaci according to the severity of his actions.



Denunciation – a lengthy term of imprisonment was imposed to convey the court's condemnation of Arpaci's offence.

Protection – Arpaci's blatant disregard for the safety of other drivers suggests that he does pose a significant threat to the community. Judge Hogan also pointed out the need to impose a sentence which would ensure community protection by trying to deter others from repeating the negligent behaviour.

Rehabilitation – Arpaci's young age and lack of criminal history suggest that he may have good prospects for rehabilitation. However, the nature of the offence requires other purposes of sanctions to be prioritised over rehabilitation, as stated by Judge Hogan:

> While, certainly, I do have regard to your prospects of rehabilitation, in my view, the gravity of your offending is such that denunciation of your conduct and general deterrence and just punishment must be the predominant sentencing principles.

Specific and general deterrence – while specific deterrence will likely be achieved by the severe sentence imposed, general deterrence was a very high priority in this case.

Driving offences such as dangerous and culpable driving are common offences within the community, particularly among young men (50 of the 59 persons sentenced for culpable driving causing death between 2013 and 2018 are male) and must be discouraged.

It was therefore necessary to emphasise the gravity of such offences and remind other drivers that they will be punished if they engage in similar behaviour. In sentencing Arpaci, Judge Hogan explained:

> We have so many unnecessary deaths on our roads. Yours is a case where the court must denounce your offending conduct and emphasise general deterrence. This means that, in sentencing you, a strong message must be sent out to all drivers that, if they engage in drag racing or other competitive behaviour, particularly at high speeds and interfering with other traffic on a public roadway like you did, then they need to be aware that they will be appropriately punished for it. It is imperative that courts do all that they can, when sentencing for conduct like this, to ensure that the community is protected, by trying to deter others from repeating such criminality-negligent behaviour.

Possible avenues of appeal 2.1.11.17

OVERVIEW

Arpaci could have appealed to the Court of Appeal, challenging either the conviction or the sentence.

DETAILS

Arpaci had a limited time-frame (28 days following his sentencing) in which to appeal to the Court of Appeal.

Conviction

To challenge the guilty verdict itself, Arpaci would have been required to argue that the jury had been wrongly directed by the judge as to the law about culpable driving, that evidence had been incorrectly admitted, or similar.

Sentence

- Arpaci could have submitted an appeal against the severity of the sentence – 14 years' imprisonment is lengthy given current sentencing practices for other culpable driving convictions.
- The Director of Public Prosecutions could theoretically have submitted an appeal against the sentence on the basis that it was inadequate, but this was highly unlikely given the long sentence imposed by the County Court.

The extent to which the principles of justice could be or were achieved 2.1.11.18

OVERVIEW

The principles of justice were impacted in a number of ways during Arpaci's encounter with the criminal justice system.

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Fair processes. Arpaci was made aware of the charges being brought against him and the evidence that police had gathered (this was presented in the committal proceeding, allowing Arpaci and his legal representatives to prepare a defence). In addition, he had the opportunity to defend the accusations in a public hearing by questioning the evidence presented by the prosecution's witnesses, such as police officers who examined the scene and other nearby drivers.

cont'd

Jury trial. He was tried by a jury of his peers who would have made their decision based on the evidence presented in court. This promotes fairness as his guilt was determined by an independent and unbiased decision-maker.

Delays. Arpaci did face substantial delays in his trial which appear to have impacted his mental health. Arpaci committed the offence in January 2016 and was not sentenced until March 2018. While this is not unreasonably long for a serious indictable offence, Arpaci was forced to undergo two separate trials due to a hung jury in the first trial. His family submitted evidence which suggested that the wait to be tried and sentenced caused Arpaci significant stress and anxiety. However, he was released on bail between his arrest and the second jury's 'guilty' verdict, minimising the harm caused by this delay.

Table 2 The principle of access in this case

Principle of justice: *Access*
Legal representation. Arpaci had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
Rights of the accused. Arpaci was afforded all of the rights that an accused person has in Victoria. The police investigation and the court procedures were consistent with the rules of procedure that are followed in all cases. He would not have been treated any differently than any other person despite the horrendous nature of his crimes or his young age.

Keen to learn more?

DPP v Arpaci [2018] VCC 285 (16 March 2018)

QUESTIONS 7C DPP v Arpaci [2018]

LEVEL 1:
Define and understand

1. Which of the following is not true?

- **A.** Adem Arpaci was charged with two counts of culpable driving after engaging in an illegal drag race with Harley Churchill on the Western Ring Road.
- **B.** Arpaci pleaded not guilty to the culpable driving charges.
- **C.** Arpaci's charge was reduced from culpable driving to dangerous driving causing death because of the mutual encouragement between himself and Churchill.
- **D.** Arpaci was sentenced to 14 years' imprisonment with a non-parole period of 9 ½ years.

2. Why was Arpaci's trial heard in the County Court?

- **A.** Arpaci was charged with a summary offence and the County Court has original jurisdiction to hear all summary offences.
- **B.** Arpaci was charged with an indictable offence and the County Court has original jurisdiction to hear all but the most serious indictable offences (which are reserved for the Supreme Court), where the accused has pleaded not guilty.
- **C.** Arpaci pleaded not guilty to the offence, therefore it was heard in the County Court; if he had pleaded guilty, the trial would have taken place in the Supreme Court.
- **D.** Arpaci was charged with one of the most serious indictable offences, which falls under the same category as murder and treason.

3. Which of the following was not a mitigating factor in Arpaci's sentencing?

- **A.** Arpaci displayed remorse.
- **B.** Victim impact statements from the victims' families.
- **C.** Arpaci had no prior criminal history.
- **D.** Arpaci was employed, and there was evidence attesting to his good character.



4. Was 14 years' imprisonment an appropriate sanction for Arpaci?

- **A.** No, because Arpaci did not directly cause the victims' deaths. He was only in control of his own car and had no ability to stop Churchill from crashing.
- **B.** Yes, because culpable driving offences will always result in a lengthy term of imprisonment.
- **C.** No, because Arpaci pleaded guilty to perjury.
- **D.** Yes, because the level of culpability in Arpaci's case was found to be very high and a long term of imprisonment was the only suitable sanction in this situation.

5. The principle of fairness was upheld in a range of ways during Arpaci's trial and sentencing. Which of the following is an example of fairness being undermined in Arpaci's case?

- **A.** Arpaci was tried by a jury of his peers who would have made their decision based on the evidence presented in court.
- **B.** Arpaci had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights.
- **C.** Arpaci faced significant delays in the resolution of his case due to the fact that he had two jury trials.
- **D.** Arpaci was afforded all of the rights that an accused person has in Victoria.

LEVEL 2:
Describe and explain

6. Which party had the burden of proof in this case? How does this uphold the presumption of innocence? (3 MARKS)

7. Outline the actus reus and mens rea elements of culpable driving and provide an explanation of each within Arpaci's case. (4 MARKS)

8. Arpaci pleaded not guilty to an indictable offence and was therefore given a jury trial in the County Court. Describe two benefits of a jury trial in this case. (4 MARKS)

9. Describe two ways in which the principles of justice were upheld in this case. (4 MARKS)

LEVEL 3:
Apply and compare

10. Assume that Arpaci pleaded guilty to the two culpable driving charges at his committal hearing. What effect do you think this would have on his sentence? Give reasons for your answer. (3 MARKS)

11. The most common sentence imposed for a culpable driving offence in Victoria is between 5-7 years' imprisonment. Arpaci was sentenced to 10 years' imprisonment for each culpable driving charge and a cumulative total exceeding 14 years in prison.

With reference to any factors considered in sentencing, suggest two reasons why Arpaci's sentence was so severe. (4 MARKS)

LEVEL 4:
Discuss and evaluate

12. Describe two purposes of sanctions and discuss the extent to which they are achieved by the sanction imposed on Arpaci. (6 MARKS)

Unit 2, Area of study 2

CHAPTER 8

REMEDIES

08

In Unit 1 you explored types of civil disputes. The vast majority of legal disputes in the justice system are civil matters. Some are very serious, such as an injured worker seeking compensation for a workplace injury, or thousands of bank customers seeking to claim back fees they were charged for a service they weren't provided; others are much less serious, such as a landlord trying to recover a few hundred dollars in unpaid rent.

Civil disputes are resolved in a variety of methods, depending upon the nature of the legal claim and who the parties to the dispute are. In addition, there is a range of ways injured parties can be returned to the position they were in before the injury occurred.

By the end of this chapter, you will know:

- What processes can be used to resolve a dispute between a plaintiff and a defendant.
- Which bodies within the justice system are the most appropriate place for an injured person or business to initiate a claim against another party.
- The role juries play in resolving civil matters in Victoria.
- The outcomes a court or tribunal can impose when compensating a plaintiff for their suffering.

UNIT 2 AOS 2 – KEY KNOWLEDGE

- the principles of justice: fairness, equality and access
- methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies
- an overview of the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the purposes of remedies
- types of remedies, such as damages and injunctions
- two recent civil cases and for each case:
  - an overview of the claim and the central facts of the case
  - dispute resolution bodies that may be or were involved
  - methods of dispute resolution and their appropriateness
  - remedies that could be or were awarded and their appropriateness
  - possible avenues of appeal
  - the extent to which the principles of justice were or could be achieved.

UNIT 2 AOS 2 – KEY SKILLS

- define and use legal terminology
- research, analyse and apply information in relation to civil law and two recent civil cases
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil cases
- discuss the principles of justice in relation to the resolution of civil disputes and remedies
- discuss the ability of remedies to achieve their purposes
- analyse the extent to which the principles of justice were or could be achieved in two recent civil cases.

Unit 2 AOS 2: Chapter 8

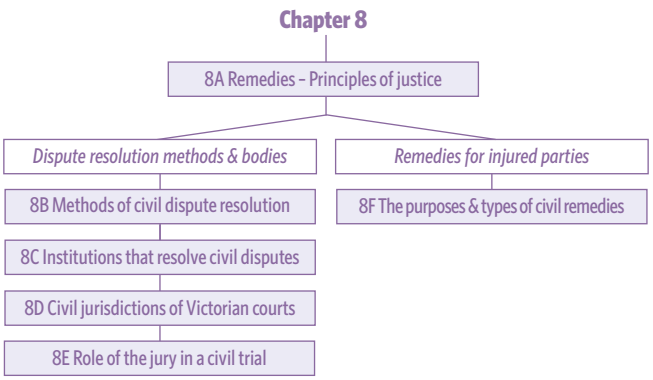
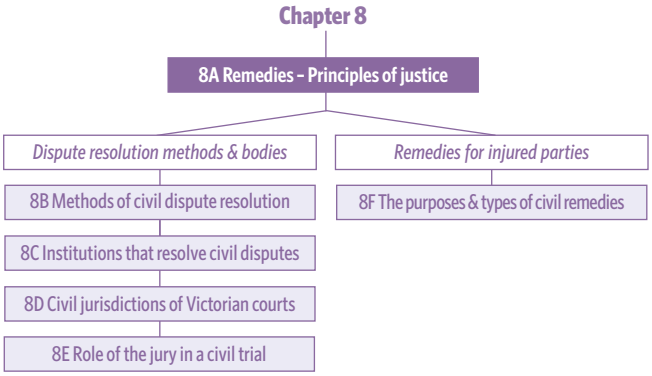


Image: sirtravelalot/Shutterstock.com

8A Remedies – Principles of justice

Assume a wealthy actor has her reputation damaged by a journalist on Twitter, an unemployed man lives in a rental house needing urgent repairs or a recent migrant is underpaid by his employer. Surely all three of these parties deserve to have their injuries 'made right' in some way – can they all receive the legal solutions they are entitled to in Victoria?

Previously you examined the principles of justice in relation to the enforcement of criminal law and sanctions. Now those same principles will be applied to civil remedies.



In this lesson you will be learning about the principles of justice and how they are upheld during the resolution of civil disputes.

The principles of justice are the fundamental or basic ideas and values that promote just treatment and outcomes in our legal system.

Study design dot point

- The principles of justice: fairness, equality and access

Key knowledge units

Fairness	2.2.1.1
Equality	2.2.1.2
Access	2.2.1.3

Fairness 2.2.1.1

OVERVIEW

'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'.

DETAILS

Fairness is upheld in civil dispute resolution in Victoria in the following ways:

- All plaintiffs in civil disputes have an opportunity to present evidence and legal argument that persuades the decision-maker (such as a court or tribunal) of their entitlement to a remedy for some injury caused by the defendant (that is, the chance to present their case in its best light).
- All defendants in civil disputes have an opportunity to:
  - Know what evidence the plaintiff will present to prove that he or she is responsible for the plaintiff's injury.
  - Test the accuracy and reliability of that evidence put forward by the plaintiff.
  - Present evidence and legal argument to persuade the decision-maker (such as a court or tribunal) that they are not liable for the plaintiff's injury (that is, the chance to present their defence in its best light).
- Outcomes and remedies provided are based upon the law and facts of the case. Decisions are not based on bias (prejudice) for or against parties due to their race, gender, age or political beliefs.
- Plaintiffs and defendants are able to engage legal representation – an expert to prepare and present their evidence and legal argument.

- Resolutions and remedies are provided with minimal delay, as delays can compound the suffering of those awaiting a remedy and cause anxiety to those defending a civil claim.

USEFUL TIP

In your assessment tasks, 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 **equitable** legal processes are in place, and all parties receive an **unbiased** hearing.

Equality 2.2.1.2

OVERVIEW

'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'.

DETAILS

Equality is upheld through the civil justice system in Victoria in the following ways:

- Plaintiffs and defendants are treated in the same manner by all those within the legal system, regardless of factors such as their age, gender, religion or disability.
- Similar cases should have a similar outcome. In particular, awards of damages for similar injuries should be of an alike amount, regardless of whether a plaintiff is famous, young, old, financially disadvantaged, etc.
- Court procedures (for example, the presentation of evidence) are applied equally to all who seek a remedy or are defending a claim.

USEFUL TIP

In your assessment tasks, avoid using the word 'equal' to define 'equality'. Instead try using words such as 'the same', 'alike' or 'equivalent' in the definition. **'Equality' is** defined as ensuring all people are treated **the same** before the law, with an **equivalent** opportunity to present their case.

Access 2.2.1.3

OVERVIEW

'Access' is defined in the VCAA Legal Studies Study Design as ensuring individuals in society have an 'understanding of legal rights and ability to pursue their case'.

DETAILS

Access is upheld in the resolution of civil cases in the following ways:

- Those who suffer injury know that they have a legal right to seek a remedy, such as financial compensation.
- Individuals know which dispute resolution body or process is the most appropriate to use when seeking redress for a civil wrong that has caused injury (either the courts, a tribunal like VCAT, a method such as mediation, etc).
- It is clear how to commence and conduct a civil proceeding to remedy an injury.
- Injured persons are able to afford the fees associated with pursuing a remedy through the courts, a tribunal 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 to reduce one's 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 know whether they have a right to appeal against the outcome, including the amount of damages awarded and the appropriate court to appeal to.

USEFUL TIP

Looking at how civil disputes are resolved in the following chapter will include focusing on whether these processes always achieve fairness, equality and access. It is possible that the principles of justice are not always achieved.



USEFUL TIP

As with criminal procedures, 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 fairness is upheld through the civil justice system, it will be coloured yellow.

When considering whether equality is upheld through the civil justice system, it will be coloured orange.

When considering whether access is upheld through the civil justice system, it will be coloured purple.

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 8A Remedies – Principles of justice

LEVEL 1:
Define and understand

1. Which of the following is the best example of how fairness is upheld through civil dispute resolution?

- **A.** Procedures are the same for all individuals attempting to obtain a remedy.
- **B.** It is clear how to commence and conduct a civil proceeding to remedy an injury that has occurred.
- **C.** Minimal delays to avoid additional pain for those awaiting a remedy or for the party defending the claim.
- **D.** None of the above.

2. Which of the following is not an example of how equality is upheld through civil dispute resolution?

- **A.** Similar cases should have similar awards of damages, for like injuries.
- **B.** Procedures are applied consistently for all who seek a remedy or are defending a claim.
- **C.** Plaintiffs and defendants are treated in the same manner regardless of age, gender, religion or disability.
- **D.** Decision-makers are independent and unbiased.

3. Which of the following is the best example of how access is upheld through civil dispute resolution?

- **A.** The outcome is based upon the law and the facts, rather than opinions and biases.
- **B.** Those who suffer injury know that they have a right to seek a remedy.
- **C.** The plaintiff and defendant are treated in the same way during the dispute resolution process.
- **D.** None of the above.

LEVEL 2:
Describe and explain

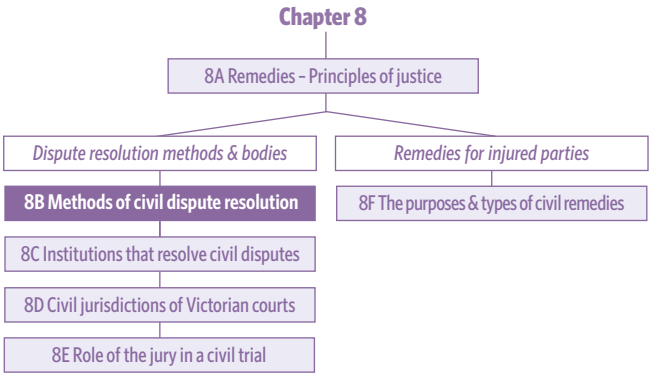
4. Describe fairness as one of the principles of justice. Provide one example of how fairness is upheld through civil dispute resolution in Victoria. (2 MARKS)

5. Describe equality as one of the principles of justice. Provide one example of how equality is upheld through civil dispute resolution in Victoria. (2 MARKS)

6. Describe access as one of the principles of justice. Provide one example of how access is upheld through civil dispute resolution in Victoria. (2 MARKS)

8B Methods of civil dispute resolution

When a person or business feels their rights have been infringed and they have suffered an injury as a result, there are a range of ways a resolution can be reached, at a range of different places (including courts and tribunals). In later lessons you will learn which bodies resolve civil disputes. This sequence of lessons will demonstrate that the most appropriate method and body to resolve a civil dispute will vary depending upon the nature of the dispute.



Is a trial (where parties and their legal representatives present evidence and legal argument, and a court decides the outcome) always the most appropriate method to resolve disputes? What if parties wish to protect their relationship or cannot afford to go to court? What if the cost of going to court is higher than the amount of money an injured party is seeking in a relatively minor dispute? In this lesson you will be learning about the different methods that may be used to resolve a civil dispute, including mediation, conciliation and arbitration. You will learn more about institutions that resolve civil disputes, such as VCAT and CAV, in lesson 8C.

Study design dot point

- Methods used to resolve civil disputes, such as mediation, conciliation and arbitration

Key knowledge units

Mediation	2.2.2.1
Conciliation	2.2.2.2
Arbitration	2.2.2.3

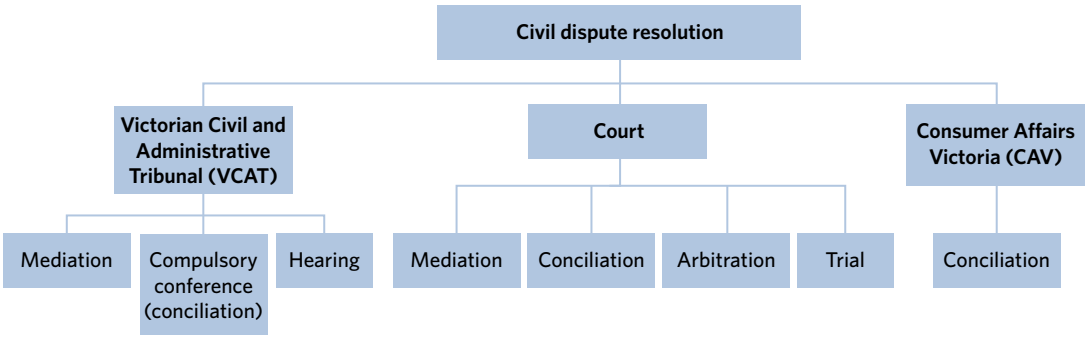


Figure 1 Civil dispute resolution methods and bodies

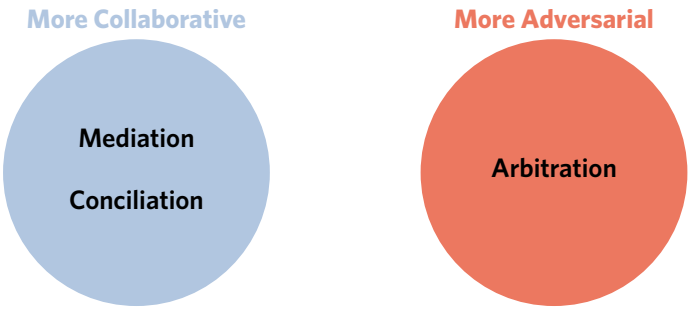


Figure 2 Methods used to resolve civil disputes

Mediation 2.2.2.1

OVERVIEW

Mediation is a cooperative, non-judicial dispute resolution process involving an independent third party (mediator). The mediator encourages the two parties to communicate, assisting the parties to voluntarily come to a resolution.

DETAILS

In many cases, plaintiffs and defendants resolving a civil dispute through the courts will be ordered to utilise other methods of dispute resolution, such as mediation. This may be done in accordance with s. 66 of the *Civil Procedure Act 2010* (Vic). Alternatively, parties to a dispute may choose themselves to engage in mediation, hiring a third party mediator before (or instead of) using the court system.

LEGISLATION

***Civil Procedure Act 2010* (Vic)**

Section 66 - COURT MAY ORDER PROCEEDING TO APPROPRIATE DISPUTE RESOLUTION

(1) A court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution.

- Other methods of dispute resolution, as referred to in (1), can include conciliation or mediation.

Features of mediation

- The mediator facilitates the conversation between the parties, which should ensure the parties voluntarily come to a resolution. The mediator cannot provide any legal advice to the parties or recommend potential outcomes for the dispute.
- The resolution reached in mediation is non-binding. It can become legally enforceable if the parties sign a deed of settlement. Where parties have commenced proceedings in the courts but reach an agreement at mediation without the need for a trial, they then present this resolution to the court which issues orders (made by consent of the parties), rendering the outcome binding. See below.
- Legal representation is often not used in mediation. The mediator ensures the negotiation is conducted in a less formal and supportive environment.
- Evidence is generally not presented as the emphasis in mediation is on reaching a resolution, not who may be right/wrong.

A consent order is a document that:

- includes the terms the parties have agreed to when resolving their civil dispute (which may include an award of damages, an apology, a promise to stop certain conduct, etc.);
- is written at the conclusion of the mediation (or conciliation, see below); and
- is issued by VCAT or a court, making the agreement reached legally binding and ending the civil dispute.

Examples of disputes referred to mediation

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.

Some other examples of cases that are referred to mediation include:

- disputes between neighbours
- divorce and child custody issues
- property settlement between separating couples.

Table 1 Appropriateness of mediation

When mediation is more appropriate	When mediation is less appropriate
Parties genuinely want to resolve the dispute and are therefore willing to negotiate.	One party is vulnerable (has a history of violence or threats, mental health issues, etc.).
Parties are able to understand and participate in the mediation process.	Parties are unwilling to discuss their issues – an agreed settlement is unlikely.

cont'd

When mediation is more appropriate	When mediation is less appropriate
A continuing relationship needs/wants to be maintained. Parties prefer privacy and confidentiality. Parties are concerned with saving time and costs.	Parties are highly emotional and/or there is animosity between the parties (negotiation and compromise become more difficult). There has been previous failed mediation attempts and/or a history of broken promises between the parties. There is a power imbalance – creates a risk that one party will 'give up too much' in mediating a settlement.

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. Many cases that are initiated in the courts are resolved at pre-trial mediation.
- Approximately 80% of mediation participants were satisfied with mediation as a way of resolving disputes.
- Those participating in mediation find the process and outcomes are 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.

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.

USEFUL TIP

The 2016 VCAA Examiner's Report identified common misconceptions about mediation, including: 'it is not always the case that mediation is inappropriate for parties where there is animosity.'

Consider a dispute between a business and their former employee, who is taking legal action because she felt harassed at work and is seeking financial compensation. Mediation may initially seem less appropriate if there is ongoing hostility between the parties, because they might be less likely to negotiate. However, in such a case the parties may also value the fact that mediation is faster, private and less expensive than going to trial and therefore be willing to attempt mediation.

Students need to be able to weigh up the pros and cons of whether mediation is appropriate in a given case.

Table 2 Strengths and weaknesses of mediation and its ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of mediation - how fairness is promoted	**Weaknesses of mediation - limitations in achieving fairness**
Control. Parties control the outcome which should result in a mutually agreeable solution, which is fair. **Independence.** The mediator is impartial, favouring neither side in the negotiation. **Time.** Delays add to the suffering of injured parties and the stress/anxiety associated with defending a claim; this is unfair, especially if the delay is not the fault of the parties. Mediation is faster than a trial (thereby avoiding such suffering) and reduces the courts' trial workload, minimising delays for matters that do need to proceed to trial.	**Intimidation.** One party may be more intimidated in the process and feel forced into an outcome that they are not happy with. However this is a small disadvantage as the mediator does ensure each party is heard. **Not automatically binding.** Unless the parties enter into a binding agreement or terms of settlement at the end of the mediation, the decision is not binding, thus risking one party reneging on their promise. A trial would then need to be conducted, which adds to the suffering of the injured party. **Requires negotiation.** The third party cannot impose a resolution nor compel parties to negotiate, the parties to the dispute must be willing to compromise. This may limit fairness if only one party is open to negotiation.

Table 3 Strengths and weaknesses of mediation and its ability to achieve access

Principle of justice: *Access*	
Strengths of mediation - how access is promoted	**Weaknesses of mediation - limitations in achieving access**
Cheaper. Mediation is conducted before court proceedings so parties will spend less money resolving a dispute at mediation compared to the costs of a trial. Legal representation is also not required which saves costs. Being more cost effective enables those with limited financial means to resolve disputes. **Private.** Mediation is a confidential process; disputes can be resolved in a discreet manner, which may be important to parties conscious of media attention. This is less intimidating for parties who may not wish to go to trial. **Informal.** Formal rules of evidence and procedure do not apply, parties feel supported by the mediator and parties can be free to speak as they wish. The intimidating nature of a trial may discourage some injured persons from seeking a remedy and may prevent some defendants from actively defending a claim made against them; the informal and supportive nature of mediation overcomes this issue, promoting access to justice. **Third party.** The third party has flexibility compared to a judge or magistrate. They can talk openly with the parties to encourage communication. This more supportive and less adversarial environment encourages individuals to use mediation.	**Time and cost.** Mediation may be a waste of time if one party does not wish to make any offers or is unreasonable, thus meaning that the parties have wasted money and time in attending mediation. However these are small disadvantages as there is an incentive to participate actively due to the cost and time that will be saved if a trial is avoided, and many cases do settle at mediation without the need for a trial. **Not suitable for some matters.** There are some matters where mediation is less appropriate. This is particularly so for long-running disputes and disputes where there is significant animosity between the parties. In these cases, parties are unlikely to be able to use mediation and must instead go to trial.

Table 4 Strengths and weaknesses of mediation and its ability to achieve equality

Principle of justice: *Equality*	
Strengths of mediation – how equality is promoted	**Weaknesses of mediation – limitations in achieving equality**
Informal. Formal rules of evidence and procedure do not apply, parties feel supported by the mediator and parties can be free to speak as they wish. Each party can present their perspective on the dispute without being limited by rules of evidence and procedure. **Representation.** Legal representation is usually not required in mediation which ensures that unrepresented parties are not disadvantaged.	**Intimidation.** One party may be more intimidated in the process and feel 'forced' into an outcome that they are not happy with. Lack of legal representation may also reduce equality if one party takes control. However, this is a small disadvantage as the mediator does ensure parties are each heard.

Conciliation 2.2.2.2

OVERVIEW

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, assisting the parties to voluntarily come to a resolution.

DETAILS

In many cases, plaintiffs and defendants resolving a civil dispute through the courts will be ordered to utilise other methods of dispute resolution, such as conciliation. This may be done in accordance with s. 66 of the *Civil Procedure Act 2010* (Vic).

LEGISLATION

***Civil Procedure Act 2010* (Vic)**

Section 66 - COURT MAY ORDER PROCEEDING TO APPROPRIATE DISPUTE RESOLUTION

(1) A court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution.

- Other methods of dispute resolution, as referred to in (1), can include conciliation or mediation.

Features of conciliation

- The conciliator can offer suggestions and possible solutions, which should help the parties voluntarily come to a non-binding resolution.
- This resolution can become enforceable if the parties sign a deed of settlement and/or ask VCAT or the court to issue orders by consent (see above).
- As in mediation, legal representation is often not used in conciliation; 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.

Example of disputes referred to conciliation

If a person in Victoria believes they have been a victim of unlawful discrimination (for example, they are denied a job due to their ethnicity, or are subjected to disrespectful comments about a disability at work) and this person makes a complaint to the Victorian Human Rights and Equal Opportunity Commission, the commission will attempt to resolve the dispute using conciliation between the two parties. The conciliator helps the two parties to negotiate a resolution that may include an apology or financial compensation. This process is private and requires the parties to reach a mutually acceptable outcome.

USEFUL TIP

When a court conducts a trial (or hearing) following strict rules about how evidence is presented and a legally-binding decision is reached, this is a 'judicial' process. The processes of mediation and conciliation described in this lesson occur without the imposition of an outcome by a judge, so they are 'non-judicial' processes.

Table 5 Appropriateness of conciliation

When conciliation is more appropriate	When conciliation is less appropriate
Parties genuinely want to resolve the dispute and prefer privacy and confidentiality.	One party is vulnerable (has a history of violence or threats, mental health issues, etc.).
Parties are able to understand and participate in the conciliation process.	Parties are unwilling to discuss their issues - an agreed settlement is unlikely.
A continuing relationship needs to be maintained.	Parties are highly emotional - negotiation becomes more difficult.
There is an admission of responsibility.	There is animosity between the parties meaning compromise is less likely.
Parties require suggestions and solutions to initiate discussion, often from an expert in the type of dispute.	
For example, in a dispute regarding the construction of a building, the conciliator may have experience as an engineer and therefore be able to offer relevant options for the resolution of the dispute.	

CASE STUDY

VCAT is a Victorian tribunal that resolves a high volume of less serious civil disputes (see Lesson 8C for further details about the matters resolved by VCAT). It resolves civil cases using a wide range of methods and 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, a dispute between a landlord and a tenant about repairing a hole in the roof is likely to be resolved in this way. The parties are likely to have an ongoing relationship and be willing to discuss their issues in order to achieve the most beneficial outcome.

cont'd

During 2017/18, 2,533 VCAT disputes were sent to be resolved by mediation (412 cases) or compulsory conference, which is a meeting with a VCAT member that follows the process of conciliation (2,121 cases). 55% of these cases were resolved during the mediation or conciliation process without needing to go to a hearing.

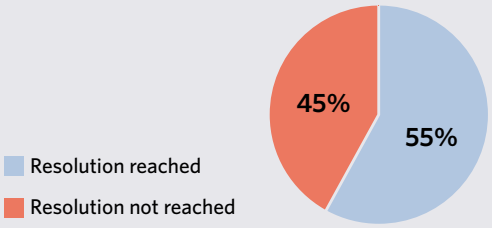


Figure 3 VCAT 2017-18 mediation and conciliation success rate
Source: VCAT 2017/18 Annual Report (2018)

Table 6 Strengths and weaknesses of conciliation and its ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of conciliation - how fairness is promoted	**Weaknesses of conciliation - limitations in achieving fairness**
Control. Parties control the outcome which allows them to negotiate a fair resolution from which both may benefit. **Independence.** The conciliator is impartial, favouring neither side in the negotiation. **Time.** Delays add to the suffering of injured parties and the stress/anxiety associated with defending a claim; this is unfair, especially if the delay is not the fault of the parties. Conciliation is faster than a trial (thereby avoiding such suffering) and reduces the courts' trial workload, minimising delays for matters that do need to proceed to trial.	**Intimidation.** One party may be more intimidated in the process and feel forced into an outcome that he or she is not happy with. However this is a small disadvantage as the conciliator does ensure each party is heard. **Not binding.** Unless the parties agree to sign a legally binding contract, then the decisions reached will not be enforceable. One party may decide not to follow the agreement as it is not automatically legally enforceable. **No resolution.** Parties do not have to reach an agreement, which means that more time is wasted if the matter proceeds to trial/hearing. However this is a small disadvantage as there is an incentive to participate actively due to the cost and time that will be saved if a trial is avoided.

Table 7 Strengths and weaknesses of conciliation and its ability to achieve access

Principle of justice: *Access*	
Strengths of conciliation - how access is promoted	**Weaknesses of conciliation - limitations in achieving access**
Cheaper. Conciliation is conducted before court proceedings so parties will spend less money resolving a dispute through conciliation compared to the costs of a trial. Legal representation is usually not required which saves costs. Paying a conciliator (if needed) is cheaper than the costs associated with a trial. Being more cost effective enables those with limited financial means to resolve disputes. **Private.** Conciliation is a confidential process; disputes can be resolved in a discreet manner, which may be important to parties conscious of media attention. This is less intimidating for parties who may not wish to go to trial. **Informal.** Formal rules of evidence and procedure don't apply, parties feel supported by the conciliator and parties can be free to speak as they wish. The intimidating nature of a trial may discourage some injured persons from seeking a remedy and may prevent some defendants from actively defending a claim made against them; the informal and supportive nature of conciliation overcomes this issue, promoting access to justice.	**Not suitable for some matters.** There are some matters where conciliation is not appropriate. This is particularly so for long-running disputes and disputes where there is significant animosity between the parties. These cases are less suitable to be resolved through conciliation.

cont'd

Strengths of conciliation - how access is promoted	Weaknesses of conciliation - limitations in achieving access
Third party. The third party has flexibility compared to a judge or magistrate - they can talk openly with the parties to encourage communication and offer a range of solutions the parties may choose to adopt. This more supportive and less adversarial environment encourages individuals to use conciliation.	

Table 8 Strengths and weaknesses of conciliation and its ability to achieve equality

Principle of justice: *Equality*	
Strengths of conciliation – how equality is promoted	**Weaknesses of conciliation – limitations in achieving equality**
Cost effective. Legal representation is not required which reduces costs and ensures unrepresented parties are not disadvantaged. **Informal.** Rules of evidence and procedure aren't used and parties can be free to speak as they wish. Each party can portray their side of the dispute without being limited by rules of evidence and procedure.	**Intimidation.** One party may be more intimidated in the process and feel forced into an outcome that he or she is not happy with. The lack of legal representation may reduce equality if one party takes control. However, this is a small disadvantage as the conciliator does ensure parties are each heard.

Arbitration 2.2.2.3

OVERVIEW

Arbitration is a dispute resolution process involving an independent third party (arbitrator) who listens to parties present evidence and makes a binding decision.

DETAILS

Features of arbitration

- Arbitration is less formal than a trial, without the strict rules of evidence and procedure used by the courts in conducting a civil trial.
- Arbitration results in a binding outcome that is enforceable.
- Proceedings in arbitration are often private.
- It is commonly used by parties to large commercial contracts to resolve disputes instead of conducting a trial in the courts:
  - Many commercial agreements between businesses will include a requirement that any dispute between the parties are to be resolved by arbitration.
  - These arbitration proceedings are often conducted within the Victorian Supreme Court (but are much faster, cheaper and less formal than a trial within the Supreme Court).

Table 9 Appropriateness of arbitration

Is more appropriate when:	Is less appropriate when:
Parties agree to arbitrate (this may include the parties having a contractual arrangement). The amount claimed in the matter is less than $10,000 and it has been initiated in the Magistrates' Court. The case requires a binding and enforceable decision.	Complex legal issues need clarification by a judge, following legal arguments being presented by barristers. Parties are comfortable navigating complex court rules of evidence and procedure and/or prefer the matter to be resolved by a jury. Parties do not agree to arbitrate.



CASE STUDY

Assume Jackie (a business owner) engages BuildIT (a construction company) to build a new office branch. 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 section stating that any disputes arising between the parties will be resolved by a specific method (in this case, arbitration).

Assume BuiltIT believes Jackie has failed to make a payment for 20% of the total fee by an agreed date. Jackie refused to pay as she believes BuildIT has fallen behind their agreed building schedule.

An independent arbitrator would be engaged (as per their agreement) to hear and resolve the dispute, without the need to initiate proceedings in the courts. The outcome determined by the arbitrator would be binding on both Jackie and BuildIT.

Table 10 Strengths and weaknesses of arbitration and the ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of arbitration - how fairness is promoted	**Weaknesses of arbitration - limitations in achieving fairness**
Certainty. The arbitration process will lead to a decision, unlike mediation and conciliation that may conclude without the parties resolving their dispute and proceeding to trial (adding delay and uncertainty). **Flexibility.** Parties can agree who the arbitrator is or who should appoint the arbitrator if they cannot agree. **Binding.** Arbitration will result in a binding decision (unlike conciliation and mediation, which may not result in a binding outcome). Both parties must follow the outcome as it is legally enforceable. **Third party independence.** The arbitrator will be independent of both parties, making a decision based solely on the law and the facts.	**Rules of evidence.** Due to relaxed rules of evidence, an arbitrator may consider evidence that would be inadmissible to present to a judge and/or jury. This may result in an unfair hearing for one party. **Limited appeal rights.** One or both of the parties may be unhappy with the binding outcome, but parties have limited rights to appeal decisions imposed at arbitration. **Legal representation.** If one party has legal representation but the other doesn't, there will be a power imbalance. One party may be able to present their case better, disadvantaging the unrepresented party and leading to an unfair outcome.

Table 11 Strengths and weaknesses of arbitration and the ability to achieve access

Principle of justice: *Access*	
Strengths of arbitration - how access is promoted	**Weaknesses of arbitration - limitations in achieving access**
Informal. Not bound by formal court procedures. The parties may agree on the procedure to be adopted and thereby achieve a more flexible and efficient process compared to a court. This is less intimidating for parties than a trial. **Privacy.** The general public cannot watch an arbitration hearing and neither the parties nor the arbitrator can (generally) disclose confidential information. This privacy may encourage parties in sensitive cases to use arbitration.	**Costly.** Can be more expensive than mediation and conciliation, especially in complicated matters as legal representation may be required. This may prevent plaintiffs and defendants with a lesser financial capacity from pursuing arbitration as a dispute resolution option.

Table 12 Strengths and weaknesses of arbitration and the ability to achieve equality

Principle of justice: *Equality*	
Strengths of arbitration – how equality is promoted	**Weaknesses of arbitration – limitations in achieving equality**
Informal. Not bound by formal court procedures. The parties may agree on the procedure to be adopted and thereby achieve a more flexible and efficient process compared to a court. Each party can present their side without being limited by rules of evidence and procedure.	**Legal representation.** If one party has legal representation but the other doesn't, there will be a power imbalance. Unrepresented parties are disadvantaged as they may not understand the rules of procedure followed in arbitration.

Table 13 Comparing mediation, conciliation and arbitration as methods of civil dispute resolution

	Mediation	Conciliation	Arbitration
Third party name	Mediator.	Conciliator.	Arbitrator.
Third party role	Facilitate discussion.	Facilitate discussion and offer solutions.	Listen to evidence and deliver verdict.
Decision-maker	Parties.	Parties.	Arbitrator.
Resolution	Not binding (unless made binding by deed of settlement or court makes order with parties' consent).	Not binding (unless made binding by deed of settlement or court makes order with parties' consent).	Binding.
Rules of evidence	Generally does not involve presentation of evidence.	Generally does not involve presentation of evidence.	Involves presentation of evidence, but following less formal rules than a trial in the courts.
Rules of procedure	Relaxed rules of procedure; parties are able to speak freely.	Relaxed rules of procedure; parties are able to speak freely.	Relaxed rules of procedure relative to a trial; parties are able to speak freely but it is more formal than conciliation and mediation.
Legal representation	Generally not needed and parties without representation are not disadvantaged. In many cases a mediator will only permit legal representation if both parties have a lawyer.	Generally not needed and parties without representation are not disadvantaged. In many cases a conciliator will only permit legal representation if both parties have a lawyer.	Sometimes no legal representation but in other cases parties may bring legal representation, and parties without representation may be disadvantaged.

USEFUL TIP

It is important not to confuse dispute resolution bodies (the courts, VCAT and CAV – **where** civil disputes are resolved, covered in Lesson 8C) with the methods used to resolve disputes (such as mediation, arbitration, conciliation and conducting hearings/trials – **how** civil disputes are resolved).

Keen to learn more?

Dispute Settlement Centre of Victoria, https://www.disputes.vic.gov.au/about-us/mediation

Office of the Victoria Information Commissioner, https://ovic.vic.gov.au/privacy/for-the-public/complaints/about-conciliation/

Victorian Bar, https://www.vicbar.com.au/public/bar-associations/commercial/arbitration-adr

QUESTIONS 8B Methods of civil dispute resolution

LEVEL 1:
Define and understand

1. Jasmine and Lucy are neighbours. Jasmine often has parties in her backyard and the sound carries over into Lucy's house. Lucy and Jasmine have been arguing about the noise created and both parties wish to resolve the dispute using a low cost method in which they get to determine the outcome. They have previously attempted to resolve the dispute with a third-party present but could not come to a decision, as neither Jasmine or Lucy could think of any solutions. Which method of dispute resolution would be the most appropriate?

A. Mediation, because Jasmine and Lucy would get to determine their own outcome.

B. Conciliation, because Jasmine and Lucy would be able to utilise the suggestions offered to determine their own outcome.



C. Arbitration, because Jasmine and Lucy would receive a binding decision.

D. A decision from a judge, because that is always the best method to use.

2. Which of the following statements about mediation is correct?

A. The outcome is automatically legally binding on the parties.

B. A mediator encourages the parties to communicate so they can come to their own solution.

C. The mediator offers suggestions, but the parties can come to their own solution.

D. Mediation is an adversarial method of civil dispute resolution.

3. Fix It Up (a mechanical company) and Mohammed entered a business deal which involved a contract with various terms. One of these terms required that any dispute that arises will be resolved using arbitration, with Hannah being the mutually appointed arbitrator. Mohammed claims that Fix It Up caused damage when inspecting his vehicle. The two parties approach Hannah to resolve the dispute, and she agrees that Fix It Up did cause damage and awards Mohammed $8,000 for the loss incurred. Fix It Up is unhappy with the outcome and does not want to pay the $8,000 to Mohammed.

Which of the following is most likely considering the scenario?

A. Fix It Up can easily appeal the decision made by Hannah.

B. Fix It Up do not need to follow the decision made by Hannah because she isn't a judge.

C. Fix It Up is bound by the decision made by Hannah and will have to pay the $8,000.

D. Fix It Up will cause further damage to Mohammed's vehicle as revenge.

4. In which of the following situations would arbitration be the most appropriate method of civil dispute resolution?

A. When parties want to determine their own solution.

B. When the plaintiff and defendant want to maintain an ongoing relationship.

C. When the parties want a binding outcome.

D. When the parties prefer to resolve the dispute using a jury to determine whether the defendant must compensate the plaintiff.

5. Which of the following is not a feature of conciliation?

A. The emphasis is on finding a solution, not who is right or wrong.

B. The conciliator encourages the parties to communicate and offers solutions.

C. Legal representation is not generally used.

D. The outcome is always binding on the parties.

6. Holly and Megan are sisters who often bicker. When they would fight as children, their mother would sit down with them and help facilitate communication between them so they could reach a solution. Recently, the sisters have been arguing over their now-deceased mother's doll collection. The girls cannot afford expensive legal costs and wish to resolve this dispute using a low cost and supportive method.

Which would be the most appropriate method of civil dispute resolution for Holly and Megan?

A. Mediation, because the sisters would be able to maintain their relationship and come to their own decision.

B. Conciliation, because the outcome will be final.

C. Arbitration, because it is the cheapest method of civil dispute resolution.

D. A decision from a judge, because they are the only people legally entitled to resolve civil disputes.

LEVEL 2:
Describe and explain

7. Identify three features of conciliation as a method of civil dispute resolution. (3 MARKS)

8. Describe mediation as a method of civil dispute resolution. (3 MARKS)

LEVEL 3:
Apply and compare

9. Blake and Fred used a method of civil dispute resolution for an issue they had over their rental agreement. Blake claimed that Fred has not repaid to him $6,000 for a new heating system installed to replace the broken one. Fred claimed that Blake was obliged to replace the heating system as it was faulty, as outlined by their contract. They did not want a decision from a judge as this would be too expensive considering the amount in question. However, the method they used was more expensive than other methods, especially because Blake and Fred both had legal representation. The dispute was resolved with an independent third party finding in favour of Fred's claim. The outcome was legally binding.

Explain the method of civil dispute resolution that was used by Blake and Fred. Justify your response. (4 MARKS)

10. 'Mediation and conciliation are virtually indistinguishable.'

Compare mediation and conciliation as methods of civil dispute resolution. (4 MARKS)

11. Judy suffered physical injury after her doctor (Paul) prescribed inappropriate medication for an illness she was suffering. She also endured financial loss, because she was unable to work for six weeks due to the negative effects of the medication. Judy is seeking compensation, so she and Paul attended conciliation. The third-party (a mediator) listened to Paul and Judy present their perspectives on what had happened, then made a binding outcome ordering Paul to pay compensation to Judy.

Identify two errors in the scenario and explain the correct process. (4 MARKS)

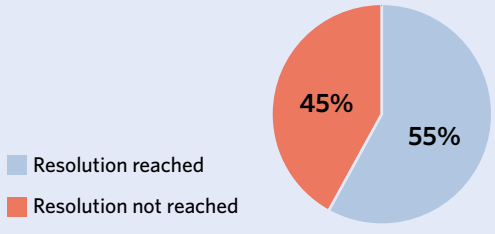
12. Eric and Lester want to resolve a dispute they have regarding access to their communal parking lot. They want to use a low-cost and informal method that gives them the flexibility to choose their own outcome.

Identify one method of dispute resolution that would be appropriate for Eric and Lester. Justify your response. (4 MARKS)

13. Compare arbitration to another method of civil dispute resolution. (6 MARKS)

LEVEL 4:
Discuss and evaluate

14. The Victorian Civil and Administrative Tribunal (VCAT) resolves a wide range of civil matters, such as disputes between landlords and tenants, and claims of discrimination based on gender, race, and so on. In many cases VCAT conducts mediation or conciliation in an effort to reach a resolution, without the need to conduct a hearing. The following data from the VCAT Annual Report indicates how successful mediation and conciliation were during 2017-18.



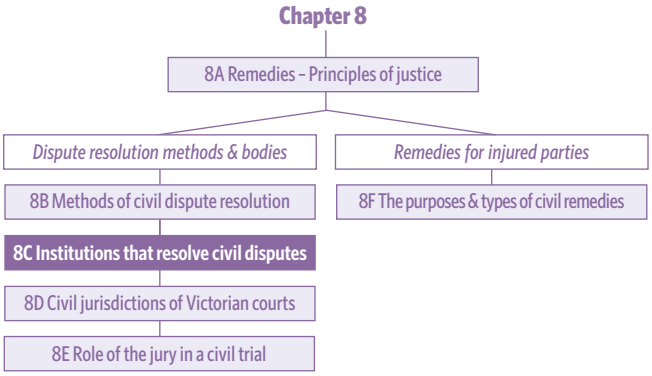
Considering this data, evaluate whether mediation and conciliation contribute to the achievement of justice. (8 MARKS)

15. 'Arbitration is the method of civil dispute resolution that is best able to deliver on the principles of justice.' Discuss this statement. (6 MARKS)

16. Discuss the extent to which mediation is able to uphold the principles of justice. (6 MARKS)

8C Institutions that resolve civil disputes

Parties to a civil dispute have many different options available to them. Not only are there various methods of dispute resolution used (mediation, conciliation, arbitration or judicial determination), there are also many different institutions that use these methods to resolve civil disputes.



Are civil disputes always resolved in the courts? Is there anywhere else injured parties can go to resolve a civil dispute? In this lesson you will be learning about the various institutions that may assist an individual, group or organisation to resolve a civil dispute. The most appropriate institution to resolve any given dispute will depend on each specific case and the parties involved.

Study design dot point

- Institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies

Key knowledge units

Tribunals	2.2.3.1
Ombudsmen	2.2.3.2
Complaints bodies	2.2.3.3

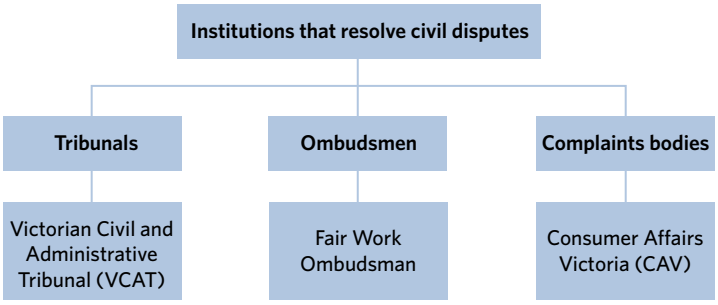


Figure 1 Examples of institutions that resolve civil disputes (other than courts)

Tribunals 2.2.3.1

OVERVIEW

A tribunal is an institution with the authority to judge, adjudicate, or determine civil claims or disputes. Tribunals aim to resolve civil disputes in a less formal, more timely way than the courts.

DETAILS

Parliaments have passed legislation to create tribunals and define their jurisdiction at both state and Commonwealth levels. There are more than 50 different tribunals that operate across Australia.

Some examples of tribunals in Victoria and Australia include:

- **Victorian Civil and Administrative Tribunal (VCAT):** hears a wide range of civil and administrative disputes.
- **Victims of Crime Assistance Tribunal (VOCAT):** hears matters concerning financial assistance for those who have been impacted by a crime.
- **Refugee Review Tribunal (RRT):** hears appeals on decisions on the refusal to grant protection visas to asylum seekers or cancelling protection visas held by refugees.

Victorian Civil and Administrative Tribunal (VCAT)

VCAT is a tribunal with the power to hear a wide range of civil and administrative disputes. VCAT is the largest tribunal in Victoria (resolving about 85,000 disputes each year) and was created by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Purpose of VCAT

The main purposes of VCAT are to provide civil dispute resolution that is:

- **Low cost**
- **Efficient and expert**
- **Accessible.**

Table 1 How VCAT achieves its purposes

Low cost	Many disputes don't require legal representation (parties present their own case). Fees in many VCAT lists are very low. For example: • To file a claim under $15,000 relating to the sale of goods and services is approximately $217. • Filing a claim under $15,000 relating to a residential tenancy is $65 (as at July 2019). Some VCAT lists have no application fee. Fees are waived in some cases for those in financial hardship (or fee payment postponed). Some lists do require legal representation, but use mediation/compulsory conference to settle disputes without a hearing, therefore minimising cost. VCAT's fees are in a three-tier model, with different application fees for different claimants starting proceedings with VCAT: • Standard application fees. • Corporate application fees (higher than the standard fee); apply to incorporated businesses initiating a VCAT claim. • Fees for Health Care Card holders (often no fee in many cases); apply to those in financial difficulty.
Efficient and expert	Hearings are very short. Many cases are resolved quickly at a compulsory conference or mediation. There are approximately 50,000 residential tenancies disputes each year; such cases are resolved on average within two weeks. There are few pre-hearing steps (compared to a court), so there is generally a limited time between initiating a claim and resolution at VCAT. Disputes about goods and services (Civil Claims List) are resolved on average within 11 weeks. VCAT members often have professional expertise and experience in the types of disputes resolved in their list.
Accessible	Low costs designed to ensure everyone can access civil dispute resolution. There are VCAT offices in Melbourne, suburbs and rural Victoria. Informal procedures (especially by comparison to courts); the formality of courts may discourage individuals from pursuing a claim, VCAT's informal/supportive environment addresses this. 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

VCAT is divided into four **divisions** and within each division types of cases are grouped together in a **list.**

- **Administrative Division:** hears applications seeking review of government decisions on areas such as taxation, business regulation and legal services.
  - An example of a list in this division is the Legal Practice List. This list hears disputes between barristers/solicitors and their clients regarding the payment of legal costs.
- **Civil Division:** hears civil disputes on consumer matters, domestic building works, owners corporation matters, retail tenancies, sale and ownership of property and use of flow of water between properties.



  - An example of a list in this division is The Civil Claims List. This list resolves claims by businesses and consumers that allege the *Australian Consumer Law & Fair Trading Act 2012* has been breached (such as a consumer claiming a business deliberately misled them about the quality of a product, or a business claiming that another business they sold goods to has not paid the outstanding debt for these items).
- **Human Rights Division:** resolves claims of racial, sexual and religious discrimination, disputes about information privacy (including protecting an individual's health information).
  - An example of a list in this division is The Human Rights List. This list hears 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, or a woman claiming she was refused service in a cafe because she was breastfeeding).
- **Residential Tenancies Division:** hears disputes between residential tenants and landlords, rooming house owners and residents and the Director of Housing and public housing tenants.
  - There is only one list in this division, The Residential Tenancies List. This list hears claims by residential landlords and tenants where the *Residential Tenancies Act 1997* has been breached (such as a landlord claiming unpaid rent, a tenant claiming that urgent repairs to a property have not been completed or a tenant challenging the time frame in which they have been directed to vacate a rented property).

Source: vcat.vic.gov.au/case-types

Dispute resolution by agreement:

- Prior to a hearing, VCAT will often attempt to have the parties settle the agreement using a process such as mediation or conciliation (see Lesson 8B).

VCAT hearings:

- Disputes are resolved through binding decisions handed down by members of the tribunal, after parties present evidence and (where needed) legal arguments.
- In many cases, no legal representation is used; parties prepare and present their own claim (or defence).

Outcomes:

- This may include decisions such as an order to pay a sum of money to the plaintiff or an order to perform a particular act. Such decisions made by a VCAT member are legally binding on the parties.

Appeals:

- Decisions from VCAT can only be appealed on a question of law (how the relevant legal principles are applied), not on questions of fact or the amount of damages awarded.

Table 2 Appropriateness of VCAT

When VCAT is more appropriate	When VCAT is less appropriate
• The civil dispute falls within its jurisdiction. • There are few complex legal issues likely to arise and the parties are therefore happy to have appeal rights only on questions of law. • Parties are willing and able to prepare and present their own case. • The parties prefer an informal and/or less expensive dispute resolution process, rather than taking their civil dispute to court.	• The civil dispute is outside its jurisdiction (such as representative proceedings, defamation claims, personal injury claims due to a car or workplace accident). • The parties desire greater avenues of appeal as there are new or complex legal issues in the dispute. • The parties prefer legal representation to conduct their case. • The claim is for a very large amount of money (damages). In this situation, taking the matter to court may be more appropriate. • The case involves a complex legal issue. In these situations it is better to have the civil claim presented and decided by experienced legal professionals in the courts.

CASE STUDY

Legacy and Chloe Roberts

Melbourne cafe (Legacy) was ordered to pay an Instagram 'influencer' (Chloe Roberts) more than $1600 after a dispute over their verbal contract. Legacy cafe refused to pay the influencer for posts that she had made advertising their cafe after they claimed she prematurely deleted them.

The original agreement between the parties involved Legacy paying the influencer $200 to $300 per post. However, an issue arose when Mr Katsogiannis, the owner of Legacy, went to count the posts on Roberts' profile to determine the amount due, and found that they were no longer active. Roberts claimed she had archived the posts and they could still be reposted later at any time. She argued that 90% of the views of an Instagram post occur in the first week and that she later archives many of her posts to ensure her profile does not become too 'busy'.

VCAT found in favour of Roberts, agreeing that newer posts are viewed more than older posts and ordered for the cafe owner to pay Roberts two-thirds of the amount she sought ($1400), as well as her filing fees ($276). VCAT compared the Instagram advertising service to a billboard and agreed she should still be paid for posts she later archived.

This case was appropriate for VCAT as it was a small claim that was able to be resolved quickly. As the parties were unable to reach their own agreement, they required a binding decision which was provided by VCAT.

Source: Joe Hinchliffe, Herald Sun (2019)

Table 3 Strengths and weaknesses of VCAT and the ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of VCAT – how fairness is promoted	**Weaknesses of VCAT – limitations in achieving fairness**
Resolution by agreement. VCAT encourages parties to resolve matters through methods such as mediation. This promotes fairness by allowing the parties to be directly involved in resolving their dispute and therefore more satisfied with the process and outcome. **Binding outcome.** Decisions made by VCAT are legally binding. This means that both parties are legally obliged to follow the decision. **Timely resolution.** In many cases VCAT hearings are resolved more quickly as they have fewer pre-hearing steps, as well as more informal rules of procedure. This promotes fairness by reducing delays for those entitled to a remedy (as delay adds to a plaintiff's injury and stress for the defendant).	**Lack of jury trials.** VCAT cannot use juries and therefore do not provide for a trial by one's peers. **Self-representation.** VCAT often requires parties to self-represent, which can create difficulties for those from a non-English speaking background or the poorly educated. This may undermine the principle of fairness for these parties if they cannot prepare and present their case adequately. **Limited avenues for appeal.** There is a limited right to appeal VCAT decisions, which may be seen as unfair to parties dissatisfied with the outcome of their case. Furthermore, if a decision is made in VCAT, the appeal must be brought to the Supreme Court Trial Division or Court of Appeal, making it more costly.

Table 4 Strengths and weaknesses of VCAT and the ability to achieve access

Principle of justice: *Access*	
Strengths of VCAT – how access is promoted	**Weaknesses of VCAT – limitations in achieving access**
Informal. VCAT is less formal than taking a matter to court and provides significant support to the parties, making it less intimidating and more accessible for parties. **Cost effective.** Dispute resolution through VCAT is relatively cheap (as filing fees are usually low and parties often do not use legal representation) and therefore promotes access for parties with limited financial capacity.	**Limited jurisdiction.** VCAT can only resolve civil matters within its jurisdiction. Whilst VCAT resolves a very high volume of minor cases within its jurisdiction (for example, over 50,000 residential tenancies disputes are resolved by VCAT per year), some complex civil matters must proceed to the courts (such as representative proceedings). **Increasing costs.** Costs in some VCAT lists are increasing (and more complex matters require legal representation). **Self-representation.** VCAT often requires parties to self-represent, which can create difficulties for those who are poorly educated or from a non-English speaking background. This may limit access for these parties if they cannot bring a civil claim to VCAT.

Table 5 Strengths and weaknesses of VCAT and the ability to achieve equality

Principle of justice: *Equality*	
Strengths of VCAT – how equality is promoted	**Weaknesses of VCAT – limitations in achieving equality**
Informal. VCAT is less formal than taking a matter to court and provides significant support to both parties. Each party can present their case without being limited by the strict rules of evidence and procedure that exist in court.	**Self-representation.** VCAT often requires parties to self-represent, which can create difficulties for those from a non-English speaking background, the poorly educated, etc. These parties may be disadvantaged and less able to present a case of equal quality.

USEFUL TIP

Many tribunals (including VCAT) offer mediation, conciliation and arbitration to assist individuals with resolving a dispute. A common misconception is that VCAT only conducts hearings to resolve civil disputes. Generally, parties are encouraged to attempt mediation or conciliation (at a pre-hearing conference), then have a decision imposed in a hearing if the dispute cannot be resolved by agreement.

Ombudsmen 2.2.3.2

OVERVIEW

Ombudsmen are independent authorities created to investigate complaints against a company or organisation, and in particular public authorities. Ombudsman services are free in Australia, and give both parties the opportunity to submit their case, while acting impartially to resolve the dispute.

If the parties are unable to resolve the dispute, the ombudsman may make a binding decision. This will depend upon the nature of the complaint/dispute and the powers of the ombudsman in question.

DETAILS

Over 500,000 complaints about the Australian public sector are made every year (source: Commonwealth Ombudsman, 2019). An ombudsman operates to resolve any disputes that may arise as a result of these complaints. There are a number of ombudsman services across Australia that deal with complaints against government agencies, or specific industry bodies. Similar to tribunals, the powers of an ombudsman are given through legislation, but they act independently from the government.

Some examples of ombudsmen in Victoria and Australia include:

- **Fair Work Ombudsman:** hears disputes concerning workplace issues.
- **Energy and Water Ombudsman Victoria:** hears complaints from Victorians about energy or water companies.
- **Victorian Ombudsman:** hears disputes about Victorian government departments, public statutory authorities and officers of municipal councils.

Fair Work Ombudsman

The Fair Work Ombudsman provides information to employers and employees to help them understand their rights and responsibilities under Australian workplace laws. The services of the Fair Work Ombudsman are free for all workers and employers throughout Australia, and provide an accessible means for parties to resolve any workplace issues that may arise. The Fair Work Ombudsman was created under the *Fair Work Act 2009* (Cth).

The Fair Work Ombudsman provides free information about and investigates complaints regarding:

- pay and entitlements
  - for example, an employee who claims they were underpaid.
- awards and workplace agreements
  - for example, an employee who claims their award has not been upheld.
- leave entitlements
  - for example, an employee who claims their leave entitlements have not been upheld.

- ending employment
  - for example, an employee who claims their employment was unlawfully terminated.
- finding employment.

After receiving a complaint from an individual who believes workplace laws have not been followed, the Fair Work Ombudsman may:

- Investigate a workplace to determine whether it is complying with Australian workplace laws (providing its workers with appropriate pay, leave and so on).
- Commence legal action against an employer who breaches workplace laws, which will also deter other employers from doing so.
- Give advice to the employer and/or employee about how to resolve a disagreement about workplace rights (such as clarifying what hourly pay rate a person is entitled to in a given industry).
- Provide mediation services to resolve a workplace dispute.

CASE STUDY

Fair Work Ombudsman for the cleaners

The Fair Work Ombudsman helped recover $64,334 for 36 cleaners from locations across the Great Ocean Road and Otways region in Victoria. 23 cleaners recovered $37,754 for underpaid shifts and other unpaid allowances. This was done in accordance with the *Cleaning Services Award 2010* which outlines that employees should receive a minimum hourly rate of $23.08 for business day hours, $32.31 on Saturdays, $41.54 on Sundays and $50.77 for public holidays.

In addition, workers were underpaid the penalty rate allowance of an additional 15% of business day rates for early morning shifts (before 6am) and afternoon shifts (after 6pm). The funds were recovered following workplace inspections by the Fair Work Ombudsman, who then warned that enforcement action will be taken in the courts if breaches continue.

Source: The Institute of Certified Bookkeeping (2019)

Table 6 Strengths and weaknesses of the Fair Work Ombudsman and the ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of Fair Work Ombudsman – how fairness is promoted	**Weaknesses of Fair Work Ombudsman – limitations in achieving fairness**
Flexibility. The Fair Work Ombudsman encourages parties to resolve the dispute themselves. **Specialisation.** Each ombudsman resolves disputes in a specific area. For example, the Fair Work Ombudsman was created by the government to specialise in workplace issues.	**Outcome.** Decisions are not automatically binding, meaning there is a risk that an agreement reached using mediation services provided by the Fair Work Ombudsman may not be adhered to.

Table 7 Strengths and weaknesses of the Fair Work Ombudsman and the ability to achieve access

Principle of justice: *Access*	
Strengths of Fair Work Ombudsman – how access is promoted	**Weaknesses of Fair Work Ombudsman – limitations in achieving access**
Free service. The Fair Work Ombudsman's services are free. **Public information.** The Fair Work Ombudsman publishes detailed information about Australian workplace laws online and provides training courses for employers and employees, assisting parties to understand their legal rights and responsibilities.	**Limited jurisdiction.** The Fair Work Ombudsman can only hear and investigate disputes arising from and concerning workplace issues. **Complex matters.** The Fair Work Ombudsman cannot provide quick solutions to complicated problems. In these situations Fair Work Ombudsman must take the issue to court which becomes a lengthy process. **Voluntary.** The Fair Work Ombudsman cannot compel employers or employees to participate in its mediation services. If one party is unwilling to attempt mediation, the employer or employee who claims workplace laws have been breached must instead take action in the courts. This may be inaccessible to those with limited finances.

Table 8 Strengths and weaknesses of the Fair Work Ombudsman and the ability to achieve equality

Principle of justice: *Equality*	
Strengths of Fair Work Ombudsman – how equality is promoted	**Weaknesses of Fair Work Ombudsman – limitations in achieving equality**
Impartiality. The Fair Work Ombudsman offers advice and mediation services to all workers and employers (regardless of their personal characteristics) and an impartial and objective investigator when investigating workplace matters.	**Selective.** The Fair Work Ombudsman does not investigate every complaint, nor does it take legal action against all employers who breach workplace laws.

Complaints bodies 2.2.3.3

OVERVIEW

Complaints bodies assist parties to a civil dispute by investigating and/or attempting to resolve their dispute through conciliation.

DETAILS

Complaints bodies are more informal than a tribunal or an ombudsman. For example, if the parties are unable to resolve a dispute, a complaints body is not able to make a binding decision whereas a tribunal or ombudsman generally can. However, they can in some cases take action against an individual or organisation through the courts. Like the ombudsman services provided in Australia, each complaints body has slightly different powers to resolve civil disputes.

Some examples of complaints bodies include:

- **Consumer Affairs Victoria (CAV):** provides advice about (and can assist in the resolution of) disputes about the provision of goods and services.
- **Health Complaints Commissioner:** hears disputes about a health service or concerns about health information privacy.
- **Legal Services Commissioner:** hears and investigates complaints about lawyers.

Consumer Affairs Victoria (CAV)

Consumer Affairs Victoria is a complaints body that gives advice about civil disputes regarding the provision of goods and services. In some cases CAV can assist parties to these disputes to resolve the matter through conciliation.

CAV will conciliate disputes:

- initiated by a consumer against a business
- initiated by a tenant against a landlord.

Parties must first attempt to settle the dispute themselves and if this is unsuccessful, CAV will provide the service of a conciliator.

CAV will not conciliate disputes:

- between businesses
- initiated by landlords against tenants
- initiated by a business against a consumer.

Purpose of CAV

The main purposes of CAV are to:

- provide information about consumer laws to the public
- conciliate disputes arising under consumer laws
- advise the government about consumer affairs legislation
- in some cases, conduct legal action against businesses who breach consumer protection laws in Victoria
- investigate complaints about unsafe products being sold in Victoria and (if needed) remove such items from sale.

CAV jurisdiction

CAV can assist to resolve the following types of disputes through conciliation:

- A complaint by a consumer against a business who believes the *Australian Consumer Law and Fair Trading Act 2012* (Vic) has been breached. For example:

  - A consumer who claims 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 motorist who has paid for their car to be repaired, but thinks the repairs have not been carried out correctly.
- A complaint by a tenant against a landlord who believes the *Residential Tenancies Act 1997* (Vic) has been breached. For example:
  - A tenant who requested a repair to the property, but the repair work is not done.
  - A landlord who has given notice to a tenant to vacate a property, but the tenant feels the time frame in which to vacate is too short.

CAV can also act on businesses' non-compliance with consumer protection laws. CAV may issue warning letters, infringement notices or start court action (for the most serious matters), for breaches such as underquoting the price of a property or selling unsafe products.

CASE STUDY

Unfair contract terms: Foxtel (2006)

CAV started discussions with Foxtel after receiving more than 230 enquiries and 50 written complaints about the company. A number of the complaints between March 2004 and March 2005 related to billing issues and existing customer contract terms and conditions.

Foxtel agreed to alter the terms of their television subscription contracts after discussions with CAV. It also agreed to ensure its obligations to repair, maintain and replace faulty equipment were clearly explained in its contracts.

Source: Consumer Affairs Victoria (2019)

Table 9 Appropriateness of CAV

When CAV is more appropriate	When CAV is less appropriate

• The dispute is within its jurisdiction.
• Parties have already tried to negotiate a settlement themselves.
• Both parties are willing to attend and participate in conciliation.
  – For example: a consumer/renter may seek out assistance from CAV with a complaint but CAV cannot compel a business or landlord to attend and participate in conciliation.
	• A court has already ruled on the matter.
	• Parties have not tried to negotiate a resolution themselves.
	• There is a better way to resolve the dispute.
	  – For example: water billing issues should be heard by the Energy and Water Ombudsman Victoria.
	• One party is unwilling to participate in conciliation (CAV cannot compel parties to attend and participate in conciliation).
	• A business or landlord approaches CAV seeking assistance to resolve a dispute.
	• CAV will only provide conciliation for disputes initiated by a renter or a consumer.

Table 10 Strengths and weaknesses of CAV and the ability to achieve fairness

Principle of justice: ***Fairness***	
Strengths of CAV – how fairness is promoted	**Weaknesses of CAV – limitations in achieving fairness**
Party control. Parties to a civil dispute tend to have increased control over the outcome of their dispute, as resolutions through CAV are based on finding a solution rather than determining who is right/wrong. **Timely resolution.** CAV promotes a timely resolution of civil matters through its informality and party control.	**Lack of enforceability.** CAV is unable to legally enforce the decisions reached at conciliation, meaning that there is a risk that one party will not adhere to the decision reached at conciliation. This reduces fairness as the injured party may still be required to take further action to claim a remedy against the business or landlord.

Table 11 Strengths and weaknesses of CAV and the ability to achieve access

Principle of justice: *Access*	
Strengths of CAV – how access is promoted	**Weaknesses of CAV – limitations in achieving access**
Free service. CAV is a free service, which increases access for individuals who may not have the financial capacity to have a civil matter heard in a different dispute resolution body, such as the courts. **Informality.** The informal process of conciliation used by CAV promotes a continuing relationship between the parties. This is a less intimidating process for parties than taking the matter to court. CAV also gives individuals the ability to resolve disputes with larger organisations and government agencies in a less intimidating way. **Timely resolution.** CAV promotes a timely resolution of civil matters through its informality and party control.	**Limited jurisdiction.** Many disputes cannot be resolved using conciliation at CAV. These disputes must be taken to other institutions. **Party engagement.** CAV is unable to force parties to attend and participate in conciliation. For example: if a landlord or business refuses to attend conciliation at CAV (if they believe they have acted lawfully and have no case to answer), the tenant or consumer will need to pursue legal action through a different institution such as VCAT.

Table 12 Strengths and weaknesses of CAV and the ability to achieve equality

Principle of justice: *Equality*	
Strengths of CAV – how equality is promoted	**Weaknesses of CAV – limitations in achieving equality**
All tenants and consumers. CAV provides extensive information about consumer protection online in many languages and offers conciliation services to all consumers and renters for free. This ensures equal access to this information and assistance for all individuals regardless of race, wealth and so on.	**Imbalance of power.** The informal nature of dispute resolution through CAV could lead to an imbalance of power in cases where one party is particularly forceful or more familiar with the law than the other party. **Consumers and tenants only.** CAV provides dispute resolution in cases initiated by tenants and consumers, but not landlords or businesses.

Table 13 Comparison of VCAT, Fair Work Ombudsman and CAV

	VCAT	**Fair Work Ombudsman**	**CAV**
Type of institution	Tribunal.	Ombudsmen.	Complaints body.
Types of disputes heard	Disputes between individuals and businesses, between individuals and other individuals and between businesses and other businesses. Wide range of matters.	Complaints about workplace matters.	Consumers can initiate a claim against a business. Tenants can initiate a claim against a landlord.
Outcome	Decisions reached in a VCAT hearing are automatically binding and enforceable.	Generally the outcome is not binding when mediating a dispute. The Fair Work Ombudsman can (in some cases) take an organisation to court to seek a binding decision to enforce workplace legislation.	Not binding when conciliating disputes (and cannot compel parties to participate), but they can in some cases take a landlord or business to court to seek a binding decision to enforce compliance with consumer protection laws.

USEFUL TIP

Make sure you do not confuse the **methods** of dispute resolution with the **institutions** that hear disputes. Many institutions offer multiple different methods of civil dispute resolution.

For example, if Harry had a dispute with his employer he may go to the **Fair Work Ombudsman** (institution) to have the dispute resolved using **mediation** (method).

Keen to learn more?

Victorian Civil and Administrative Tribunal, https://www.vcat.vic.gov.au/

Fair Work Ombudsman, https://www.fairwork.gov.au/

Consumer Affairs Victoria, https://www.consumer.vic.gov.au/

QUESTIONS 8C Institutions that resolve civil disputes

LEVEL 1:
Define and understand

1. Which of the following statements is incorrect?

- **A.** Parliament passes legislation to create tribunals and outline their jurisdiction.
- **B.** Tribunals are generally more cost effective than the courts.
- **C.** VCAT is the largest tribunal in Victoria.
- **D.** Tribunals only deal with complaints concerning public authorities.

2. Which of the following concerns would the Fair Work Ombudsman have the jurisdiction to investigate?

- **A.** A concern from a consumer that they were sold a faulty product.
- **B.** A concern from a local about nuisance in the area.
- **C.** A concern from an employee that they have been underpaid.
- **D.** A concern from a tenant about an issue regarding their landlord.

3. Which of the following is true regarding complaints bodies?

- **A.** Complaints bodies investigate issues and help resolve disputes by offering conciliation.
- **B.** Complaints bodies are more formal than tribunals and ombudsmen.
- **C.** Complaints bodies only hear disputes between individuals.
- **D.** Complaints bodies always make a binding decision.

4. What are the three purposes of VCAT?

- **A.** Low cost, accessible and timely resolution of civil cases.
- **B.** Accessible, equal and efficient resolution of civil cases.
- **C.** Accessible, efficient and fair resolution of civil cases.
- **D.** Low cost, accessible and efficient resolution of civil cases.

5. Which of the following disputes are within the jurisdiction of CAV?

- **A.** A dispute initiated by a landlord against a tenant.
- **B.** A dispute initiated by a consumer against a business.
- **C.** A dispute initiated by a business against a consumer.
- **D.** A dispute between businesses.

6. Which of the following is correct about ombudsmen?

- **A.** Their services are costly.
- **B.** They only operate on a federal level.
- **C.** They can only hear disputes between individuals.
- **D.** They are created by the government.

LEVEL 2:
Describe and explain

7. Describe the Fair Work Ombudsman as an institution that resolves civil disputes. (3 MARKS)

8. Describe CAV as an institution that resolves civil disputes. (3 MARKS)

9. Explain how VCAT upholds the principle of access. (3 MARKS)

Adapted from 2018 VCAA Sample Exam Section A Question 2

LEVEL 3:
Apply and compare

10. Compare VCAT and CAV as institutions that resolve civil disputes. (2 MARKS)

11. Andy is having an issue with his landlord over a leaky pipe that is causing water damage to his apartment. The parties have previously tried to negotiate a settlement but could not reach an agreement. Andy believes that if they had some assistance they would be able to reach an agreement. Identify an appropriate institution to hear Andy's dispute. Justify your response. (4 MARKS)

12. Sally wants to lodge a complaint about her employer, as she believes she has been underpaid for the past four months. Sally does not have the financial means to pursue her issue through the courts, but heard from a friend that she should be able to have her complaint heard, investigated and resolved for free. Sally feels intimidated by her employer and is scared she will be unable to have her matter resolved without assistance. Identify an appropriate institution to hear Sally's dispute. Justify your response. (4 MARKS)

13. Jack and Rob are having a dispute over a verbal contract they have. Under this contract, Jack has been paying for advertisements of his sportswear company 'Jack Attack' on Rob's blog 'Rob's Spot'. However, Jack claims that Rob has started editing his previous posts resulting in his brand no longer being visible or mentioned. Rob wants to pursue a claim against Jack for money owed (being $1500). Jack claims that the amount outstanding should not be paid because Rob has not followed their agreed terms by altering the posts. The parties want a binding outcome, but do not want complicated processes and legal jargon. Identify an appropriate institution to hear this dispute. Give reasons for your response. (4 MARKS)

14. Eric purchased a tennis racket last year with some money he received from his 18th birthday party. Eric has since discovered that the tennis racket is faulty. The vendor has told Eric that he cannot return the racket and is not entitled to a refund. Eric attempted to follow up on the matter but the company refused to take part in any further communications. Eric's friend suggests he take the matter to CAV. Discuss whether CAV is an appropriate institution to hear this dispute. (5 MARKS)

Adapted from 2018 VCAA Sample Exam Section A Question 5

LEVEL 4:
Discuss and evaluate

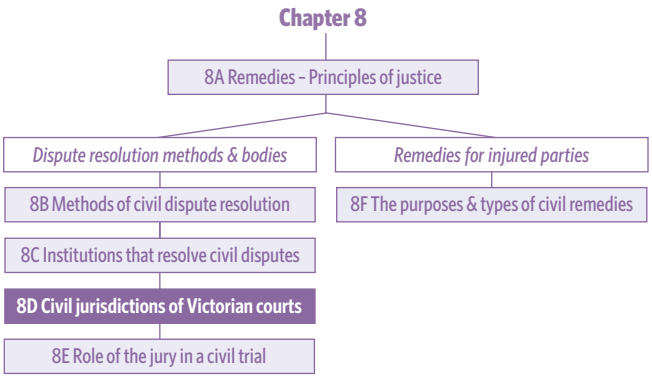
15. Amber is having a dispute with her landlord who refuses to fix a faulty air vent. The landlord also declined Amber's request to discuss the matter. Amber's friend has advised her that the Victorian Civil and Administrative Tribunal (VCAT) is the most appropriate institution to resolve her dispute.

Discuss the ability of VCAT to uphold access. Explain one reason why VCAT may be the most appropriate institution to resolve Amber's dispute. (8 MARKS)

Adapted from 2018 VCAA Exam Section A Question 2

8D Civil Jurisdictions of Victorian courts

As with criminal cases, the courts within the Victorian court hierarchy each have a different jurisdiction to hear and determine civil disputes. Though many civil matters are resolved through institutions other than the courts (such as VCAT or CAV), some civil disputes will be resolved in the courts. The court that hears the case will be determined by the type of dispute in question.



In this lesson you will be learning about the Victorian court hierarchy and in particular, the different civil jurisdictions of each court. You will learn about the power of each court to hear cases in the first instance (original jurisdiction), and to which courts a dissatisfied party can appeal (appellate jurisdiction).

You will also learn about the reasons for having a court hierarchy.

Study design dot point

- An overview of the role and civil jurisdictions of the Victorian courts.

Key knowledge units

Overview of civil jurisdictions in Victoria	2.2.4.1
Role of civil jurisdictions in Victoria	2.2.4.2

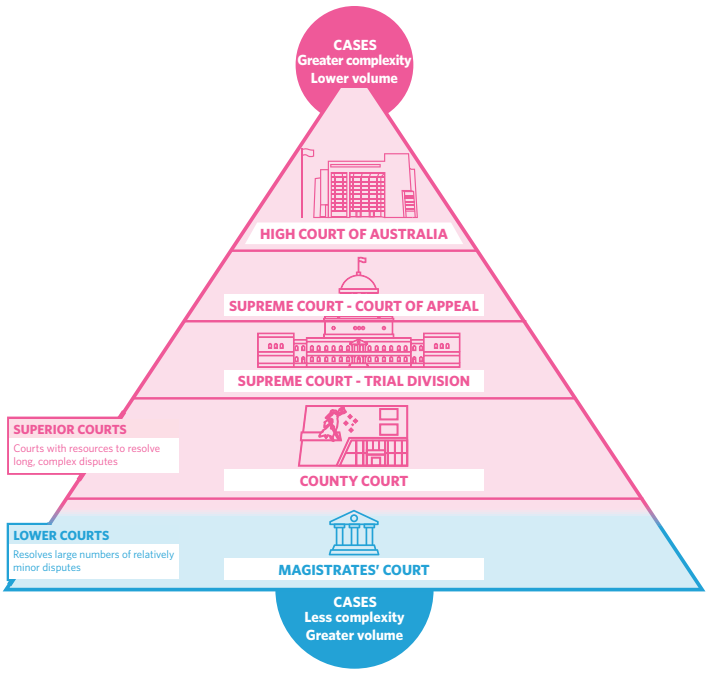


Figure 1 Overview of the Victorian court hierarchy

Overview of civil jurisdictions in Victoria 2.2.4.1

OVERVIEW

How is the court system organised in Victoria? What types of civil cases are resolved by each of the courts in the Victorian court hierarchy (as shown in figure 1)?

Each of the courts in the Victorian hierarchy has a specific jurisdiction (authority) to hear and determine particular civil disputes. As you know, there are two 'types' of jurisdiction:

- **'Original jurisdiction' refers to** a court's power to hear a case that is being heard for the first time.
- **'Appellate jurisdiction' refers to** a court's ability to hear a case on appeal (reviewing a decision made in a lower court in the hierarchy).

Supreme Court – Court of Appeal

Original jurisdiction:

- The Court of Appeal does not have an original jurisdiction, and only deals with cases on appeal from lower courts in the hierarchy.

Appellate jurisdiction:

- The Court of Appeal hears appeals from:
  - The County Court or Supreme Court (Trial Division) on questions of law, questions of fact or the amount of damages awarded.
  - Appeals from the President and Vice-President of VCAT.

Leave (permission) is required for almost all civil cases before an appeal is allowed to be heard in the Court of Appeal. Generally, a case at the Court of Appeal will be heard by three justices.

Supreme Court – Trial Division

Original jurisdiction:

- The Trial Division of the Supreme Court has civil jurisdiction to hear claims of unlimited amounts. However, in practice the Trial Division is used for large civil disputes that are usually complex in nature and often involve more complicated areas of law, meaning that it usually only hears claims well above $100,000.
- Parties can choose to have their case heard by a judge alone or by a judge and a jury of six.

Examples of civil disputes initiated in the Supreme Court (Trial Division):

- Representative proceedings (see Lesson 4C for further information regarding such claims).
- Defamation and personal injury claims involving complex legal issues and/or very large claims for damages.
- Commercial disputes (such as disputes arising from insurance contracts, businesses seeking to recover unpaid debts and intellectual property matters).
- Claims for damages arising from 'dust diseases', caused by exposure to substances such as asbestos.

Appellate jurisdiction:

- The Trial Division **has appellate jurisdiction to hear civil appeals from:**
  - The Magistrates' Court on a point of law.
  - VCAT on a point of law.
- In both cases, a single justice of the Supreme Court will hear and decide the appeal.

County Court of Victoria

Original jurisdiction:

- Like the Supreme Court (Trial Division), the County Court has civil jurisdiction to hear claims of unlimited amounts. In practice, it will hear claims over $100,000. In some cases, a plaintiff can choose to initiate their civil claim in either the County Court or Supreme Court (Trial Division).
- Parties to a civil dispute in the County Court may also choose to have the case heard by a judge alone or by a judge and jury of six.

Examples of civil disputes initiated in the County Court:

- Personal injury claims (including workplace injury and transport accident claims).
- Defamation proceedings.
- Disputes regarding loans and property purchases.

Appellate jurisdiction:

- The County Court **does not hear civil cases on appeal** from VCAT or the Magistrates' Court.

USEFUL TIP

Remember there is no limit to the County Court's original jurisdiction. It can hear claims for damages (monetary compensation) of any amount, including those below $100,000 (though this is rare).

USEFUL TIP

Refer to lesson 8F for further information on the different types of civil remedies, including damages and injunctions.

The Magistrates' Court

Original jurisdiction:

- The Magistrates' Court has original jurisdiction to hear minor civil disputes involving claims of **up to $100,000**. When the amount of damages sought is under $10,000 the Magistrates' Court will usually resolve the claim using arbitration.

Examples of civil disputes initiated in the Magistrates' Court:

- Claims for minor workplace injuries.
- Small claims against an employer for breaching an employment contract.
- Claims for repairs arising from car accidents.
- Claims by businesses for an unpaid debt.

Appellate jurisdiction:

- The Magistrates' Court is the lowest court in the Victorian court hierarchy and therefore has **no appellate jurisdiction** to hear civil appeals from other courts.

USEFUL TIP

A common misconception is to say that the Magistrates' Court's jurisdiction is 'between $10,000 and $100,000'. Remember that the Magistrates' Court has jurisdiction to hear any civil matters where the amount sought is up to the value of $100,000. While claims under $10,000 are normally referred to arbitration, the arbitration is still conducted by the Magistrates' Court, meaning that the Magistrates' Court's jurisdiction is not limited to matters above $10,000.

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 that this damages payout was excessive. In June 2018 the Court of Appeal upheld this appeal, reducing the damages awarded to Wilson to $600,000.

Wilson took her case to the High Court of Australia in November 2018 to challenge the Court of Appeal's decision. The High Court ultimately rejected Wilson's appeal and upheld the decision of the Court of Appeal.

This case is an example of the superior courts' ability to review decisions made in lower courts and ensure mistakes are corrected. Review by superior courts would not be possible if the courts were not organised into a hierarchy.

Summary of civil jurisdictions

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

Figure 2 Summary table of the civil jurisdiction of each of the Victorian courts

USEFUL TIP

As the High Court of Australia can hear appeals on decisions made by 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.

USEFUL TIP

Some students incorrectly assume that the High Court can hear civil claims of any amount.

The High Court does have a broad original jurisdiction including disputes between states and cases regarding the Australian Constitution, however it will not conduct trials for civil disputes such as negligence, defamation, etc. When considering the High Court's role in resolving civil disputes that arise within Victoria, focus upon its ability to hear appeals.

Role of courts in Victoria 2.2.4.2

OVERVIEW

Why not just have one level of courts? How does the separation of civil cases across courts allow our justice system to operate more effectively?

The role of the Victorian courts in civil cases can be broken into two overarching responsibilities:

1. To **determine the liability** of the parties involved.
2. To **impose an appropriate remedy** if one is required.

Having a court hierarchy with clearly established jurisdictions assists the courts in effectively satisfying these responsibilities.

Reasons for a court hierarchy

Separating civil disputes across different Victorian courts (each with its own jurisdiction) allows for:

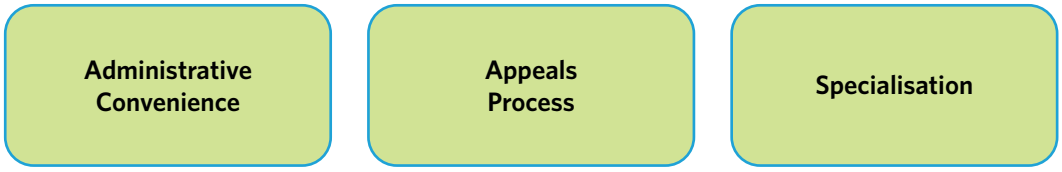


Figure 3 Reasons for a court hierachy

Administrative Convenience

Administrative convenience comes from separating minor civil matters that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts.

Benefits of administrative convenience:

The administration of justice is as efficient as possible by avoiding a backlog of cases in particular courts. Processing cases quickly across different courts increases **access** to the justice system by reducing delays and associated costs:

- The superior courts (such as the Supreme Court) are free to devote time and resources to long, complex disputes without the court being 'clogged up' with the responsibility of also resolving minor disputes.
- The lowest court (the Magistrates' Court) can quickly resolve a large number of relatively minor disputes, minimising delays for parties to such disputes.

Appeals Process

An appeals process is only possible within a court hierarchy, where decisions made in lower courts can be appealed to superior courts if a party is dissatisfied with the original decision. Grounds for an appeal include appealing on points of law, questions of fact or the remedy awarded.

Benefits of an appeals process:

The appeals process promotes fairness in the administration of justice as decisions can be reviewed and mistakes corrected.

Specialisation

Specialisation refers to the expertise of each of the courts in hearing certain types of cases.
A court hierarchy delivers specialisation by assigning each court a defined jurisdiction – a set of civil disputes that each court hears regularly. For example:

- A judge in the Supreme Court (Trial Division) is familiar with the laws and procedures relating to large and complex representative proceedings, where a group of plaintiffs join together to initiate a claim against a common defendant.
- A magistrate in the Magistrates' Court is familiar with the laws and procedures relating to employment contracts, allowing them to develop expert knowledge in hearing small claims against an employer for breaching an employment contract.

Benefits of specialisation:

Specialisation promotes **fairness** in decision-making by ensuring that civil cases are heard by experienced legal professionals who have expert knowledge of the law pertaining to those particular cases. The skill and expertise developed by regularly conducting similar cases allows for a more just outcome and a more timely resolution of cases.

USEFUL TIP

It is important to remember that specialisation 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 and the principles of justice

Table 1 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of the court hierarchy - how fairness is promoted	**Weaknesses of the court hierarchy - limitations in achieving fairness**
Specialisation. Specialisation allows for different cases to be presided over by skilled and knowledgeable judges who are able to ensure a just and correct outcome. **Appeals.** Organising courts into a hierarchy allows decisions in lower courts to be reviewed by the superior courts, which ensures mistakes are corrected. This promotes fairness in the administration of justice. **Independent and public.** Trials in all courts in the hierarchy are conducted in public, by judges and magistrates who are independent of the parties. This ensures decisions are based on the facts and the law, rather than being politically motivated or based on some bias/prejudice toward one of the parties.	**Cost of specialisation.** The costs associated with defending a case in a higher court such as the Supreme Court are much higher than in a lower court. Having specialised higher courts that deal with complex matters may mean that defendants responding to these types of matters are forced to have their matter heard in these expensive higher courts.

Table 2 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve access

Principle of justice: *Access*	
Strengths of the court hierarchy - how access is promoted	**Weaknesses of the court hierarchy - limitations in achieving access**
Administrative convenience. The added administrative convenience of having a court hierarchy promotes access by reducing the backlog of cases in particular courts and minimising unnecessary delays and costs associated with taking a matter to court. **Published online.** Each court publishes information online regarding its civil jurisdiction, assisting parties unable to engage legal representation to access the appropriate court. **Pre-trial procedures.** All courts in the hierarchy use pre-trial procedures that require parties to share information about the facts and legal issues in the dispute. This regularly results in the parties settling the dispute prior to a trial (often through mediation), minimising overall costs in resolving the matter.	**Appeals.** An appeal is not an automatic right. Grounds for appeal must exist and be considered strong enough to warrant a review by a superior court. This may render some cases ineligible for an appeal, meaning access to such appeals is limited. **Possible confusion.** Although information is publicly available describing each court's jurisdiction, knowing in which court to initiate a claim or appeal (or whether to instead initiate proceedings in VCAT) can still be difficult to understand for self-represented parties, undermining access to justice. **Complexity of procedures.** The pre-trial and trial procedures used in all courts in the hierarchy are more complex than those used in VCAT. This makes legal representation necessary (which some parties may be unable to afford) and can be difficult for self-represented parties to understand. **Costs.** To initiate a claim in the courts is very expensive (both the filing fees charged by the courts and the cost of engaging legal representation to prepare the required documentation). The further up in the hierarchy a case is being heard, the higher the costs. This can be a barrier to injured parties seeking a remedy for their injury. **Intimidating procedures.** The strict procedures used in the courts may discourage some parties from pursuing or defending a civil claim. These procedures become even more complex and formal in higher courts.

Table 3 Strengths and weaknesses of the Victorian court hierarchy and its ability to achieve equality

Principle of justice: *Equality*	
Strengths of the court hierarchy – how equality is promoted	**Weaknesses of the court hierarchy – limitations in achieving equality**
Specialisation. Similar civil cases are resolved in the same court, in a similar manner. **Appeals.** Defendants and plaintiffs are entitled to appeal (irrespective of their age, gender, whether they are an individual or business, etc).	**Cost of appeals.** Although all parties with grounds for an appeal are entitled to do so, in practice the costs of appealing to the superior courts may prevent poorer plaintiffs or defendants from appealing, limiting the achievement of equality in the civil justice system.

Keen to learn more?

Court Services Victoria, www.courts.vic.gov.au/court-system

The Magistrates' Court, http://www.mcv.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],** https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/judgment-summaries/bauer-media-pty-ltd-v-wilson-2018-vsca

QUESTIONS 8D Civil jurisdictions of Victorian courts

LEVEL 1:
Define and understand

1. Which of the following options correctly outlines the original and appellate jurisdiction of the Supreme Court – Trial Division?

A. Original jurisdiction: civil cases with claims above $100,000.

Appellate jurisdiction: appeals from the Magistrates' Court on a point of law.

B. Original jurisdiction: highly complex civil disputes, such as those between large organisations.

Appellate jurisdiction: appeals from the County Court and the Magistrates' Court.

C. Original jurisdiction: civil cases of unlimited amounts.

Appellate jurisdiction: appeals from the Magistrates' Court on a point of law, and appeals from VCAT.

D. Original jurisdiction: civil cases of unlimited amounts.

Appellate jurisdiction: appeals from the Magistrates' Court and from the County Court.

2. Which of the following statements is the most accurate description of a reason for the court hierarchy?

A. One benefit of having a court hierarchy is that it allows for administrative convenience. That is, separating courts based on what types of matters they usually hear allows for each court to develop special knowledge when it comes to deciding on those types of cases.

B. One benefit of having a court hierarchy is that it allows for an appeals process to occur. That is, if a party is dissatisfied with a decision made in a lower court, they have an automatic right to appeal that decision in a higher court and have the decision reviewed.

C. One benefit of having a court hierarchy is that it allows for administrative convenience. That is, superior courts are able to devote resources to long and complex disputes, while lower courts can efficiently resolve a larger number of comparably minor disputes, avoiding delays for parties in civil disputes.

D. One benefit of having a court hierarchy is that it allows for specialisation. That is, it establishes superior courts that are more specialised and experienced than lower courts.



3. Stephen wants to bring a claim for $90,000 to court. Which of the following statements is correct?

A. It is possible that Stephen's case could be heard in the County Court, as this court has unlimited original jurisdiction.

B. Stephen's case can only be heard in the Magistrates' Court, as this court has original jurisdiction between $10,000 – $100,000.

C. It is likely that Stephen's claim will be referred to arbitration, as the claim is for less than $100,000.

D. None of the above.

4. An appeal from the President of VCAT is likely to go to which court?

A. The Magistrates' Court

B. The County Court

C. The Supreme Court – Trial Division

D. The Supreme Court – Court of Appeal

5. Which of the following options correctly matches each of the reasons for having a court hierarchy with its most accurate description?

I) _____ refers to decisions that are made in lower courts being reviewed by superior courts if a party is dissatisfied with the original decision.

II) _____ refers to the benefit we derive in avoiding a backlog of cases in higher courts, by organising matters according to how serious or complex they are.

III) _____ refers to the benefit we derive in the accuracy of decision making by separating courts based on the types of matters they usually hear and allowing each court to develop a level of expertise when it comes to determining particular matters.

a) I – Appeals process; II – Specialisation; III – Administrative convenience.

b) I – Specialisation; II – Appeals process; III – Administrative convenience.

c) I – Access; II – Fairness; III – Equality.

d) I – Appeals process; II – Administrative convenience; III – Specialisation.

LEVEL 2:
Describe and explain

6. Describe specialisation as a reason for having a court hierarchy. (2 MARKS)

7. Distinguish between administrative convenience and specialisation as reasons for the court hierarchy. (3 MARKS)

LEVEL 3:
Apply and compare

8. A boutique retailer in Fitzroy was accused of negligently breaching its duty of care when a patron slipped and fell on a puddle of water while leaving the store. The legal issues in the dispute were complex and the injured party was seeking a significant award of damages. The retailer was held to be liable by a jury in the Supreme Court (Trial Division). On appeal, the retailer argued that they did not owe the patron a 'duty of care' after it was established that the patron had already exited the shop and had fallen outside on public property. The Court of Appeal agreed and allowed the retailer's appeal.

Other than specialisation, explain one reason for the existence of the court hierarchy in relation to this dispute. (3 MARKS)

9. India commences proceedings against her employer and is seeking $65,000 in damages.

India believes her case could go to a court other than the Magistrates' Court in the first instance. Why is she correct? (2 MARKS)

Adapted from VCAA exam 2016 Question 1C

10. The following extract is from a news report. It contains a number of errors:

> Today is the beginning of Alex's civil action against his former football club. The case will be heard and determined in the Magistrates' Court, where Alex is claiming $175,000 for breach of the final year of his contract at the club. Alex hopes the case will proceed to trial, where he can prove to the judge that the club is liable 'beyond reasonable doubt'.

Identify two errors in the extract and provide the correct definition, process or procedure. (4 MARKS)

Adapted from VCAA exam 2010 Question 4

LEVEL 4:
Discuss and evaluate

11. Consider the following statement:

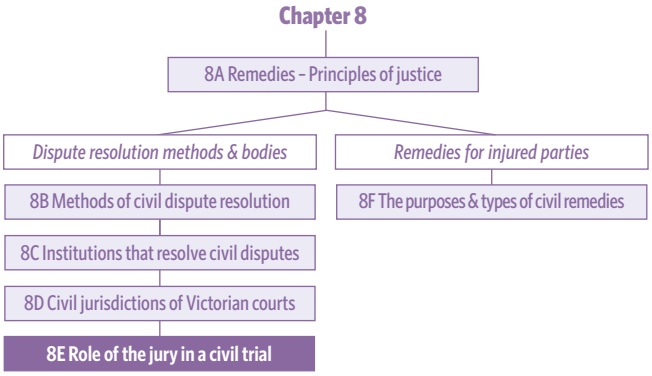
Organising our Victorian court system into a hierarchy of multiple courts decreases access to justice. Although information is publicly available online regarding the jurisdiction of each court, it is still extremely confusing to know which court to initiate a particular case in.

Explain two ways the court hierarchy promotes access to justice. (4 MARKS)



8E Role of the jury in a civil trial

If a civil dispute is not resolved through an out-of-court settlement, it will proceed to trial where the court will decide whether the defendant is liable or not liable. What role, if any, does the jury play in a civil trial?



In this lesson you will learn about the role of the jury in a civil trial, including when a jury is used, its composition and how it is empanelled. You will also explore the strengths and weaknesses of using a jury in resolving a civil matter.

Although the use of juries in civil trials is rare, they can be requested by the parties and have a number of important responsibilities.

Study design dot point

- The role of the jury in a civil trial

Key knowledge units

When a jury is used in civil matters	2.2.5.1
Composition of a civil jury	2.2.5.2
Jury empanelment process	2.2.5.3
Responsibilities of the jury in a civil case	2.2.5.4
Strengths & weaknesses of juries in civil matters	2.2.5.5

USEFUL TIP

This lesson includes content that has already been covered in Lesson 6E (The role of the jury in a criminal trial). While the role of a civil jury is different to that of a criminal jury, the empanelment process for both is very similar.

LEGISLATION The *Juries Act 2000* (Vic) regulates the use of criminal and civil juries in Victoria. The Act outlines the process of empanelment for a jury, juror eligibility and the responsibilities of a civil jury.

When a jury is used in civil matters 2.2.5.1

OVERVIEW

The use of a jury in civil cases depends largely on the type of remedy sought, as well as the wishes of the parties involved. In Victoria, a trial by jury is only available by application from the plaintiff or the defendant, and only when a remedy is sought in the County Court or Supreme Court. This application for trial by jury is a right under law, and if one party wishes for their trial to be heard by a jury and the other party does not, then the second party must persuade the court as to why the jury ought not to be used in their case.

DETAILS

Unlike in criminal trials for indictable offences, the use of juries in civil trials is not automatic and will only occur in a small proportion of cases. For example:

- In 2016/17, 3641 matters were listed for trial in the general list of the County Court. Most of these matters were settled prior to a trial being conducted (either at mediation, or parties negotiating an out-of-court settlement).
- 789 were tried by judge alone at trial.
- Only 23 were resolved by jury trial.

When are juries used in civil matters?

- In the County Court and the Supreme Court – Trial Division; and
  - When one/both of the parties request a jury; or
  - When a judge requires that a jury be empanelled (this is not common).

When are juries not used?

- For cases heard in the Magistrates' Court.
- For cases being heard on appeal.
- For matters determined by VCAT (Victorian Civil and Administrative Tribunal – See Lesson 8C).
- When both parties would prefer a trial by judge alone.
- When a judge orders that a case be tried by judge alone.

Cost of civil juries

- In a civil dispute, the parties are required to pay any fees associated with the use of a jury.
- These fees will usually be paid by the party that requests a jury to be empanelled.
- The costs associated with using a jury and the complexity of civil matters are reasons why many parties elect a trial by judge alone.

USEFUL TIP

Don't forget that juries are only used in civil trials when one/both of the parties request a jury.

The 2017 VCAA Examiners' Report stated that a common misconception amongst students was that juries are not available in civil trials and civil disputes will always be heard by a judge sitting alone. This is incorrect. Although it is rare for parties in a civil dispute to elect a trial by jury, they do have this option in the County Court and the Supreme Court – Trial Division.

Composition of a civil jury 2.2.5.2

OVERVIEW

What are the characteristics of a civil jury? Are there the same number of members as a criminal jury or is the composition different?

DETAILS

Composition of a civil jury

- A civil jury will usually consist of six members.
- In cases where the trial is expected to be particularly lengthy, up to eight jurors may be empanelled. However, if this is the case, two members will be excused before the deliberations. Thus, the verdict will be decided by a jury of six.

Who is qualified and liable for jury service?

A person is qualified and liable for jury service if they are:

1. **18 years or older** and
2. **Enrolled to vote** in Victoria.

LEGISLATION

Section 5 of the *Juries Act 2000* (Vic) outlines the requirements for a person to become liable for jury service:

(1) Subject to this Act, every person aged 18 years or above who is enrolled as an elector for the Legislative Assembly and Legislative Council is qualified and liable for jury service.

(2) A person referred to in Schedule 1 is disqualified from jury service.

(3) A person referred to in Schedule 2 is ineligible for jury service.

However, this does not mean everyone who satisfies these two criteria is liable for jury service.



There are certain groups of people who will not sit on a jury by reason of a particular characteristic. These people fit into one of the following three categories:

1. People that are **disqualified** from jury service.
2. People that are **ineligible** for jury service.
3. People that are **excused** from jury service.

Who is disqualified from jury service?

Individuals disqualified from jury service include any person who:

- Has been convicted of an indictable offence and sentenced to a term of imprisonment of 3 years or more.
- Within the last 10 years, has been sentenced to a term of imprisonment of 3 months or more.
- Has within the last 5 years been subject of a community corrections order.
- Has been charged with an indictable offence and is released on bail in respect of that offence.
- Is remanded in custody in respect of an alleged offence.
- Has been declared bankrupt and has not obtained a discharge.

Source: Juries Act 2000 (Vic), Sch.1

Who is ineligible for jury service?

Individuals who are ineligible for jury service include:

- Individuals **within the legal system** who have a level of expertise or knowledge that could jeopardise their ability to act as an unbiased representative of broader society. This includes people who are (or were in the last 10 years):
  - The Governor or the Official Secretary to the Governor.
  - A judge, a magistrate or the holder of any other judicial office.
  - An Australian lawyer.
  - A police officer.
  - A member of the Legislative Assembly or Legislative Council.
- Individuals who **may not be able to perform the necessary tasks of a juror due to a personal reason.** This includes:
  - A person who has a physical disability that renders the person incapable of performing the duties of jury service.
  - A person who is unable to communicate in or understand the English language adequately.

Source: Juries Act 2000 (Vic), Sch.2

Who is excused from jury service?

The Act states that potential jurors may apply to be excused from jury service. This can occur at two different stages:

- When potential jurors are first selected from the electoral roll and sent a questionnaire to determine whether they will be required to attend jury service; or
- On the day of trial during the empanelment process.

The court may excuse a person from jury service (or defer their jury service) if that person:

a) Is **unable** to consider the case **impartially** – perhaps they might know someone in the trial or have experienced that particular civil wrong in the past. This will only be determined during the empanelment process (see below).

b) Is **unable** to serve on the jury for any **other legitimate reason** – perhaps they are seriously ill, of advanced age, or need to take care of someone at home and are unable to sit on a jury for a particularly long trial; this may be determined when the questionnaire is first sent to a potential juror or during the empanelment process.

Jury empanelment process 2.2.5.3

OVERVIEW

How are jurors selected for a civil trial? Who determines which 6 members of the community will sit on the jury?

DETAILS

A jury pool is the people who attend court in response to a summons for jury service.

Prior to attending court

Prior to a trial, there needs to be a method for selecting a list of potential jurors. This process of selecting a jury for a civil trial is set out in the *Juries Act 2000* (Vic).

- The Victorian Electoral Commission prepares a **jury roll** of randomly selected names from the electoral roll.
- The Juries Commissioner will send a **questionnaire** to those individuals who have been randomly selected, and use the answers to determine which individuals may be qualified and liable for jury service.
  - The questionnaire will check if a person is **disqualified** or **ineligible** for jury service, by asking questions relating to their criminal history, employment history and mental and physical capabilities.
  - The questionnaire will also provide an opportunity for people to ask to be **excused** from jury service if they have a valid reason (or have jury service deferred until a later time). For example:
    - › They are operating a small business.
    - › They are the primary care-giver for a child/children.
    - › They live too far away from where they are required for jury service.
- Once a list of potential jurors has been finalised, a **summons** is sent at least 10 days before the person is required for jury service. The summons will specify the date, time and location where the individual is required to attend.

In Figure 1 are examples of the questions asked in the **questionnaire from the Juries Commissioner:**

1. Can you understand and communicate in English well enough to undertake jury service?

2. I am applying to be permanently excused from jury service due to:
   a. Advanced age
   b. Medical reasons

3. I am unable to complete jury service because:
   a. I have been found guilty of an offence at court.
   b. I am currently on bail or on remand.
   c. I have been sentenced to a term of imprisonment or detention.
   d. I am an undischarged bankrupt.

Source: Juries Commissioner's Office, http://www.courts.vic.gov.au/jury-service

Figure 1 Extract of questionnaire to Victorians used in jury selection

At court – jury selection process

Jury ballot
Before a trial begins, a random selection of people are chosen from the jury pool and taken to the courtroom.

Arriving at the courtroom
The judge will provide the following information to the jury panel:
- The length of the trial.
- The name of the parties.
- The nature of the dispute.
- The names of the witnesses to be called.

Asking to be excused
Jurors who have a good reason why they should not be on the jury in a particular trial have the opportunity to apply to the judge to be excused from that trial. For example, if they can't be independent as they know a witness personally, or the trial will be too long for them due to work commitments.

Selecting jurors
The judge and his or her staff oversee this process. Names are chosen at random from the jury panel until 6 jurors have been selected.

Challenges
The parties involved in the trial (plaintiff and defendant) have the right to challenge jurors.

Oath or affirmation
Those who are selected to be members of the jury will take an oath to carry out their role faithfully.

Figure 2 Jury selection process in court

Challenges

There are two types of challenges available to the parties in a civil trial:

1. **Peremptory challenges**
   - Challenges made without needing a reason.
   - Parties in a civil trial are allowed two peremptory challenges each.
2. **Challenges for cause**
   - Challenges made with a reason given. For example, if a party believes a potential juror cannot be unbiased or impartial in the trial. The judge will either accept or reject this challenge.
   - Parties in a civil trial are allowed an unlimited number of challenges for cause.

Responsibilities of the jury in a civil case 2.2.5.4

OVERVIEW

A jury in a civil trial has a number of important responsibilities during the trial and in delivering a verdict.

DETAILS

Be objective

- A jury is required to 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.
- Jurors should not conduct their own research into the case outside of the trial, as such information may be unreliable or misleading.

Listen to the evidence, the judge's directions and legal representatives' submissions

- A jury must be alert, take notes and keep track of (often complex) information.
- A jury must determine which witnesses and evidence they accept as accurate and reliable.
- A jury must listen to the judge's directions regarding the law and the evidence submitted.
- A jury must 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).

Decide liability and damages

- A jury must decide whether the defendant is responsible (and to what extent) for the plaintiff's harm, based on whether the plaintiff has proven their case on the balance of probabilities.
- Calculate damages to award to the plaintiff (in some matters).

Table 1 Comparing the role of a criminal jury and a civil jury

Similarities	Differences
• The jury is the decider of facts, and will make a decision based on the evidence presented in court. • Jurors must make their decision based only on the evidence presented, and nothing else, meaning that they are unable to conduct their own research. This is the same in both a criminal and a civil trial. • Unanimous verdicts are required, but in both civil and criminal trials a majority verdict may be accepted in certain circumstances. • Jurors must be unbiased, listen to the evidence and listen to the directions given by the judge.	• Jurors in a criminal case have no involvement in sentencing if the accused is found guilty. Jurors in a civil trial, however, may be required to undertake an assessment of damages. • The standard of proof is different. In criminal trials the standard is 'beyond reasonable doubt', whereas in civil trials the jury must decide whether the plaintiff has proven their case 'on the balance of probabilities'. • What they are deciding is different – guilt (criminal) or liability (civil).

CASE STUDY

***Wilson v Bauer Media Pty Ltd* [2017] VSC 521**

In this case the jury was required to determine whether the defendant had published defamatory material about the plaintiff and if so, whether the defence of qualified privilege raised by the defendant was established.

The jury examined the eight allegedly defamatory articles published by the Australian magazine, 'Women's Day', and heard from more than twelve witnesses, including Wilson, her siblings, friends and celebrity agents.

To reach their verdict the jury were given thirteen pages of questions to respond to. Among these questions, the jury needed to decide whether Wilson had lied about her name, age and upbringing.

The jury ultimately decided that Bauer Media was responsible for Rebel Wilson's harm.

> The jury of six women found Bauer Media liable for defamation. They found the defendants' articles conveyed defamatory imputations and did not accept any of the defences argued by Bauer Media.

Bauer Media appealed this decision in 2018. The Court of Appeal overturned the payout that Wilson was awarded, ordering her to repay Bauer approximately $4 million of the damages initially awarded to her (a decision she challenged in the High Court, unsuccessfully). However, the jury's verdict was not overturned.

USEFUL TIP

A jury will not decide the damages in a defamation case; this will be the judge's responsibility. Whether the jury will or will not determine an award of damages depends on the nature of the civil claim (and Victorian and Commonwealth laws governing such civil claims).

Strengths and weaknesses of juries in civil matters 2.2.5.5

OVERVIEW

How does the use of a jury in a civil trial achieve the principles of justice?

DETAILS

Table 2 Strengths and weaknesses of juries in civil matters and their ability to achieve fairness

Principle of justice: *Fairness*	
Strengths of the jury system – how fairness is promoted	**Weaknesses of the jury system – limitations in achieving fairness**
Trial by peers. In serious cases juries provide for trial-by-peers. A cross-section of the community is used as decision-maker, so the parties should feel their case has been decided by their equals; prevents parties feeling they have been oppressed by the state, which promotes fairness. **Democratic.** Trial by peers protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair. **Independence.** 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 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 dispute (or the parties involved). They can therefore be completely impartial which promotes fairness.	**Influence and prejudice.** 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. **Complexity.** 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 parties to a civil dispute. **Delay.** 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 plaintiffs and defendants by compounding the stress involved and delaying a remedy for an injured party. **Few in number.** Juries are used in a very small proportion of civil cases – juries promote fairness in relatively few cases.

Table 3 Strengths and weaknesses of juries in civil matters and their ability to achieve access

Principle of justice: *Access*	
Strengths of the jury system – how access is promoted	**Weaknesses of the jury system – 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 to resolve their dispute, which promotes access to justice (by improving understanding of the legal process).	**Very few cases.** Very few matters are tried by jury, as most civil matters settle out of court or go to trial by judge alone. As the parties carry the cost of a jury in civil cases, this may make civil juries inaccessible to poorer plaintiffs and defendants. **Limited use.** Many thousands of civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is further limited.

Table 4 Strengths and weaknesses of juries in civil matters and their ability to achieve equality

Principle of justice: *Equality*	
Strengths of the jury system – how equality is promoted	**Weaknesses of the jury system – limitations in achieving equality**
Applies to all parties. Both parties have the capacity to request a jury trial in a civil dispute.	**Cost.** The party that requests to have a jury trial in a civil dispute will have to cover the cost of the jury – this can limit equality if not all parties have the financial capacity to request a trial by jury.

USEFUL TIP

Make sure you are able to apply your knowledge of the strengths and weaknesses of civil juries to different types of questions.

For example, the question below is from the 2015 VCAA Exam (Question 12):

> The author of a journal article wrote the following opinion: 'Juries should not decide matters of fact. It should all be left up to the judge.' To what extent do you agree with this opinion? Justify your answer. (8 marks)

The 2015 VCAA Examiners' Report stated:

> There appeared to be a trend of using pre-prepared or rote-learned answers for this question. Many students seemed to be responding to a question that asked for strengths and weaknesses of a jury. Those students provided their contention and then went on to provide one strength of a jury, then one weakness, then one strength, then one weakness. Students need to adapt their knowledge of the jury and its strengths and weaknesses to the question that is asked.

A high-scoring response to this question could have begun with:

'One reason why we should retain juries and not simply have judges sitting alone in all civil cases is...'

A low scoring response to this question might begin with:

'One strength of a jury is....'

The first response is better because it begins by addressing the question specifically and will then introduce the strengths and weaknesses of a jury in light of the question, while the second response simply states strengths and weaknesses of a jury without applying this knowledge to the specific question.

The Examiners' Report stated that the following strengths and weaknesses could have been used as a basis for a student's response.

Some strengths of the jury system, which would be lost if it were a judge alone that decided matters of fact, are:

- The decisions reflect the views of the common person/community.
- Juries are independent and impartial.
- Juries ensure that the system remains intelligible to the ordinary person and involves the community.
- Decision-making is spread across a number of people.
- There may be less likelihood of a wrong decision being handed down.
- Juries provide a trial that is free from political interference.

Some weaknesses of the jury system are:

- Jury deliberations are kept secret and reasons do not have to be given (which would not be the case if a judge alone made a decision, and the reasons for that decision were recorded).
- Juries can add to the cost and length of a trial.
- Jurors may not understand or recall evidence that can be complex and technical, whereas a judge is more likely to recall and understand evidence.
- Jurors may be influenced by factors other than the facts before them (for example, rhetoric of counsel) or they may be influenced by bias and prejudice.

CASE STUDY

Declining use of jury trials

In the media in 2018 it was reported that 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: Whitbourn, M 'The new battleground emerging in defamation feuds' (2018)

Keen to learn more?

The Judicial College of Victoria's Civil Juries Charge Book, http://www.judicialcollege.vic.edu.au/publications/civil-juries-charge-book

QUESTIONS 8E Role of the jury in a civil trial

LEVEL 1:
Define and understand

1. Emily is suing Bill, her former employer, in the County Court for negligence. Will this case be heard by a jury? If so, how many jurors will be empanelled?

A. This case may be heard by a jury if one of the parties requests a jury or if the judge requires that a jury be empanelled. 12-15 jurors will be empanelled.

B. This case cannot be heard by a jury because it is in the County Court.

C. This case may be heard by a jury if one of the parties requests a jury or if the judge requires that a jury be empanelled. 6-8 jurors will be empanelled.

D. This case cannot be heard by a jury because it is a negligence claim.

2. Which of the following people would be qualified and liable for jury service?

A. Someone who is currently serving a 10 year sentence of imprisonment for a sexual offence.

B. Someone who is on the electoral roll but only 18 years old and very unfamiliar with the legal system.

C. Someone who has recently migrated to Australia and has very limited abilities in the English language.

D. Someone who was a Victorian magistrate up until 8 years ago when she retired.

3.

_____	_____	Asking to be excused	_____	Challenges	Oath or affirmation

The diagram outlines the process of empanelling a jury in a civil case. Which of the following options fills in the blank spaces in the diagram in the correct order?

A. Arriving at the courtroom; Juries Commissioner questionnaire; jury ballot.

B. Juries Commissioner questionnaire; summons; arriving at the courtroom.

C. Summons; jury ballot; selecting jurors.

D. Jury ballot; arriving at the courtroom; selecting jurors.

4. The following passage contains errors.

An Australian politician has initiated a civil claim against a newspaper following the publication of a defamatory article. The case will be heard in the Magistrates' Court by a magistrate and a jury of 6 people. The responsibility of the jury in this case is to listen to the facts and evidence presented at trial and make a decision based on their personal opinion of the defendant. If the defendant is found guilty, the jury will then decide what damages should be awarded to the plaintiff.

Which of the following options does not correct an error in the passage?

A. The defendant cannot be found guilty because this is a civil case; the outcome of the trial will determine the liability of the defendant.

B. A jury would not be empanelled in this case because it is being heard in the Magistrates' Court; juries are only empanelled in the County Court and Supreme Court.

C. The jury would not decide damages in this case because it is a defamation case.

D. The jury would not consist of 6 people; civil juries always consist of 8 jurors.

E. The jury does not make decisions based on their personal opinions; it is the responsibility of the jury to be objective at all times and make decisions based on the facts of the case.

5. James and Michael are in the middle of a civil dispute which is being heard by a judge and a jury in the County Court. This is a high profile case which has attracted a lot of media attention. Several of the jurors have researched the details of the dispute and the parties online. During the trial, some jurors are sleeping and none of the jurors take notes based on the evidence presented. While the legal representatives of the parties are summing up the case, the jurors are distracted and whispering to one another.

Which responsibilities has the civil jury failed to perform in this case?

A. Be objective, listen to and remember evidence, understand summing up.

B. Be objective, understand summing up, decide on liability.

C. Understand directions, listen to and remember evidence.

D. None of the above.

6. Which of the following is not a strength of a jury in civil matters?

A. The use of a jury provides for trial-by-peers.

B. Juries are independent of all parties to a dispute.

C. Jurors may be influenced by what they hear about a case in the media.

D. Both parties are able to request a jury trial in a civil dispute.

7. Jane is involved in a representative proceeding in the Supreme Court. A representative proceeding is a complex type of civil proceeding which can be undertaken when seven or more people want to initiate a claim against a defendant for the same or similar reasons. In Jane's case, she and the other plaintiffs claim the defendant was negligent in developing a medicine that had serious side-effects. The presentation of scientific evidence about the development of the medicine is expected to take four weeks.

What might be some disadvantages of empanelling a jury for this case?

A. Civil juries are more appropriate for very serious cases in the Supreme Court.

B. Making decisions in a case as complex as this may be difficult for people who have no legal training, creating the risk of an incorrect verdict; the use of juries creates delays; the use of juries in civil trials results in additional fees for the parties.

C. The party who requests a jury trial will have to cover the cost of the jury; juries are not available for all civil cases.

D. Many civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is limited; the use of juries creates delays; the use of juries in civil trials results in additional fees for the parties.

LEVEL 2:
Describe and explain

8. Identify two reasons why a jury may not be used in a civil dispute. (2 MARKS)

9. John is 22 years old and on the electoral roll. John has a severe physical disability which renders him incapable of performing most day-to-day tasks. Is John likely to be required for jury service? Why/why not? (2 MARKS)

10. Describe the term 'juror summons' and explain its purpose within the jury empanelment process. (2 MARKS)

11. Describe two responsibilities of the jury in a civil trial. (4 MARKS)

12. Lana is currently a party to a civil dispute which will be heard in the County Court. She is considering requesting a trial by jury, but does not know if this is the best option for her case. Referring to the principles of justice, describe one strength and one weakness of a jury in a civil case. (4 MARKS)

LEVEL 3:
Apply and compare

13. Erin is in a civil dispute with her previous employer. She is seeking $1 million in damages. She thinks that:

- Her trial will be heard in the Magistrates' Court.
- She will have a trial heard by a jury of 12 people.
- A trial by jury will be unfair because the jurors will look up the details of her case online and side with her employer.

Outline why each of these statements is incorrect. (3 MARKS)

Adapted from 2013 VCAA Exam Question 4

14. Read the case *Wilson v Bauer Media Pty Ltd* [2017] VSC 521.

a) Would the jury have decided the amount of damages awarded to Wilson in this case? Justify your answer. (2 MARKS)

b) Explain two responsibilities of the jury in this case. (4 MARKS)

15. Compare the role of a civil jury with that of a criminal jury. (5 MARKS)

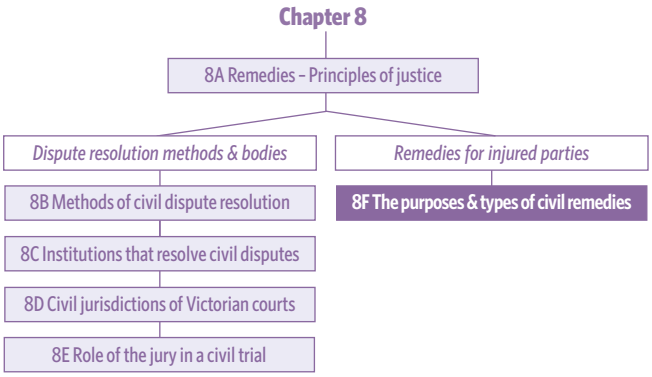
LEVEL 4:
Discuss and evaluate

16. Justify the use of a jury in a civil trial. (5 MARKS)

17. 'Juries should be abolished in civil trials. Civil cases are too complex for people with no legal training and juries only add further costs and delays to a trial, undermining the achievement of justice.' Discuss the extent to which you agree with this statement. (8 MARKS)

8F The purposes & types of civil remedies

After a party is found to be liable in a civil dispute, the courts will impose an appropriate remedy which aims to restore the plaintiff to their former position.



In this lesson you will learn about damages and injunctions, the two most common remedies that are sought by a plaintiff in a civil dispute.

Study design dot points

- The purposes of remedies
- Types of remedies, such as damages and injunctions

Key knowledge units

Purpose of remedies	2.2.6.1
Damages	2.2.7.1
Injunctions	2.2.7.2

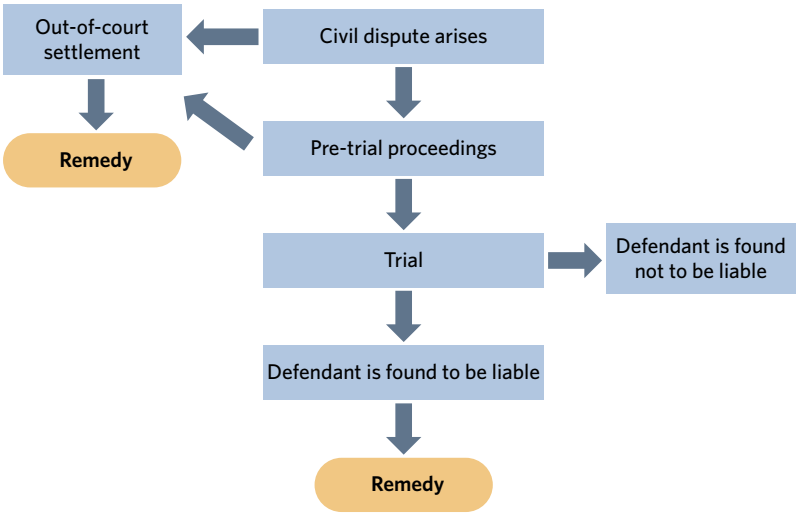


Figure 1 Stages of a civil proceeding

Purpose of remedies 2.2.6.1

OVERVIEW

A civil remedy is 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.

DETAILS

Remedies awarded by the courts include:

- damages
- injunctions.

Purpose of civil remedies

The overarching purpose of all civil remedies is to restore the plaintiff to the position they were in before their rights were infringed.

> **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. Remedies are also not to be confused with the sanctions imposed at the end of a criminal matter (such as a fine or CCO).

Damages 2.2.7.1

OVERVIEW

Have you ever wondered how plaintiffs whose civil rights have been breached are compensated for their loss?

Damages are an award of monetary compensation to the plaintiff, to be paid by the defendant.

DETAILS

Damages can be classified into different categories:

- **Compensatory damages are** the most common damages sought and can be separated into three sub-categories:
  - **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, embarrassment, distress.
- **Nominal damages are** a small amount of money (usually valued at $1) awarded to acknowledge that the defendant did breach the rights of the plaintiff, but there was no harm/loss involved.
  - For example, tainted reputation but no substantial damage, touching a person without causing harm.
- **Exemplary damages are** an additional sum of money (awarded to a plaintiff in addition to compensatory damages) that seeks to punish a defendant for an extreme infringement of rights and, to some extent, deter others from undertaking similar actions. Such awards are not common.
  - For example, cruelty or revenge in disregarding the plaintiff's rights (such as a plaintiff seeking damages from a defendant for the intentional torts of battery and false imprisonment following a violent or sexual assault).

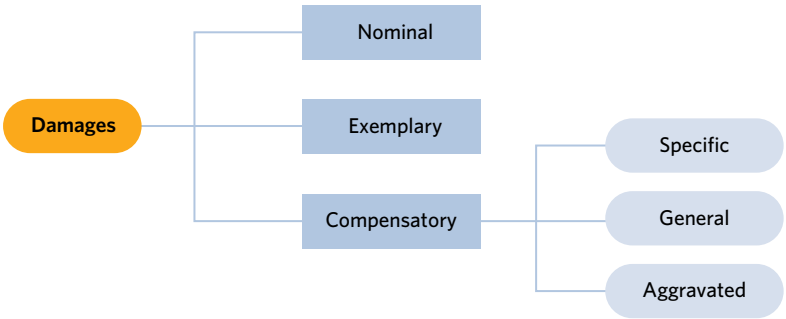


Figure 2 Types of damages

> **USEFUL TIP**
>
> Exemplary damages cannot be awarded in defamation cases.

USEFUL TIP

It is important to remember that damages are not the same as a fine. A fine is a criminal sanction imposed on an offender by the courts as punishment for committing a crime. Damages, on the other hand, are a civil remedy awarded by the courts to compensate the plaintiff for the defendant's infringement of their rights.

Table 1 The purposes of damages

Type of damages	Purpose
Compensatory	Aim to reimburse the plaintiff for the loss that they have suffered as a result of the infringement of rights and therefore return them to their original position.
Nominal	Aim to reflect that the plaintiff is legally right.
Exemplary	Aim to punish the defendant and deter others in the community.

CASE STUDY ***Pokemon Company International, Inc v Redbubble Ltd* [2017] FCA 1541**

In 2017, Pokemon sued Redbubble for copyright infringement. Redbubble had 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.

USEFUL TIP

Make sure you are able to apply your knowledge of damages to a scenario! Past VCAA exam questions have required a detailed discussion of the benefits and limitations of civil remedies in relation to a case study/scenario.

For example, Question 7c in the 2017 VCAA Legal Studies exam asked students to read a scenario and discuss the extent to which one remedy could achieve its purpose in this scenario. The 2017 Examiner's Report noted that: 'Many students were able to make some points about damages, but few provided sufficient detail about the benefits and limitations of damages in the context of the case.'

Table 2 The ability of damages to achieve their purpose

Damages	Purpose achieved	Purpose not achieved
Compensatory – Specific damages	Returns plaintiff to original financial position. Reflects the financial loss endured by each individual plaintiff.	Cannot take away the harm that the plaintiff has suffered. Amount of damages may be outside the financial capacity of the defendant; if the plaintiff does not receive such damages, they are not restored to their original position.
Compensatory – General damages	Offers some monetary compensation for the harm that the plaintiff suffered.	Impossible to place a quantifiable value on pain and suffering. Impossible to objectively measure a monetary figure all plaintiffs would agree is sufficient for the harm they suffered. Cost of damages may be outside the financial capacity of the defendant.
Compensatory – Aggravated damages	Additional sum to compensate for humiliation.	Does not reverse humiliation.
Nominal	Recognition of infringed rights.	Very little monetary compensation for infringed rights.
Exemplary	Punishes defendant. Deters others in the community.	Cannot reverse harm suffered. Defendant may not be able to pay such a large sum. Not commonly awarded.

CASE STUDY

***Swan v Monash Law Book Co-operative* [2013] VSC 326**

In 2013, Wendy Swan (plaintiff) initiated a claim of negligence against Legibook (defendant), a law-book cooperative that operates out of the basement of the law building at Monash University, for psychiatric injury sustained in the course of her employment.

Swan alleged that whilst working for the company between 2002-2008, she was continually bullied, harassed and intimidated by the shop manager, Kriston Cowell.

Following her employment, the plaintiff suffered from depression, anxiety and features of traumatisation, which prevented her from returning to work and caused a disconnection between the plaintiff and her friends and family. Her experience while working for the defendant resulted in a substantial loss of enjoyment of life, and extensive mental and physical pain and suffering.

Justice Dixon of the Supreme Court noted:

> The plaintiff has surrendered her personal independence, lost her confidence, and lost her capacity to take interest in and derive pleasure from the stimulus in life. This has been a substantial loss of enjoyment of life, with much pain and suffering, both mental and physical.

Justice Dixon assessed the plaintiff's financial loss in the sum of $292,554.38, and awarded the plaintiff damages for pain and suffering and loss of enjoyment of life in the sum of $300,000.

In arriving at this decision, Justice Dixon stated:

> I consider that the severity of the plaintiff's illness as described in the medical evidence that I have set out above was evident when she gave evidence. I am satisfied that the impact of the plaintiff's illness upon her since 2007 and into the foreseeable future has been, and will continue to be, severe.

This case demonstrates the ability for compensatory damages to compensate a plaintiff for the suffering they experience as a result of the infringement of rights. However, damages will never be able to reverse the plaintiff's experience, or fully compensate them for the ongoing impact of the defendant's actions, and measuring the 'right' amount of damages to reflect the emotional suffering of a plaintiff is a difficult task.

Injunctions 2.2.7.2

OVERVIEW

How do courts stop a defendant from acting in a way which infringes the civil rights of a plaintiff?

Injunctions are court orders compelling a party to do something, or preventing a party from doing something.

DETAILS

Types of injunctions

There are two types of injunctions:

- **Mandatory injunctions** force parties to do something.
  - For example, a demand for a written apology.
- **Restrictive injunctions** prevent parties from doing something.
  - For example, preventing 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 to not print a defamatory book.

The purpose of an injunction is to change the 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.

Table 3 The ability of injunctions to achieve their purposes

Injunctions	Purpose achieved	Purpose not achieved
Mandatory	The defendant is forced to start/complete an action to benefit the plaintiff.	The mandated action may have occurred too late to save the plaintiff from suffering harm/too late to undo existing harm caused by the defendant.
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 Corporation Ltd v Singtel Optus Pty Ltd* [2018] VSC 247**

In 2018, 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 service in Australia, a claim Telstra said 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.

USEFUL TIP

Make sure you are able to apply your knowledge of injunctions to a scenario!

Here is an example of a question from the 2018 VCAA sample exam, requiring students to apply knowledge of injunctions to a hypothetical scenario:

Section A Question 1B

Louis has an ongoing dispute with his neighbour. The neighbour has said that he will soon cut down a tree on the boundary of his and Louis' properties. Louis wants to seek an injunction as a remedy.

Describe what an injunction is and outline one of its purposes in this case. (3 MARKS)

This is an example of a **low-scoring response**:

'An injunction is a court order compelling a party to do something, or preventing a party from doing something. One purpose of an injunction is to restore the plaintiff to the position they were in prior to the infringement of rights.'

This is a low-scoring response because:

- It does not reference the case study.
- It does not outline a purpose of injunctions which is relevant to the case study.

This is an example of a **high-scoring response**:

'An injunction is a court order compelling a party to do something, or preventing a party from doing something. One purpose of an injunction in this case would be to prevent any infringement on Louis' rights by restricting the actions of the defendant, Louis' neighbour. For example, an interlocutory injunction which prevents the tree from being cut down until the dispute is settled will ensure that no infringement occurs.'

This is a high-scoring response because:

- It makes explicit references to the case study.
- It outlines a purpose of injunctions in this case.
- It provides an example of how an injunction would fulfil this purpose in the case.

Keen to learn more?

The Law Handbook, www.lawhandbook.org.au/

QUESTIONS

8F The purposes & types of civil remedies

LEVEL 1:
Define and understand

1. Match each of the following terms to the corresponding definitions.

- Compensatory damages
- Nominal damages
- Exemplary damages

a) _____ a 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

b) _____ the most common damages sought; aiming to reimburse the plaintiff for any loss suffered

c) _____ a small amount of money (usually valued at $1) awarded to acknowledge that the defendant did breach the rights of the plaintiff, but there was no harm/loss involved

2. Which of the following best reflects the overarching purpose of civil remedies?

A. To punish the defendant for their infringement on the plaintiff's rights.

B. To restore the plaintiff to the financial position that they were in prior to the infringement of rights.

C. To protect the community from the actions of the defendant.

D. To restore the plaintiff to the position that they were in before the infringement of rights occurred.

3. Which of the following is not true of injunctions?

A. Injunctions aim to restore the plaintiff to their former position and prevent any harm to the plaintiff by either restricting the actions (or mandating certain actions) of the defendant.

B. Injunctions can be either short-term or permanent.

C. Injunctions will always restore the plaintiff to their former position.

D. Injunctions are limited in their ability to achieve the purposes of remedies because they are often imposed after harm has already been done to the plaintiff.

4. Bob, a celebrated doctor, has initiated a civil claim after a local newspaper published a defamatory article falsely accusing him of 'pushing' a verbally aggressive patient and committing acts of 'physical abuse' within his practice. Bob is seeking a civil remedy which will prevent any further harm to his reputation. Identify which of the following would be the most appropriate remedy for the courts to impose, and the correct purpose of that remedy.

A. Mandatory injunction; forcing the newspaper to publish a written apology.

B. Restrictive injunction; preventing the newspaper from reprinting the defamatory article.

C. Exemplary damages; punishing the newspaper for publishing the defamatory article and deterring others from acting in a similar way.

D. Restrictive injunction; forcing the newspaper to write Bob an apology.

5. The following passage contains three errors.

Eleanor is suing her previous employer, the plaintiff, for their failure to prevent workplace bullying and harassment throughout the course of her employment. Eleanor has suffered from post-traumatic stress disorder for several years since her employment, and is therefore unable to work. She is seeking an award of compensatory damages, both specific (for her pain and suffering), and general damages (for her loss of income). Compensatory damages are the most appropriate remedy for Eleanor because they are always able to fully restore the plaintiff to their former position.

Identify which of the following statements does not correct an error in the passage.

A. The employer is not the plaintiff in this case; Eleanor is the plaintiff.



B. Specific damages are not awarded for pain and suffering and general damages are not awarded for loss of income; specific damages are awarded for loss of income, and general damages are awarded for pain and suffering.

C. Compensatory damages are not the most appropriate remedy in this case; a more appropriate remedy would be a mandatory injunction requiring the employer to implement an effective anti-bullying policy in the workplace.

D. Compensatory damages are not always able to entirely restore the plaintiff to their former position; some consequences of an infringement of rights, such as pain and suffering or loss of enjoyment of life, cannot be translated into a quantifiable value which fully reimburses the plaintiff for their suffering. While the plaintiff is compensated for their suffering, it cannot be undone.

6. Read the case *Telstra Corporation Ltd v Singtel Optus Pty Ltd* [2018] VSC 247. Which of the following statements best conveys the ability of an injunction to achieve its purposes in relation to this case?

A. The injunction in the case achieves its purposes by restoring Telstra to its former position and preventing any further harm to its reputation.

B. The injunction does not achieve any purpose because Telstra has already suffered harm as a result of the advertisement disseminated by Optus.

C. The injunction achieves its purposes to an extent. By forcing Optus to remove the advertisement the injunction prevents any further harm to Telstra, however, it cannot fully restore Telstra to its former position because some harm has already been caused by the advertisement.

D. The injunction achieves its purposes to an extent. The injunction punishes Optus for the advertisement by forcing them to remove it, however, it does not offer Telstra any compensation for the harm that was suffered as a result of the advertisement.

7. Read the case *Swan v Monash Law Book Co-operative* [2013] VSC 326. Is the remedy imposed by the Supreme Court likely to fully restore the plaintiff to her position prior to her rights being infringed?

A. The damages awarded are likely to fully restore the plaintiff to her former position. The specific damages address her loss of income, and the general damages compensate her for pain and suffering, thus effectively reversing the actions of the defendant.

B. The damages awarded are not likely to fully restore the plaintiff to her former position. While the specific damages may be able to fully compensate the plaintiff for financial loss, it is impossible to accurately quantify pain and suffering into a monetary value. Additionally, damages can only reimburse the plaintiff for the harm suffered, they cannot reverse the harm.

C. The damages awarded are likely to fully restore the plaintiff to her former position. The harm suffered by the plaintiff was not substantial, and the amount of damages is more than enough to make up for the defendant's actions.

D. The damages awarded are not likely to fully restore the plaintiff to her former position. The plaintiff will never be able to work again as a result of the infringement of rights, and has therefore lost all enjoyment of life. No monetary amount could ever reimburse the plaintiff for the negative impact of the defendant's actions and an award of damages

LEVEL 2:
Describe and explain

8. Describe the term 'civil remedies' and identify the overarching purpose of all civil remedies. (3 MARKS)

9. Susan is suing her neighbour Emily for trespassing. Emily entered Susan's property without permission whilst looking for an item that had been thrown over the fence between the two properties. Emily did not cause any damage to the property. Susan is awarded $1 in damages by the courts.

Identify the type of damages awarded to Susan and outline the purpose of these damages. (2 MARKS)

10. Describe the term 'injunction' and provide an example of the two types of injunctions. (3 MARKS)

LEVEL 3:
Apply and compare

11. In 2010, Linton Shirreff sued his previous employer, Elazac Pty Ltd for damages in the Supreme Court of Victoria. During the course of his employment, Shirreff had sustained a serious injury to his right foot, resulting from negligence on the part of the employer. Shirreff was awarded $320,000 in damages for pain and suffering and loss of enjoyment of life, as well as $940,000 for financial loss (loss of income and medical expense), totalling $1.26 million in damages.

Source: Shirreff v Elazac Pty Ltd [2010] VSC 381

a) Distinguish between specific and general damages and provide an example of each in the case. (3 MARKS)

b) Discuss the ability of the damages awarded to achieve their purpose in this case. (5 MARKS)

12. James and Mary have recently separated after five years of marriage. James wants to sell the house that they previously inhabited together, but Mary wants to keep the house. A civil dispute is initiated between the two parties and they proceed to have the matter heard in court. The court makes an order which prevents the property from being sold until the dispute can be settled.

a) Describe the type of injunction that has been awarded in this case. (2 MARKS)

b) Explain how an injunction achieves its purpose in this case. (2 MARKS)

13. 'They can apply only where the conduct of the defendant merits punishment, which is only considered to be where the defendant's conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like; or, as it is sometimes put, where the defendant acts in contumelious disregard of the plaintiff's rights'.

Source: Judicial College of Victoria, Civil Juries Charge Book (2019)

The extract is taken from a manual published by the Judicial College of Victoria, which informs judges' instructions to juries in civil cases. Identify the type of damages being referred to in this extract. Justify your response. (3 MARKS)

14. Emma was shopping at a local supermarket when she slipped in a puddle of water and broke her hip. Emma has since been faced with expensive medical bills and has been unable to return to work for several months. The injury has caused her significant physical and emotional suffering. She now wants to initiate a civil claim for negligence against the supermarket.

Outline one remedy that Emma may be awarded and discuss the extent to which this remedy could achieve one of its purposes in this case. (5 MARKS)

LEVEL 4:
Discuss and evaluate

15. 'Damages are a useless remedy because money cannot reverse the harm that a plaintiff has suffered.' Discuss the extent to which you agree with this statement. (7 MARKS)

16. Evaluate the ability of injunctions to achieve the purposes of civil remedies. (6 MARKS)

REVIEW QUESTIONS

08 Remedies

LEVEL 5:
Bringing it all together

1. Alisha is a well-known actress. She has commenced a civil proceeding in the County Court against a magazine publisher for defamation. Alisha 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 Alisha's case. (4 MARKS)

c) Identify one remedy that may be awarded to Alisha if she is successful in her claim and discuss the ability of this remedy to achieve its purposes in Alisha's case. (6 MARKS)

d) Describe one method of civil dispute resolution other than a trial that Alisha and the defendant could have used to resolve this matter, and discuss its ability to achieve justice in this case. (6 MARKS)

Adapted from 2018 VCAA Exam Section A Question 5

2. 'Resolving civil disputes through mediation is always more effective than resolving civil disputes through a trial in the courts.'

Discuss the extent to which you agree with this statement. (6 MARKS)

3. 'There are weaknesses in the ways the Victorian Civil and Administrative Tribunal (VCAT) resolves disputes.'

Comment on the statement. (6 MARKS)

Adapted from 2015 VCAA Exam Question 11

Unit 2, Area of study 2

CHAPTER 9

RECENT CIVIL CASES

09

Previous chapters describe the law pertaining to civil claims and the processes used in the Victorian justice system to resolve such matters. In practice, civil matters are resolved in a wide range of ways – many disputes are settled by agreement at mediation or conciliation, some minor disputes are resolved at VCAT and more complex disputes are resolved following a trial in the superior courts. In these real-world scenarios, does the Victorian legal system deliver fairness, equality and access to justice to plaintiffs and defendants?

By the end of this chapter, you will know:

- The facts giving rise to two recent civil cases.
- How each case proceeded through the institutions that resolve civil disputes.
- The remedies awarded in each matter, why the court or tribunal such a remedy in each case and the extent to which justice was achieved.

UNIT 2 AOS 2 – KEY KNOWLEDGE

- the principles of justice: fairness, equality and access
- methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies
- an overview of the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the purposes of remedies
- types of remedies, such as damages and injunctions
- two recent civil cases and for each case:
  - an overview of the claim and the central facts of the case
  - dispute resolution bodies that may be or were involved
  - methods of dispute resolution and their appropriateness
  - remedies that could be or were awarded and their appropriateness
  - possible avenues of appeal
  - the extent to which the principles of justice were or could be achieved.

UNIT 2 AOS 2 – KEY SKILLS

- define and use legal terminology
- research, analyse and apply information in relation to civil law and two recent civil cases
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil cases
- discuss the principles of justice in relation to the resolution of civil disputes and remedies
- discuss the ability of remedies to achieve their purposes
- analyse the extent to which the principles of justice were or could be achieved in two recent civil cases.

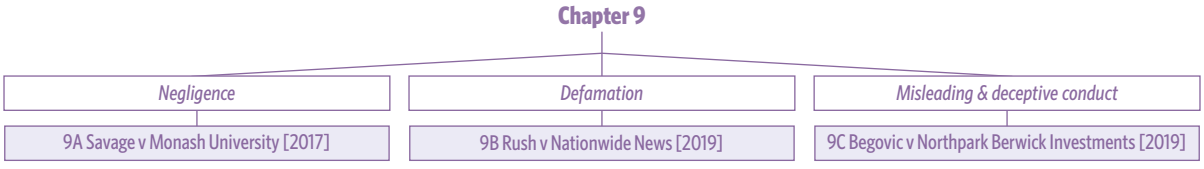
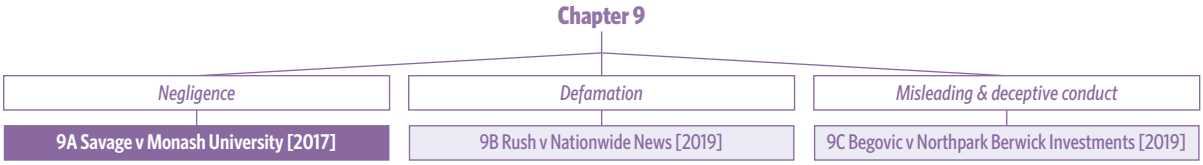


Image: dokurose/Shutterstock.com

9A Savage v Monash University [2017]

You have previously learned about the tort of negligence in detail, including the elements required to prove a negligence claim, as well as possible defences and remedies for negligence. You will now look at a recent Australian negligence case relating to an injury received whilst the plaintiff was at work.



In this lesson you will study the case *Savage v Monash University* [2017], an Australian negligence case involving Monash University as the defendant.

Study design dot point

- Two recent civil cases and for each case:
  - an overview of the claim and the central facts of the case
  - dispute resolution bodies that may be or were involved
  - methods of dispute resolution and their appropriateness
  - remedies that could be or were awarded and their appropriateness
  - possible avenues of appeal
  - the extent to which the principles of justice were or could be achieved.

Key knowledge units

An overview of the claim and the central facts of the case	2.2.8.1
Dispute resolution bodies that may be or were involved	2.2.8.2
Methods of dispute resolution and their appropriateness	2.2.8.3
Remedies that could be or were awarded and their appropriateness	2.2.8.4
Possible avenues of appeal	2.2.8.5
The extent to which the principles of justice could be or were achieved	2.2.8.6

An overview of the claim and the central facts of the case 2.2.8.1

OVERVIEW

In 2017, Sheila Savage successfully sued Monash University (where she worked as a security supervisor) in the County Court for negligence, after the University's failure to maintain safe conditions on campus caused her to fall and roll her ankle.

DETAILS

Parties

- Sheila Savage was the plaintiff (that is, the injured party bringing the claim to the court).
- Monash University was the defendant; it was sued as the occupier of the property on which Savage injured herself.
- Programmed Maintenance Services Ltd was a third party; the defendant alleged that this company was at least partially responsible for the injury suffered by Savage.

Facts

On the morning of 18 August 2010, the plaintiff, Savage, had parked her car in a car park within the grounds of Monash University's Clayton campus and was walking to the building in which she was employed as a security control room operator when she rolled her ankle and stumbled on a pedestrian pathway. The pathway, one of the busiest on campus, consisted of a compacted crushed-rock surface which, when wet, was prone to flooding. It had been raining the night before the incident – due to the puddles on the path it was impossible to identify unevenness in the surface of the path. Savage was very familiar with the pathway and was wearing steel-capped boots at the time of the accident.

Following the incident, a chain of emails were sent between the plaintiff's supervisor, the defendant's grounds curator and the defendant's security operation manager, Trevor Smith. Smith reported the accident involving Savage and also noted that a number of other pedestrians had either tripped or fallen in the past due to the unevenness in the path's surface. The grounds curator inspected the surface and reported a very slight unevenness that was 'unsafe', and he started dealings to replace the pathway with an all-weather surface.

In 2017, due to an ongoing injury, Savage initiated a claim for negligence against Monash University in the County Court, alleging that the University owed her a duty of care as a reasonable occupier to prevent the dangers that the pathway posed.

Judge Saccardo of the County Court found that Smith, who reported having noticed several pedestrians trip or fall on the pathway, had acted negligently in not requesting that the pathway be replaced earlier (which would have prevented Savage's injury). He also noted the vicarious liability of Monash University as Smith's employer.

The defendant denied that a reasonable occupier would be expected to eliminate the potential hazard caused by the pathway. They also claimed that Programmed Maintenance Services, a third party employed to maintain the path, was partially liable for the dangerous state of the crossing.

Legal issues

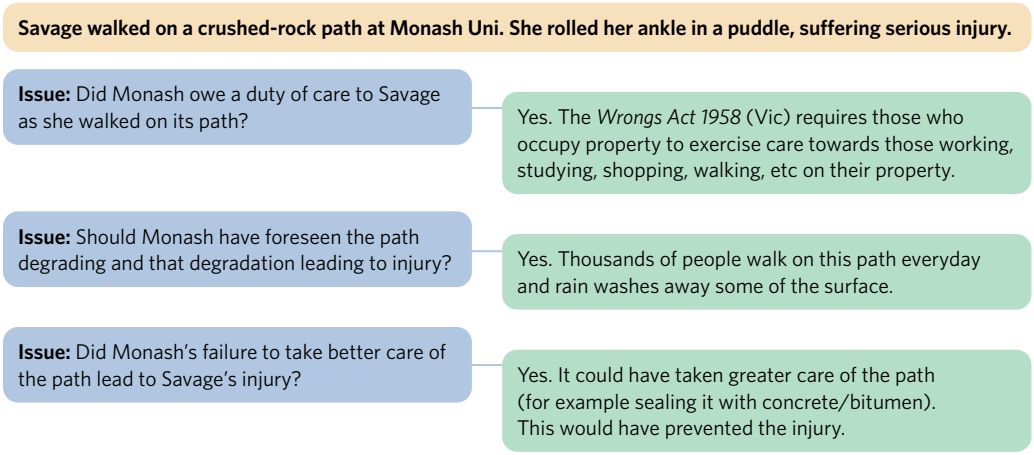


Figure 1 Overview of the issues in *Savage v Monash University* [2017]

Section 14B (4) of the *Wrongs Act 1958* (Vic) provides that certain criteria must be considered when determining whether the duty of care of an occupier has been discharged. Judge Saccardo made his judgement in accordance with the following criteria:

a) the gravity and likelihood of probable injury

- The pathway was created with the specific purpose of facilitating the safe passage of a vast number of people across two roadways everyday.
- The nature of the surface meant that exposure of the crossover to significant quantities of rain during an extreme weather event such as a thunderstorm would have created a possibility that a significant deterioration of the surface might occur, particularly due to the number of pedestrians using the crossing.
- It is likely that many incidents of tripping or falling where people weren't seriously injured would not have been reported.
- The crossing required constant maintenance.
- There was a high potential for serious injuries, such as broken bones or fractures, to occur as a result of someone slipping and falling on the pathway.

b) the circumstances of entry onto the premises;

c) the nature of the premises; and

d) the knowledge which the occupier has or ought to have had of the likelihood of persons or property being upon the premises

- There was no doubt that thousands of people were invited to use the crossing each day.
- The defendant created a designated pedestrian crossover between the two bitumen surfaces and effectively directed persons making their way to and from its car park to make use of the path.

e) the age of the person entering the premises; and



f) the ability of the person entering the premises to appreciate the danger

- The majority of persons making use of the property were of an age which enabled them to appreciate dangers which might be present when negotiating footpaths. They were almost all adults.
- However, the danger in question – namely the presence of an unexpected alteration in the surface in the form of ruts, which although minor in nature may nonetheless cause a loss of footing – was hidden by the effect of the water on the nature of the surface of the crossover.
- While it was put to the plaintiff that she could have avoided the puddle created by the depression, she didn't act unreasonably in failing to do so.
- Judge Saccardo was therefore satisfied that the danger was one which was hidden and of a type which might escape the attention of persons using the crossover by reason of mere inadvertence on their part.

g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person

- The defendant's grounds manager gave evidence that the costs associated with creating a concrete surface were not significant.
- The fact that the works were undertaken shortly after the plaintiff was injured demonstrated that it was relatively easy for Monash to eliminate the danger associated with tripping hazards arising from the degradation of the surface of the path.

Source: Sheila Savage v Monash University [2017] VCC 1774

The decision

Due to the reasons above, Judge Saccardo was satisfied that the defendant was liable to compensate the plaintiff for her injury due to its failure to take such care as was reasonable to ensure she would not be injured by reason of the state of the path.

Contributory negligence

Having been found liable, the defendant raised the defence of contributory negligence, claiming that the plaintiff failed to take reasonable care for her own safety. However, Judge Saccardo ultimately found that this was not the case, for the following three reasons:

a) Firstly, it was the defendant who chose to present a crushed-rock, non-all-weather path which was prone to deterioration and puddles forming. It presented this path as a walkway for thousands of people to use every day. To suggest that any person who elected not to jump puddles in some way failed to take reasonable care for their own safety is unreasonable.

b) Secondly, Savage described many puddles on the path. Given she was wearing work boots which would have provided solid and robust footing it was reasonable for Savage to walk on the path in a straight line across the area rather than to zigzag her way down the path.

c) Thirdly, evidence given by Monash University's grounds manager showed that it was common for pedestrians on this path to walk through the puddles as Savage did.

Damages

Judge Saccardo assessed compensatory damages in light of the following injury and loss reported by Savage:

- She developed a condition of chronic pain disorder which has been managed through rehabilitation and the prescription of medication.
- Savage's ability to walk is extremely limited. She makes use of a walking stick and a walker. She described her weight as having increased from 95 kg at the time of the accident to 145 kg at the time of the case.
- Savage now had a negative, anxious and depressed mental state and lost her ability to work, cook and clean; prior to the incident she was the primary breadwinner in her family.
- Savage's doctor reported that she is in constant pain which affects her sleep and everyday activities, as well as her relationship with her family.
- These symptoms are likely to continue for the rest of her life.

The County Court therefore assessed the plaintiff's compensatory damages in the sum of $275,000.

A further hearing took place in December 2017 in order to determine the liability of the third party. Judge Saccardo ultimately decided that the defendant had not established liability against the third party (Monash University's maintenance provider) and the third party was therefore not required to pay any of the damages.

Dispute resolution bodies that may be or were involved 2.2.8.2

OVERVIEW

This case was heard and determined in the Victorian County Court.

DETAILS

Appropriateness of the County Court in resolving this case

- The County Court has original jurisdiction to hear all civil claims, though in practice it only hears claims where the plaintiff is seeking more than $100,000 in damages.
- In this case, Savage was seeking more than $100,000 in damages, making the County Court the most appropriate court to hear the dispute. Savage initiated proceedings in the County Court in November 2015.
- This was a personal injury claim, meaning that other bodies of dispute resolution, such as VCAT and CAV, did not have jurisdiction to hear the matter.

Methods of dispute resolution and their appropriateness 2.2.8.3

OVERVIEW

This case was resolved following a trial in the County Court, with the court making a binding decision in favour of Savage.

DETAILS

The following methods of dispute resolution were used:

Mediation

- The parties were ordered by the court to attend mediation prior to trial in an attempt to resolve the issue outside of court.
- The mediation was not successful in resolving the matter.
- Due to the private nature of this method of dispute resolution, it is unclear what issues were discussed and why a settlement was not reached during the mediation.

Appropriateness of this method:

This would have been an appropriate method of dispute resolution, allowing the parties to resolve the dispute by agreement. If the parties had reached a settlement at mediation, it would have:

- Minimised delays.
- Saved both parties the cost of court fees and legal representation which were ultimately required to resolve the issue.
- Kept the decision and it's resolution private.
  - When disputes are resolved through mediation, the parties are often required to keep the details of the mediation private.
  - This may have been preferable for Monash University as it would have prevented any damage to the institution's reputation.

Trial

- The case was ultimately resolved following a trial in the County Court.

Appropriateness of this method:

Following the unsuccessful attempt at mediation, a trial was an appropriate method for resolving the dispute because:

- A judge who is specialised in deciding these types of disputes provided a binding outcome in favour of one of the parties.
- There was a clear imbalance of power between the parties in the dispute, one being a very large institution and the other an ordinary individual. A trial with an independent decision maker, legal representation and strict rules of procedure ensures an even contest in such cases.
- The issues in dispute in this case were somewhat complex due to the involvement of several different witnesses, and a third party who may have been partially liable.

Remedies that could be or were awarded and their appropriateness 2.2.8.4

OVERVIEW

Savage was awarded $275,000 in general compensatory damages for pain and suffering.



DETAILS

Appropriateness of the remedy

Compensatory damages are generally the most appropriate remedy for plaintiffs who succeed in making a negligence claim. This is because the plaintiff has usually suffered a loss or injury for which they are seeking compensation. A plaintiff may be awarded any of the following types of compensatory damages:

- Specific damages
- General damages
- Aggravated damages.

In this case, Judge Saccardo was only required to assess general damages. General damages were an appropriate remedy for the plaintiff's:

- Continued pain and suffering due to the ongoing injury; and
- Loss of enjoyment of life.

Possible avenues of appeal 2.2.8.5

OVERVIEW

Cases that are heard in the County Court can be appealed to the Supreme Court – Court of Appeal.

DETAILS

Appeals process

- In civil cases heard in the County Court, if a party intends to appeal a decision they must indicate that intention within 28 days. The right to appeal is not automatic and parties must seek leave to do so.

Monash University appeal

- In this case, Monash University lodged an application to appeal against the decision made by Judge Saccardo.
- The University claimed that:
  - Judge Saccardo made an error in deciding what Monash ought to have done in providing and maintaining the crossing.
  - Judge Saccardo failed to have adequate regard to the extent and nature of contractual obligations of the maintenance contractor (Programmed Maintenance Services) in assessing whether it had taken reasonable care in maintaining the crossover.
- The application was heard in the Court of Appeal in June 2018.
- The court denied the University leave to appeal on both counts.

The extent to which the principles of justice could be or were achieved 2.2.8.6

OVERVIEW

The principles of justice were impacted in a number of ways (positively and negatively) during Savage's civil proceedings in the County Court.

DETAILS

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Pre-trial procedures. The pre-trial processes of pleadings and discovery allowed for all parties to exchange documents and other information regarding their claims and evidence in a clear, open and transparent way. This enabled each party to prepare to test the accuracy of the other party's evidence in court – which ensures the decision is based on accurate and reliable evidence.
Legal representation. Both parties had legal representation to present their case in the best possible light. Thus, no party was disadvantaged.
Party control. Both parties were able to control their own case and decide which evidence to submit to prove the facts of the case.
Independent and unbiased decision maker. An independent judge was able to resolve the complicated legal and factual issues in an objective way. The reasons for the conclusions reached (showing how the law was applied to the facts) are published.
Appeals. Monash University took the opportunity to lodge an application to appeal to the Supreme Court – Court of Appeal, which ensured that the application of the law in this case was affirmed by a higher court (however, this caused delay in the final resolution of the matter from Savage's perspective).

Table 2 The principle of access in this case

Principle of justice: *Access*
Mediation. The parties were given an opportunity to resolve the dispute through mediation, which is a less expensive and less time-consuming method than a trial.
Legal costs. Legal costs, including court costs and legal representation, are very expensive in higher courts, reducing access for both parties. Each party would have spent significant sums of money having solicitors prepare the claim and defence; experienced and highly-skilled barristers presenting legal argument and examining witnesses during the trial (and the subsequent appeal) would also be extremely costly. However, the County Court did award costs in Savage's favour, requiring Monash University to meet its own costs and Savage's legal expenses.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
Equal chance to present cases. Despite Savage being a private citizen and Monash University being a large institution, both parties were equally entitled to present evidence and challenge the evidence of the other party.

Keen to learn more?

***Monash University v Savage* [2018] VSCA 156**

***Sheila Savage v Monash University* [2017] VCC 1774**

QUESTIONS 9A Savage v Monash University [2017]

LEVEL 1:
Define and understand

1. Which of the following is not true?

- **A.** Monash University owed Savage a duty of care.
- **B.** Judge Saccardo found that a reasonable occupier would have acted to prevent the potential hazard of the crossing.
- **C.** This case was resolved by the County Court, which has unlimited jurisdiction in civil claims.
- **D.** Judge Saccardo found that the third party, Programmed Maintenance Service, was partially liable for the plaintiff's injury.

2. Which of the following needs to be proven in order to establish the defence of contributory negligence?

- **A.** The plaintiff was completely responsible for the injury that they suffered.
- **B.** The plaintiff's negligence was a contributing cause of the damage suffered.
- **C.** The plaintiff behaved recklessly.
- **D.** The plaintiff could have avoided the danger which caused them to suffer injury.

3. Was a trial the most appropriate method of dispute resolution for this case?

- **A.** No, because arbitration is the most appropriate method of dispute resolution for negligence cases.
- **B.** Yes, because personal injury claims can only be resolved through a trial.
- **C.** Yes, because there were complex issues to be decided in this case and mediation was unsuccessful.
- **D.** No, because Savage likely could not afford the fees involved in going to trial.

4. Which of the following types of damages was awarded to Savage?

- **A.** Specific damages
- **B.** Nominal damages
- **C.** Aggravated damages
- **D.** General damages.



5. Which of the following is an example of access being upheld in this case?

A. The parties were given an opportunity to resolve the dispute through mediation, which is a less expensive and less time-consuming method than a trial.

B. Both parties had legal representation to present their case in the best possible light. Thus, no party was disadvantaged.

C. Legal costs, including court costs and legal representation, are very expensive in higher courts.

D. Both parties were able to control their own case and decide which evidence to submit to prove the facts of the case.

LEVEL 2:
Describe and explain

6. Two of the elements required to prove a negligence claim are as follows:

- The defendant owed a duty of care to the plaintiff;
- The defendant breached that duty of care.

Describe these two elements using examples from the case *Savage v Monash* [2017]. (4 MARKS)

7. Suggest two reasons why mediation would have been a better method to resolve this dispute than a trial in the County Court. (2 MARKS)

8. Describe the defence to negligence that was used in this case and provide one reason why the defence was unsuccessful. (3 MARKS)

9. Describe two ways the principles of justice were upheld in this case. (4 MARKS)

LEVEL 3:
Apply and compare

10. Assume Savage consulted her friend Sarah about her claim prior to the trial. Sarah told Savage the following information:

- In order to succeed in her negligence claim, Savage would have to prove the liability of the University beyond reasonable doubt.
- The limitation of actions on a negligence claim is three years, therefore by initiating a claim seven years after the incident, Savage has given Monash the opportunity to raise the limitation of actions as a defence.
- If Monash is able to prove that Savage contributed to her injury in any way (contributory negligence), they will have a complete defence and will not be liable to pay her damages.

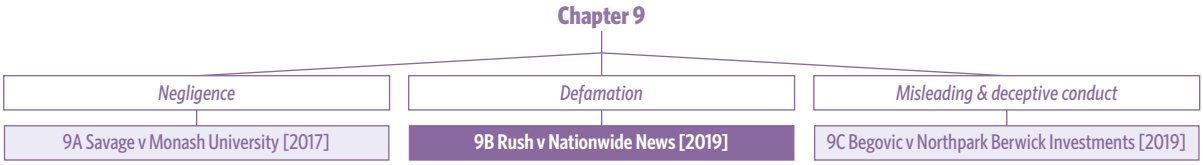
Explain why each of the above pieces of information is incorrect. (6 MARKS)

11. Assume the crossing in question was in a secluded location on the University campus and was accompanied by a sign warning pedestrians to take care as it may be slippery in wet weather, but Savage ignored the sign and rushed across the surface. Would she have succeeded in her action? Justify your answer. (3 MARKS)

12. Analyse the impact of the negligence claim on the parties. (4 MARKS)

9B Rush v Nationwide News [2019]

You have previously learned about the tort of defamation in detail, including the elements required to prove a defamation claim, as well as possible defences and remedies for defamation. You will now look at a recent Australian defamation case which has drawn significant attention in the media.



In this lesson you will study the case *Rush v Nationwide News Pty Ltd* (2019), an Australian defamation case involving celebrated actor Geoffrey Rush.

Study design dot point

- Two recent civil cases and for each case:
  - an overview of the claim and the central facts of the case
  - dispute resolution bodies that may be or were involved
  - methods of dispute resolution and their appropriateness
  - remedies that could be or were awarded and their appropriateness
  - possible avenues of appeal
  - the extent to which the principles of justice were or could be achieved.

Key knowledge units

An overview of the claim and the central facts of the case	2.2.8.7
Dispute resolution bodies that may be or were involved	2.2.8.8
Methods of dispute resolution and their appropriateness	2.2.8.9
Remedies that could be or were awarded and their appropriateness	2.2.8.10
Possible avenues of appeal	2.2.8.11
The extent to which the principles of justice could be or were achieved	2.2.8.12

An overview of the claim and the central facts of the case 2.2.8.7

OVERVIEW

In 2019, actor Geoffrey Rush made a successful defamation claim against Nationwide News in the Federal Court of Australia, following the publication of a series of defamatory articles.

DETAILS

Parties

- Geoffrey Rush was the plaintiff (that is, the injured party bringing the claim to the court).
- Nationwide News Pty Ltd was the first defendant; this was the publisher of the newspaper The Daily Telegraph (where the defamatory articles appeared).
- Jonathon Moran was the second defendant, as the primary author of the defamatory articles.

Facts

In late 2015 and early 2016, the Sydney Theatre Company (STC) ran a production of Shakespeare's King Lear, starring Rush in the main role. Eryn Jean Norvill played Rush's daughter in the play.

Over a year after the conclusion of the play, in the midst of the worldwide #MeToo movement, Sydney's The Daily Telegraph published a front page article on 30 November 2017 accusing Rush of engaging in 'inappropriate behaviour' during the production. The following day, the Telegraph released a more detailed story claiming that two STC actors had spoken out in support of the actress (Norvill) who accused Rush of 'touching her inappropriately' during the stage production of King Lear. The paper also indirectly linked the claims against Rush to other prominent cases in Australia and overseas where well-known personalities were accused of sexual harassment. Further articles of a similar nature were published in December 2017.



Rush initiated a defamation claim against the Telegraph's publisher, Nationwide News Pty Ltd, and the main author of the stories, Jonathon Moran. Rush alleged the articles included a range of negative claims about his conduct and character, and sought damages for financial loss and aggravated damages.

Nationwide News and Moran defended the proceeding, arguing:

- The articles did not include the negative meaning alleged by Rush; and
- Even if the publications did convey these negative imputations about Rush, most of the allegations were substantially true.

There were therefore two main issues to be decided in this case:

1. Did the articles contain defamatory imputations?
2. If so, were these imputations substantially true?

Judge Wigney of the Federal Court found:

1. Did the articles contain defamatory imputations? **Yes.**
2. Were these imputations substantially true? **No.**

In his judgement, Judge Wigney stated:

> I have found that Nationwide and Mr Moran have not discharged their onus of proving the substantial truth of any of the imputations that were conveyed by the poster and the articles in question. I was not satisfied on the balance of probabilities that the incidents during the rehearsals and performances of King Lear occurred as alleged by Nationwide and Mr Moran.

Rush was awarded:

- $850,000 in aggravated damages.
- A further $1.98 million for past and future financial loss.

Rush requested the imposition of a permanent injunction on the newspaper to prevent the publication of further allegations. However, the Federal Court found this would be an unnecessary restriction of free speech and the application was dismissed.

Dispute resolution bodies that may be or were involved 2.2.8.8

OVERVIEW

This case was heard and determined in the Federal Court of Australia.

DETAILS

Appropriateness of the Federal Court in resolving this case

- Plaintiffs to defamation claims in Australia are able to choose whether their case will be heard in a superior state/territory court (such as the County Court in Victoria) or the Federal Court of Australia.
- There has recently been an increase in plaintiffs choosing to bring their defamation claims in the Federal Court rather than a state/territory court.
- This case could not have been heard by Consumer Affairs, VCAT or an ombudsman. Defamation cases must be tried in the courts.

Benefits of Federal Court hearings for plaintiffs

Use of juries in defamation cases: Uniform Acts

- The *Uniform Acts* refers to a series of Defamation Bills enacted in each Australian state and territory between 2004-2006, which created uniform defamation laws across the nation. There are some differences in defamation law between states/territories, however, there are also many similarities.
- Section 21 of the *Uniform Acts* (which applies in Victoria, Queensland and NSW) provides the default position in defamation trials is that (unless ordered otherwise by the judge) if either party elects for there to be a trial by jury, there will be a trial by jury.
- An overarching goal of the *Uniform Acts* is to ensure decisions about whether content is defamatory (or not) should reflect the values of an 'ordinary reasonable reader' – and the use of juries means such decisions are therefore made by members of the community, who could be regarded as 'ordinary reasonable readers'.

Juries in the Federal Court

- There is an inconsistency between s. 21 of the *Uniform Acts* and s. 39 of the *Federal Court of Australia Act 1976* (Cth):

  - As explained above, the default position of the *Uniform Acts* is for defamation actions to be tried by jury.
  - However, s. 39 of the *Federal Court of Australia Act* provides for the opposite: civil trials in the Federal Court are usually by judge alone, without a jury.

- In recent times, more and more plaintiffs are electing to have defamation claims heard in the Federal Court to avoid the cost, time and unpredictability involved in a jury trial. The plaintiff may also find some advantage in having their case heard by judge alone, as the judgement surrounding defamatory material will be made by a judge that is versed in defamation law, rather than the 'ordinary reasonable reader', as intended by state law.
- For example, in the Rush case, the articles published by Nationwide News were found to convey defamatory imputations by Judge Wigney. However, a jury comprising of 'ordinary reasonable readers' may have come to a different conclusion.
- Thus, hearings in the Federal Court can operate to deprive defendants in defamation cases from being able to access a jury trial, which begs the question: how does this impact fairness in the civil justice system?

Evidence in the Federal Court (oral vs. affidavit evidence)

- An affidavit is a written account of someone's evidence.
- The bulk of evidence in the Federal Court is given via affidavit.
- This allows a plaintiff to more closely control not just the narrative of their dispute, but the issues that may arise during trial.
- The distinction between affidavit and oral evidence in a defamation hearing is significant. Often in defamation claims, the court will be called upon to make a decision regarding the credibility of a witness. For example, in the Rush case, the credibility of Eryn Norvill was a key consideration in the judgement made by Judge Wigney.
- The court may find more credibility in a genuine and spontaneous account given via oral evidence, than in an affidavit that is pre-prepared and submitted for examination.
- This can give advantages to plaintiffs in defamation claims if the credibility of the defendant's witnesses is reduced in the eyes of the court (due to the style of the evidence given). However, cross-examination is still permitted, and the use of affidavit evidence allows the defendant ample opportunity to examine, and find flaws in, the plaintiff's case prior to trial. Thus, both parties may find advantages in this use of affidavit evidence.
- Affidavit evidence also saves time, and therefore cost, by reducing the amount of evidence which must be heard at the hearing.

Methods of dispute resolution and their appropriateness 2.2.8.9

OVERVIEW

Multiple methods of dispute resolution were used in resolving, and attempting to resolve, this case.

DETAILS

Mediation

- Judge Wigney ordered the parties to this dispute to attend mediation with a registrar of the courts prior to the trial.
- Rush and the defendants attended mediation in July 2018.
- Due to the private nature of mediation, it is unclear whether or not any issues were settled during the mediation. However, the parties would have been given an opportunity to discuss the facts of the case in private and attempt to settle the dispute without a trial.
- The mediation was unsuccessful in resolving the dispute, as it progressed to a trial in the Federal Court.

Trial

- The case was eventually resolved by a trial in the Federal Court, by judge alone.
- A trial is often the most appropriate method for resolving defamation cases, due to the complexity of the evidence, uncertainty regarding the reliability of the claims made about Rush and the sensitive nature of the matters to be decided.
- Furthermore, the amount of damages sought in this case was very high, making it less likely for negotiation between the parties to be successful.



Other methods of dispute resolution

- Arbitration is more suited to contract disputes than a defamation case.

Remedies that could be or were awarded and their appropriateness 2.2.8.10

OVERVIEW

Rush was awarded $850,000 in aggravated damages and $1.98 million for past and future economic loss.

DETAILS

Appropriateness of the remedy

- The *Defamation Act 2005* (NSW) sets a cap for damages at $389,000. However, this cap does not apply in cases where the plaintiff has proven that they are entitled to aggravated damages, as occurred in the Rush case.
- Judge Wigney found that Rush was entitled to aggravated damages because Nationwide News' actions in publishing the defamatory publications was unjustifiable.
- The damages awarded for past and future economic loss was based on a consideration of the impact the defamatory articles had on Rush's reputation, and by extension his capacity to continue earning money.
- Rush also sought a permanent injunction against Nationwide News to prevent any future publications of similar allegations. However, Justice Wigney ultimately decided this was not appropriate and was contrary to the public interest in 'the right of free speech'. The application was therefore dismissed.

Possible avenues of appeal 2.2.8.11

OVERVIEW

Cases that are heard in the Federal Court can be appealed to the Full Court of the Federal Court (consisting of three judges of the Federal Court).

DETAILS

Appeals process

- In civil cases heard in the Federal Court, if a party intends to appeal a decision they must indicate that intention within 28 days. The right to appeal is not automatic and parties must seek leave to do so.

Nationwide News appeal

- In this case, Nationwide News has initiated an appeal to the Full Court of the Federal Court against the decision made by Judge Wigney, on the grounds that he erred in finding that Eryn Norvill had given unreliable evidence.
- Judge Wigney's failure to find credibility in Norvill's evidence had a substantial impact on the outcome of the case, as Norvill was the primary witness for Nationwide News.
- Nationwide News is also appealing the amount of damages awarded to Rush, claiming the amount is excessive.
- The appeal was opened in court on 4th November 2019 and is yet to be decided (at the time of writing).

The extent to which the principles of justice could be or were achieved 2.2.8.12

OVERVIEW

The principles of justice were impacted in a number of ways (positively and negatively) during Rush's civil proceedings in the Federal Court.

DETAILS

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Fair processes. This trial would have followed rules and procedures that were consistent with how all civil cases are handled. The trial was conducted in public, which ensures the strict rules of procedure are applied without bias toward/against either party.
Pre-trial procedures. The pre-trial processes of pleadings and discovery allowed for all parties to exchange documents and other information regarding their claims and evidence in a clear, open and transparent way.

cont'd

This enables each party to prepare to test the accuracy of the other party's evidence in court – which ensures the decision is based on accurate and reliable evidence.

Legal representation. Both parties had legal representation to present their case in the best possible light. Thus, no party was disadvantaged.

Trial in the Federal Court. By electing to have a trial in the Federal Court, rather than a superior state court, Rush made it more difficult for Nationwide News to access a jury trial. This may be seen as unfair for the defendant, as state laws promote the use of juries in defamation cases. The defendant was therefore unable to have their case determined by 'ordinary reasonable readers'.

Unintended publicity. Eryn Norvill found herself at the centre of legal proceedings she did not initiate, and she had not spoken to The Daily Telegraph for its stories regarding Rush. Whilst it is critically important the courts can uncover all relevant facts in a matter, it could be seen as unfair that Norvill was subjected to public scrutiny of these very sensitive matters and ultimately criticised by the judge as not being reliable in her account, given she did nothing to invite this public scrutiny.

Table 2 The principle of access in this case

Principle of justice: *Access*
Trial in the Federal Court. Rush was able to choose to have his case heard in the Federal Court. This minimised delays, and therefore legal costs, as there will usually be no jury in the Federal Court and most evidence is given via affidavit.
Legal costs. Legal costs, including court costs and legal representation, are very expensive in higher courts, reducing access for both parties. Each party would have spent significant sums of money having solicitors prepare the claim and defence; experienced and highly-skilled barristers presenting legal argument and examining witnesses during the trial (and the subsequent appeal) would also be extremely costly.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
No special treatment. Geoffrey Rush is a well-known actor in Australia with a large fan base. However, his fame and wealth do not allow him to be treated any differently under the law. He underwent the same pre-trial and trial processes as any other Australian would. Nationwide News is also a large publisher that prints many Australian newspapers. Yet, they were also treated the same under the law.

Keen to learn more?

***Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496**

Rares, Justice Steven The jury in defamation trials (FCA) [2010] FedJSchol 10, http://classic.austlii.edu.au/au/journals/FedJSchol/2010/10.html

Leder, R. Defamation trials: why plaintiffs are Rush(ing) to file in the Federal Court, corrs.com.au/insights/defamation-trials-why-plaintiffs-are-rushing-to-file-in-the-federal-court

QUESTIONS 9B Rush v Nationwide News [2019]

LEVEL 1:
Define and understand

1. Which of the following is not true?

- **A.** Geoffrey Rush successfully sued Nationwide News for defamation.
- **B.** Rush could have chosen to have his case heard in a NSW state court.
- **C.** Judge Wigney found that the defamatory imputations alleged by Nationwide News were substantially true.
- **D.** Rush's case was determined in the Federal Court by judge alone.

2. Why was Rush's case heard in the Federal Court?

- **A.** All defamation cases are heard in the Federal Court.
- **B.** The plaintiff in most defamation cases can choose whether to have their case heard in the Federal Court or a superior state/territory court.
- **C.** The Federal Court has jurisdiction to hear cases where nationwide celebrities and/or companies are involved.
- **D.** All civil cases where neither party requests a jury are heard in the Federal Court.



3. Was a trial the most appropriate method of dispute resolution in this case?

- **A.** Yes, because both parties were wealthy enough to afford the costs associated with a trial.
- **B.** No, because conciliation is always the most appropriate method of dispute resolution for defamation cases.
- **C.** No, because both parties in this case were well-known in the media and a more private method of dispute resolution would have been the most appropriate.
- **D.** Yes, because defamation cases involve complex evidence and the amount of damages sought was very high. Mediation was also unsuccessful in this case.

4. Which of the following is incorrect?

- **A.** The cap for damages did not apply in this case because Judge Wigney found that Rush was entitled to aggravated damages.
- **B.** Rush was awarded nominal damages for past and future loss of income.
- **C.** Rush was unsuccessful in seeking an injunction against Nationwide News.
- **D.** The type of damages awarded in this case was compensatory damages.

5. Which of the following is an example of equality being upheld in this case?

- **A.** The pre-trial processes of pleadings and discovery allowed for all parties to exchange documents and be clear, open and transparent about their claims and the remedies being sought.
- **B.** Legal costs, including court filing fees and legal representation, are very expensive in higher courts.
- **C.** By electing to have a trial in the Federal Court, rather than a superior state court, Rush made it unlikely Nationwide News could request a jury trial.
- **D.** Neither party received any special treatment, even though they are both well-known in the Australian community.

LEVEL 2:
Describe and explain

6. Outline the burden and standard of proof in this case. (2 MARKS)

7. Identify the limitation of actions for a defamation claim and explain what would have occurred in this case if Rush had initiated a claim after the limitation period. (3 MARKS)

8. Describe one defence to defamation that was used in this case. Indicate whether or not the defence was successful. (3 MARKS)

LEVEL 3:
Apply and compare

9. Other than a trial, describe one method of dispute resolution that would have been appropriate in this case. Give reasons for your answer. (3 MARKS)

10. Analyse the impact of the defamatory publications on two of the following parties:

- The plaintiff (Rush)
- The defendants (Nationwide News and Jonathon Moran)
- The witness (Eryn Jean Norvill) (4 MARKS)

LEVEL 4:
Discuss and evaluate

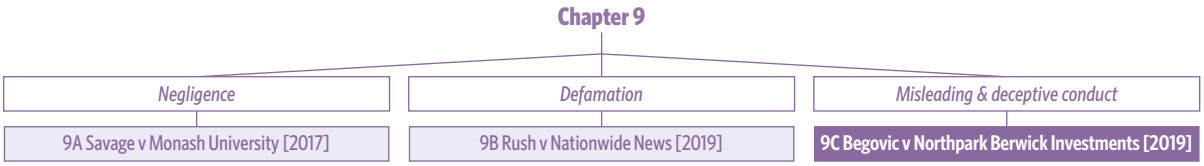
11. Discuss whether fairness and access were achieved in this case. (6 MARKS)

12. 'There are advantages and disadvantages to having a case heard in the Federal Court for both the plaintiff and the defendant.'

Do you agree with the statement? Justify your response. (5 MARKS)

9C Begovic v Northpark Berwick Investments [2019]

Having learned about the elements that must be proven by a plaintiff in a civil claim of misleading or deceptive conduct, you will now look at a recent example of such a case.



In this lesson you will be learning about a recent VCAT case, in which Begovic claimed he was misled regarding a new car's fuel efficiency and the financial loss he suffered as a consequence.

Study design dot point

- Two recent civil cases and for each case:
  - an overview of the claim and the central facts of the case
  - dispute resolution bodies that may be or were involved
  - methods of dispute resolution and their appropriateness
  - remedies that could be or were awarded and their appropriateness
  - possible avenues of appeal
  - the extent to which the principles of justice were or could be achieved.

Key knowledge units

An overview of the claim and the central facts of the case	2.2.8.13
Dispute resolution bodies that may be or were involved	2.2.8.14
Methods of dispute resolution and their appropriateness	2.2.8.15
Remedies that could be or were awarded and their appropriateness	2.2.8.16
Possible avenues of appeal	2.2.8.17
The extent to which the principles of justice could be or were achieved	2.2.8.18

An overview of the claim and the central facts of the case 2.2.8.13

OVERVIEW

In 2017 Begovic purchased a new Mitsubishi Triton. A label on the vehicle indicated it was more fuel efficient than it proved to be, and Begovic claimed this was misleading conduct pursuant to the *Australian Consumer Law*. He took legal action to recover the cost of the vehicle in the Victorian Civil and Administrative Tribunal (VCAT).

DETAILS

Parties

- Zelko Begovic was the applicant (that is, the injured party bringing the claim at VCAT – referred to as a plaintiff in the courts).
- Northpark Berwick Investments was the first respondent (that is, the defendant); this was the dealership trading as Berwick Mitsubishi.
- Mitsubishi Australia was also a respondent (defendant) to Begovic's civil claim, as the manufacturer of the vehicle.

Facts

In 2017 Begovic sought to replace his 2008 Triton with a newer version of the same vehicle. He purchased a new Triton from Berwick Mitsubishi. In the car yard, a label appeared on the Triton's windscreen.

- The label stated this Triton's fuel consumption was:
  - 9.0 litres/100km for 'urban' driving (that is, in the city/suburbs).



  - 6.8 litres/100km for 'extra urban' driving (which is driving on country roads).
  - 7.6 litres/100km for 'combined test' driving (an average measure of fuel usage).
- The label also stated: 'Actual fuel consumption and CO2 emissions depend on factors such as traffic conditions, vehicle condition and how you drive.'

Mitsubishi Australia (as the manufacturer of the vehicle) had provided this fuel consumption data to the Berwick dealership. The dealership included this information in its marketing of the vehicle.

Begovic was looking for a more fuel-efficient version of his existing vehicle. When making the purchase he relied on the information that appeared on the label. He gave evidence at VCAT that he does a lot of country driving (classified as 'extra urban' driving for the purposes of measuring a car's fuel efficiency).

After the purchase Begovic complained the vehicle was using too much fuel. He asserted during the VCAT hearing that if he had known how much fuel the car would use (compared to what he'd expected), he would not have bought it.

Three times in the second half of 2017 Begovic took the Triton back to the dealer in Berwick to have the fuel consumption checked. He also had the vehicle's fuel efficiency checked by a different Mitsubishi dealer in April 2018. On each occasion, no fault was found when the vehicle was inspected by the mechanics at the dealerships.

In July 2018 the parties agreed to test the vehicle's fuel consumption, so in August the parties went on three test drives of the vehicle:

- Begovic drove the vehicle for one of the test drives; his driving recorded an average result of 8.85 litres/100km.
- A Mitsubishi technician drove the ute for the remaining two test drives; his driving was found to average 8.5 litres/100km.
- All three test drives used significantly more fuel than the consumption advertised on the label asserting that 'extra urban' consumption would be 6.8 litres/100km.

Begovic's fuel receipts and other data showed his average fuel usage in 'extra urban' driving was around 12 litres/100km.

Begovic presented to VCAT expert evidence from an automotive engineer (Andrea Winkelmann). She conducted tests on the vehicle that were similar to those conducted by manufacturers on all new vehicles sold in Australia.

As stated on the label itself, all vehicles' fuel consumption varies depending on factors such as the weight of any items carried in the car and whether it is being driven on congested city roads or at high speeds on rural roads. However, even allowing for these factors, Winkelmann found that overall fuel usage by Begovic's Triton was approximately 26% higher than advertised on the label.

Legal Issues

Begovic's civil claim alleged that Berwick Mitsubishi breached the *Australian Consumer Law* (the *ACL*). Under Victoria's *Australian Consumer Law and Fair Trading Act 2012,* such claims may be pursued in VCAT.

The following sections of the *ACL* were relevant to Begovic's civil action

LEGISLATION

Extracts from *Australian Consumer Law:*

- Section 18(1): A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- Section 236(1) If:
  (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
  (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

USEFUL TIP

Section 18 is within Chapter 2 of the *ACL,* so the remedies provided by s. 236 were applicable if Begovic proved the defendants' conduct breached s. 18.

According to the VCAT judgement, these sections of the *ACL* require Begovic to prove:

(a) the dealer and/or manufacturer;

(b) in trade or commerce;

(c) engaged in conduct;

(d) which was misleading or deceptive or likely to mislead or deceive; and that

(e) because of the conduct;

(f) he suffered loss or damage.

In deciding whether conduct is misleading and deceptive, the VCAT member Ms Lineen Forde stated: 'The causing of confusion or questioning is insufficient; it is necessary to establish that the ordinary or reasonable consumer is likely to be led into error.'

The VCAT decision

VCAT held the label was misleading. As Begovic had relied upon the information presented when deciding whether to purchase the vehicle, VCAT ordered he be refunded the purchase price (and to return the Triton to the dealership).

The VCAT member who resolved the case published reasons for her decision. These include the following conclusions:

- The sale of a car by a dealership is a supply of goods in trade or commerce, as is distributing Mitsubishis in Australia to dealerships. So the *ACL* applied to this transaction.
- The manufacturer had passed on information to dealerships about Tritons' fuel efficiency knowing this was going to be shared with consumers. The information on the label was on the windscreen of the new Triton – the dealership was therefore clearly making a claim to the public about how fuel efficient this car is.
- The issue to be determined was whether the label was misleading or deceptive (or likely to mislead or deceive a consumer):
  - The label asserted that this Triton was very fuel efficient (with the qualification that actual efficiency would vary depending on how the vehicle was driven, traffic conditions, etc).
  - The test drives conducted in August supported Begovic's claim that the label was inaccurate.
  - Begovic's fuel receipts and data for distance travelled showed the car was using over 12 litres/100km in 'extra urban' driving.
  - During the hearing, Mitsubishi asserted the fuel efficiency figures on the label were correct and not misleading, but provided no data or other evidence to prove this.
- The expert evidence was persuasive. Winkelmann conducted testing similar to that conducted on all new cars sold in Australia. According to the VCAT judgement, the results 'she obtained for the vehicle are significantly higher than the label information (26.7% combined). I accept her conclusion that the difference is unusual and excessive'.
- VCAT accepted Begovic's claim that fuel usage was much higher in the new Triton compared to his older model, despite driving in the same conditions. The label on the new car had indicated it would be more fuel efficient than the older 2008 model.
- Therefore – the label was misleading for this car. No finding was made about Tritons' fuel efficiency more widely. VCAT Senior Member Forde stated:

  > The label information was false based on the expert evidence. It misled Mr Begovic to believe the vehicle had certain fuel consumption characteristics it did not have. He relied upon the representation in the label in making his decision to purchase the vehicle. He wanted a vehicle with a better fuel consumption than his 2008 vehicle. In purchasing the vehicle, he did not get what was represented to him by the fuel label. He suffered a loss by reason of increased fuel costs which he did not bargain for when purchasing the vehicle.
  >
  > I find that both the dealer and the manufacturer engaged in misleading and deceptive conduct. As previously stated, the manufacturer was responsible for the label information and adhering the label to the vehicle knowing that the vehicle was to be sold by the dealer or at least a dealer in Australia. The dealer sold the vehicle with the label information.

  Source: Begovic v Northpark Berwick Investments Pty Ltd (Civil Claims) [2019] VCAT 772
- VCAT made findings regarding whether the sale of the car breached other aspects of the *ACL;* these are not relevant here in considering the misleading and deceptive conduct claim.



Dispute resolution bodies that may be or were involved 2.2.8.14

OVERVIEW

The matter was resolved at VCAT in the Civil Claims List.

DETAILS

VCAT has the capacity to resolve civil disputes between an individual and a business regarding the provision of goods and services.

VCAT's jurisdiction includes disputes arising under the *Australian Consumer Law and Fair Trading Act 2012* (Vic), such as claims of misleading conduct under the *ACL*.

USEFUL TIP

VCAT was the most appropriate body to resolve this dispute, however misleading and deceptive conduct claims are often heard in the courts too. For instance:

- A claim by one business that another firm engaged in misleading and deceptive conduct, resulting in significant financial loss, may be initiated in the Supreme Court or the Federal Court.
- A representative proceeding by a group of consumers claiming a business engaged in misleading conduct would be resolved in the Supreme Court. VCAT cannot resolve class actions, even if the dispute arises from misleading statements about goods and services. This is important to know for Year 12 Legal Studies!

Methods of dispute resolution and their appropriateness 2.2.8.15

OVERVIEW

The dispute was resolved following a VCAT hearing, with VCAT making a binding order in favour of Begovic.

DETAILS

The following methods of dispute resolution were used:

Negotiation

The parties attempted to resolve this dispute informally without legal proceedings:

- Prior to the August test drives Begovic and Mitsubishi agreed that, if the fuel consumption during the test drives was below an agreed limit, they would settle the matter and proceed no further.
- As described above, the fuel consumption during all three test drives was higher than the agreed target.
- The dispute was therefore not resolved by this informal process.

Conciliation

The parties attended a compulsory conference – a VCAT pre-hearing procedure in which the VCAT member attempts to resolve the dispute by conciliation.

In many ways this process was appropriate because it allowed the parties to attempt to resolve the dispute by agreement. If this had succeeded, it would have:

- Minimised delay in the final resolution of the matter.
- Reduced the costs to Begovic (which is particularly important given the total value of the car was under $40,000 – a large sum for Begovic but relatively small compared to many other civil disputes).
  - He would not be required to pay VCAT's hearing fees; and
  - He would not have been required to pay his legal representative to appear during the VCAT hearing.
- Kept the dispute and its resolution private.
  - When a legal issue is resolved by agreement through conciliation, such agreements often require the parties to keep the resolution of the issue private.
  - The resolution of the dispute in favour of Begovic and VCAT's acceptance that he was misled regarding the vehicle's fuel efficiency may do reputational damage to Mitsubishi. Indeed, the decision in this case has been reported in the news media.
  - Mitsubishi may therefore have preferred the private nature of a settlement during the compulsory conference.

The matter was not resolved by conciliation at the compulsory conference. Given this process is conducted in private, what was discussed and why a settlement was not reached are not known.

VCAT Hearing

A hearing was conducted in mid-April 2019; VCAT made its orders and published reasons for doing so on 27 May 2019.

Begovic had a legal representative present his case during the hearing; Mitsubishi was represented by one of its employees (the National Manager Field Services). Berwick Mitsubishi was not present at the hearing.

A VCAT hearing was appropriate in this case because:

- The parties had unsuccessfully attempted to resolve the dispute using negotiation and conciliation – so an independent third party making a legally-binding determination was now required.
- There was a dispute regarding how a vehicle's fuel efficiency is measured. Given this, a hearing was beneficial because:
  - Both parties were given the opportunity to present evidence regarding the Triton's fuel efficiency. However, the VCAT member did note that Mitsubishi didn't present any evidence of its own fuel efficiency testing on vehicles – it merely asserted that the information on the label was correct.
  - The defendant was able to question Begovic and his expert witness (Winkelmann) about the way this Triton's fuel efficiency was measured. This ability to test the accuracy of the evidence presented helps ensure the 'right' decision is reached.
- VCAT's process is relatively informal, which is beneficial to the parties because the intimidating nature of a trial in the courts can leave parties dissatisfied, even if they are ultimately successful.
- VCAT hearings are relatively cheap compared to a trial in the courts, because the filing and hearing fees are comparatively low. This is appropriate given the amount in dispute was under $40,000 – a large sum for Begovic and Berwick Mitsubishi, but small compared to many civil disputes.
- The hearing enabled VCAT to reach a conclusion regarding the version of facts it found to be most accurate. It then linked these facts to the law to decide whether Mitsubishi was liable for Begovic's loss and published its reasons for doing so.

Remedies that could be or were awarded and their appropriateness 2.2.8.16

OVERVIEW

VCAT ordered Berwick Mitsubishi to pay $39,500 to Begovic; Begovic was ordered to return the Triton to Berwick Mitsubishi.

DETAILS

Under the *ACL* a wide range of remedies can be sought by plaintiffs who succeed in making a misleading conduct claim, such as:

- A consumer can ask the tribunal or court to make an order allowing him or her to reject the item and seek a refund.
  - This is the order Begovic sought and received from VCAT.
- Compensatory damages can be claimed in cases of misleading conduct.
  - In theory, a plaintiff such as Begovic could ask VCAT to award damages to recover the money spent on fuel over and above what he or she had expected to spend.
  - However, in this case VCAT decided that:
    - Begovic had given up his 2008 Triton when he traded it in, and had paid increased fuel costs following the 2017 purchase; but
    - He had also used the new vehicle for 2 years; therefore
    - The use of the new vehicle over this time was a fair trade-off for the loss of the value of the 2008 Triton and the higher fuel costs.
- An order instructing the manufacturer to repair the item.
- An order instructing the defendant to replace the item.

Possible avenues of appeal 2.2.8.17

OVERVIEW

In June 2019 Mitsubishi announced its intention to appeal the decision to the Supreme Court – Trial Division.

DETAILS

There are limited rights to appeal a decision reached at VCAT; an appeal must be lodged within 28 days of a decision being reached.

Mitsubishi must be granted leave (permission) by the Supreme Court to appeal. An appeal from the decision of a VCAT member can only be made on a point of law – that is, Mitsubishi can only challenge the interpretation and application of the legal principles in the case.

The VCAT member's decision notes that Mitsubishi's representative at the hearing is not a technical expert and did not present evidence regarding Mitsubishi's testing of the Triton's fuel efficiency. In addition, Mitsubishi did not have legal representation. It is likely that in any future Supreme Court appeal:

- Mitsubishi will have legal representation.
- Mitsubishi may attempt to lead further evidence regarding the fuel usage testing undertaken on new vehicles, to prove the information on the label was not misleading or deceptive.

At the time of writing, the precise content and nature of Mitsubishi's application to appeal the decision is not publicly known.

The extent to which the principles of justice could be or were achieved 2.2.8.18

OVERVIEW

The principles of justice were impacted in a number of ways (positively and negatively) during Begovic's civil proceeding in VCAT.

DETAILS

Table 1 The principle of fairness in this case

Principle of justice: *Fairness*
Legal representation. Begovic had legal representation, which promoted fairness as he had an expert to present his case in its best light.
No legal representation for the respondents. It is unclear why Mitsubishi did not have legal representation. Use of a solicitor or barrister to prepare and present their case may have resulted in a better-prepared defence, such as evidence explaining why the label included information about fuel efficiency that was ultimately found to be misleading.
Party control. Begovic was able to control his own case, in that he decided to present expert evidence and his own receipts proving his fuel usage. Both of these decisions in preparing and presenting his case also helped him to present his case in its best light.
Jury trial. Trial by peers is one way to promote fairness. As the matter was resolved in VCAT the parties did not have access to a jury. However, in one sense this can be seen as a positive – the cost and time taken to use a jury to resolve such a matter would be excessive and disproportionate, given the relatively small financial claim involved.
Independent and unbiased decision maker. An independent VCAT member was able to resolve the complicated legal and factual issues in an objective way. The reasons for the conclusions reached (showing how the law was applied to the facts) are published.
Appeals. Mitsubishi is taking the opportunity to appeal to the Supreme Court, which will ensure any mistakes in the application of the law are corrected (however this will delay the final resolution of the matter from Begovic's perspective).
Process allowed facts to emerge. To ensure the full facts emerged and the correct decision was reached, VCAT made orders before the hearing about the sharing of expert evidence. In addition, Mitsubishi's representative was allowed to contact colleagues during the hearing to clarify evidentiary issues regarding fuel consumption and how new cars are tested. These processes help ensure the 'right' outcome is achieved and are part of VCAT's 'Fair Hearing Obligation' procedures, giving both parties a reasonable chance to present their case. The directions hearings and compulsory conference also ensure the parties are fully aware of the evidence each party will lead, so they can better prepare their own case and plan how to test the other party's evidence.

Table 2 The principle of access in this case

Principle of justice: *Access*
Low cost. VCAT's filing and hearing fees are low, ensuring dispute resolution is accessible to individuals such as Begovic.
Conciliation. VCAT's compulsory conference (though ultimately unsuccessful) would have included an attempt to conciliate the dispute prior to a hearing, promoting access to justice by working to minimise time and expense to the parties.
Limited appeal rights. As the matter was resolved in VCAT, Mitsubishi need to show the law was applied incorrectly to successfully appeal the decision in the Supreme Court.

Table 3 The principle of equality in this case

Principle of justice: *Equality*
Equal chance to present cases. Despite Begovic being a private citizen and Mitsubishi being a huge global manufacturer, both parties were equally entitled to present evidence and challenge the evidence of the other party (although Mitsubishi didn't take full advantage of this opportunity, as described above).

Keen to learn more?

Eddie R & Zhuang Y, The $40,000 sticker: Man successfully sues Mitsubishi for 'misleading' fuel label, www.theage.com.au/national/victoria/the-40-000-sticker-man-successfully-sues-mitsubishi-for-misleading-fuel-label-20190626-p521jy.html

***Begovic v Northpark Berwick Investments Pty Ltd (Civil Claims)* [2019] VCAT 772**

QUESTIONS 9C Begovic v Northpark Berwick Investments [2019]

LEVEL 1:
Define and understand

1. Which party had the burden of proof in this case?

- **A.** Mitsubishi, because it is a criminal offence to mislead or deceive consumers and they must prove they did not do so.
- **B.** Begovic, because he was prosecuting this matter.
- **C.** Begovic, because he was the injured party seeking a remedy.
- **D.** VCAT was required to discover the full truth of the matter, so it had the burden of investigating the facts.

2. What was the standard of proof in this case?

- **A.** Begovic had to prove beyond reasonable doubt that Mitsubishi had engaged in conduct that was misleading or deceptive.
- **B.** Begovic had to prove that Mitsubishi had, on the balance of probabilities, engaged in conduct that was misleading or deceptive.
- **C.** Mitsubishi had to prove on the balance of probabilities that it did not mislead Begovic.
- **D.** As it is a civil matter there is no legally-stated standard of proof.

3. What was the decision reached by VCAT?

- **A.** VCAT found in favour of Begovic, deciding that new Mitsubishi Tritons are not as fuel efficient as advertised.
- **B.** VCAT found in favour of Begovic, deciding that his new Mitsubishi Triton was not as fuel efficient as advertised.
- **C.** VCAT found in favour of Begovic, deciding that he was clearly confused about the Triton's fuel efficiency when he bought it and the advertising caused this confusion.
- **D.** No final decision has been reached as the matter is being appealed.

4. Which statement was held to be misleading or deceptive?

- **A.** TV and Facebook advertising about new Tritons' fuel consumption.
- **B.** The statements of the Mitsubishi technicians when the parties conducted the 3 test drives.
- **C.** The label on the windscreen when the new car was at the dealership.
- **D.** All of the above were held to be misleading.

5. Which of the following statements is not correct?

- **A.** Begovic relied on the fuel consumption information displayed on the Triton when he was looking for a new vehicle.
- **B.** The evidence presented by Begovic and his expert witness demonstrated that his Triton was not as fuel efficient as advertised.



C. Begovic was refunded the purchase price of the vehicle and returned it to the dealership.

D. Begovic was refunded the purchase price of the vehicle, returned it to the dealership and was awarded damages as compensation for the excess money he had to spend on fuel (compared to what he had expected).

6. Fairness was promoted in Begovic's case in a range of ways. Which of the following is an example of fairness being limited in this matter?

A. One party did not have legal representation.

B. The respondent was aware of the expert evidence Begovic would present, assisting Mitsubishi to better prepare its defence.

C. The respondent was able to contact Mitsubishi technicians during the hearing to clarify technical matters about fuel efficiency testing, ensuring the full facts emerged.

D. The parties had not been able to settle this dispute by agreement, so an independent and unbiased decision-maker imposed a legally binding outcome.

7. The respondent can appeal to

A. The Magistrates' Court, because it is the next court in the hierarchy (sitting above VCAT).

B. The County Court, because it hears civil appeals from VCAT.

C. The Supreme Court – Trial Division, because its appellate jurisdiction includes appeals from decisions of VCAT members.

D. The Supreme Court – Court of Appeal, because its appellate jurisdiction includes appeals from decisions of the VCAT president and vice-presidents.

LEVEL 2:
Describe and explain

8. Describe one piece of evidence that led VCAT to determine the fuel efficiency of Begovic's Triton was not that which was advertised. (2 MARKS)

9. VCAT found in favour of Begovic because it was satisfied beyond reasonable doubt that Mitsubishi misled him. Is this correct? Give reasons for your response. (2 MARKS)

10. Describe two ways the principles of justice were upheld in this case. (4 MARKS)

LEVEL 3:
Apply and compare

11. Assume Begovic had been confused about the Triton's fuel usage, and after buying it was unhappy with how much fuel it used. Would he have succeeded in this action?

Justify your response. (3 MARKS)

12. Having been found liable for misleading a consumer about this Triton's fuel efficiency, Mitsubishi may be concerned about suffering reputational damage. Describe one method of dispute resolution that could have avoided this. (3 MARKS)

13. Assume 65 people scattered across Victoria purchased a Triton based on the same fuel-efficiency label being used to promote the ute by car dealerships and believe they have been misled regarding their vehicles' fuel usage.

Comment on whether VCAT is the best institution to resolve these matters in a representative proceeding. (3 MARKS)

Unit 2, Area of study 3

CHAPTER 10

RIGHTS

10

According to the United Nations:

> Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.
>
> *Source:* https://www.un.org/en/sections/issues-depth/human-rights/

The Australian legal system has mechanisms to ensure such human rights are respected. The law protects individuals from discrimination or mistreatment based on their race, age and gender and ensures all members of the community can participate in Australia's democratic processes.

By the end of this chapter, you will know:

- What 'human rights' are and how they are protected in the Australian legal system.
- Ways to enhance the legal protection of Australians' human rights.
- How other nations' legal systems protect human rights.
- How the justice system responds when an individual's human rights are breached.

UNIT 2 AOS 3 – KEY KNOWLEDGE

- an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law
- the influence of international declarations and treaties on the protection of rights in Australia
- the approach adopted by one other country in protecting rights
- possible reforms to the protection of rights in Australia
- one Australian case that has had an impact on the protection of rights in Australia, including:
  - the role of the individual in taking a case to court
  - the facts and issues central to the case, including the rights in question
  - the laws that applied to the case
  - the outcome of the case and its impact on the rights of individuals and on the legal system
  - possible conflicting attitudes in relation to the case.

UNIT 2 AOS 3 – KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about the protection of rights
- compare Australia's approach to the protection of rights with the approach of another country
- evaluate the ways in which rights are protected in Australia
- discuss possible reforms to the protection of rights in Australia
- describe the role of individuals in bringing about changes in the protection of rights through cases
- analyse the impact of a case on the rights of individuals and on the legal system
- apply legal principles to actual cases.

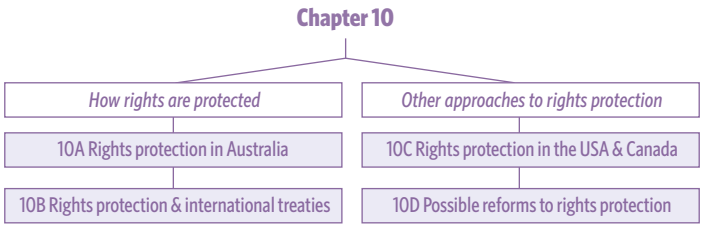


Image: Rawpixel.com/Shutterstock.com

10A Rights protection in Australia

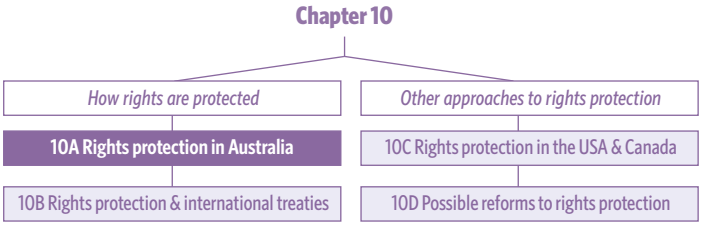
'Human rights are basic entitlements that belong to every one of us, regardless of our background, where we live, what we look like, what we think or what we believe.'

Source: Victorian Equal Opportunity & Human Rights Commission

What are these entitlements? How does Australian law protect these entitlements?

Though our society isn't perfect, Australians are treated in broadly equal ways regardless of gender, religion or age. The law and courts treat the rich and the poor in the same way, and government agencies cannot harass and mistreat certain parts of society. How does Australian law ensure this is the case?

Later in the course you will explore what can be done if a person feels such rights have been violated in some way.



In 2019, thousands of young Australians skipped school to protest in support of climate change action. Assume the government (annoyed about these protests) wants to ban such demonstrations, indefinitely imprison the teenagers who organised the protests and raise the voting age to 25. Does the law prevent them from doing so? If so, which law?

In this lesson you will be learning about the range of ways Australian law protects individuals' rights and freedoms.

Although there are some democratic and human rights protected by the Australian Constitution, human rights are largely protected by the system of representative government. This in turn ensures law-makers do not pass laws that violate the human rights voters want protected, and instead pass laws to actively protect the human rights that voters deem to be important.

Study design dot point

- An overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law

Key knowledge units

The Constitution – Express rights	2.3.1.1.1
The Constitution – Implied rights	2.3.1.1.2
The Constitution – Structural protections	2.3.1.1.3
Strengths & weaknesses of constitutional protections	2.3.1.1.4
How the VCHRR protects rights	2.3.1.2.1
Strengths & weaknesses of VCHRR	2.3.1.2.2
How statute law protects rights	2.3.1.3.1
Strengths & weaknesses of statutory protection of rights	2.3.1.3.2
How common law protects rights	2.3.1.4.1
Strengths & weaknesses of common law protection of rights	2.3.1.4.2



Figure 1 The different ways human rights are protected under Australian law

The Constitution – Express rights 2.3.1.1.1

OVERVIEW

A 'constitution' is a foundational law that establishes a nation's system of government. Constitutional law includes rules about how laws are made, which parliament makes laws on particular topics, the role of the people in choosing law-makers and restrictions on the powers of law-makers.

The Australian Constitution includes explicit limitations on the law-making powers of the Commonwealth and state parliaments to prevent legislation violating certain rights and freedoms.

For instance, most Australians would support the idea that individuals should be free to practise their faith as they wish, no matter what they believe (including the freedom to follow no particular religion). Assume the Commonwealth Parliament wants to pass a law banning a religion. Such a law would be invalid.

DETAILS

Express rights are those human rights that are explicitly stated in the Constitution. There are five express rights included in the Australian Constitution.

Features of express rights:

- **Express rights are entrenched,** meaning they can only be removed, changed or added to via a referendum (a yes/no vote that requires a high level of community support to remove or amend such a right).
- **Express rights are fully enforceable.**
  - A person or organisation that is negatively affected by particular legislation that breaches an express right can challenge the law's validity in the High Court.
  - A law that potentially breaches an express right cannot be challenged by any/all individuals in society; rather, a party must have 'standing' to challenge such a law in the High Court:
    - 'Standing' refers to the ability of a party to appear in court and challenge the validity of legislation.
    - Usually, only a party genuinely affected by such legislation has 'standing'.
  - This process takes time; the cost of preparing and presenting such a case is significant.
  - The law continues to operate until it is challenged and the Court declares it invalid.
- Express rights are a **limitation on the law-making powers** of parliaments. Table 1 indicates how, in practice, the express rights restrict the Commonwealth's law-making powers.



Table 1 Examples of express rights in the Australian Constitution

Section 51(xxxi): Right to 'just terms' when Commonwealth acquires property	
Section 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.'	**How this protects human rights:** • The Commonwealth cannot simply pass a law taking a person's (or a company's) land, possessions, etc. If it passes such a law, 'just terms' must be provided. • 'Just terms' means any Commonwealth law taking possession of property must provide compensation that is fair. **However:** • Section 51(xxxi) does not prevent the Commonwealth from acquiring property – it actually 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 states to ensure just terms are provided if a state parliament passes a law acquiring property from a person or business.
Section 80: Right to jury trial for Commonwealth indictable offences	
Section 80 requires 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury.'	**How this protects human rights:** • This section guarantees individuals a jury trial if charged with an indictable offence under Commonwealth law. • The Commonwealth cannot legislate to have indictable offences tried by judge alone. This helps ensure trials are fair (see Lesson 6E for how jury trials promote fairness in society). **However:** • Most criminal offences are created by state laws, not Commonwealth law; s. 80 does not prevent states from passing laws to have serious offences tried by judges alone. • Section 80 provides jury trials for indictable offences. When the Commonwealth passes a law creating a criminal offence, the new law states whether that crime is to be tried on indictment (with a jury), or summarily (judge alone). In other words, it can pass a law creating a new criminal offence (even a very serious criminal offence) and state in the legislation the crime is to be tried summarily by a judge alone. This is a 'way around' the operation of s. 80.
Section 92: Free interstate trade	
Section 92 declares that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'	**How this protects human rights:** • 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:** • Although designed to protect freedom of movement, in practice s. 92 applies largely to how businesses conduct trade rather than individuals' rights and freedoms. • The High Court has stated that although a law intended to prevent interstate movement of people would be invalid, a law that has some other legitimate 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.

cont'd

Section 116: Freedom of religion

Section 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.'

How this protects human rights:

- The Commonwealth cannot pass laws that are designed to restrict the free practice of religion.
- The Commonwealth cannot pass a law imposing a religion on any individuals.
- A person cannot be denied a position in the Commonwealth government because of their religious beliefs.

However:

- Section 116 limits the Commonwealth's law-making powers, but does not apply to the state parliaments. That is, it does not stop states passing laws to limit freedom of religious practices.
- 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

Section 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.'

How this protects human rights:

- 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.

USEFUL TIP

As stated in the VCAA examiner's report regarding the 2014 exam: 'In their definition, students were expected to use a word other than "express" to explain what it meant. Therefore, the definition should have used words such as "entrenched", "written in the Constitution" or "stated in the Constitution".'

Which is how the concept is defined above! 'Express rights are those rights explicitly written in the Constitution.'

Plus, when defining a concept such as express rights, always include an example to demonstrate the depth of your understanding – this will help in the Year 12 exam!

The Constitution – Implied rights 2.3.1.1.2

OVERVIEW

Are there other rights enjoyed by Australians that go beyond simply those included in the Constitution? For example, through its interpretation of the Constitution the High Court has determined that the authors of the Constitution intended for Australians to be free to communicate on political issues, despite this entitlement not being explicitly stated in the Constitution.

DETAILS

An implied right is an entitlement that is not explicitly stated in the Constitution, but the High Court has ruled that this entitlement is intended to exist, based on the meaning of the words written in the Constitution.



As mentioned above, the High Court has found an implied right to freedom of political communication in the wording of the Constitution. Features of this implied right include:

- Because our Constitution establishes a system of representative government, an implied right to **free political communication** is necessary for that system to operate properly.
- **The implied right is fully enforceable.**
  - A person or organisation that is negatively affected by legislation breaching the implied right can challenge the law's validity in the High Court.
  - This takes time; the cost of preparing and presenting such a case is significant.
  - The law continues to operate until it is challenged and the Court declares it invalid.
- There are **limitations to this implied right:**
  - The High Court has not found that a general right to free speech is implied by the Constitution, but only a right in regard to matters which can be described as 'political communications'.
  - Communication about the Australian political system is protected, but communication about political issues in other nations is not protected.

CASE STUDY

***Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106**

In 1991 the Commonwealth passed legislation to restrict television advertising during an election campaign. The purpose of this law was to ensure election campaigns were not dominated by those who had the most money to spend on advertising. The validity of this law was challenged in the High Court.

Sections 7 and 24 of the Constitution require the parliament to be 'directly chosen by the people'. The High Court decided this establishes the principle of representative government – a democratic system that 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.

Without explicitly stating so, ss. 7 and 24 require voters to be free to communicate on political matters – the right to free political communication was implied by the words 'directly chosen by the people'. The political advertising law was declared invalid as it breached this implied right.

This High Court decision is significant because it concluded that the authors of the Constitution intended for free political communication to be protected, without explicitly stating this in the Constitution. Sections 7 and 24 gave rise to an implied right to freedom of political communication and in this decision the Court defined what sort of communication is protected by this implied right.

CASE STUDY

***Comcare v Banerji* [2019] HCA 23**

In 2011 Banerji joined Twitter, using the Twitter handle 'LaLegale' (rather than her own name). She worked for the Department of Immigration and Border Protection, and was therefore a member of the Australian Public Service (APS).

Banerji posted many tweets that were very critical of Australia's border protection laws, members of parliament and the Department itself. Almost all of these tweets were posted outside work hours, on a private device.

The code of conduct for the APS includes a requirement they behave at all times in a manner that upholds the APS values and the integrity and good reputation of the APS. Among the APS values it is stated that the 'APS is apolitical, performing its functions in an impartial and professional manner'.

After the Department conducted an investigation into the tweets, it determined Banerji was posting as Lalegale, and dismissed her for breaching the code of conduct.

Banerji initiated legal action, arguing the APS code of conduct (and the legislation that created the code of conduct) unfairly breached the implied right to free communication on political issues.

The Court had to weigh-up two competing considerations:

1. Those who work in the public service must be seen to be independent of politics, and doing their duties according to the law and to the best of their ability, For example, consider members of the police force, individuals responsible for collecting taxes, those who decide who is eligible for a government pension and those who decide how funds are distributed to schools – the community needs these workers to act in a way that is apolitical, independent and based on the law;
2. In a democracy, all individuals should be free to debate political issues and support (or criticise) the work of law-makers, government ministers and government departments, regardless of their job.

The High Court rejected Banerji's argument, stating 'the implied freedom of political communication is not a personal right of free speech.'

The Court decided an independent and apolitical public service is a critical part of Australia's system of government, therefore the law creating this code of conduct for the APS (preventing the 150,000 people employed by the APS from publicly criticising the work of politicians and government departments) is reasonable. As a result, Banerji's dismissal was lawful, and not a violation of the implied right.

This case indicates how narrow the operation of the implied right is, compared with other nations' constitutional protection of free speech. The implied right prevents laws being created that unreasonably restrict political discussion, but it does not provide individuals with an entitlement to free speech.

USEFUL TIP

When defining 'implied rights', don't simply re-use the word 'implied'. Avoid repetition in your explanations because it's an easy (and too common) way to lose marks in the Year 12 exam. Use the definition provided above.

Representative government = Law-makers acting in a way that reflects the community's values & expectations.

This is achieved by:

- **Voters knowing what law-makers do and propose to do in future.**
- **Voters discussing with each other and law-makers what they think the law should be.**
- **Voters making informed choices at elections.**
- **Ensuring most Australians participate in elections.**

Figure 2 Linking representative government and the implied right to freedom of political communication



The Constitution – Structural protections 2.3.1.1.3

OVERVIEW

The Constitution establishes particular mechanisms to ensure that governments act in a way that protects the rights of individuals in society. These are known as 'structural protections'.

DETAILS

Structural protections are the systems and mechanisms set up by the Constitution that indirectly protect human rights.

Two systems set up in the Constitution that indirectly protect the rights and freedoms of Australians:

1. Separation of powers
2. Representative government

The Separation of powers

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.
- **Executive power is** the ability to administer laws and '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.
- **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.
- 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).
- 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.

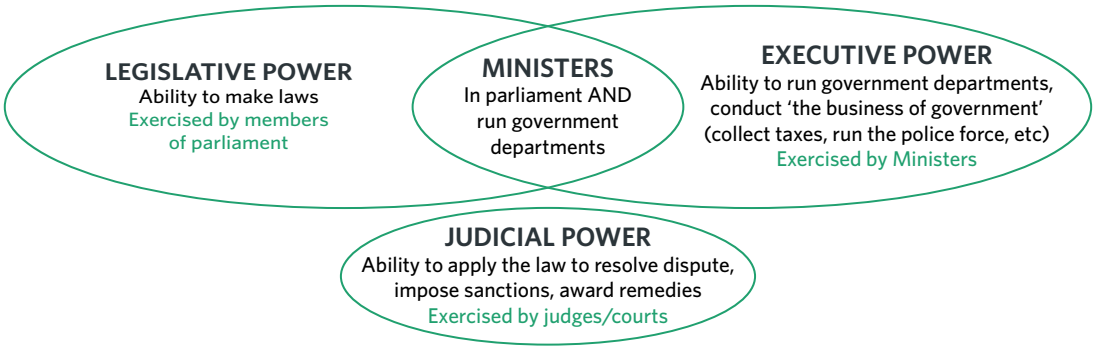


Figure 3 The separation of powers

Ways the separation of powers protects individuals' rights:

- Law-makers in parliament cannot also decide who has broken the law (even though it might be politically popular to do so).
- Ministers & government departments can investigate possible breaches of the law, but cannot decide who has/has not broken the law.
- 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).

Example of how the separation of powers protects human rights:

- Assume members of the House of Representatives face pressure from voters in their electorates to get tough on crime. The Commonwealth Parliament responds by passing legislation allowing the House of Representatives to conduct criminal trials.
- Dylan is charged with defrauding Centrelink and awaits a hearing before the House of Representatives.
- If Dylan 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).

CASE STUDY

***Australian Communist Party v Commonwealth* [1951] 83 CLR 1**

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 should 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 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 the Commonwealth Parliament had no power to pass a law banning political parties.

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 limit on the law-making power of the parliament and protecting the rights of those with different political views.

Representative Government

As seen in *Australian Capital Television* (above), ss. 7 & 24 of the Constitution require the parliament to be 'directly chosen by the people'. How does this protect individuals' rights?

- Law-makers will pass laws that protect the rights valued by the community.
  - For example: laws preventing discrimination based on gender have been passed because the voters want people protected from such discrimination (and the principle of representative government ensures law-makers act in accordance with the values of the majority of voters).
- Regular elections allow voters to remove a government that introduces legislation violating individuals' rights.
- Regular elections mean the fear of losing office should prevent law-makers introducing and passing legislation that breaches human rights.
- This system of representative government requires a substantial majority of the population to participate in elections, meaning the parliament has a limited ability to pass laws taking away the right to vote.

USEFUL TIP

Express and implied rights directly protect particular entitlements (such as free practise of religion and free political communication). Structural protections are more indirect ways of ensuring individuals' rights are protected.



USEFUL TIP

The Constitution does not guarantee all Australians the right to vote. However the High Court has decided the system of representative government requires a substantial majority of the population to be allowed to participate in elections – the parliament can only truly represent 'the people' if most of the people are involved in choosing who is in the parliament.

As a consequence, the right to vote can only be removed for substantial reasons (such as imprisonment for very serious criminal offences). See Lesson 11A for further information.

The Constitution – Strengths and weaknesses of Constitutional protections 2.3.1.1.4

OVERVIEW

The founders of Australia's Constitution very deliberately included few express rights and decided to rely on structural protections such as the separation of powers and representative government. Is this an effective way of protecting the rights of Australians? What are some possible downsides to this?

DETAILS

Table 2 Strengths and weaknesses of constitutional protections of rights

Strengths	Weaknesses
Entrenched. The five express rights can only be removed by a referendum. This is a difficult process, making it unlikely these rights will be removed easily. **Implying rights.** The High Court has the ability to find implied rights, as reflected in the implied right to political communication. **Enforceability.** The express and implied rights are fully enforceable by the High Court. **Cannot be overridden.** None of the protected rights can be overridden by parliament (contrast Canada where parliament can override a court order that has declared a law invalid because it infringes a right – see Lesson 10C). **Separation of powers.** The separation of powers is an effective way to protect human rights. 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 many ways. **Representative government – laws protecting rights.** The reliance on representative government to protect human rights allows rights protection to change as society changes. For instance, laws promoting equality for all regardless of gender, sexuality and race were (unfortunately) unthinkable at the time the Constitution was written, but as society's values changed the system of representative government ensures new laws evolve to remove discrimination and protect individuals' rights in such situations. **Representative government – fear of losing office.** The principle of representative government includes having regular elections; the fear of losing power at an election should prevent law-makers passing laws to violate human rights, which is preferable to having mechanisms for compensating/removing rights abuses after the fact.	**Limited express rights.** 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 limitation on the power of law-makers). **Narrow application.** The express and implied 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. • The implied right protects only communication about political issues in Australia rather than free speech more generally. **Need for challenge.** 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 from challenging a law that breaches an express right, meaning the law continues to operate. **Remedies.** The Court cannot award damages to a person affected by a law breaching express or implied rights. **Advisory opinions.** The High Court does not give advisory opinions on the scope of the protection of rights. It will only rule on those matters when a dispute is before the Court and a judgment is required (contrast Canada where the court can give advice on proposed legislation). **Representative government – protecting minorities.** The reliance on representative government to protect human rights is not an effective way to protect the rights of unpopular minorities (such as asylum seekers in Australia) – such laws may in fact be popular with some voters and/or unknown to other voters (meaning fear of losing office does not prevent law-makers from passing such legislation).

CASE STUDY ***Al-Kateb v Godwin* [2004] HCA 37**

When Al-Kateb arrived in Australia by fishing boat in 2000 he was placed in immigration detention. His application for protection and permission to live in Australia was rejected. He was not deported, as no other nation was willing to accept Al-Kateb. He therefore remained in an Australian detention centre (the *Migration Act 1958* (Cth) requires the mandatory detention of unlawful non-citizens).

Al-Kateb argued the *Migration Act* empowered the Australian government to keep him detained indefinitely, and that such detention breached his human rights. A majority of the Court's justices rejected his argument, concluding:

- The *Migration Act* does empower the government to detain people indefinitely;
- The Constitution does not prevent such legislation being passed (there is no express or implied constitutional right that provides protection from being detained – even for children, the elderly and those who have committed no criminal offences); and
- In the words of Justice McHugh the situation may be 'tragic' but 'it is not for courts... to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.'

How the VCHRR protects rights 2.3.1.2.1

OVERVIEW

Legislation called the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects human rights in Victoria and ensures that every new law is reviewed in light of its impact on the rights of Victorians.

DETAILS

The VCHRR is Victorian law that outlines basic human rights of all Victorians.

Features of the VCHRR's operation include:

- Before a law is passed in Victoria, the Minister introducing a bill (new legislation to be passed by parliament) needs to outline how the law is/is not compatible with the *Charter* (presenting a 'Statement of Compatibility'):
  - The *Charter* should therefore discourage the parliament from introducing and passing new laws that breach Victorians' human rights.
  - If a proposed law does breach a right in the *Charter*:
    - This breach is debated openly in the parliament.
    - Law-makers consider whether the breach of human rights is justified.
- The VCHRR does not create a right to begin legal action if rights in the *Charter* are breached. Instead, it protects rights indirectly by:
  - Promoting new laws being developed in accordance with rights (as above).
  - Ensuring government bodies act in accordance with human rights in the VCHRR (such as the police, schools, hospitals, etc).

Examples of rights protected by the *Charter:*

- Equality before the law (s. 8)
- Protection from torture (s. 10)
- Protection from slavery (s. 11)
- Right to freedom of thought and religion (s. 14)
- For those accused of a criminal offence the right to silence and the right to an interpreter (s. 25).

The Victorian parliament is the supreme law-making body in the state, meaning it can pass new laws that are inconsistent with legislation previously passed in Victoria – including the *Charter*.



USEFUL TIP

Many students misunderstand the 'power' of the *Charter*. It does not prevent new laws that breach or impact upon human rights – the Victorian parliament has the power to pass legislation that breaches or limits the rights in the *Charter.* The VCHRR's 'power' lies in requiring the parliament to explicitly debate and consider how new laws might impact upon Victorians' human rights.

CASE STUDY

Voluntary assisted dying in Victoria

In 2017 the *Voluntary Assisted Dying Act 2017* (Vic) was passed in Victoria. This provides access to medically-assisted dying (through access to medication that ends life) for those enduring significant pain and suffering as a result of a terminal illness. The *Act* only makes this medical assistance available to those experiencing intolerable suffering as a result of an incurable illness, who are over 18 years of age.

Section 8 of the *Charter* includes the right to equality before the law. This includes equal treatment of all people regardless of gender, race and age.

The *Voluntary Assisted Dying Act 2017* (Vic) infringes upon the rights of those under 18 who may be suffering incurable illnesses, by preventing access to medically-assisted dying – it treats young people differently, based on their age. This 2017 law could therefore be regarded as violating the human rights of young people under the *Charter.*

The Victorian parliament considered and debated this limitation on young people's *Charter* rights, but deemed the age qualification to be a reasonable restriction of the right to equality before the law in this situation.

This case study demonstrates:

- *Charter* rights are not absolute; new laws can be passed that limit such rights.
- Complex issues regarding limits on human rights (such as equal access to medical assistance regardless of one's age) must be considered due to the *Charter's* existence.
- Difficult issues regarding when/how certain human rights may be limited are resolved in a public way, debated by elected-law-makers.

Strengths and weaknesses of VCHRR 2.3.1.2.2

OVERVIEW

The *Charter* includes an extensive list of human rights – how successful is it at protecting the rights of Victorians?

DETAILS

Table 3 Strengths and weaknesses of VCHRR

Strengths	Weaknesses
New laws and human rights. Ensures human rights issues are considered and debated publicly when all new legislation is considered in Victoria. This creates a political risk for law-makers introducing laws breaching human rights, discouraging law-makers from doing so.	**No new legal claims.** VCHRR does not establish the right to begin legal action for rights breaches. A party who has had their rights breached under VCHRR cannot initiate court proceedings under this law seeking a remedy solely for a breach of the Charter.
Debate. This process ensures complex issues regarding human rights are debated and resolved in a public way, by democratically-elected law-makers. See the Case Study regarding voluntary assisted dying.	**Only Victoria.** The VCHRR applies only to new laws being considered in Victoria. It has no impact on new laws being developed in the Commonwealth Parliament, which may infringe upon the rights of Victorians.
	Can be overridden. Although the VCHRR requires Victorian law-makers to explicitly consider whether new laws violate human rights in the Charter, it does not stop such laws being created. See the Case Study regarding voluntary assisted dying.

How statute law protects rights 2.3.1.3.1

OVERVIEW

Laws created by the Commonwealth and Victorian parliaments protect human rights by making certain discrimination unlawful, such as discrimination on the basis of gender, religion, age and sexuality.

DETAILS

Statutes in Australia protect human rights by making some discrimination unlawful. Laws such as the *Equal Opportunity Act 2010* (Vic), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) render certain discriminatory actions unlawful.

Features of such statutes include:

- The **grounds** on which it is unlawful to discriminate against someone, such as age, gender, religion, pregnancy and marital status.
- **Places** where such discrimination is not permitted, such as when a person is applying for a job or a university course, and when in a shop or a restaurant.
- **Remedies** for individuals if they have their rights breached, such as a court-ordered apology or damages.
- Some **exceptions** may be permitted (for example, schools may apply for the right to enrol students of one gender only).

This Victorian and Commonwealth legislation provides **very widespread protection from discrimination** based on age, gender, marital status, sexuality, race and so on in all walks of life.

LEGISLATION Commonwealth legislation makes it unlawful to mistreat an individual based on his or her race.

***Racial Discrimination Act 1975* (Cth)**

SECTION 9 – RACIAL DISCRIMINATION TO BE UNLAWFUL:

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Victorian and Commonwealth legislation also protects the rights of suspects when they are **the subject of a criminal investigation:**

- Statutes protect most suspects' right to silence when being questioned by the police, and prevent physical force and intimidation being used to gain answers to questions or gather forensic evidence such as fingerprints.
- The failure to follow these statutes and uphold a suspect's rights can result in evidence gathered illegally being inadmissible in a criminal trial. This encourages police to ensure they adhere to these laws protecting suspects as they move through the criminal justice system.

Strengths and weaknesses of statutory protection of rights 2.3.1.3.2

OVERVIEW

Statutory protection of human rights (which is linked to the principle of representative government described above) forms the basis of most human rights protection in Australia.

DETAILS

Table 4 Strengths and weaknesses of statutory protection of rights

Strengths	Weaknesses
Anti-discrimination law. Statues such as the *Equal Opportunity Act 2010* (Vic) allow injured parties to seek a remedy if they have been mistreated on the basis of gender, marital status, etc. This discourages rights breaches and enables those who are wronged to seek damages or an apology.	**Courts not always accessible.** Some cases of alleged human rights abuses under legislation must be pursued through the courts, which is time-consuming and expensive for the parties involved.

cont'd



Strengths	Weaknesses
Remedies usually accessible. In many cases in Victoria, such legal action to uphold rights against discrimination is easily accessible (for example, the anti-discrimination cases at VCAT attract no filing fee and parties can self-represent). **Evolution.** Rights protection can evolve as society's expectations and values evolve. At the time of federation, discrimination on the basis of gender, sexuality and race was commonplace in Australia; as society's expectations about human rights and equality have changed, new laws have been created to promote and protect such rights. **Widespread protection.** Victorian and Commonwealth legislation now provides very widespread protection from discrimination based on age, gender, marital status, sexuality, race and so on. **Protecting accused persons.** Legislation protecting those suspected of crimes ensures evidence obtained by police in a way that violates accused persons' rights is not admitted in court (for example, a confession gained by threatening a suspect with physical harm cannot be used as evidence in court). This protects the human rights of those facing the criminal justice system.	**Parliament can abolish rights.** Parliament can pass new laws amending or removing human rights that were previously protected in legislation. – For example, there is legislation that allows the police to detain in prison for a short time individuals merely suspected of (but not formally charged with) terror offences.

How common law protects rights 2.3.1.4.1

OVERVIEW

Common law is law created by judges when resolving a dispute, if there is no applicable law or the existing law is unclear. This process often involves questions about human rights.

DETAILS

As described in Lessons 1D and 1E, common law is law made by judges when resolving a dispute. This includes:

- Giving meaning to words in legislation (known as **'statutory interpretation'**); and
- Creating principles of law when a new type of dispute arises for which there is no relevant law to apply (called **'precedent'**).

The definitions/principles created by the judge becomes law to apply in future, similar cases.

Precedent:

A principle of law created by a court when resolving one case which is then followed in similar cases in the future is called a 'precedent'.

The human rights of accused persons were protected by judge-made law throughout much of the 20th century. Now, most of these rights developed by judges (such as the right to silence during police questioning) have been adopted into legislation.

Statutory interpretation:

Most of judges' work in developing the common law is giving meaning to the words in legislation, to decide whether a particular law has been breached. This process of statutory interpretation applies to laws protecting human rights. For example:

1. The *Equal Opportunity Act 2010* (Vic) states a person cannot discriminate against another person by refusing to provide them employment or goods/services on the basis of their gender, marital status, sexuality, age etc.

   Assume Ash applies for a job as a TV netball commentator, but when he is rejected he's told it's because his wife plays for the Australian Diamonds. Ash takes legal action arguing he's been mistreated because of his marital status. Does 'marital status' under this law simply mean whether a person is married or single? Or does it also include who you're married to? The court will need to interpret the meaning of the term 'marital status' to determine whether the *Equal Opportunity Act* has been breached in this case. The definition given to this phrase will apply in future cases.

2. Section 462A of *Crimes Act 1958* (Vic) states that when a police officer arrests a suspect or acts to prevent an indictable offence being committed, the officer 'may use such force not disproportionate' as to what he/she believes to be needed to arrest that person or prevent the crime being committed.

Assume Tara is about to shoplift from a supermarket and a police officer uses force to prevent her from doing so, breaking her arm. Was this 'disproportionate'? A court will need to give meaning to that word to decide whether the *Crimes Act* has been broken, and this definition of 'disproportionate' becomes a common law rule to follow in future cases such as this.

CASE STUDY

***Attorney-General (Vic) (Ex Rel Black) v Commonwealth* [1981] HCA 2**

The Commonwealth Parliament passed legislation granting money to fund religious schools.

Section 116 of the Constitution states the Commonwealth cannot establish a religion. The validity of the Commonwealth law giving funds to religious schools was challenged on the basis that it breached s. 116.

The High Court had to interpret the words 'establishing any religion' in s. 116 and decided that granting funds to religious organisations (such as schools) would support those bodies, but it doesn't establish a religion. Instead, the High Court decided 'establishing a religion' means 'creating a religion, with its own belief system.'

This definition of 'establishing a religion' is now a common law principle to be applied in future cases where the right to freedom of religion under s. 116 is to be considered.

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 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, and
- The indigenous connection to the land had not been extinguished by some transaction since European settlement (such as the land being bought and sold).

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 High Court decided the law's previous assumption that Australia was a 'land of no-one' was racist and discriminatory. The facts presented by 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.

This is an example of court-made law being changed, to recognise Indigenous Australians' right to own land and removing previous common law principles based on outdated and racist views about Indigenous people.



Strengths and weaknesses of common law protection of rights 2.3.1.4.2

OVERVIEW

Law-making by courts plays a central role in human rights protection in Australia. Is it effective?

DETAILS

Table 5 Strengths and weaknesses of common law protection of rights

Strengths	Weaknesses
New rights issues. Courts can give meaning to the words in legislation and the Constitution protecting human rights, to determine whether particular actions do/do not breach human rights. This is beneficial as society changes and new issues (and new scenarios of potential rights abuses) arise. **Fill gaps in the law.** The courts can recognise individuals' human rights when the parliament has failed to do so (as occurred in *Mabo*).	**Inaccessible.** It is the higher courts in the hierarchy that create common law through statutory interpretation, constitutional interpretation and changing outdated common law principles (such as in *Mabo*). Pursuing such a case to the higher courts to determine whether human rights have been breached is very expensive and time-consuming. **Reactive.** Courts cannot initiate a change in the law to recognise human rights, but instead must wait for a relevant case to be brought before the courts. For example, the High Court's recognition of indigenous rights to own land was in response to Mabo initiating this claim in the courts, the Court could not proactively create such a right. **Removed by parliament.** Common law human rights can be abolished by legislation. For example: over many decades judges created a right to remain silent when being questioned by police. While legislation now protects this right in most criminal cases, for some individuals suspected of terrorism offences this right has been replaced by legislation making it an offence not to cooperate with police.

Keen to learn more?

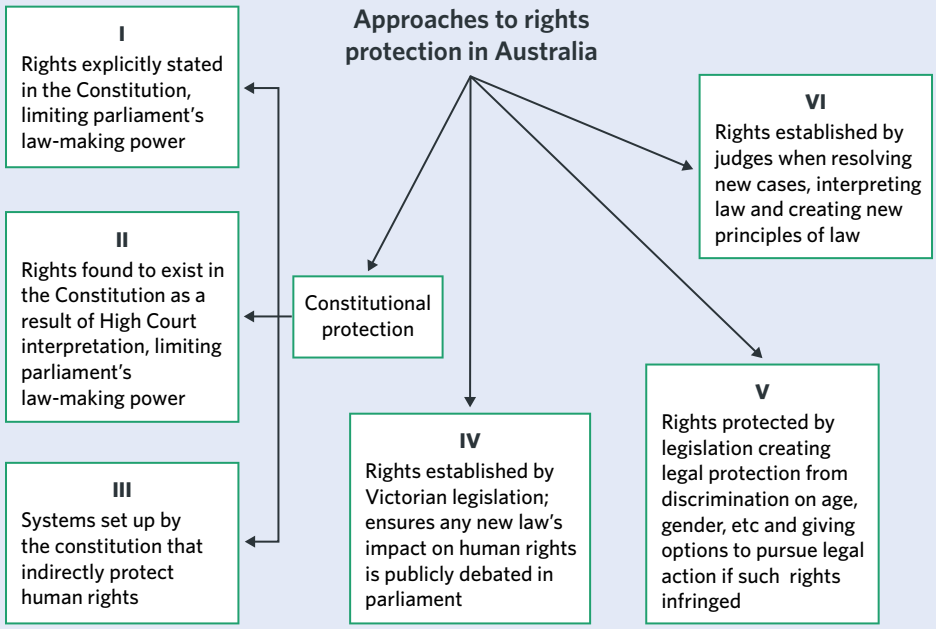
Parliamentary Education Office: Separation of powers: Parliament, Executive and Judiciary, https://www.peo.gov.au/understand-our-parliament/how-parliament-works/system-of-government/separation-of-powers/

Victorian Equal Opportunity & Human Rights Commission, www.humanrightscommission.vic.gov.au/

QUESTIONS 10A Rights protection in Australia

LEVEL 1:
Define and understand

1. Which of the following correctly fills in this diagram?



A. I – implied rights; II – express rights; III – structural protections; IV – common law protections; V – VCHRR; VI – statutory protections

B. I – express rights; II – implied rights; III – structural protections; IV – statutory protections; V – VCHRR; VI – common law protections

C. I – express rights; II – express rights; III – structural protections; IV – common law protections; V – VCHRR; VI – statutory protections

D. I – express rights; II – implied rights; III – structural protections; IV – VCHRR; V – statutory protections; VI – common law protections

2. Match each of the following terms to the corresponding definitions.

- Express right
- Structural protection in the Constitution
- Right protected in legislation
- Right protected by the VCHRR
- Implied right

a) _____ free communication on political issues

b) _____ representative government

c) _____ protection from torture

d) _____ non-discrimination based on marital status when applying for a job

e) _____ freedom of religion

3. Which of the following is incorrect?

A. Human rights protection by express and implied rights is limited, because few human rights are included in the Constitution and their operation is narrow. On the other hand, legislation breaching such rights can be declared invalid when challenged in the High Court.

B. The system of representative government should ensure parliament does not introduce and pass laws that infringe on voters' rights (due to the fear of losing office), but the rights of unpopular minorities in society may not be protected by relying on this mechanism.



C. The VCHRR protects the rights of Victorians by allowing those who have their rights infringed to take legal action seeking compensation, but it only applies in Victoria.

D. Victorian and Commonwealth legislation prevents discrimination on a wide range of grounds such as gender or religious beliefs, and allows those subjected to such discrimination to seek a remedy such as damages. However, parliament could choose to change or remove such protections in future.

E. Judges have the ability to make decisions that protect human rights in future cases, but such rights can be overridden by the parliaments in making laws.

4. Assume Anthony challenged legislation in the High Court that banned certain religious practices which are central to his faith. Which of the following is a likely outcome?

A. Anthony would receive financial compensation, as a remedy for the injury he has suffered.

B. The legislation would be declared invalid, as laws breaching an express right are struck down by the High Court when challenged.

C. The legislation would be declared invalid, as laws breaching an implied right are struck down by the High Court when challenged.

D. The legislation would be declared invalid, as laws breaching the VCHRR's protection of religious freedom are struck down by the High Court when challenged.

5. Assume Kat challenged legislation in the High Court, which had banned her from posting comments about the Prime Minister's performance on Twitter. Which of the following is a likely outcome?

A. Kat would receive financial compensation, as a remedy for the injury she has suffered.

B. The legislation would be declared invalid, as laws breaching an express right are struck down by the High Court when challenged.

C. The legislation would be declared invalid, as laws breaching an implied right are struck down by the High Court when challenged.

D. The legislation would be declared invalid, as laws breaching the VCHRR's protection of freedom of communication are struck down by the High Court when challenged.

6. At a Commonwealth election, a new government is voted in. If human rights protection was an issue that voters were thinking about before the election, which of the following is the most likely cause for change in government?

A. Before the election, the Commonwealth passed legislation that was widely supported, but breached the implied right of freedom of political communication.

B. Before the election, the Commonwealth passed legislation that was widely supported, but breached the express right to freedom of religion.

C. Before the election, the Commonwealth passed unpopular legislation that permitted businesses to ask questions in job interviews about an applicant's sexuality. This is an example of the principle of representative government protecting human rights.

D. Before the election, the Commonwealth passed popular legislation that permitted indefinite detention of people seeking refugee status in Australia. This is an example of the principle of representative government protecting human rights.

7. Which of the following best summarises the overall approach to human rights protection in the Australian legal system?

A. The Constitution provides extensive protection of human rights, with many express rights. There is some legislation protecting individuals from being discriminated against based on their race, gender and so on.

B. The Constitution provides very limited protection of human rights, with relatively few express rights. However the Constitution does create the principle of representative government which indirectly protects human rights, and this has resulted in Victorian and Commonwealth parliaments passing legislation to protect individuals from discrimination based on their race, gender and so on.

C. The Constitution provides extensive protection of human rights, with many express rights. There is also significant legislation protecting individuals from being discriminated against based on their race, gender and so on.

D. The Constitution provides very limited protection of human rights, with relatively few express rights. There is some legislation protecting individuals from being discriminated against based on their race or gender, and those affected by such discrimination can seek damages in the courts.

LEVEL 2:
Describe and explain

8. Using one example, define the term 'express rights'. (3 MARKS)

Adapted from VCAA Exam 2014 Question 7A

9. Using one example, define the term 'implied rights'. (3 MARKS)

Adapted from VCAA Exam 2014 Question 7A

10. 'The structural protection of rights in Australia is one of the means by which the Commonwealth Constitution protects rights.' Identifying one example, define the term 'structural protection'. (2 MARKS)

Adapted from VCAA Exam 2011 Question 6A

11. A senior constitutional lawyer recently said 'one weakness of human rights protection through express rights is that those who challenge legislation because it breaches an express right cannot be awarded damages by the High Court.'

Describe one other weakness of express rights as a means for protecting human rights in Australia. (2 MARKS)

12. The implied right being fully enforceable is a strength of the Australian Constitution's protection of rights. Explain this strength. (2 MARKS)

13. Sections 7 and 24 of the Constitution require the Commonwealth Parliament to be 'directly chosen by the people', creating the principle of representative government. Describe one strength and one weakness of relying on the principle of representative government to protect human rights. (4 MARKS)

14. Describe one way the *Victorian Charter of Human Rights and Responsibilities* (VCHRR) promotes human rights protection in Victoria. In your response, identify two examples of human rights within the VCHRR. (3 MARKS)

15. Describe one weakness of the VCHRR as a means for protecting human rights. (2 MARKS)

16. To promote an equal and fair society for all individuals, the Australian legal system relies largely on statutory protection of human rights. Describe how legislation protects human rights in Australia, using an example to illustrate. (3 MARKS)

17. The High Court's decision in *Mabo* is an example of which method of human rights protection? Justify your response. (2 MARKS)

18. Legal protection for human rights developed by judges can be abolished by legislation. For example, in many cases during the 20th century Australian judges recognised and protected the right to remain silent when being questioned by police. While legislation now protects this right in most criminal cases, for some individuals suspected of terrorism offences this right has been replaced by legislation making it an offence not to cooperate with police.

Describe one other weakness of common law as a method for protecting human rights. (2 MARKS)



LEVEL 3:
Apply and compare

19. Assume in the constitutional matter *Campbell v Commonwealth* that the High Court declared Commonwealth legislation invalid. Campbell hailed it 'a win for human rights!' One possible reason is the Commonwealth law had breached an express right. Identify and explain one other reason why this law may have been declared invalid. (3 MARKS)

20. Compare implied and express rights as means for protecting human rights. (5 MARKS)

21. Read the case *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106.

Assume the Commonwealth Parliament (filled with politicians who are sick of being ridiculed online) passes legislation banning journalists from commenting on the conduct of members of the Commonwealth Parliament.

As the in-house legal representative for *The Edrolo & Weekly Times* (who are affronted at this attack on free speech), predict the likely outcome of your planned legal challenge to this law in the High Court of Australia. Give reasons for your conclusion. (4 MARKS)

22. Please read the following:

LEGISLATION

***Sex Descrimination Act 1984* (Cth)**

SECTION 4B – MEANING OF POTENTIAL PREGNANCY

A reference in this Act to potential pregnancy of a woman includes a reference to:

(a) the fact that the woman is or may be capable of bearing children; or

(b) the fact that the woman has expressed a desire to become pregnant; or

(c) the fact that the woman is likely, or is perceived as being likely, to become pregnant.

SECTION 14 – DISCRIMINATION IN EMPLOYMENT OR IN SUPERANNUATION

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

(a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

During a job interview, Sarah was asked whether she intended to have children. Somewhat taken aback by the question, she said that she would eventually like to have a family. Although Sarah was the most qualified and experienced candidate, she did not get the job. She later heard that the interviewer did not like to employ young women who may become pregnant.

Source: Australian Human Rights Commission, Getting to know the Sex Discrimination Act: A guide for young women (2002)

Have Sarah's human rights been infringed? Justify your response. (4 MARKS)

23. Assume the Commonwealth Parliament passes legislation banning individuals from praying in public places. An interfaith community group including members of the Christian, Jewish and Muslim communities oppose this new law and their leader Josiah wishes to explore his legal options.

Josiah approaches you about what action can be taken to have this law overturned. In your response, advise Josiah about:

- Which type of right may have been infringed;
- In which court he should commence proceedings;
- The likely verdict of the court regarding the legislation; and
- Any remedies available to his interfaith group. (5 MARKS)

LEVEL 4:
Discuss and evaluate

24. The Commonwealth Constitution protects Australians through express rights. Evaluate this protection. In your answer, identify two express rights. (7 MARKS)

Adapted from VCAA Exam 2017 Question 9

25. A former Attorney-General recently wrote: 'the *Victorian Charter of Human Rights and Responsibilities* is an ineffective mechanism for protecting human and democratic rights'.

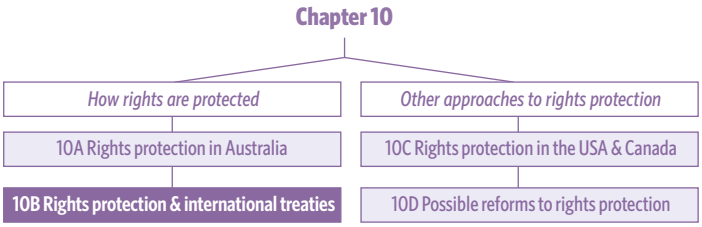
Do you think the Charter is an 'ineffective mechanism for protecting human and democratic rights'? Justify your answer. (6 MARKS)

Adapted from VCAA Exam 2009 Question 9b



10B Rights protection & international treaties

Australian governments regularly enter into agreements with other nations about a range of topics. Since the mid-20th century Australia has signed many agreements with other nations regarding the protection of human rights. What impact do such international agreements have upon the law within Australia?



In this lesson you will learn that agreements between Australia and other nations do not automatically protect human rights within Australia, but do have a significant impact on how laws passed by the Commonwealth Parliament affect human rights within Australian society.

Assume the Australian government signs a treaty with 100 other nations, making a commitment to prevent slavery. This treaty has no immediate impact on the law within Australia – the treaty on its own would not automatically make forced labour unlawful in Australia.

However, if the Australian government signs a treaty to prevent slavery, the government will often then introduce and pass new legislation through the Commonwealth Parliament that prevents slavery – it will pass a law that 'keeps the promise' Australia has made to other nations to prevent forced labour. In addition, the Commonwealth Parliament will often review whether other proposed changes in the law (on any topic) have an impact on Australia's commitment to prevent slavery.

Study design dot point

- The influence of international declarations and treaties on the protection of rights in Australia

Key knowledge units

Australian laws passed to implement international treaties	2.3.2.1.1
Proposed laws reviewed in relation to impact on rights within treaties	2.3.2.1.2

Australian laws passed to implement international treaties 2.3.2.1.1

OVERVIEW

An agreement between Australia and other nations of the world to protect human rights does not automatically become part of the law within Australia. An international commitment to protect human rights must be implemented by passing legislation through the Commonwealth Parliament to give effect to the human rights protection contained within such a treaty.

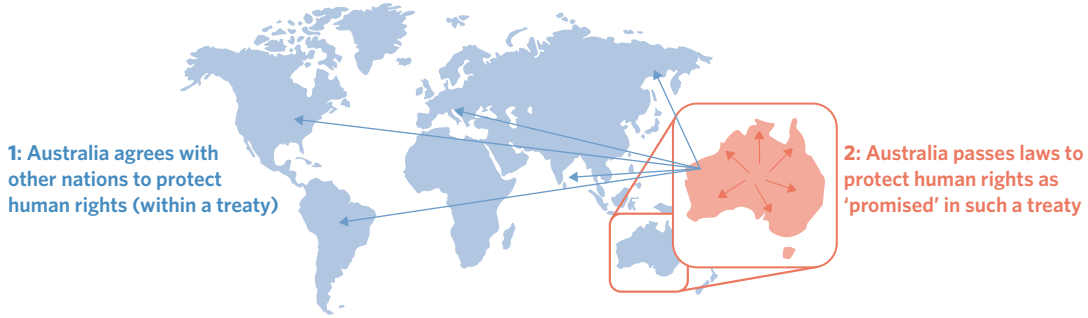


Figure 1 The commitments in a human rights treaty become law in Australia

DETAILS

A treaty is an agreement between two or more nations to do (or not do) certain things. Treaties cover a wide range of topics, including: rules about how goods and services are traded, how international shipping and aviation are kept safe and the conduct of nations' armed forces. An international treaty may also be referred to as a 'covenant' or 'convention' (these terms are used interchangeably).

An international declaration is a statement of principles that is not binding upon a nation – a country may sign an international declaration but is not bound to follow the content of this document. An example is the *Universal Declaration of Human Rights*.

Australia has signed many international treaties that relate to human rights protection. It has therefore made commitments to other nations to protect human rights as contained within these conventions.

International treaties and declarations **do not automatically become part of Australian law:**

- The High Court stated in *Kioa v West* (1985) 159 CLR 550 'treaties do not have the force of law unless they are given that effect by statute'.
- To implement commitments made to other nations by the Australian government through a treaty, the Commonwealth Parliament should pass legislation (to give effect to whatever commitments are made within a treaty).

Examples of international human rights treaties Australia has signed

INTERNATIONAL TREATY
In 1972 Australia signed the *International Covenant on Civil and Political Rights* (ICCPR).

This treaty includes the protection of human rights such as:

- No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
- Everyone has the right to liberty. No one shall be subjected to unjustified arrest or detention.
- Everyone shall have the right to freedom of thought, conscience and religion.
- Everyone shall have the right to freedom of expression.
- A sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. The death sentence shall not be carried out on pregnant women.
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

INTERNATIONAL TREATY
In 1975 Australia signed the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD).

This treaty includes (among other statements) the following protections of human rights:

- Nations who sign the *Convention*:
  - Promise to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination based on race or notions of racial superiority.
  - Agree to create laws that prevent all publication and spreading of ideas based on racial superiority or hatred, incitement to racial discrimination.
  - Create criminal laws that punish all acts of violence against any race or group of persons of another colour or ethnic origin.
  - Condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature.
- Nations who sign the *Convention* promise that equality shall be provided for all persons regardless of race, for example with respect to:
  - Voting rights,
  - The right to own property,

cont'd



- Freedom of religion and expression, and
- Access to employment.

Many of the statutes protecting human rights in Australia identified in Lesson 10A have been passed in response to commitments made in international human rights treaties.

CASE STUDY

The creation of the *Racial Discrimination Act 1975* (Cth)

As stated above, Australia is a signatory to *Convention on the Elimination of all forms of Racial Discrimination.*

Following the Australian government signing this treaty the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth). This statute makes it unlawful to discriminate against another person based on race or ethnicity. For example:

- Section 13: it is unlawful to deny a person the sale of goods or services based on their race, colour or ethnic background.
- Section 15: it is unlawful to dismiss a person or refuse to employ a person on the basis of their race, colour or ethnic origin.
- Section 18: it is unlawful to do any act in public that insults or intimidates a person based on their race or colour. 'In public' is defined very broadly to include conduct in public spaces, online, in print, on television and radio.

In his speech introducing the legislation to the House of Representatives, the Attorney-General stated:

> 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. I need hardly say that I am sure all honourable members would agree with these sentiments.
>
> The proscribing of racial discrimination in legislative form will require legal sanctions. These will also make people more aware of the evils, the undesirable and unsociable consequences of discrimination – the hurtful consequences of discrimination – and make them more obvious and conspicuous. In this regard the Bill will perform an important educative role.

Source: Commonwealth Parliamentary Debates, House of Representatives, 13 February 1975, p. 285

Proposed laws reviewed in relation to impact on rights within treaties 2.3.2.1.2

OVERVIEW

Australia is a signatory to many international treaties aimed at protecting human rights. When new laws are debated and passed in the Commonwealth Parliament, there is a mechanism to consider whether such proposed laws will uphold or breach the human rights Australia has 'signed-up' to protect in these treaties.

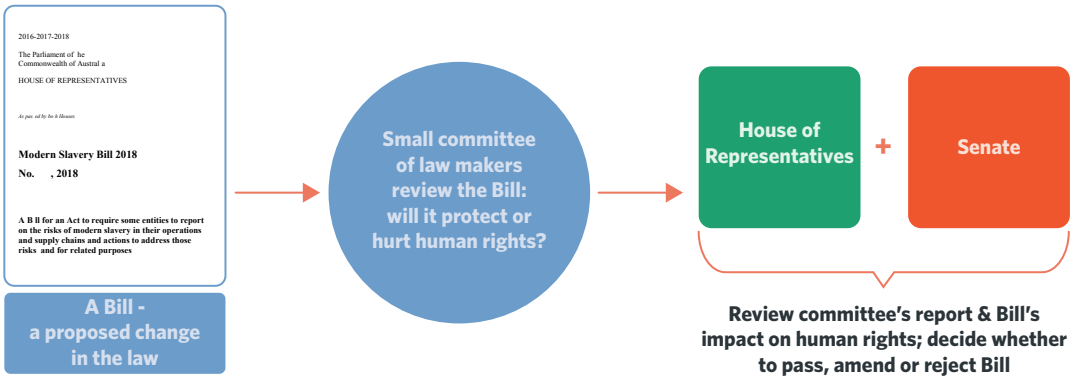


Figure 2 Law-makers consider proposed laws' impact on human rights

DETAILS

A parliamentary committee is a small group of 6-12 members of parliament from a range of political parties.

The role of a parliamentary committee (in general) is to investigate bills in detail to ensure the parliament as a whole is well-informed before deciding whether to amend and/or pass new legislation. There is often limited time to debate complex changes to the law in the House of Representatives and the Senate, so committees undertake detailed reviews of new laws where necessary and share their findings with the parliament.

Within the Commonwealth Parliament there are many committees, each focused on a different topic (such as proposed laws relating to education, taxation and human rights).

The Parliamentary Joint Committee on Human Rights (PJCHR)

The PJCHR is an example of one committee within the Commonwealth Parliament. It includes members of the House of Representatives and Senators from a range of political parties.

The PJCHR's role is to review proposed laws for their compatibility with the human rights stated in international treaties, and report its findings to the Senate and House of Representatives. This process allows the parliament to amend, reject or pass new laws with a full understanding of each bill's impact on human rights.

Treaties considered by the PJCHR

When reviewing whether proposed laws impact upon Australia's international human rights commitments, the PJCHR will look at the following treaties:

- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities.*

Outcome of review by PJCHR

The PJCHR has no power to prevent new laws being passed that breach the human rights contained in the international treaties listed above.

After reviewing a bill in light of these treaties, the PJCHR publishes its findings. Its reports will state that a proposed new law:

- Has a negative impact on the human rights of some individuals, or
- Promotes or protects the human rights contained within the above treaties, or
- Has no impact on the human rights outlined in the above treaties (positive or negative).

After the PJCHR publishes these findings in its reports, it is then a matter for the democratically-elected members of the Senate and the House to decide whether to pass, reject or amend the new law based on this information.

CASE STUDY

2018 & 2019: Proposed law breaches human rights

Many people in Australia were born overseas. Under Australia's migration laws, in most cases those born overseas must be granted legal permission to be in Australia. This permission is referred to as a 'visa'. Reasons a visa might be granted include (but are not limited to):

- To work or study in Australia for a set period of time, or
- To allow a person to travel in Australia as a tourist, or
- As protection, if a person has fled abuse in another country and been granted refugee status in Australia.

In addition to providing protection to those fleeing persecution, Australia is also a signatory to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the *CAT*).

cont'd



Under the *CAT*, Australia and other signatories commit to not returning a person to a country in which they face the risk of persecution, torture or other harm. This is known as an obligation to 'non-refoulement'.

In 2018, the PJCHR reviewed the *Migration Amendment (Strengthening the Character Test) Bill 2018*. One part of this bill gave the Minister for Immigration the power to cancel a person's visa if that person was found guilty of a serious criminal offence (such as murder, assault, using a weapon or sexual assault). A person who has their visa cancelled is an 'unlawful non-citizen' and will be removed from Australia.

The PJCHR reported that the proposed law (and the increased power it gives to the Minister) might result in a person being returned to a nation in which they face a risk of harm or torture. For example, consider a man granted a protection visa in Australia after he escaped torture in his war-torn home country: if this man is convicted of a serious offence, under the new law the Minister for Immigration could cancel his visa and order his removal from Australia, returning him to the place he fled.

The report of the PJCHR concluded this law might therefore breach Australia's non-refoulement obligations under the *CAT*.

The Bill lapsed at the time of the May 2019 election, but was reintroduced in July 2019. As at August 2019, the Bill is currently being considered in the House of Representatives.

These findings of the PJCHR are made known to all members of parliament and published online – it is then up to the elected members of the Senate and the House of Representatives to decide:

1. To pass (or reject) this new legislation to give the Minister increased power to cancel visas; and if so,
2. Whether to include in the new law a way to ensure unlawful non-citizens aren't returned to a country in which they face the risk of harm or injury.

CASE STUDY

2018: New law promotes human rights

'Modern slavery' includes forced labour, child labour and other circumstances in which people cannot leave work due to violence, threats and coercion. According to the International Labor Organisation, approximately 40 million people worldwide are in some form of modern slavery.

Source: Retrieved from https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm

In 2018 the PJCHR reviewed the *Modern Slavery Bill 2018*. This legislation requires large businesses to publicly report on any risks of modern slavery within their supply chains. Specifically, these businesses must report on:

- Where their products are made;
- What they have done to learn whether any such products are being made by forced labour;
- If examples of modern slavery are found to exist within their supply chains, what action they have taken.

The PJCHR reviewed the Bill and concluded that this law advances many human rights that are stated in treaties Australia has signed:

- The Bill promotes freedom from slavery and forced labour – human rights that are protected in treaties such as the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and
- The Bill promotes the right of children to protection from exploitation, violence and abuse as outlined in the *Convention on the Rights of the Child*.

The PJCHR's report stated 'the committee welcomes the proposed reporting requirements, which promote the right to freedom from slavery and forced labour.' This law was passed by the Senate and the House of Representatives in 2018.

Keen to learn more?

International Covenant on Civil and Political Rights, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

Convention on the Elimination of all forms of Racial Discrimination, https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx

Parliamentary Joint Committee on Human Rights, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights

PEO Fact Sheet: Committees, https://www.peo.gov.au/understand-our-parliament/how-parliament-works/parliament-at-work/committees/

Redmond, P. (2018) At last, Australia has a Modern Slavery Act. Here's what you'll need to know, The Conversation, https://theconversation.com/at-last-australia-has-a-modern-slavery-act-heres-what-youll-need-to-know-107885

QUESTIONS 10B Rights protection & international treaties

LEVEL 1:
Define and understand

1. Fill in the blank spaces:

A _____ is an agreement between two or more _____ to do or not do certain things. Such agreements are binding in international law. An international _____ may also be referred to as a 'convention' or '_____'. The *Convention on the Elimination of all forms of* _____ _____ is one example of an international treaty signed by _____.

A. treaty; nations; treaty; covenant; *Racial Discrimination*; Australia

B. statute; nations; treaty; document; *Racial Discrimination*; Victoria

C. covenant; parliaments; covenant; treaty; *Racial Discrimination*; Australia

D. charter; nations; treaty; covenant; *Racial Discrimination*;Victoria

2. In *Kioa v West* (1985) 159 CLR 550 the High Court described the impact of international treaties upon the law in Australia. Which of the following statements best reflects the impact of international treaties on Australian law?

A. When the Australian government signed the *Convention on the Elimination of all forms of Racial Discrimination*, the treaty automatically made racial discrimination unlawful in Australia.

B. When the Australian government signed the *Convention on the Elimination of all forms of Racial Discrimination*, the Commonwealth Parliament then needed to pass legislation to give effect to the commitments made in the treaty.

C. When the Australian government signed the *Convention on the Elimination of all forms of Racial Discrimination* it was a symbolic gesture and had no impact on the law in Australia.

D. When the Australian government signed the *Convention on the Elimination of all forms of Racial Discrimination*, the High Court gained the power to award damages to victims of racial discrimination.

3. Which of the following statements about the Parliamentary Joint Committee on Human Rights is incorrect?

A. The PJCHR can prevent the passage of new laws that breach human rights.

B. The PJCHR will report publicly on whether new laws breach human rights contained in treaties, such as the Convention on the Rights of the Child.

C. The PJCHR includes members of both houses of parliament, from a range of political parties.

D. The PJCHR cannot prevent new laws being created that breach human rights, because the parliament as a whole decides whether to pass, reject or amend proposed changes to the law.

4. Which of the following best describes the findings of the PJCHR regarding the *Modern Slavery Act 2018* (Cth)?

A. The modern slavery legislation has no impact upon Australia's human rights commitments.

B. The modern slavery legislation upholds human rights commitments Australia has made.



C. The modern slavery legislation undermines Australia's international human rights commitments.

D. The Senate and the House of Representatives are responsible for passing legislation protecting human rights, the PJCHR does not have this responsibility.

LEVEL 2:
Describe and explain

5. What is an international treaty? Using one example, describe one way an international treaty can lead to the protection of human rights in Australia. (3 MARKS)

LEVEL 3:
Apply and compare

6. The following is an extract from the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

> **4 Parliamentary Joint Committee on Human Rights**
>
> As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Human Rights, is to be appointed according to the practice of the Parliament.
>
> **7 Functions of the Committee**
>
> The Committee has the following functions:
>
> (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

Australia is a signatory to the *Convention on the Elimination of All Forms of Discrimination against Women*. It states

> 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It includes (but is not limited to) a commitment to ensure women and men have equal access to employment, voting and education.

Source: Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and Convention on the Elimination of All Forms of Discrimination against Women

Explain how s. 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the *Convention on the Elimination of All Forms of Discrimination against Women* affect proposed laws being considered by the Commonwealth Parliament. (3 MARKS)

7. The following passage contains errors.

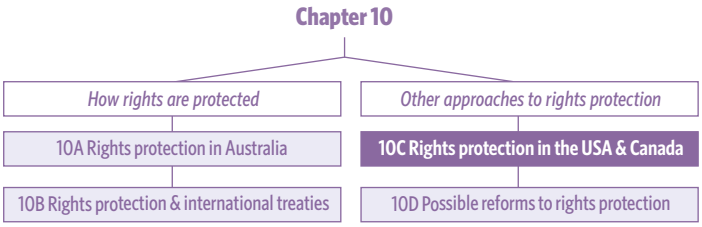
The Prime Minister today gave a speech celebrating Australia's approach to human rights protection. He began by telling his audience 'in 1989 the Australian government joined other nations in signing the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The signing of this treaty automatically ensured torture became unlawful in Australia.'

Later in his presentation, the Prime Minister explained how the parliament works to protect human rights every time a law is passed. He told a story about 'a Bill that was introduced into the Senate to require all children aged 16 and 17 to undertake 6 hours of unpaid community work each week. A parliamentary committee decided that Bill breached the Convention on the Rights of the Child, so the proposal could not pass the Commonwealth Parliament and did not become law.'

Identify two errors in this passage and explain the correct processes or procedures. (4 MARKS)

10C Rights protection in the USA & Canada

Having considered Australia's approach to human rights protection, how does it compare to the approach taken in similar nations such as Canada and the USA?



In this lesson you will be learning that the approach adopted in the USA and Canada to human rights protection is fundamentally different to the approach taken in Australia. The differences far outweigh the similarities.

Study design dot point

- The approach adopted by one other country in protecting rights

Key knowledge units

United States of America's approach to protecting rights	2.3.3.1.1
Canada's approach to protecting rights	2.3.3.1.2

The United States of America's approach to protecting rights 2.3.3.1.1

OVERVIEW

The Bill of Rights is referred to frequently in US pop-culture and news reporting. But what is it?

DETAILS

The Constitution of the United States of America includes the Bill of Rights.

The Bill of Rights is a section of the US Constitution devoted to human rights protections, with an extensive list of express rights.

Features of the USA's approach to rights protection:

- The Bill of Rights is the basis of human rights protection in the USA.
- The US system of government also includes the principle of representative government (like in Australia); while this should ensure laws are not passed that limit the rights of Americans and that law-makers pass laws to promote equality among Americans, the overall approach taken is to rely on the Bill of Rights to protect human rights (rather than relying on legislation and representative government to protect human rights).
- The Bill of Rights includes:
  - Many express rights, and
  - Rights that are very broad in their operation.
- There are some examples of legislation being passed to protect human rights, similar to how rights are primarily protected in Australia:
  - For example, the *Civil Rights Act* prevents discrimination on the basis of race and gender.
  - Despite this, the Bill of Rights remains at the centre of rights protection in the USA.
- In addition to the Bill of Rights, US courts have recognised an implied right to privacy.
- The express rights in the Bill of Rights are entrenched, meaning they can only be removed by the complex process of constitutional amendment:
  - The US law-making body (the US Congress) cannot act alone to remove or amend any such express rights.



If constitutionally-protected human rights are breached:

- Rights in the Bill of Rights are fully enforceable – legislation breaching such rights will be declared invalid by the US Supreme Court, after such a law is challenged. The Supreme Court is independent of law-makers.
- In some cases those who have suffered injury due to a breach of a constitutionally-protected right (such as a wrongful arrest, unlawful police seizure of their property or injury due to excessive force during an arrest) may be able to seek a remedy such as damages under other pieces of legislation passed by the US Congress.

Examples of express rights in the US Bill of Rights:

- The 1st amendment provides for freedom of speech, freedom of religion and the right to protest peacefully.
- The 6th amendment protects those charged with criminal offences, including the right to a public trial without unnecessary delay and legal representation, the right to an independent jury, and the right to know any evidence being used against you.
- The 8th amendment prevents prisoners being mistreated.

LEGISLATION

Extracts from the US Bill of Rights

Drafted in the late 18th century, the Bill of Rights includes the following:

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Source: US Const. amend I, VI & VIII

Table 1 Comparing rights protection in Australia and the United States of America

	Australia	United States of America
Summary of overall approach	Constitution places reliance on representative government & separation of powers. Most rights protection is through legislation.	Reliance on constitutional protection of rights.
Bill of rights	No; 5 express rights scattered throughout the Constitution.	Yes; the Bill of Rights.
Express rights	Yes; few and narrow in operation (for example, s. 80 guarantees jury trial for only Commonwealth indictable offences).	Yes; many and broad in operation (for example, 6th amendment provides wide ranging rights for those accused of a crime, including a jury trial, legal representation and minimal delay before trial).
Can courts give advisory opinions?	No; will only determine whether legislation breaches express rights after the legislation has been passed by parliament and its validity is challenged.	No; will only determine whether legislation breaches express rights after the legislation has been passed by congress and its validity is challenged.

cont'd

	Australia	United States of America
If laws breach express rights?	Law declared invalid by independent court; no damages awarded.	Law declared invalid by independent court; damages may be awarded by a court.
Can law-makers override a court's declaration that law breaches express rights?	No.	No.

USEFUL TIP

Use the marks awarded as a guide as to how much detail to provide - and signpost your answers clearly!

Consider the 2013 VCAA exam question (Question 7): 'Using one similarity and one difference, compare Australia's constitutional approach to the protection of rights with the approach adopted by one of the following countries: Canada, New Zealand, South Africa or the United States of America.' (4 marks).

The examiner's report said:

> Two marks were awarded for each similarity and difference, with the marks given depending upon the level of detail given. Use of terms such as 'similarly' and 'the same as' for similarities, and 'whereas', 'on the other hand' and 'different from' for differences, may assist students when answering this type of question.
>
> While this question was generally approached in a methodical way, many students were either too vague, too brief or discussed particular rights (such as the right to bear arms) as opposed to the actual approach used by each country.
>
> Students needed to ensure the difference or similarity is clear. For example, some students stated that 'the difference is that the USA has a Bill of Rights'. This is not enough – students should have discussed how that approach is different.

USEFUL TIP

The Study Design requires students to compare Australia's approach to rights protection with one other nation – choose either the USA or Canada, but you're not required to study both.

Canada's approach to protecting rights 2.3.3.1.2

OVERVIEW

The system of government in Canada is very similar to that in Australia – a democratically elected parliament makes laws for a multicultural nation. A striking difference is the approach adopted to rights protection.

DETAILS

The Canadian Constitution includes the *Charter of Rights and Freedoms*.

Features of Canada's approach to rights protection:

- The *Charter* is the basis of human rights protection in Canada.
- The Canadian system of government also includes the principle of representative government (like in Australia); whilst this should ensure laws are not passed that limit the rights of Canadians and that law-makers pass laws to promote equality among Canadians, the overall approach taken is to rely on the *Charter* to protect human rights (rather than relying on legislation and representative government to protect human rights).
- Rights in the *Charter* are fully enforceable:
  - Legislation breaching such rights will be declared invalid by the Canadian Supreme Court.
  - The Supreme Court may also award damages (or impose some other remedy) to a party injured by a law infringing rights in the *Charter*.
  - The Supreme Court is independent of law-makers.
- Certain rights can never be overridden by parliament (for example, the right to vote). However, some rights can be overridden:
  - The Canadian Parliament can respond to a Supreme Court declaration of invalidity by passing the offending legislation again and indicating that it is to override the *Charter*.



  - This legislation has a five-year sunset clause – it will lapse at the end of five years unless the parliament passes it again and indicates (again) that it is to override particular human rights in the *Charter*.
- The Supreme Court can give an opinion on whether proposed legislation will infringe the *Charter*.

LEGISLATION

Extracts from the *Canadian Charter of Rights and Freedoms*

Examples of express rights in the *Charter* include:

- Section 2: Everyone has the following fundamental freedoms:
  (a) freedom of conscience and religion;
  (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.
- Section 3: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
- Section 11: Any person charged with an offence has the right
  (a) to be informed without unreasonable delay of the specific offence;
  (b) to be tried within a reasonable time;
  (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
  (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
  (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
  (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;
- Section 15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Source: Canadian Charter, 1982, ss. 2, 3, 11 & 15(1)

Table 2 Comparing rights protection in Australia and Canada

	Australia	Canada
Summary of overall approach	Constitution places reliance on representative government & separation of powers. Most rights protection is through legislation.	Reliance on constitutional protection of rights.
Bill of rights	No; 5 express rights scattered throughout the constitution.	Yes; The Charter of Rights & Freedoms.
Express rights	Yes; few, narrow in operation (For example, s. 80 guarantees jury trial for only Commonwealth indictable offences).	Yes; many, broad in operation (For example, ss. 7-14 provide wide range of rights for those accused of crimes including the presumption of innocence, legal representation, jury trial).
Can courts give advisory opinions?	No; will only determine whether legislation breaches express rights after the legislation has been passed by parliament and its validity is challenged.	Yes; Supreme Court can be asked to advise whether proposed legislation is/is not likely to breach Charter rights.
If laws breach express rights?	Law declared invalid by independent court; no damages awarded.	Law declared invalid by independent court; damages may be awarded by the court.
Can law-makers override a court's declaration that law breaches express rights?	No.	Yes, in some cases (such laws expire after 5 years).

USEFUL TIP

When comparing how Australia and other nations protect rights, focus on differences in the approach taken, not merely different rights protected (or not protected) in each nation's constitution.

Part of question 11 in the 2017 VCAA exam asked students to 'Compare Australia's approach to the constitutional protection of democratic and human rights with the approach adopted in one of the countries listed above.'

'Compare' requires you to describe similarities and differences. The examiner's report also said:

> The emphasis needed to be on how rights are protected or the approach that is used to protect rights, rather than the rights in a specific sense.

USEFUL TIP

When examining how nations protect human rights, look beyond the name of any legal instrument protecting human rights. For example, the Canadian *Charter* is entrenched in that nation's constitution and can only be amended by a difficult process. By comparison, the Victorian *Charter* is an ordinary piece of legislation, which could be amended (or repealed) by the normal law-making process of the Victorian Parliament. How a particular human right is protected in law (and how difficult it is to change or remove) is more important than whether it sits in a document called a 'Bill of Rights' or a '*Charter*'.

Keen to learn more?

Feinberg, B. (1987) Explaining the Bill of Rights, https://www.scholastic.com/teachers/articles/teaching-content/explaining-bill-rights/

Guide to the Canadian Charter of Rights and Freedom, https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

QUESTIONS 10C Rights protection in the USA & Canada

LEVEL 1:
Define and understand

1. Which of the following is not an example of a similarity regarding the protection of rights in Australia and the USA?

A. In both Australia and the USA, an independent court will declare legislation invalid if it breaches an express right.

B. Courts in both nations may award damages to a person who successfully claims that a law breaches an express right.

C. Express rights in the USA and Australia are entrenched and cannot be removed by law-makers alone.

D. Freedom of religion is protected in some way in both nations' constitutions.

2. Consider the following statements about rights protection in the USA and Australia:

I) The overall approach to rights protection is similar, with both nations' constitutions relying on express rights.

II) The overall approach to rights protection is different, with the US relying on constitutional protection of rights and Australia relying on representative government and rights protection through legislation.

III) The US Constitution includes many more express rights, compared to the Australian Constitution.

IV) Both nations' constitutions include many express rights.

V) The express rights in the US Constitution are more broad in their operation, compared with the express rights in the Australian Constitution.

If asked in an exam question to distinguish between the US and Australian approaches to rights protection, which of the statements would you include?

A. I and V

B. II and V



C. II and IV

D. II, III and V

3. Which of the following is not an example of a similarity regarding the protection of rights in Australia and Canada?

A. In both Australia and Canada, an independent court will declare legislation invalid if it breaches an express right.

B. Courts in both nations may give advisory opinions about whether or not proposed legislation is likely to breach human rights.

C. Express rights in Canada and Australia are entrenched and cannot be removed by law-makers alone.

D. Freedom of religion is protected in some way in both nations' constitutions.

4. Consider the following statements about rights protection in Canada and Australia:

I) The overall approach to rights protection is similar, with both nations' constitutions relying on express rights.

II) The overall approach to rights protection is different, with Canada relying on constitutional protection of rights and Australia relying on representative government and rights protection through legislation.

III) The Canadian Constitution includes many more express rights, compared to the Australian Constitution.

IV) Both nations' constitutions include many express rights.

V) The express rights in the Canadian Constitution are more broad in their operation, compared with the express rights in the Australian Constitution.

If asked in an exam question to distinguish between the Canadian and Australian approaches to rights protection, which of the statements would you include?

A. I and V

B. II and V

C. II and IV

D. II, III and V

LEVEL 2:
Describe and explain

5. In the USA human rights are protected by a bill of rights, which includes express rights that are entrenched and fully enforceable. Describe the key terms 'bill of rights', 'entrenched' and 'fully enforceable'. (3 MARKS)

6. Describe Canada's approach to the protection of human rights. (3 MARKS)

LEVEL 3:
Apply and compare

7. Explain the extent to which Australia's approach to the protection of rights is the same as that of one of the following countries: Canada or the United States of America. (4 MARKS)

Adapted from VCAA Exam 2016, Question 4

8. Using one of the countries listed, explain two ways in which that country's approach to the protection of democratic and human rights is similar to, or different from, the approach provided by the Constitution of Australia. The countries you may use for the comparison with Australia are Canada or the United States of America. (In your answer you may explain two similarities, or two differences, or one similarity and one difference.) (4 MARKS)

Adapted from VCAA Exam 2008, Question 5

9. Imagine a scenario in which the Canadian Parliament passes a law banning members of a particular religion from praying in public. This new law causes distress and upset for those who adhere to this faith. You ask a friend studying law 'Shouldn't the law protect freedom of religion?'

Your friend replies 'The Canadian Bill of Rights is a section of the nation's constitution devoted to human rights protection. If a law breaches the express rights in the Canadian Constitution, such laws will be declared invalid yet anyone who suffers injury as a result of such a law – such as members of the religion identified above – cannot receive any form of compensation (which is similar to how the courts operate in Australia).'

Identify and correct two errors in the passage. (4 MARKS)

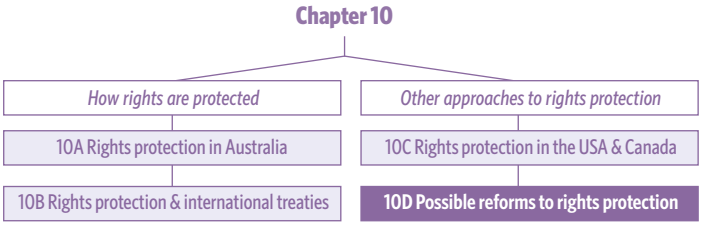
10. Imagine a scenario in which the US Congress passes a law preventing children charged with criminal offences from obtaining legal representation. This causes distress and upset for those charged with criminal offences. You ask a friend who is studying law at a university in America, 'Doesn't US law promote a fair trial by guaranteeing a lawyer to represent an accused person?'

Your friend sends back the following email: 'The US Charter of Rights and Freedoms is a section of the nation's constitution devoted to human rights protection. If a law breaches the express rights in the US Constitution, such laws will be declared invalid yet anyone who suffers injury as a result of such a law – such as children defending themselves in court as identified above – cannot receive any form of compensation (which is similar to how the courts operate in Australia).'

Identify and correct two errors in the passage. (4 MARKS)

10D Possible reforms to rights protection

If Australia's constitution was drafted in 2019, would it include a bill of rights? Australia's approach to human rights protection is complex, imperfect, and markedly different to most other democratic nations. How could it be improved?



In this lesson you will be learning about two alternative ways to change the Australian legal system's protection of human rights, and the strengths and weaknesses of each possible reform.

Study design dot point

- Possible reforms to the protection of rights in Australia

Key knowledge units

Possible reforms to the protection of rights in Australia	2.3.4.1
Reform: Additional express rights	2.3.4.1.1
Reform: Statutory charter of rights	2.3.4.1.2

Possible reforms to the protection of rights in Australia 2.3.4.1

OVERVIEW

In Lesson 10A you learned about Australia's approach to human rights protection. When these constitutional, legislative and common law protections are taken together it becomes clear there are limitations to human rights protection in the Australian legal system. Some of these limitations could be overcome by:

1. Adopting further express rights in the Constitution, similar to the approach in the USA and Canada; or
2. Creating a statutory charter of human rights at a national level, similar to the Victorian Charter of Human Rights and Responsibilities (VCHRR).

Each possible reform has strengths and weaknesses, as there is no perfect approach to human rights protection.

DETAILS

Why human rights law reform is necessary

Many barristers, judges and legal experts argue that human rights protections in the Australian justice system are inadequate. Consider this comment from former High Court Justice the Hon. Michael Kirby AC:

> Sadly, Australians cannot claim that their parliamentary system works so perfectly that it does not occasionally need the stimulus of reminders that the law sometimes treats people (usually minorities) unjustly and unequally. Australia's history has been repeatedly marked with unfortunate illustrations of such injustice.
>
> *Source:* Kirby, M. Arguments for an Australian Charter of Rights (2009).

Table 1 Limitations regarding human rights protection in Australia

Limited constitutional protection of rights	Australia is the only Western democracy in the world without a constitutional bill of rights (like that in the Canadian and American constitutions) or a legislated charter of human rights (similar to the approach taken in the UK; Victoria's VCHRR is also a statutory charter of rights). There are very few express rights in the Constitution and they are narrow in their operation; furthermore when such rights are breached, the courts cannot award damages for breaches of express rights. As demonstrated in the 2019 High Court case of *Comcare v Banerji,* the implied freedom of political communication is also narrow in its operation. See Lesson 10A.
Complex legal framework	The mix of statutes protecting human rights is complex: • There are separate statutes protecting individuals from racial and gender discrimination. • There are different national and state laws prohibiting such discrimination. This can create confusion about which human rights are (and are not) protected in Australia, and in which court or tribunal a person may take action to uphold their rights.
Incomplete human rights protection	Although there is legislation protecting individuals from racial and gender discrimination, existing laws protecting human rights are incomplete. For example: • There is limited protection of free speech for journalists publishing matters based on leaked information from government departments, even if there is a strong public interest in having voters aware of such matters.
Rights are misunderstood	Human rights protection is not well understood in Australia. For example: • In 2006 Amnesty International Australia commissioned a survey of 1001 Australian voters. Asked whether human rights are protected by a bill of rights, 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 human rights protection in Australia and the Australian Constitution. This lack of understanding means law-makers can perhaps more easily pass legislation breaching human rights with little push-back from voters. Compare this to the USA's Bill of Rights – citizens are aware of the exact protections, and these rights are even well known internationally. For example: • The Second Amendment: '...the right of the people to keep and bear Arms, shall not be infringed.' *Source:* US Const. Amend II
Rights breaches are common	There are many examples of the Commonwealth Parliament passing laws that could be in violation of human rights: • Under Australia's migration laws, unlawful arrivals seeking refugee status must be detained indefinitely, despite committing no criminal offence. This includes the detention of children. • Some national laws impact Australians' privacy. Consider the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* – this law gives government agencies (like the Australian Federal Police) the ability to compel telecommunications companies to assist in their investigations, for example by giving access to users' encrypted content. • Free speech is restricted by a range of anti-terror laws, including: – Section 80.2C of the *Criminal Code 1995* (Cth) creates an offence of advocating for terrorism, punishable by imprisonment. 'Advocating terrorism' is very broadly defined. – Section 102.1(1A) of the *Criminal Code 1995* (Cth) allows the imprisonment of members of a terrorist organisation. What constitutes a 'terrorist organisation' is also very broad, and can include any group advocating or praising a terrorist act. – These laws are designed to discourage violence. However there is also a human rights impact, with free speech being limited by these laws. For example: › The application of these laws is often very broad and the consequences can be severe. › According to constitutional law expert George Williams: 'The offences would, as a result, apply with regard to speech praising, for instance, Nelson Mandela in regard to his resistance to apartheid in South Africa.' *Source:* Williams, G, 'The Legal Assault on Australian Democracy' (2016) – Section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) makes it a crime for the media to report on the investigative work of ASIO, even if it is in the public interest to report on how ASIO investigates suspected criminal and terrorist activities in Australia. *cont'd*

Rights breaches are common

- Some Commonwealth laws remove the right to silence. For example:
  - Section 13C of the *Australian Sports Anti-Doping Authority Act 2006* (Cth) enables ASADA to compel athletes to provide certain information, with no right to remain silent, when investigating whether an athlete has used performance-enhancing substances.

Each of these laws may be enacted for a good and proper purpose, such as preventing cheating in sport and promoting public safety. The issue is:

- Such laws have an impact on human rights; and
- The affected human rights are not promoted or protected in any way by the Constitution or some other list of fundamental human rights.

Reform: Additional express rights in the Constitution 2.3.4.1.1

OVERVIEW

One reform that could increase the protection of human rights in the Australian legal system is to insert additional express rights into the Constitution; this could include organising the express rights into a separate chapter of the Constitution.

DETAILS

The Constitution could be amended to include additional express rights, such as freedom of speech, the right to silence and a guarantee of equality of opportunity regardless of race, gender or disability. Such a reform could also include the organisation of express rights into a charter of rights/bill of rights (similar to that in the USA and Canada).

To include further express rights in the Constitution would require the referendum process in s. 128 to be followed and to be successful.

LEGISLATION

To amend the words of the Constitution, the process in s. 128 of the Australian Constitution must be followed:

(1) Legislation including the proposed changes in the Constitution (to add new express rights) would be passed through the Commonwealth Parliament; and

(2) The proposal would then be put to the voters in a compulsory yes/no vote. To succeed in changing the words of the Constitution, a referendum requires a 'yes' vote from:
- The majority of voters across Australia, and
- The majority of voters in the majority of states.

Table 2 Advantages and disadvantages of greater constitutional protection of rights

Advantages	Limitations
Strict rights protection. The inclusion of further express rights would ensure any laws that breach the fundamental rights valued in a democratic society would be declared invalid by the High Court.	**Difficulty.** It is very difficult to amend the Constitution – only 8 out of 44 attempts to change the Constitution have succeeded. Previous attempts to add more express rights have failed. For example: • The 1988 referendum to expand freedom of religion and the guarantee to trial by jury was defeated emphatically.
Protection of minorities. Express rights protect minorities in society, by ensuring such persons are not discriminated against by legislation passed by the parliament (which may be popular with many voters).	**Inflexible.** As expectations about human rights change in future, amending express rights in the Constitution would prove very difficult.
Public awareness. The lead up to a referendum (and any subsequent addition of express rights) would provide greater public awareness of human rights protection in the Australian legal system.	**Expanded role for the courts.** With more express rights in the Constitution it would be up to the High Court to determine whether legislation breaches an express right. It can be argued that it is better for a democratically-elected parliament to decide whether a law should or should not be passed at a given time based on its impact on human rights.

cont'd

Advantages	Limitations
	Cost. It is very expensive to undertake the referendum process to change the Constitution and add further rights (particularly in light of the poor success rate of previous referendums). For example: • The unsuccessful 1988 referendum to expand freedom of religion and the guarantee to trial by jury cost $34,447,200.

Source: AEC: Cost of Referendums and Elections

Reform: Statutory charter of human rights 2.3.4.1.2

OVERVIEW

The Commonwealth Parliament could pass legislation similar to the *Victorian Charter of Human Rights and Responsibilities* (VCHRR), creating a single human rights protection framework.

DETAILS

Some human rights commitments made in various treaties (such as the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of all forms of Racial Discrimination*) have been implemented by the passage of new laws in Australia such as the *Racial Discrimination Act 1975* (Cth). However, there are also some human rights contained within these treaties that have not been protected in Australian legislation.

An improvement to the human rights framework in Australia could be achieved by passing a charter of human rights (reflecting all commitments within international treaties).

This reform could include:

- Legislation providing a wide range of human rights protections, such as eliminating racial and gender discrimination, promoting freedom of speech and the right to liberty of movement.
- Removal of the current, complex arrangement of many pieces of legislation providing some human rights protections.
- Remedies for breaches of human rights within a national charter. For example:
  - Assume a new charter of rights included protections from mistreatment when a person is suspected of a crime. If the Federal Police breached a suspect's human rights by using excessive force or intimidating a suspect during questioning, a charter could include entitlement to a remedy (such as damages being awarded).
- A procedure requiring new laws to be considered in light of their impact on human rights. This would ensure the human rights implications of new laws are debated within the parliament.
  - A requirement that any human rights violations in new laws need to be declared in public (within the parliament) should discourage laws being passed that breach human rights, due to the fear of voter backlash for doing so.
  - If laws do infringe the human rights in a charter, law-makers would need to publicly explain why.
  - This is similar to the process created by the VCHRR to ensure human rights issues are debated in the Victorian parliament when passing new legislation.

Table 3 Advantages and disadvantages of a statutory charter of rights

Advantages	Limitations
Flexibility. A statutory charter of rights provides a more flexible way to solve complex issues regarding laws that are designed to protect society but have an impact on human rights. A statutory charter does not prevent human rights being impacted by new laws, but it does ensure human rights consequences of new laws are more carefully debated (in a public forum by elected law-makers). **Education.** A charter would help to educate Australians about human rights issues. The existence of the charter itself, and the process it would create for public debate of how new laws impact on human rights, would lead to better public discussion and consideration by voters of human rights issues when voting. For example: • Consider laws allowing government agencies to access telecommunications companies' encrypted information and laws removing the right to silence for athletes being questioned by ASADA – how well do most voters understand these laws and their human rights implications?	**Enforceability.** A statutory charter does not prevent new laws limiting human rights to the same extent that additional express rights (through constitutional change) would prevent such legislation. **Not necessary.** There is already significant state and Commonwealth legislation protecting human rights. In addition: • The PJCHR already reviews proposed Commonwealth legislation with respect to its impact on human rights. Its reports are public and provided to law-makers to consider when debating bills; therefore, the human rights implications of proposed laws are already considered when law-makers decide whether to pass, amend or reject new legislation. • The Constitution guarantees regular elections (every 3 years), providing a way for Australians to remove law-makers that pass laws breaching important human rights.

Keen to learn more?

Williams, G (2016) The Legal Assault on Australian Democracy, QUT LawRw 10, http://www.austlii.edu.au/au/journals/QUTLawRw/2016/10.html

Williams, G & Reynolds D (2017) How a charter of rights could protect Australians' fundamental freedoms, The Conversation, 7/8/2017, https://theconversation.com/how-a-charter-of-rights-could-protect-australians-fundamental-freedoms-81947

Begg, M & Rezae, A (2019) Legal Rights Audit (IPA), https://ipa.org.au/wp-content/uploads/2019/01/IPA-Report-Legal-Rights-Audit-2018.pdf

Harris, B (2017) Australia doesn't have a constitutional right protecting freedom of the person – it needs one, The Conversation, 17/7/2017, https://theconversation.com/australia-doesnt-have-a-constitutional-right-protecting-freedom-of-the-person-it-needs-one-80603

Whitbourn, M (2019) How free is the press in Australia? The Sydney Morning Herald, 12/6/2019, https://www.smh.com.au/national/how-free-is-the-press-in-australia-20190612-p51wvi.html

QUESTIONS 10D Possible reforms to rights protection

LEVEL 1:
Define and understand

1. Adding further express rights to the Australian Constitution (such as a right to free speech) would improve human rights protections in Australia.

Which of the following options does not support this conclusion?

A. Express rights protect minority groups within society from legislation that infringes their human rights, but is popular with a majority of voters.

B. Express rights are fully enforceable in the courts and legislation breaching any new express rights would be declared invalid by the High Court.

C. A referendum to add further express rights would improve public understanding of how human rights are protected in Australia's legal system.

D. Adding further express rights through the referendum process is difficult and unlikely to succeed.

2. In the *Al-Kateb* case (see Lesson 10A) the High Court decided that legislation allowing for the indefinite detention of a person (the *Migration Act*) does not breach the Constitution – such a law infringes upon individuals' human rights but is currently constitutionally valid.

Human rights protections can be reformed in a variety of ways. A new express right to liberty of the person (and freedom from arbitrary detention) may prevent such a law being passed, but a statutory charter of rights protecting liberty of the person/preventing arbitrary detention would not.

Is this correct? Choose the best response.

A. Yes, because legislation breaching an express right will be declared invalid.

B. Yes, because legislation breaching an express right will be declared invalid, but the Commonwealth Parliament would be able to pass legislation breaching any human rights in a statutory charter of rights.

C. No, because the parliament is unable to pass laws that breach human rights protected in other pieces of legislation.

D. No, because parliament is the democratically-elected supreme law-maker and can pass laws on any topic if the majority of voters support such laws.

3. A Commonwealth statutory charter of human rights (similar to the VCHRR) would improve human rights protection by:

A. Improving public understanding of human rights and preventing the parliament from passing new laws that breach human rights.

B. Preventing the Commonwealth Parliament from passing new laws that breach human rights.

C. Ensuring the human rights impact of new laws is debated and improving public understanding of human rights.

D. Improving public understanding of human rights and allowing the PJCHR to invalidate laws that infringe human rights.

4. In *Comcare v Banerji* (see Lesson 10A), Banerji was dismissed from her job because she had posted tweets that were critical of the government and these were seen to breach the APS Code of Conduct (which requires those working in government departments to remain independent and apolitical). The Code of Conduct is contained in the *Public Service Act 1999* (Cth). Banerji argued this law violated the implied right of freedom to political communication, but the High Court rejected this argument.

Which of the following changes to human rights protections in Australia would be most likely to alter the outcome, if a similar case arises in future?

A. A statutory charter of rights that includes a personal right to free speech, because this is easier to create than a new express right in the Constitution.

B. A new express right that protects individuals' freedom of speech, because any person who is negatively impacted by laws breaching express rights can be awarded damages by the High Court.

C. A new express right that protects individuals' freedom of speech, as legislation that prevents free communication on social media (such as the *Public Service Act*) would likely be declared invalid.

D. No change to human rights protection is needed, because free speech is protected by the *International Covenant on Civil and Political Rights*.

LEVEL 2:
Describe and explain

5. One proposed reform to Australia's approach to human rights protection is to include additional express rights in the Constitution. Describe one other reform to human rights protection. (3 MARKS)

LEVEL 3:
Apply and compare

6. The Australian Federal Police raids last week on the ABC's Sydney headquarters and the home of News Corp journalist Annika Smethurst triggered a public debate about press freedom and prompted renewed calls for greater protections to be given to whistleblowers and journalists reporting on matters in the public interest.

Source: Whitbourn, M. How free is the press in Australia? (2019)

Following the 2019 decision in *Comcare v Banerji* and police raids on ABC and Herald-Sun journalists, many legal experts criticised Australia's protection of the right to free speech. Human rights protection in Australia would be improved by a statutory right to free speech or an express right to free speech. Distinguish between these proposed reforms. (4 MARKS)

LEVEL 4:
Discuss and evaluate

7. In 2016 and 2017 Australian citizens were held in immigration detention and threatened with deportation. Consider the extract referring to one detained man.

He had been a citizen of Australia since he was 10 years old, and repeatedly told immigration department officials he was Australian, but was ignored.

'I am Australian-born,' he said in one interview. 'I have been in Australia for my whole life. 'I've only been to New Zealand once. I have children that are Australian-born. I was not born in New Zealand and you've got it all wrong, my birth certificate should be on the system and in my file. I've only been out of Australia once in my life, and you are trying to kick out someone that was born here.'

He was ultimately released after 97 days in detention.

Source: Doherty, B. Australian citizens wrongfully detained because of immigration failures, report finds (The Guardian, 2/2/2018)

The Commonwealth Government (and its agencies such as the Federal Police) can do so because the Constitution does not guarantee individual freedom; the Constitution does not require a court's approval to detain someone.

A proposed improvement to prevent such rights abuses is to include an express right protecting individual freedom, requiring a court's permission to detain a person, however it is very expensive to conduct a referendum to add express rights to the Constitution.

Describe one advantage and one other limitation of such a reform. (4 MARKS)

8. The role of legislators is particularly important in Australia. In other nations, legal rules, typically found in a Human Rights Act or Bill of Rights, constrain the power of parliaments to depart from basic democratic standards, such as in regard to freedom of speech or the right to vote. Few such constraints exist in Australia.

Source: Williams, G The Legal Assault on Australian Democracy (2016)

One proposed reform to rights protection in Australia is the passage of a statutory charter of rights, similar to the VCHRR. Discuss this proposed reform. (8 MARKS)

REVIEW QUESTIONS

10 Rights

LEVEL 5: Bringing it all together

1. Consider the following sources:

Source 1

An extract from *Despite our fears we should be wary of harsher bail laws*:

> There are obvious and significant justice and human rights concerns raised by a large population of unsentenced prisoners. Research has shown that around half of people held on remand will either be found not guilty or will be sentenced to time served on remand, meaning that they are released immediately.
>
> Allegations of offending do not justify the forfeiture of human rights. The presumption of innocence is fundamental to our western criminal justice system; it sets us apart
> from totalitarian regimes that rely for their very existence on the repressive power of arbitrary detention.
>
> Let's remember that the bail process is not intended to assess whether the accused is guilty of committing a crime. Rather, it is an exercise in the management of risk – risk that the accused will fail to appear in court, or risk that the accused will reoffend.

Source: Gelb, K, Despite our fears we should be wary of harsher bail laws, The Age (2018), https://www.theage.com.au/national/victoria/despite-our-fears-we-should-be-wary-of-harsher-bail-laws-20180222-p4z1al.html

Source 2

An 'unsentenced prisoner' is a person remanded in custody awaiting trial (that is, arrested but not yet tried and found guilty) or a person who has been convicted at trial (or pleaded guilty) and is awaiting sentencing.



Source: Corrections Victoria, Monthly Prisoner and Offender Statistics

Source 3

An extract from the *Victorian Charter of Human Rights and Responsibilities.*

LEGISLATION

***Charter of Human Rights and Responsibilities Act 2006* (Vic)**

SECTION 25 – RIGHTS IN CRIMINAL PROCEEDINGS

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

Source 4

Bail Amendment (Stage One) Act 2017 (Vic) took effect in May 2018 and made various changes to the operation of Victoria's process for granting bail to those arrested and charged with criminal offences, including:

- An increase in the number of crimes for which it's presumed an arrested person won't be released on bail, requiring the accused to show a compelling reason why bail should be granted.
- Permitting the police to refuse a bail application and then detain a person for up to 48 hours before taking them to a court to apply for bail.

a) Describe one way the *Victorian Charter of Human Rights and Responsibilities* promotes human rights protection in Victoria. Other than the presumption of innocence, identify one example of human rights within the VCHRR. (3 MARKS)

b) Identify one difference between the human rights protection provided by express rights and rights protected in a statutory charter such as the VCHRR. (2 MARKS)

c) Comment on the relationship between Victoria's unsentenced prisoner population, *Bail Amendment (Stage One) Act 2017* (Vic) and the presumption of innocence in the Charter. (2 MARKS)

d) The Victorian Parliament's ability to pass legislation restricting access to bail exemplifies one weakness of the VCHRR. Describe one other weakness. (3 MARKS)

e) 'The Australian government has signed international treaties protecting individuals' liberty and freedom, ensuring Australians should only be imprisoned when they are convicted of a crime. These treaties would prevent the Commonwealth Parliament from passing a law like the *Bail Amendment (Stage One) Act 2017* (Vic) that allows for the detention of people merely charged with a crime.' Comment on this statement. (5 MARKS)

3. The Australian Constitution provides limited human rights protection, and would be improved by the addition of more express rights in a Bill of Rights.

a) Discuss the extent to which you agree with this statement. (7 MARKS)

b) Explain one way in which the approach to rights protection adopted by Australia is different from the approach adopted by one other country. (3 MARKS)

Unit 2, Area of study 3

CHAPTER 11

HUMAN RIGHTS CASES

11

The Australian courts – in particular the High Court of Australia – have made significant decisions to promote the legal protection of human rights. The ability to vote, the right to a fair trial and removing entrenched discrimination toward Indigenous Australians have all been the subject of court cases that have had a far-reaching impact on Australian society.

This chapter discusses two very significant High Court judgements: the 2007 *Roach* decision, which explored Australians' constitutional entitlement to vote in elections (a fundamental aspect of living in a democratic society!) and the decision in the 1992 *Mabo* ruling that recognised Indigenous Australians' entitlement to land rights as predating – and surviving – British settlement in the 18th century. The VCAA Study Design requires you to study one of these cases in depth.

By the end of this chapter, you will know:

- The facts and legal issues considered by the High Court in *Mabo* or *Roach.*
- The decision of the High Court and the impact of this decision on Australians' human rights.
- Alternative viewpoints regarding the Court's decision in *Mabo* or *Roach.*

UNIT 2 AOS 3 – KEY KNOWLEDGE

an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law

the influence of international declarations and treaties on the protection of rights in Australia

the approach adopted by one other country in protecting rights

possible reforms to the protection of rights in Australia

one Australian case that has had an impact on the protection of rights in Australia, including:

- the role of the individual in taking a case to court
- the facts and issues central to the case, including the rights in question
- the laws that applied to the case
- the outcome of the case and its impact on the rights of individuals and on the legal system
- possible conflicting attitudes in relation to the case.

UNIT 2 AOS 3 – KEY SKILLS

define and use legal terminology

research and analyse relevant information about the protection of rights

compare Australia's approach to the protection of rights with the approach of another country

evaluate the ways in which rights are protected in Australia

discuss possible reforms to the protection of rights in Australia

describe the role of individuals in bringing about changes in the protection of rights through cases

analyse the impact of a case on the rights of individuals and on the legal system

apply legal principles to actual cases.

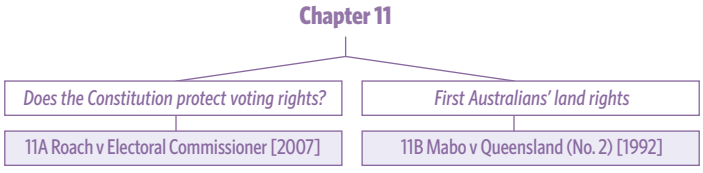
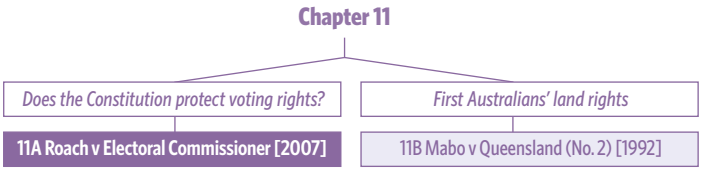


Image: vchal/Shutterstock.com

11A Roach v Electoral Commissioner [2007]

Voting is at the heart of Australia's democratic society. The opportunity to choose our law-makers and to remove law-makers we disapprove of is a privilege – a privilege that people in less free nations around the world would be jealous of. But who gets to vote, and who is excluded from voting? Can the entitlement to vote be taken away from an Australian? When? By whom?



In this lesson you will learn that the Constitution does not explicitly protect Australians' right to vote in elections, but it does assume the Commonwealth Parliament will be democratically elected. The Commonwealth Parliament is permitted to pass laws regarding who can vote and how elections are conducted, but in the *Roach* case the High Court decided there are limits to who can and cannot be excluded from the voting process.

Study design dot point

- One Australian case that has had an impact on the protection of rights in Australia, including:
  - The role of the individual in taking a case to court
  - The facts and issues central to the case, including the rights in question
  - The laws that applied to the case
  - The outcome of the case and its impact on the rights of individuals and on the legal system
  - Possible conflicting attitudes in relation to the case

Key knowledge units

The role of the individual in taking a case to court	2.3.5.1
The facts and issues central to the case, including the rights in question	2.3.5.2
The laws that applied to the case	2.3.5.3
The outcome of the case and its impact on the rights of individuals and on the legal system	2.3.5.4
Possible conflicting attitudes in relation to the case	2.3.5.5

The role of the individual in taking a case to court 2.3.5.1

OVERVIEW

In 2007 Vickie Roach was part-way through a 6 year prison term, and challenged the validity of 2006 Commonwealth legislation that excluded her (and many other prisoners) from voting in federal elections.

DETAILS

- In 2004 Roach was convicted of recklessly causing serious injury, following a failed robbery and car accident.
- She was imprisoned for 6 years, but would be eligible for parole from August 2008.
- At the time of the case (May 2007), an election was due to be held between August 2007 and January 2008. Roach would therefore be in prison at the time of the next election.
- Roach is Indigenous and was removed from her family at a very young age. She became a drug addict by the age of 14 and had a long criminal history.
- As a person directly affected by the legislation restricting voting by prisoners, Roach had standing to initiate a challenge to the law.

- The Human Rights Law Resource Centre (HRLRC; now the Human Rights Law Centre) coordinated pro bono legal assistance from various barristers and a law firm to prepare and present Roach's case, completing hundreds of hours of legal work provided for no fee:

  'Working pro bono, Vickie's legal team has made an outstanding commitment and contribution. They brought exceptional professionalism, intellect, rigour, experience and enthusiasm to the matter, often under very heavy workloads and time constraints,' Phil Lynch, director of the HRLRC.

  Source: MacIntyre L. & Schoikman B., 'Prisoners win right to vote', Law Institute Journal, October 2007

The facts and issues central to the case, including the rights in question 2.3.5.2

OVERVIEW

Prisoners serving prison terms exceeding 3 years were prevented from voting in federal elections until 2006, when new legislation removed the vote from all prisoners. Did this breach the Constitution?

DETAILS

In 2004, the Commonwealth Parliament changed the *Commonwealth Electoral Act 1918* (Cth) such that any person serving a prison term over 3 years was unable to vote in an election.

In 2006, the Commonwealth changed s. 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) again when it passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

Section 93(8AA) stated a person serving a sentence of imprisonment at the date of the election is not entitled to vote.

At the time of the 2006 legislative change there were approximately 20,000 prisoners in Australia:

- About 8,000 prisoners lost the ability to vote as a result of the 2006 change in the law – that is, 40% of the prisoners were serving a prison term under 3 years and would have been permitted to vote had the 2006 amendments not been made.
- The 2006 change disproportionately took the vote from Indigenous Australians – 24% of the prison population was Indigenous, with Indigenous Australians 13 times more likely to be imprisoned than non-Indigenous Australians.

  Source: Kirby, M. 'Prisoners' vote is the Australian way' (2007)

The issues raised by Roach's challenge to the 2006 amendments were:

1. Did the new s. 93(8AA) restrict voting in a way that is contrary to the system of representative government established by ss. 7 and 24 of the Australian Constitution?
2. If the new s. 93(8AA) banning all prisoners from voting was found to be invalid, was the previous law banning prisoners serving over 3 years valid or invalid?

> **USEFUL TIP**
>
> Refer to Lesson 10A to review the decision in *Australian Capital Television* and the system of representative government established by ss. 7 and 24 of the Constitution.

The laws that applied to the case 2.3.5.3

OVERVIEW

The *Commonwealth Electoral Act 1918* (Cth) dictates who can and cannot enrol to vote and ss. 7 and 24 of the Australian Constitution require the Commonwealth Parliament to be 'directly chosen by the people'.

DETAILS

LEGISLATION Following the 2006 amendments, s. 93(8AA) of the *Commonwealth Electoral Act* said:

> A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election.



LEGISLATION

Section 7 of the Australian Constitution 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 of the Constitution 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.
>
> (Emphasis added by the authors.)

The outcome of the case and its impact on the rights of individuals and on the legal system 2.3.5.4

OVERVIEW

A 4:2 majority of the justices of the High Court of Australia accepted Roach's argument that legislation removing voting rights from all prisoners was contrary to the system of representative government established by ss. 7 and 24 of the Constitution, and the law was declared invalid.

DETAILS

The 4 majority justices delivered two judgements – one from Chief Justice Gleeson, the other from Justices Gummow, Kirby and Crennan. These two written judgements applied slightly different reasons for deciding the 2006 removal of voting rights from all prisoners was invalid, however the Court's key conclusions are summarised in Figure 1 (Source: *Roach v Electoral Commissioner* [2007] HCA 43).

The High Court's reasoning

The Commonwealth can pass laws about voting practices.

The Commonwealth Constitution (unlike many other nations' constitutions) does not explicitly guarantee a right to vote in elections.

It is for the Commonwealth Parliament to decide matters relating to how elections are conducted. Indeed, many features of our democracy that Australians now enjoy – such as compulsory voting, the secret ballot and granting the vote to women before almost any other place in the world – are all the result of laws passed by the Commonwealth Parliament, not the Australian Constitution.

Therefore, the Commonwealth Parliament can pass laws dictating who is and who is not permitted to vote.

However, the principle of representative government requires most Australians to participate in elections.

Sections 7 and 24 of the Commonwealth Constitution require the Commonwealth Parliament to be 'directly chosen by the people'. This sets up the principle of representative government, which places some limits on the Commonwealth's ability to decide who can and cannot vote, because 'voting in elections for the Parliament lies at the very heart of the system of government for which the Commonwealth Constitution provides,' according to Justices Gummow, Kirby and Crennan.

There are limits on who the Commonwealth can exclude from voting.

During the case, the Commonwealth itself agreed that a law which disqualified from voting any members of a major political party or residents of a particular state would be invalid. The High Court also stated that to remove the vote on the basis of religion would be excessive, as would excluding women or Indigenous Australians.

Where to draw the line?

The majority of the High Court had to determine what exclusions from voting the Commonwealth can validly include in its electoral laws, and which exclusions would be excessive.

The phrase 'directly chosen by the people' assumes a voting right generally held by all adults, unless there is a substantial reason for removing them. The system of representative government includes not only communicating with law-makers (as described in *Australian Capital Television*), but also having a voice in choosing them.

The High Court made the following comments about what is a 'substantial reason' when deciding if an exclusion to vote is permitted:

- People who have engaged in treason (a crime of violence against the system of government) have no right to participate in that system of government.
- Excluding those not able to understand voting due to having an unsound mind is appropriate, because such an exclusion protects the integrity of the voting system.
- A person seriously violating community standards (that is, committing a serious criminal offence) is an appropriate reason to take away the vote. A long prison sentence is good evidence of who falls into this category – a person serving an extended prison term has probably committed a serious crime.

cont'd

The 2006 amendments to exclude all prisoners from voting were excessive.

As stated above, the High Court held that persons who seriously offended against society's values can be excluded from voting. But is the fact that a person is serving any prison term – even a very short one – good proof that individual has seriously violated community standards?

- The 2006 law disqualified all prisoners, regardless of whether they were found guilty of serious or minor offences.
- The previous law (excluding those serving a prison term of 3 or more years) disqualified those found guilty of serious crimes, but the 2006 changes applied to everyone in prison:
  - All prisoners automatically lost the vote without considering how culpable such individuals were – some prisoners are incarcerated for committing very serious crimes, others for really minor offences such as the non-payment of a fine (for a very short period).
  - A large proportion of prisoners serve less than 6 months; the 2006 law was far more wide-ranging in excluding voters (compared to the previous laws).

The 2006 law cast the net too wide in disqualifying all prisoners. It did not discriminate between serious and minor offenders when removing the vote.

The previous law (passed in 2004) which disqualified those serving a prison term of 3 or more years was held to be acceptable. A person serving such a long prison sentence has more seriously violated society's values (which meets the 'substantial reason' criterion), so legislation to remove the vote while they are in prison was permitted.

Figure 1 The High Court's reasoning

The decision

By a 4:2 majority, the High Court answered the questions posed by Roach's challenge:

- Is s. 93(8AA) invalid because it is contrary to ss. 7 and 24 of the Australian Constitution? **Yes.**
- If the new s. 93(8AA) banning all prisoners from voting was found to be invalid, was the previous law banning prisoners serving over 3 years valid or invalid? **The prior ban on prisoners serving prison terms exceeding 3 years was valid.**

The majority decision was that this isn't so much an individual human right to vote that can't be taken away, but is instead a limitation on the Commonwealth Parliament's power to pass laws deciding who can and cannot vote in elections. (Although Chief Justice Gleeson concluded the Constitution **does** set up a personal right to vote, no other High Court justices reached this conclusion).

The impact of the decision on Roach

Roach was serving a sentence over 3 years so she did not regain the right to vote, but as a result of the challenge she led, thousands of other prisoners serving short sentences did regain the right to vote:

> Ron Merkel QC, her senior counsel, said: 'Like Eddie [Mabo], who lost his land claim but established the principle of native title in Australia, she lost her case in terms of her own right to vote but won the case for her own people and other prisoners who just happen to be in jail on election day not to be subject to this exclusion.'
>
> *Source:* Topsfield J, Leading the Charge, (2009)

The impact of the decision on individuals

The entitlement to vote in Commonwealth elections was returned to all prisoners serving prison terms under 3 years.

As stated above, the decision in *Roach* does not create an individual, constitutionally-protected right to vote. Rather, it indirectly protects voting power for most Australians by limiting the Parliament's ability to pass laws taking away the vote:

- The vote can only be removed for a 'substantial reason', and
- If the Commonwealth pass legislation removing the vote from some individuals at some later date, the High Court will decide whether the new law passes (or violates) this 'substantial reason' test when such a law is challenged by an individual affected by the law.

The impact of the decision on the legal system

In the short term, the vote was returned to all prisoners serving under 3 years – around 8,000 voters came back into the electoral process.

The reasoning in *Roach* was applied in another case regarding the electoral process in Australia – the High Court's 2010 decision in *Rowe*.



CASE STUDY

***Rowe v Electoral Commissioner* [2010] HCA 46**

The *Commonwealth Electoral Act 1918* (Cth) describes the rules for who may enrol to vote (as described in *Roach*) and when they can/should enrol to vote:

- Prior to 2006, the Act had required new voters to enrol (if not enrolled already) or update their enrolment details within seven days of an election being called.
- In 2006, the Commonwealth legislated to change these time-frames:
  - New voters now had one day to enrol following a federal election being called.
  - A person already on the electoral roll had just three days to update their details.

The intention of this new legislation was to ensure that only those entitled to vote in a federal election, did vote in an election. That is, to ensure the electoral roll was accurate at the time of an election.

Rowe challenged the validity of the 2006 statute. The new law had the potential to exclude a lot of voters from participating in the up-coming election:

- According to the Australian Electoral Commission (AEC), prior to the 2004 election around 423,000 people had enrolled for the first time or updated their details in the seven days following the Prime Minister calling that election.
- The parties in *Rowe* agreed the 2006 law set such a tight timeframe to enrol for the first time that up to 100,000 young Australians could be excluded from participating in the election.

The Court held this change to the timeframe in which to enrol/update enrolment details was an excessive restriction on Australians' ability to participate in elections. In reaching this decision, the High Court expanded on the decision in *Roach* – the effect of the 2006 law was to remove the vote from too many people, especially given the AEC indicated it had no difficulty processing a lot of new enrolments in the previous 7 day window, and there was no proof of fraud in the previous 7 day period.

Possible conflicting attitudes in relation to the case 2.3.5.5

OVERVIEW

Attitudes regarding the decision vary widely, because while many people support the vote being returned to prisoners, there are those who believe that prisoners have (due to their wrongdoing) forfeited the privileges of being a member of the community, such as voting. Furthermore, some legal experts believe it is for the Commonwealth Parliament to decide who can and can't vote, and the Court should not have a role in deciding whether restrictions on voting are appropriate or not.

DETAILS

Support for the decision:

- Human rights advocates supported the decision and endorsed the comment made by Justices Gummow, Kirby and Crennan that 'prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.' This is especially so given that, in time, almost all individuals in prison will eventually return to the community.
- The decision was certainly supported by many (such as the HRLRC) who saw it as beneficial to Indigenous Australians, who are over-represented in the prison population and were therefore disproportionately impacted by the 2006 law.
- The *Roach* decision was also beneficial for prisoners' rights because removing the vote could be seen as double punishment. State courts imprison those who violate criminal laws, and then the 2006 Commonwealth law added a further penalty to every prisoner (regardless of how minor their offending was).

Criticisms of the decision:

- The Commonwealth (in defending its own legislation) believed the 2006 law promoted integrity in elections and election results, by excluding from voting those who were less informed about elections (because they are in prison). However:

  - In the age of social media (along with TV, radio, etc) this is not the reality in a prison.
  - No other Australians are eligible or ineligible based on how much they know about the nation's political issues.
  - At the time of the judgement Roach had completed a masters degree whilst in prison and was about to start a PhD.
- Those who are in prison have offended society's values and therefore forfeited the right to participate in community activities such as elections.
- The two justices who delivered the minority judgements of the Court (and rejected Roach's arguments about the 2006 legislation) confirmed the power to decide who can and cannot vote is a power for the Commonwealth Parliament, and also stated:
  - It's not appropriate for the High Court to try to place limits on that power of the Parliament.
  - The words 'directly chosen by the people' don't require universal voting rights but speak more generally about elections. The Constitution then leaves it up to the Parliament to decide how elections are conducted – a point reinforced by the fact that the framers of the Constitution decided not to include an express right to vote.
- The decisions in *Roach* and *Rowe* protect the entitlement to vote and ensure it can be removed only for 'substantial reasons' but the judges in the High Court were divided in each case. As a result, there is uncertainty about exactly when the vote can/can't be taken away:
  - What if the law excluded prisoners serving a two year sentence? Would that be valid?
  - Consider a law that allowed all first-time prisoners to vote, but excluded those prisoners who were repeat offenders back in prison for a second time. Would that be valid?
- Some legal experts criticise the *Roach* decision by stating the 2006 law was made by a democratically-elected parliament, and then declared invalid by unelected judges. The decision was based on a very broad interpretation of the principles of the Constitution, not its text. The changes in who can vote since Federation in 1901 (such as including women, making voting compulsory, lowering the voting age) all happened as a result of changes to legislation, and the High Court shouldn't now insert itself into that process.
- If Australians want to ensure everyone can participate in elections, an express right should be added to the Constitution by the referendum process (rather than the Court identifying entitlements to vote that aren't explicitly written into the Constitution).

Keen to learn more?

Allan J (2012) The Three 'Rs' Of Recent Australian Judicial Activism: Roach, Rowe And (No)'riginalism 36(2) Melbourne University Law Review 743, https://law.unimelb.edu.au/__data/assets/pdf_file/0012/1700130/36_2_11.pdf

Lynch P (2010) High Court Recognises that Constitution 'Embeds' a Right to Vote and a 'Fully Inclusive Franchise' in Landmark Constitutional Case, www.hrlc.org.au/human-rights-case-summaries/high-court-recognises-that-constitution-embeds-a-right-to-vote-and-a-fully-inclusive-franchise-in-landmark-constitutional-case

QUESTIONS 11A Roach v Electoral Commissioner [2007]

LEVEL 1:
Define and understand

1. True or false: There is an express right to vote in the Australian Constitution.

A. True

B. False

2. Complete this statement.

'Sections 7 and 24 of the Australian Constitution require the Senate and the House of Representatives to be...'

A. democratically elected.

B. directly chosen by the people.

C. chosen at regular elections.

D. elected by Austraian citizens.



3. Following the decision in *Roach,* which of the following statements about elections is most accurate?

A. The Commonwealth Parliament has complete authority to decide who can and cannot vote in elections.

B. Australians have an implied right to vote in elections.

C. The Commonwealth Parliament can decide who can vote in elections, but can only remove individuals for a substantial reason.

D. It is for the High Court to decide whether particular groups of Australians can vote in elections.

4. Which of the following statements is not an endorsement of the High Court's decision in *Roach*?

A. Prisoners remain members of the community and therefore retain an interest in how it is governed. Most prisoners (except the most serious offenders) should therefore be permitted to participate in voting, given most prisoners serve relatively short sentences and will return to the community at some point.

B. The 2006 law disproportionately took the vote from Indigenous Australians given the overrepresentation of this group in the prison population. The *Roach* decision was a win for Indigenous Australians' rights.

C. The framers of the Commonwealth Constitution deliberately decided not to include an express right to vote and instead left it to the Parliament to decide who can or cannot vote. The High Court should not insert itself into this process of deciding who is disqualified from voting.

D. To remove the vote from even minor offenders was double-punishment for their crimes.

5. Assume the Commonwealth Parliament passed legislation excluding those residents in Tasmania from voting in elections. Would this law be valid?

A. No, because the Commonwealth Constitution includes an implied right to vote that cannot be breached in this way.

B. No, because the Commonwealth Constitution requires most adult Australians to participate in elections and the vote can only be taken away for a 'substantial reason'. Merely being in Tasmania is not a 'substantial reason' and this exclusion would be excessive.

C. Yes, because the Commonwealth Parliament is permitted to decide who can and cannot vote in elections.

D. We do not have enough information from the High Court's decisions to know whether this exclusion would be permitted or excessive.

6. Assume the Commonwealth Parliament passed legislation excluding those serving a two year prison term from voting in elections. Would this law be valid?

A. No, because the Commonwealth Constitution includes an implied right to vote that cannot be breached in this way.

B. No, because the Commonwealth Constitution requires most adult Australians to participate in elections and the vote can only be taken away for a 'substantial reason'. Serving a two year prison term is not a 'substantial reason' and this exclusion would be excessive.

C. Yes, because the Commonwealth Parliament has an unlimited power to decide who can and cannot vote in elections.

D. We do not have enough information from the High Court's decisions to know whether this exclusion would be permitted or excessive.

LEVEL 2:
Describe and explain

7. The High Court determined that the ability to vote can only be removed for a substantial reason. Identify one example of a 'substantial reason'. (1 MARK)

8. Did the decision of the High Court have a more positive impact upon Roach personally or the wider prison population? Justify your response. (2 MARKS)

9. Describe one argument supporting the High Court's decision in *Roach*, and one criticism of the decision. (4 MARKS)

LEVEL 3:
Apply and compare

10. Assume the Parliament passed legislation to further amend the *Commonwealth Electoral Act 1918* (Cth) to disqualify the following groups from voting:

- Citizens under the age of 22
- Australian citizens who identify as Catholic
- Prisoners serving a two year prison ban

Would these amendments be valid? Give reasons for your conclusions. (5 MARKS)

LEVEL 4:
Discuss and evaluate

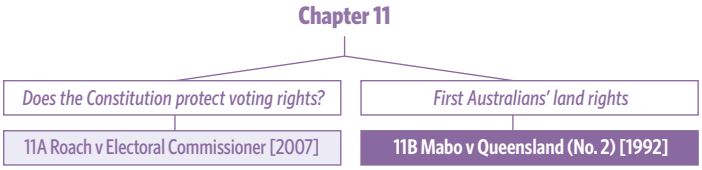
11. 'The Australian Constitution requires all adult Australians to be able to vote in elections.'

Is this correct? (5 MARKS)



11B Mabo v Queensland (No. 2) [1992]

Indigenous Australians inhabited the continent for many thousands of years before British settlement. Does the Australian legal system uphold Aboriginal and Torres Strait Islanders' rights to use this land?



Study design dot point

- One Australian case that has had an impact on the protection of rights in Australia, including:
  - The role of the individual in taking a case to court
  - The facts and issues central to the case, including the rights in question
  - The laws that applied to the case
  - The outcome of the case and its impact on the rights of individuals and on the legal system
  - Possible conflicting attitudes in relation to the case.

Key knowledge units

The role of the individual in taking a case to court	2.3.5.6
The facts and issues central to the case, including the rights in question	2.3.5.7
The laws that applied to the case	2.3.5.8
The outcome of the case and its impact on the rights of individuals and on the legal system	2.3.5.9
Possible conflicting attitudes in relation to the case	2.3.5.10

The role of the individual in taking a case to court 2.3.5.6

OVERVIEW

Mabo was one of 5 men from the island of Mer (in the Murray Islands, in the Torres Strait) to initiate a High Court action in 1982, claiming ownership of the land on Mer and seeking recognition of Indigenous Australians' original ownership of the land prior to British settlement in 1788.

DETAILS

Mabo was born on Mer in 1936 and named Eddie Sambo. His mother died just a few days after his birth, and he was adopted and raised by his uncle and aunt. His surname was changed to Mabo (his uncle's surname).

As a young man, Mabo was banished from Mer by Queensland authorities for drinking alcohol, and he worked and lived in Townsville. During his time in Townsville he established a school for Indigenous children to better understand their culture and history, and he was active in encouraging people to vote 'yes' in the 1967 referendum to remove discrimination against Aboriginal Australians from the Constitution.

In 1981 Mabo attended a conference on Aboriginal land rights. Indigenous leaders, students from James Cook University and legal experts attended the conference. Presentations about land rights issues included:

- Mabo making a speech about Murray Islanders' history of land ownership and how land was transferred by inheritance.
- Legal experts arguing that a High Court case should be commenced by members of an Indigenous community, to challenge the prevailing legal position that Aboriginal Australians did not lawfully own the land that was settled as NSW in 1788 (which eventually became Australia). These lawyers argued that, even if such a case was unsuccessful, the public debate caused by such a case might lead to the Commonwealth Parliament passing laws to recognise Indigenous Australians' traditional connection to the land.

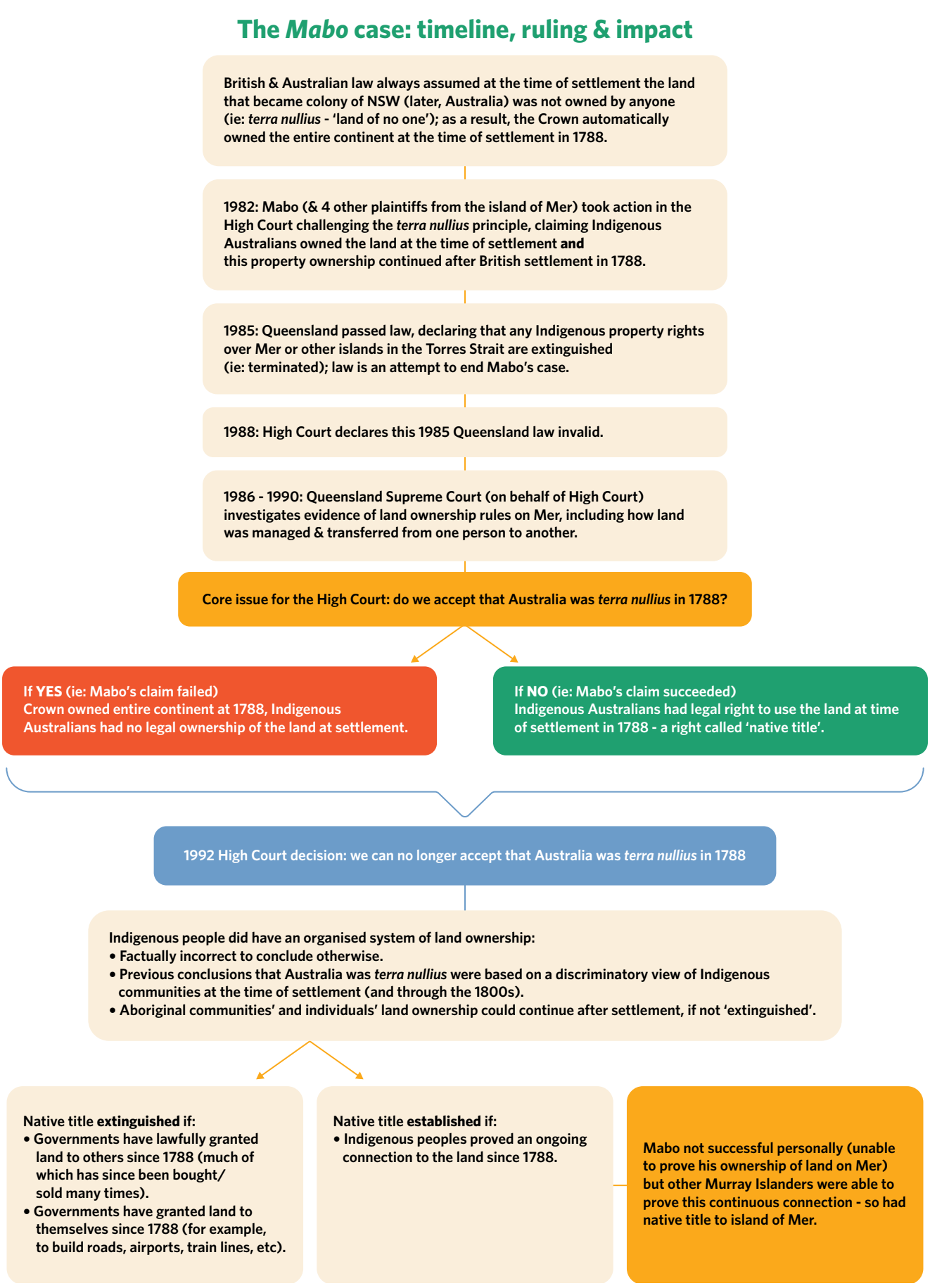


Figure 1 an overview of the Mabo ruling

Mabo met with other Murray Islanders and legal experts at the conference; as a group they decided to initiate a case in the High Court of Australia.

The legal fight ultimately took 10 years. According to a member of his legal team (Bryan Keon–Cohen QC), Mabo was driven by feelings of injustice regarding how Indigenous Australians were treated in Queensland and the racism he had himself been subjected to.

In initiating this claim, the plaintiffs sought a High Court declaration that the Meriam people were the traditional owners of the Murray Islands, and were legally entitled to possession and use of the islands.

The facts and issues central to the case, including the rights in question 2.3.5.7

OVERVIEW

The facts in *Mabo* proved the Meriam people had an organised system of land ownership, including clearly identified parcels of land that belonged to individuals and were passed on by inheritance. The High Court was asked to recognise this system of land ownership; all previous decisions of Australian (and British) courts had assumed the continent was 'the land of no–one' at the time of settlement and therefore belonged automatically to the Crown in 1788, ignoring Indigenous Australians' claims to possess and access their traditional lands.

DETAILS

Proceedings commenced

1982: the plaintiffs initiated proceedings in the High Court.

Since European settlement, Australian law had assumed the continent was *terra nullius* at the time of settlement:

- Legally, the 'land of no–one'.
- As a result of the *terra nullius* principle, the law determined that:
  - The Crown automatically took ownership of the entire continent at the time of European settlement in 1788.
  - Indigenous Australians had no lawful claim to possession or ownership of any land.
- By extension of this principle of *terra nullius,* Queensland automatically took control of the Murray Islands in 1879 when it annexed the islands (that is, declaring the islands were now part of Queensland).

Researching the facts

1986: the High Court asked the Queensland Supreme Court to conduct hearings and gather evidence about the Meriam peoples' relationship to the land on the Murray Islands.

Queensland attempted to terminate Mabo's claim

1985: the Queensland Parliament passed legislation to extinguish (with no compensation payable) any Torres Strait Islanders' legal claim to ownership of property in the Murray Islands.

1986: the High Court (in *Mabo v Queensland (No. 1)*) declared this Queensland legislation invalid:

- Sections 9 and 10 of the *Racial Discrimination Act 1975* (Cth) make it unlawful to discriminate against a person on the basis of race and require equal treatment of all persons regardless of race.
- The 1985 Queensland law took away the property rights of the Torres Strait Islands without compensation.
- The Commonwealth and Queensland laws were therefore inconsistent.
- According to s. 109 of the Australian Constitution, if state and Commonwealth laws are inconsistent, the Commonwealth law prevails and the state law is declared invalid.
- The Queensland law (which was an effort to terminate Mabo's claim) was struck down.

The Supreme Court's findings of fact

1990: Justice Moynihan of the Queensland Supreme Court published his findings:

- Justice Moynihan concluded the people of Mer had a traditional system of land and property ownership.
- Mabo was not personally successful in proving his ownership of land on Mer. Justice Moynihan doubted whether Mabo's adoption by his uncle (Benny Mabo) was to be recognised lawfully, which undermined his claim to have inherited the land owned by his uncle. The Court accepted there was Mabo land on Murray Island, but questioned whether Eddie Mabo had lawfully inherited such land.

- Despite Mabo's claim being undermined, the case continued with a focus on the other plaintiffs' claims of land ownership on Mer.

The issues raised by Mabo's claim

The plaintiffs argued that the legal assumption that Australia was *terra nullius* was incorrect. Instead, Mabo asked the Court to accept that Indigenous Australians owned the land at the time of settlement (ownership known as 'native title') and that this land ownership continued after European settlement.

If Australia is accepted to be *terra nullius* in 1788 (plaintiffs in *Mabo* fail):	If Australia is **NOT** accepted *terra nullius* in 1788 (plaintiffs in *Mabo* **succeed**):
• No Indigenous land ownership. • Crown automatically owned the entire continent of Australia at settlement. • All land usage and ownership from 1788 onwards was based on the Crown granting (and recognising in law) such usage and ownership. Groups of Indigenous Australians (such as the Meriam people) had never been granted land by the Crown, therefore they had no such ownership rights to land in Australia.	• Native title existed. • This native title was not terminated merely by the Crown having claimed the continent of Australia in 1788 when NSW was settled. • If Indigenous communities have native title to land in 1788 that continues to exist after British settlement: – How does an Indigenous community prove an entitlement to the land? – What happens if that land has since been bought and sold, and is now possessed by someone else?

Figure 2 The possible consequences of the Court's decision

The rights in question were:

- Should the Australian legal system **now** recognise Indigenous Australians' ownership of land prior to British settlement?
  - If so, how is this affected by that land now being farmed, mined, lived on, used as parkland and so on?
  - If an Indigenous community can prove a connection to traditional land that will be used by others, how are these competing interests to be reconciled?

The laws that applied to the case 2.3.5.8

OVERVIEW

Since the 1800s the courts had accepted the legal view that Australia was *terra nullius* at the time of settlement.

DETAILS

In 1889 the Privy Council (then the highest court in the Australian court hierarchy) decided in *Cooper v Stuart* that no land ownership existed in NSW prior to 1788. That is:

- The *terra nullius* principle was accepted.
- The Crown automatically owned all land in Australia from 1788 onward.
- Indigenous peoples had no lawful entitlement to use and possess the land they had inhabited for many thousands of years.

This decision had never been amended by Australian courts (nor the Commonwealth Parliament).

By the time of the *Mabo* application the High Court of Australia was the highest court in the nation, not bound to follow previous judgements and free to change the law if needed.

USEFUL TIP

In the earlier case of *Mabo v Queensland (No. 1)* (discussed above), a range of statutes and constitutional principles were considered.

However, the validity of the common law principle of *terra nullius* was the central legal issue considered in *Mabo v Queensland (No. 2)* – the judgement in which the underlying human rights issue of Indigenous land ownership was decided. Hence, the *terra nullius* principle is the focus here.

The outcome of the case and its impact on the rights of individuals and on the legal system 2.3.5.9

OVERVIEW

By a 6:1 majority the High Court decided in favour of the Meriam people.

DETAILS

In *Mabo v Queensland (No. 2)* [1992] the High Court accepted the claim of Mabo and his co–plaintiffs that Australia was not *terra nullius* at the time of British settlement, and it would be wrong to allow the law to continue to reflect this incorrect assumption. Rather, in 1788 Indigenous Australians did have a legal entitlement to the land and these land rights (native title) continued after settlement. A summary of the Court's reasoning appears in Figure 3 (Source: *Mabo v Queensland (No. 2)* [1992] HCA 32).

Historically, the law had always accepted the Crown took ownership of the entire continent when NSW settled in 1788.

In *Cooper v Stuart* (1889) it was held there was no system of land ownership in Australia at the time of settlement.

In cases such as the 1969 decision in *Wade v. New South Wales Rutile Mining*, the High Court confirmed this principle: 'On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown.'

Justice Brennan questioned these earlier decisions. If the *terra nullius* assumption is correct, then in 1788:

- British authorities took complete ownership of the entire continent, and
- Indigenous Australians lost the right to occupy the land they had lived on for thousands of years, with no compensation to be paid.

The High Court held that 'judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned'.

The facts do not support the *terra nullius* principle. To judge Indigenous people as not having a system of land ownership was not only inaccurate, it was discriminatory.

The High Court said it '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.'

Accepting *terra nullius* requires a discriminatory view of Aboriginal Australians. For the British Crown to automatically become the owner of all land in Australia – because they had no other owner – required an assumption that those who inhabited the land were 'barbarous' and had no system of law.

Unfortunately, this discriminatory view of Indigenous Australians was widely held in the 19th century. For instance, in 1837 a report to the British Parliament concluded that the state of Australian Aborigines was 'barbarous' and 'so entirely destitute ... of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded.'

The facts don't match this assumption. The High Court stated that the common law's previous assumption that 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 the *terra nullius* assumption to be factually wrong. For example:

- On Mer there was 'no concept of public or general community ownership among the people of Murray Island, all the land of Murray Island being regarded as belonging to individuals or groups.'
- Throughout the Murray Islands there was an elaborate system of individual property ownership.
- Indigenous communities have strong spiritual connections to the land and regard themselves as custodians of the land.

Rejecting *terra nullius*. The High Court can change previous common law principles if required. Although the High Court is slow to change the common law, it is at the top of the hierarchy and therefore is not bound to follow previous decisions.

Justice Brennan's judgement included the following comments:

> It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.
>
> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.
>
> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

cont'd

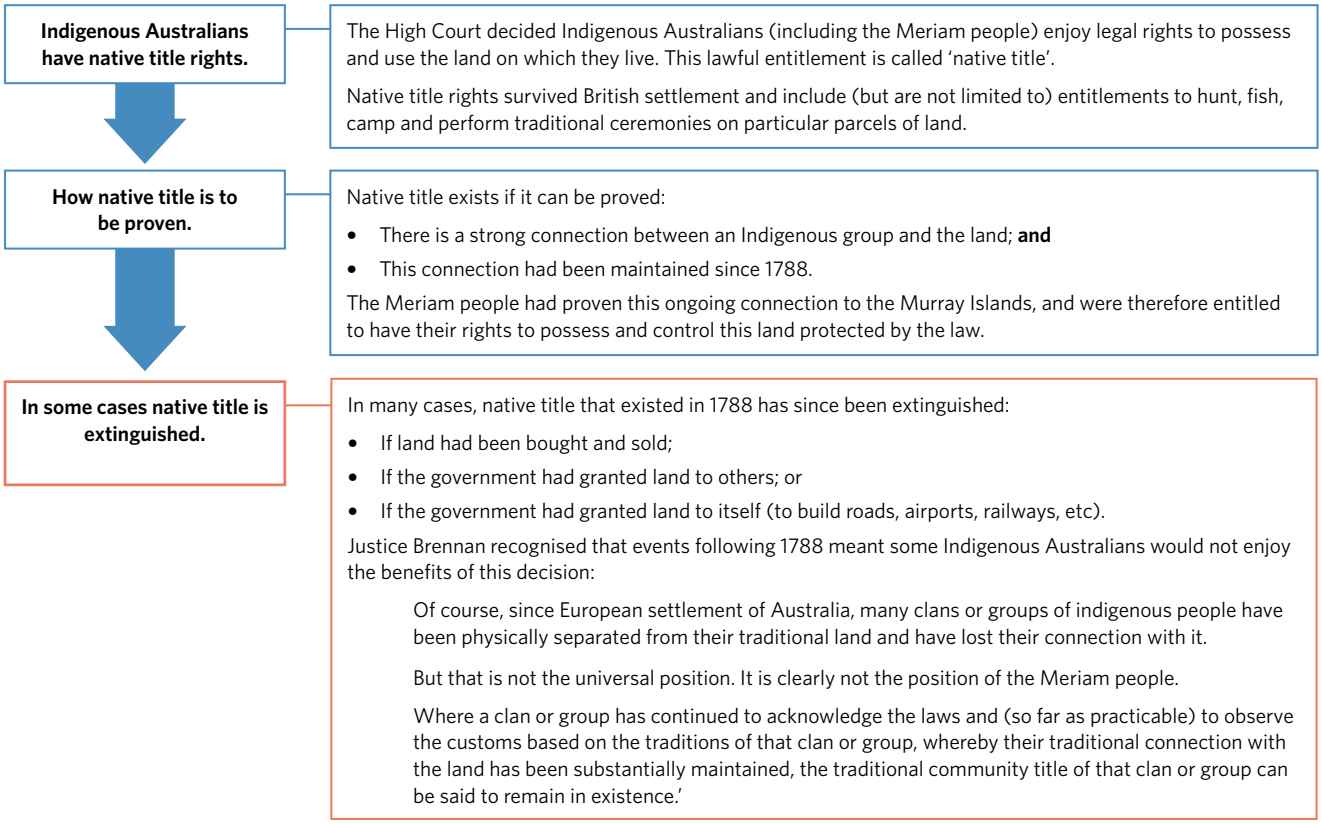


Figure 3 The High Court's reasoning

The decision

By a 6:1 majority, the Court rejected the *terra nullius* principle and recognised Indigenous Australians' native title rights to land across Australia.

The impact of the decision on Mabo

Eddie Mabo not only had his personal claim to land rights on Mer rejected by the Court, but died a few months before the Court delivered its judgement in this case. However, one of the most significant decisions in the Court's history bears his name.

The impact of the decision on Meriam people

The Court recognised that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer.'

The impact of the decision on other Indigenous Australians

As highlighted by Justice Brennan, some Indigenous communities (especially those in eastern Australia) enjoyed no practical benefit from the *Mabo* verdict:

- Their traditional lands had been inhabited and sold many times since European settlement; and/or
- Indigenous groups had been forced from their land as settlers spread throughout the colony of NSW during the 19th century; therefore
- It was difficult or impossible for such groups to prove a continuing connection to the land since 1788.

In more remote parts of Australia, Indigenous communities were now able to assert a lawful 'say' in how their traditional lands were used for activities such as mining and farming; this new legal entitlement opened the way to:

- Indigenous Australians being able to access certain land (for hunting, traditional ceremonies, etc.) even if it was also being used for other purposes, such as farming; and/or
- Compensation when access to such land was restricted by activities such as mining.

The process of proving native title and asserting such rights was clarified by legislation shortly after the *Mabo* decision.

The impact of the decision on the legal system

Following *Mabo* the Commonwealth Parliament passed the *Native Title Act 1993* (Cth).

The *Native Title Act 1993* (Cth) codified the legal recognition of native title (see Lesson 1E to recap the definition of 'codification'). The Act also:

- Clarified how Indigenous communities can prove and register their native title rights to particular parcels of land.
- Set up a process for Indigenous groups, governments and farming/mining businesses to negotiate agreements regarding how traditional lands are used for commercial farming and mining activities, while also preserving native title holders' rights to use that land for hunting, spiritual activities, etc.:
  - There are now over 1,000 Indigenous Land Use Agreements in place that balance Indigenous communities' rights to use and possess traditional land, with activities such as farming and mining.
  - The National Native Title Tribunal and Federal Court manage these processes.
- Determined which acts extinguish native title, codifying the practical impact of the Court's decision – native title rights are extinguished on land used for residential housing and schools, roads, etc.
- Established guidelines for compensation to be paid to Indigenous communities when their native title rights have been extinguished.

Native title rights have now been recognised over approximately 30% of Australia (including access to land, waterways and beaches) – around 2,000,000 km^2.

USEFUL TIP

The legal concept of 'native title' differs from the traditional, Western understanding of land ownership. A person's land ownership usually entitles that person to build a home or a business on the land to the exclusion of all others; in other words, the law usually recognises landowners as having 'exclusive possession' of the land.

By contrast, native title rights coexist with others' rights to use the land. Native title rights usually enable Indigenous communities to hunt, fish or conduct traditional ceremonies on land that is also used for some other purpose, such as mining or farming.

Possible conflicting attitudes in relation to the case 2.3.5.10

OVERVIEW

The *Mabo* judgement was subject to intense public debate, with a wide range of opinions expressed by politicians, lawyers and farming interests in particular.

DETAILS

Support for the decision included:

Human rights advocates, Indigenous communities and many politicians endorsed the decision, because it:

- Corrected past injustices, by overturning the *terra nullius* principle.
- Provided a legal recognition of traditional owners' rights to land:
  - 'I don't know that I had particular hopes, but I thought it meant a lot that Indigenous land rights were recognised. I thought that would enable the Indigenous people to take more pride in their inheritance than they had done otherwise. I also thought that it would enable them to see that the justice system in Australia was capable of delivering results – results that actually protected their interests.' Sir Anthony Mason, former Chief Justice of the High Court of Australia.

Source: Jackson, L, *4 Corners: Judgement Day* (2012)

- Enabled Aboriginal Australians to enforce their entitlement to use and enjoy land they had inhabited for thousands of years, when other parties also wish to use that land:
  - 'It certainly required the industry to talk more to Aboriginal people, and I think that's a plus. I think the Aboriginal... the relationship between the mining industry and the Aboriginal people is much better than is generally considered in the community, and I think that's probably because of *Mabo* rather than despite it.' Campbell Anderson, former President, Australian Mining & Industry Council.

    Source: Jackson, L, *4 Corners: Judgement Day* (2012)

Criticisms of the decision included:

- Some mining and farming interests criticised the decision, arguing it would prevent businesses from using land for economic purposes (this concern did not prove to be the case).
- Various politicians claimed – incorrectly – that the decision could result in Australians losing their backyards. This was inaccurate because:
  - The High Court clearly stated that native title existed only on vacant land still managed by the Crown (and some land that had been leased); and
  - Indigenous groups had to prove an ongoing connection to that land, which is difficult to do.
- Some legal experts supported the minority judgement of Justice Dawson. He rejected Mabo's claim on the basis that:
  - Abolishing *terra nullius* and recognising native title is a very significant change in the law.
  - If Australia's system of land ownership is to be changed and land rights are to be granted to the Meriam people (and other indigenous communities), it is for the democratically–elected Commonwealth Parliament to make such a big change, not a court.
  - The original legal position (that is, the *terra nullius* principle) looks discriminatory in contemporary Australia, with Justice Dawson stating 'there may not be a great deal to be proud of in this history of events.' However, whilst these previous assumptions about Indigenous Australians are insensitive, this itself is not a sufficient reason for the High Court to change what the law is.
- The High Court set a very difficult standard for Indigenous communities to meet; for many, it will be too hard to prove a continuous connection to the land since 1788.

Keen to learn more?

Keon–Cohen, B. The Mabo Litigation: A Personal and Procedural Account (2000), http://www.austlii.edu.au/au/journals/MelbULawRw/2000/35.html#fnB37

Loos, N, Australian Dictionary of Biography: Edward Koiki Mabo (2016), http://adb.anu.edu.au/biography/mabo-edward-koiki-eddie-16122

Mabo Case – Australian Institute of Aboriginal & Torres Strait Islander Studies, https://aiatsis.gov.au/explore/articles/mabo-case

Jackson, L, 4 Corners: Judgement Day – 20 years on from the Mabo judgement, https://www.abc.net.au/4corners/judgement-day/4003760

Native Title: Austrade, Department of Foreign Affairs & Trade, https://www.austrade.gov.au/land-tenure/Native-title/native-title

QUESTIONS 11B Mabo v Queensland (No. 2) [1992]

LEVEL 1:
Define and understand

1. Read this extract from Justice Brennan's written judgement in *Mabo:*

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.
>
> *(Source: Mabo v Queensland (No. 2)* [1992] HCA 32)

Which of the following was not a consequence of this judgement from the Court:

A. Indigenous Australians were recognised as having a lawful entitlement to use and possess the land they had lived on for thousands of years.

B. The *terra nullius* principle was rejected.

C. Any native title rights that existed in 1788 were extinguished.

D. The High Court made a radical change to the previously–accepted common law principles about land ownership.

2. 'Mabo's claim to native title was successful in the High Court.' Is this correct?

A. Yes, because Mabo and the Meriam people were found to be lawfully entitled to use and possess the land in the Murray Islands.

B. Yes, because the *terra nullius* principle was overturned by the High Court.

C. Yes, to an extent, because the *terra nullius* principle was overturned by the High Court and the Meriam people were found to be lawfully entitled to use and possess the land in the Murray Islands. However, Mabo himself was not successful in his claim.

D. No, because the High Court did not overturn the *terra nullius* principle.

3. According to the High Court, some acts extinguish native title, whilst others do not. Consider the following actions:

I) The government granting land to itself to build an airport.

II) A parcel of land being granted to sheep graziers in the 1920s, which has since been bought and sold on two separate occasions.

III) An Indigenous community being removed from its traditional lands, in what is now suburban Melbourne.

Which acts extinguish native title?

A. I

B. I & III

C. II & III

D. I, II & III

4. A majority of the High Court accepted the Meriam people's claim to native title rights over the land in the Murray Islands. Which of the following best describes the reason for Justice Dawson's dissenting judgement?

A. History suggests Aboriginal Australians did not have any system of property ownership, so the *terra nullius* principle remains good law.

B. Although it is at the top of the court hierarchy, the High Court must follow decisions made in other courts in earlier cases. Therefore, even if it wished to do so the Court cannot change the *terra nullius* principle and recognise native title.

C. To recognise native title is a significant change in the law, and large acts of law reform should be left to the democratically–elected Commonwealth Parliament.

D. To recognise native title rights would require an Indigenous community to prove it has enjoyed a continuous connection to that land since 1788, and such a connection is now impossible to prove.

LEVEL 2:
Descrie and explain

5. Explain the terms 'native title' and '*terra nullius*'. (4 MARKS)

6. Is the passage of the *Native Title Act 1993* (Cth) an example of the codification or abrogation of common law? Give reasons for your response. (3 MARKS)

7. To accept the Meriam people's claim, what did the High Court decide about the *terra nullius* principle? Identify two reasons for the Court making this decision regarding *terra nullius*. (3 MARKS)

LEVEL 3:
Apply and compare

8. 'The *Mabo* decision makes it clear that in 1788 Indigenous Australians owned the land my local railway station is built on, and the same Indigenous group owns that land now.'

Is this correct or incorrect? Justify your response. (4 MARKS)



BONUS – CARTOON QUESTIONS

The cartoon included across pages 195-451 depicts the scales of justice, a historical symbol used to represent the unbiased morality of the legal system. The scales originated as part of the personification of justice in Ancient Rome, and were held by Justitia - Lady Justice. For the purpose of the following questions, imagine Justitia was placed in a time machine and asked to sit as Judge in the County Court of Victoria.

Multiple choice questions

Question 1 (1 MARK)

In Justitia's time, people accused of a crime could sometimes be forced to answer questions and were even threatened with torture and death if they were not cooperative with the law. While hearing an assault case, Justitia was surprised when the prosecution explained that the accused refused to provide an answer when asked by the police if he was involved. Justitia has asked you how this was allowed to occur.

Which of the following explanations is correct?

A. **You explain to Justitia that this should not have been allowed. The evidence against the accused is compelling, so the police should have forced a confession from the accused.**

B. **You explain to Justitia that this is allowed as the Constitution includes an express right to remain silent when being questioned by police.**

C. **You explain to Justitia that the right to silence is protected by s. 25 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).**

D. **You explain to Justitia that this is allowed as statute law protects an accused's right to silence**

E. **Both C and D are correct.**



Question 2 (1 MARK)

You and Justitia decided to go for lunch in between hearings. At lunch, Justitia noticed a newspaper and was blown away to read open criticism of the government, and in particular, the Prime Minister. Assuming such critics should be dealt with in a severe manner by the nation's ruling elite, Justitia asked you to explain how this could be allowed to occur.

Which of the following explanations is correct?

A. The Australian Constitution includes an express right to political communication, allowing journalists to openly criticise the government.

B. A right to political communication is given only to professional political commentators, such as journalists who publish the newspapers.

C. The High Court of Australia has found an implied right to free speech within the wording of the Australian Constitution, allowing citizens to openly discuss all topics of conversation, including political affairs.

D. An implied right to free political communication exists that allows citizens to discuss and be informed of the actions of the government. This extends only to matters which can be described as 'political communications'.

Short answer questions

Question 3 (2 MARKS)

With reference to the symbolism behind the scales of justice, explain to Justitia what is meant by 'the presumption of innocence' and why it is important for upholding the principle of equality before the law.

Question 4 (3 MARKS)

In the time of Justitia, the approach of Roman law to the protection of human rights was different to that of modern Australia. To assist her in her duties as a judge in the County Court, Justitia has asked you to explain the current approach to human rights protection in the Australian legal system - but she's a busy ancient deity, so she'd like the explanation in fewer than 100 words.

1A Social cohesion and rights of individuals

LEVEL 1

1. C **2.** D

LEVEL 2

3.

✓ ✗	I have described non-legal rules as 'rules that are made privately by individuals or groups in society and are not enforceable by the courts' (or similar).[1]
✓ ✗	I have provided an example of a non-legal rule.[2]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[3]
✓ ✗	I have described legal rules as 'rules that are created by official law-making bodies such as parliament and are enforceable by the courts' (or similar).[4]
✓ ✗	I have provided an example of a legal rule.[5]
✓ ✗	I have used key legal studies terminology effectively such as: 'enforceable', 'parliament', etc.

Exemplar Response

[Non-legal rules are rules that are made privately by individuals or groups in society and are not enforceable by the courts.[1]] [For example, perhaps a sporting club has a rule stating that players must arrive 45 minutes before a game.[2]] [On the other hand,[3]] [legal rules (known as laws) are rules that are created by official law-making bodies such as parliament and are enforceable by the courts.[4]] [For example, laws preventing shoplifting are an example of legal rules.[5]]

1B Principles of justice

LEVEL 1

1. C **2.** B **3.** D **4.** C

5. A **6.** B

LEVEL 2

7.

✓ ✗	I have described fairness as 'ensuring equitable legal processes are in place, and all parties receive an unbiased hearing' (or similar).[1]
✓ ✗	I have provided one example of how fairness is upheld in the Victorian legal system.[2]
✓ ✗	I have been careful not to re-use the word 'fair' in my definition.
✓ ✗	I have used key legal studies terminology effectively such as: 'hearing', 'legal', etc.

Exemplar Response

[Fairness is defined as ensuring equitable legal processes are in place, and all parties receive an unbiased hearing.[1]] [One example of how fairness is upheld in the Victorian legal system is that both parties are entitled to legal representation to present their case.[2]]

Possible points to include

Other possible examples include (but are not limited to):

- All individuals and businesses in a legal dispute are entitled to a hearing by an impartial third party.
- Both parties have an opportunity to present their case in its best light.
- Trial processes facilitate a fair hearing, such as strict rules of evidence and procedure.
- Those charged with a criminal offence have the opportunity to be informed of all charges against them.
- In some criminal trials the accused has the right to have their case determined by a jury consisting of their peers.

8.

- ✓ ✗ I have described equality as 'ensuring all people are treated the same before the law, with an equivalent opportunity to present their case' (or similar).[1]
- ✓ ✗ I have provided one example of how equality is upheld in the Victorian legal system.[2]
- ✓ ✗ I have been careful not to re-use the word 'equal' in my definition.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'law ', 'legal', etc.

Exemplar Response

[Equality is defined as ensuring all people are treated the same way before the law with an equivalent opportunity to present their case, regardless of personal characteristics such as wealth or language background.[1]][One example of how equality is upheld in the Victorian legal system is that similar cases have similar outcomes.[2]]

Possible points to include

Other possible examples include (but are not limited to):

- Certain rights existing for the accused, such as the right to silence, the burden of proof rests with the prosecution and the high standard of proof that must be met in a criminal case (beyond reasonable doubt).
- Sentencing guidelines exist to ensure that the courts impose similar sanctions for similar offences.
- The existence of specialist courts ensure those with specific requirements can have their case heard by a court that specialises in that area.
- The remedies or sanctions provided are based upon the law and the facts. Decisions are not based on bias (prejudice) for or against parties due to their race, gender, age or political beliefs.

9.

- ✓ ✗ I have defined access as 'ensuring individuals in society have an understanding of their legal rights and an ability to pursue their case' (or similar).[1]
- ✓ ✗ I have provided one example of how access is upheld in the Victorian legal system.[2]
- ✓ ✗ I have been careful not to re-use the word 'access' in my definition.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'court', 'legal', etc.

Exemplar Response

[Access is defined as ensuring individuals in society have an understanding of their legal rights and ability to pursue a case if such rights are infringed.[1]][One example of how access is upheld in the Victorian legal system is that Court Services Victoria provides translators and other support for those attending court.[2]]

Possible points to include

Other possible examples include (but are not limited to):

- Legal Aid funds legal representation in many serious criminal cases for those who cannot afford a lawyer.
- Community Legal Centres and not-for-profit groups publish resources and provide information to people of all ages, cultures and languages to understand the law and how to protect themselves.
- Government advertising campaigns, government departments and the courts provide information across many platforms about legal rights, responsibilities and how legal disputes are resolved.

1C Characteristics of an effective law

LEVEL 1

1. C **2.** C **3.** C

LEVEL 2

4.

- ✓ ✗ I have explained that an effective law must be stable because continuous changes and updates to a law make it difficult for the law to be known and understood by society (or similar).[1]
- ✓ ✗ I have explained this characteristic of an effective law in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'continuous changes', 'implemented', etc.

Exemplar response

[An effective law must be stable as continuous changes and updates to a law may make it difficult for the law to be known and understood by society.[1]][Laws are often only effective if they are implemented for a reasonable period of time and when the community are given time to become familiar with it.[2]]

5.

- ✓ ✗ I have explained that writing laws 'in futuro' may mean that they are often written very broadly to try and capture unforeseen circumstances (or similar).[1]
- ✓ ✗ I have explained how this might influence the effectiveness of a law.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'unforeseen', 'complex', etc.

Exemplar response

[As laws are drafted in parliament 'in futuro' (ahead of time), they are often written very broadly to try and capture unforeseen circumstances.[1]][This can sometimes make them quite long and complex, meaning that they may be difficult for people to understand and follow, thus reducing the effectiveness of the law.[2]]

LEVEL 3

6.

- ✓ ✗ I have identified one reason why these new laws will be enforceable.[1]
- ✓ ✗ I have linked directly to the information in the case to demonstrate this.[2]
- ✓ ✗ I have identified one reason why these new laws may not be enforceable.[3]
- ✓ ✗ I have linked directly to the information in the case to demonstrate this.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'consequences', 'enforceable', etc.

Exemplar response

[One reason why these new laws will be enforceable is that they provide clear consequences for people who do not follow them.[1]][Under these laws, being found guilty of cruelty to animals in Victoria can result in a fine of up to $77,730 or up to two years in prison. This provides a definitive punishment to enforce the law.[2]][One reason why these new laws may not be enforceable is that it may be difficult to monitor whether people follow the law.[3]][For example, monitoring whether or not farmers are feeding heat-stressed horses with electrolytes could be extremely difficult for government authorities.[4]]

7.

- ✓ ✗ I have explained that for a law to be effective, it is necessary for laws to reflect what society believes in and values (or similar).[1]
- ✓ ✗ I have linked directly to the information in the case to demonstrate this.[2]
- ✓ ✗ I have mentioned the principle of representative government, explaining that the government must remain aware of the needs of their community (or similar).[3]
- ✓ ✗ I have linked directly to the information in the case to demonstrate this.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'consequences', 'enforceable', etc.

Exemplar response

[For a law to be effective, it is necessary for laws to reflect what society believes in and values.[1]][It is clear that an increase in affordability of renting is a major issue of concern for the public, who have been growing anxious and putting political pressure on parliament to address the issue.[2]][Since we have a representative government who are elected to represent the interests of the voters, it is necessary for law-makers to remain aware of the needs of their community.[3]][As such, law-makers will continue to discuss the views and needs of the community as the new changes are implemented across 2020.[4]]

1D Sources of law

LEVEL 1

1. D

2. **a)** Obiter dictum **b)** Binding precedent **c)** Stare decisis **d)** Ratio decidendi **e)** Persuasive precedent

3. B

4. A

5. B

6. C

LEVEL 2

7.

- ✓ ✗ I have defined statute law as 'legislation that is passed and enacted by parliament' (or similar).[1]
- ✓ ✗ I have explained what happens in the initiation stage of the legislative process.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'legislation', 'house', etc.

Exemplar Response

[Statute law refers to legislation that is passed and enacted by parliament through the legislative process.[1]][The first stage of the legislative process is initiation, where the minister responsible for the new bill will request approval from the house to introduce it for the first time.[2]]

8.

- ✓ ✗ I have defined binding precedent as 'precedent which a judge is obliged to follow, as it comes from a decision of the superior court in the same hierarchy where the facts of the case were materially similar' (or similar).[1]
- ✓ ✗ I have used a distinguishing word such as 'whereas' and 'on the other hand' to highlight difference.[2]

- ✓ ✗ I have defined persuasive precedent as 'precedent which a judge is not obliged to follow, but may still be used to assist a judge in determining a case' (or similar).[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'hierarchy', 'obiter dictum', etc.

Exemplar Response

[Binding precedent refers to precedent which a judge is obliged to follow, as it comes from the decision of a superior court in the same court hierarchy, where the facts of the case were materially similar.[1]][On the other hand,[2]][persuasive precedent refers to precedent which a judge is not obliged to follow, but may still be used to assist a judge in determining a case. Persuasive precedent may often include a judge's obiter dictum statements, or may be a previous verdict from a lower court in the court hierarchy (or a court from a different hierarchy).[3]]

LEVEL 3

9. a)

- ✓ ✗ I have identified this case as forming persuasive precedent.[1]
- ✓ ✗ I have justified this claim by highlighting that the case was heard in a different court hierarchy.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'hierarchy', 'appeal', etc.

Exemplar Response

[The case of Pedavoli is an example of persuasive precedent,[1]][as it was heard in the New South Wales Court of Appeal, which is part of a separate court hierarchy to the Victorian Supreme Court.[2]]

b)

- ✓ ✗ I have explained that the decision will be binding on judges in lower courts in the Victorian hierarchy when hearing a case of similar material facts (or similar).[1]
- ✓ ✗ I have identified that the County Court and the Magistrates' Court will be bound by this decision.[2]
- ✓ ✗ I have justified this conclusion by referring to the principle of stare decisis.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'hierarchy', 'stare decisis', etc.

Exemplar Response

[Judges will be bound to follow this decision if they are hearing a case in a lower court of the Victorian hierarchy, where the facts of their case are materially similar.[1]][As this case was heard in the Supreme Court of Victoria, this will include the County Court and the Magistrates' Court.[2]][This follows the principle of stare decisis, which requires judges to follow the decisions of past cases in future cases of a similar nature.[3]]

10. a)

- ✓ ✗ I have identified statement number 1 as forming the ratio decidendi of the decision.[1]
- ✓ ✗ I have justified this claim by linking directly to the fact in question.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas' and 'on the other hand' to highlight difference.[3]
- ✓ ✗ I have identified statement number 2 as forming obiter dictum of the decision.[4]
- ✓ ✗ I have justified this claim by linking to the judge's words that this observation is 'not necessary for my decision'.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'presiding judge', 'persuasive precedent', etc.

Exemplar Response

[Statement number 1 forms the ratio decidendi in this decision.[1]][It is clear that the presiding judge is making a direct claim about the legal responsibility of the company and how this contributes to their negligent behaviour.[2]][On the other hand,[3]]

[statement 2 is an example of obiter dictum.[4]][The judge says this observation is not necessary for the decision and is said to qualify the earlier ratio decidendi, and may be used in future cases as persuasive precedent.[5]]

b) ✓ ✗ I have identified statement 1 as forming the binding precedent.[1]

✓ ✗ I have justified this claim by explaining that statement 1 forms the ratio decidendi of the judge's decision.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'hierarchy', 'ratio decidendi', etc.

Exemplar Response

[Statement 1 will form the binding precedent in similar cases that take place in lower courts of the Victorian court hierarchy.[1]] [This statement forms the ratio decidendi of the judge's decision, which is the legal reasoning given by the judge in reaching their decision and is treated as binding on similar cases in the future.[2]]

1E Parliament and the courts

LEVEL 1

1. **a)** Statutory interpretation **b)** Abrogation

c) Parliamentary sovereignty **d)** Codification

2. C **3.** B

LEVEL 2

4. ✓ ✗ I have described statutory interpretation as 'the courts giving meaning to the words in legislation when resolving a dispute' (or similar).[1]

✓ ✗ I have described one reason for statutory interpretation.[2]

✓ ✗ I have explained this reason in further detail, including an example.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'statutory interpretation', 'legislation', etc.

Exemplar Response

[Statutory interpretation refers to the courts giving meaning to the words in legislation when resolving a dispute.[1]][One reason why statutory interpretation may be necessary is because parliament often creates laws that are quite broad in an attempt to ensure they can cover a number of different scenarios.[2]][Therefore, in resolving disputes that come before the courts, the courts must consider the intentions of parliament so that the broad terms in legislation can be applied to a specific set of facts. The case of *Deing v Tarola (1993)* is an example of the courts interpreting the words of an act to apply them to a specific case.[3]]

Possible points to include

Other possible reasons for statutory interpretation:

Changing nature of words

- The meaning of words changes over time and often it will be necessary for judges to interpret statutes so that certain words are given a more contemporary meaning and can be applied to current cases.
- An example of a case where this was necessary is *The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

Unforeseen circumstances

- Parliament can not always foresee developments in society, for example new innovations in technology, and sometimes judges may need to interpret statutory legislation to make laws applicable in light of these developments.
- *R v Brislan* [1935] 54 CLR 262 is an example of a case where unforeseen circumstances made statutory interpretation necessary.

5.

- ✓ ✗ I have described '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 identified the decision made by the courts in this case.[5]
- ✓ ✗ I have identified the Act that parliament passed to abrogate the common law followed by the courts in this case.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sovereignty', 'abrogate', '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]]

6.

- ✓ ✗ I have described codification as 'incorporating common law principles into legislation' (or similar).[1]
- ✓ ✗ I have identified a reason why codification occurs: to demonstrate that parliament agrees with 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

[Codification of common law refers to the 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 *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]]

7.

- ✓ ✗ I have identified a feature of the relationship between parliament and the courts (other than parliament establishing the courts).[1]
- ✓ ✗ I have described this relationship in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Parliament', 'abrogate', etc.

Exemplar Response

[Parliament has the power to abrogate a common law rule.[1]][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.[2]]

Possible points to include

Other possible relationships between Parliament and the courts:

- Parliament can legislate to codify common law. The codification of common law is the classifying, restating and incorporation of common law into legislation.

- The courts can declare that a statute is invalid on the grounds that it was beyond the powers of parliament to pass such a law. In this case, the law will be declared 'ultra vires' and will no longer have effect.
- Judges can criticise or make comments on law they believe is outdated. This may encourage parliament to pass legislation to change such laws.
- The courts interpret statutes passed by parliament. In resolving disputes that come before the courts, the courts must interpret the intentions of parliament and give effect to the statute law in a way that upholds the meaning of the words in the statute and resolves the dispute before them.

LEVEL 3

8.

- ✓ ✗ I have stated the difference between codification and abrogation, regarding the impact on common law.[1]
- ✓ ✗ I have described codification.[2]
- ✓ ✗ I have identified an example of codification.[3]
- ✓ ✗ I have explained this example in further detail, describing the court's decision and the subsequent legislation.[4]
- ✓ ✗ I have included a contrasting word such as 'on the other hand', 'however' or 'although'.[5]
- ✓ ✗ I have described abrogation.[6]
- ✓ ✗ I have identified an example of abrogation.[7]
- ✓ ✗ I have explained this example in further detail, describing the court's decision and the subsequent legislation.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'codification', 'abrogation', '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 following the *Mabo* decision where the High Court, established the principle of native title.[3]][In 1993 the Commonwealth Parliament passed the *Native Title Act (1993)* 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.[4]][Abrogation, on the other hand,[5]][is a process where parliament passes legislation to override judge made law.[6]][An example of this was in the *Trigwell* case, where the High Court decided to follow an old common law principle where a landowner didn't owe a duty of care for roaming livestock.[7]][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)*, abrogating the common law and imposing a duty of care on landowners to take reasonable care to see that damage is not caused by animals straying on to a highway.[8]]

9.

- ✓ ✗ I have identified one effect of statutory interpretation.[1]
- ✓ ✗ I have identified an example of this effect.[2]
- ✓ ✗ I have explained this example in further detail.[3]
- ✓ ✗ I have described how this case demonstrates this effect of statutory interpretation.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'statute', 'precedent', etc.

Exemplar Response

[One effect of the interpretation of statutes by the courts is the creation of precedent.[1]][The case of *Deing v Tarola* (1993) is an example of precedent being created through statutory interpretation.[2]][In this case, it was necessary for the court to interpret the meaning of the word 'weapon' in the *Control of Weapons Act 1990* (Vic) to determine whether it applied to the very specific facts of this case (a belt with raised metal studs).[3]]

[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. In later cases in the Magistrates' Court and County Court the legislation and this precedent defining 'weapon' were read together to determine whether those charged with carrying a regulated weapon have an item that breaches the law.[4]]

Possible points to include

Other effects of statutory interpretation and corresponding examples:

- Broadening of the application of a law – *Carr v Western Australia* [2007] 232 CLR 138.
- Narrowing of the application of a law – minority judgement in *Carr v Western Australia* [2007] 232 CLR 138.
- Parliament may amend legislation in response to statutory interpretation, abrogating interpretations of legislation – The meaning of 'persecution' in Australian refugee law.

1F Criminal and civil law

LEVEL 1

1. B **2.** C **3.** D **4.** A **5.** C

LEVEL 2

6.

✓ ✗	I have described criminal law as 'laws that are made by judges and made by parliament that aim to protect society from harm, and to punish those who break such laws' (or similar).[1]
✓ ✗	I have provided one example of an offence that is governed by criminal law.[2]
✓ ✗	I have provided another example of an offence that is governed by criminal law.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'criminal law', 'offend', etc.

Exemplar Response

[Criminal law refers to laws that are made by judges (common law) and made by parliament (statute law or legislation) that aim to protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another.[1]][Examples of offences that are governed by criminal law include murder,[2]][and assault.[3]]

Possible points to include

Other possible offences governed by criminal law include (but are not limited to):

- Manslaughter
- Theft
- Rape
- Culpable driving.

7.

✓ ✗	I have described the aim of civil law as 'to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights' (or similar).[1]
✓ ✗	I have provided an example of civil law.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'civil law', 'remedy', 'individual rights', etc.

Exemplar Response

[The aim of civil law is to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.[1]][One area of law that is governed by civil law is property law.[2]]

1F

Possible points to include

Other possible examples of civil law include (but are not limited to):

- Family law
- Intellectual property law
- Contract law
- Tort law.

8.

- ✓ ✗ I have stated one difference between criminal and civil law.[1]
- ✓ ✗ I have described the feature of criminal law that differs from civil law.[2]
- ✓ ✗ I have used distinguishing words, such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
- ✓ ✗ I have described the matching feature of civil law.[4]
- ✓ ✗ I have stated a second difference between criminal law and civil law.[5]
- ✓ ✗ I have described the feature of criminal law that differs from civil law.[6]
- ✓ ✗ I have used distinguishing words, such as 'whereas', 'however', 'on the other hand', to highlight differences.[7]
- ✓ ✗ I have described the matching feature of civil law.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'civil dispute', 'prosecution', 'defendant', 'plaintiff', 'sanction', 'remedy', etc.

Exemplar Response

[One difference between criminal and civil law is the parties within a criminal case and a civil dispute.[1]][The parties in a criminal trial are the prosecution, who brings the case against the accused,[2]][whereas[3]][a civil dispute involves the plaintiff (the person bringing the claim) and the defendant (the person defending the claim).[4]][Another difference between criminal and civil law is the outcome of a criminal case as opposed to the outcome of a civil dispute.[5]][When an accused person is found guilty in a criminal trial, the courts impose a sanction on the offender to punish them and protect society.[6]][However,[7]][if a defendant is found liable in a civil dispute, the courts will award a remedy to compensate the plaintiff.[8]]

Possible points to include

Other possible differences between criminal and civil law:

- The purposes of criminal law and civil law – the purpose of criminal law is to protect society from harm, and to punish those who offend against our basic values, while the purpose of civil law is to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.
- The party responsible for proving the case – in a criminal case the prosecution is responsible for proving the facts of the case, whereas the plaintiff is responsible for proving the case in a civil dispute.

LEVEL 3

9. a)

- ✓ ✗ I have identified the accused in this case as Borce Ristevski.[1]
- ✓ ✗ I have identified the prosecution in this case as the DPP (Director of Public Prosecutions), or the police.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defendant', 'prosecution', etc.

Exemplar Response

[The accused in this case is Borce Ristevski, the party accused of committing an offence.[1]][The prosecution in this case is the DPP (Director of Public Prosecutions), the party bringing the case against the accused.[2]]

b)

- ✓ ✗ I have explained how a single set of events may involve both criminal and civil law elements.[1]
- ✓ ✗ I have explained how a wrongdoer can face both criminal and civil consequences for their actions.[2]
- ✓ ✗ I have used an example from the case to illustrate this relationship.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'plaintiff', 'civil dispute', etc.

Exemplar Response

[In some cases, criminal law and civil law will both apply. Often when a person commits a crime, this will involve causing harm to another person. This may infringe on the individual rights of that person and result in them initiating a civil case to gain compensation for their loss.[1]][Thus, while the offender is prosecuted by the state, convicted of a crime and sentenced accordingly, they may also be found liable for loss suffered by the victim under civil law and have to provide compensation to the victim/plaintiff.[2]][For example, the above case relates to a criminal offence, however, it has the potential to cause a civil dispute to arise. The actions of the offender, Borce Ristevski, in causing the death of his wife Karen will have caused significant emotional pain and suffering for her family as a result of the loss. Therefore, a close family member of the deceased may feel that their individual rights have been infringed and initiate a civil claim against Borce for compensation.[3]]

10.

- ✓ ✗ I have identified one error in the passage.[1]
- ✓ ✗ I have corrected this error.[2]
- ✓ ✗ I have identified a second error in the passage.[3]
- ✓ ✗ I have corrected this error.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal sanction', 'civil remedy', 'defendant', 'plaintiff', etc.

Exemplar Response

[One error in the above passage is that a criminal sanction will be imposed on Zara.[1]][Criminal sanctions are not imposed in civil disputes. If Zara is found to be liable for breaching the contract and thus infringing on Tristan's individual rights, the courts will award a civil remedy to Tristan as compensation for his loss.[2]][A second error in the above passage is that Zara will have the burden of proof because she is the defendant.[3]][The defendant in a civil case does not have the burden of proof. The plaintiff in this case, Tristan, is responsible for proving the facts of the case because he is the party bringing the claim.[4]]

Possible points to include

Other possible errors:

- Another error is that Zara will be found 'guilty' by the courts. A defendant cannot be found guilty in a civil dispute, instead they will be found 'liable' for infringing the rights of the plaintiff.

11.

- ✓ ✗ I explained one similarity between criminal and civil law.[1]
- ✓ ✗ I have explained a second similarity between criminal and civil law.[2]
- ✓ ✗ I have described one feature of criminal law that differs from civil law.[3]
- ✓ ✗ I have used distinguishing words, such as 'whereas', 'however', 'on the other hand', to highlight differences.[4]
- ✓ ✗ I have described the matching feature of civil law.[5]
- ✓ ✗ I have described a second feature of criminal law that differs from civil law.[6]
- ✓ ✗ I have used distinguishing words, such as 'whereas', 'however', 'on the other hand', to highlight differences.[7]
- ✓ ✗ I have described the matching feature of civil law.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', 'remedy', 'offence', 'defendant', 'plaintiff', etc.

Exemplar Response

[Criminal and civil law are both areas of law which aim to achieve justice and social cohesion by regulating the behaviour of individuals and groups.[1]][Both types of law aim to fulfil this purpose by providing consequences for those who violate laws and cause harm within the community.[2]][However, there are a number of differences between criminal and civil law. For example, the purpose of criminal law is to protect society from harm and to punish those who offend against our basic values,[3]][whereas[4]][the purpose of civil law is to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.[5]][Furthermore, the outcomes of criminal and civil actions are different. When a person is found guilty of committing a criminal offence, the courts will impose a criminal sanction as punishment.[6]][However,[7]][in civil cases where a defendant has been found liable for infringing the rights of an individual, the courts will award a remedy which aims to compensate the plaintiff.[8]]

Possible points to include

Other possible differences between criminal and civil law:

- The parties – the parties in a criminal case are the prosecution and the accused, while the parties in a civil dispute are the plaintiff and the defendant.

1G The Victorian court hierarchy

LEVEL 1

1. C

2. **a)** criminal jurisdiction **b)** appellate jurisdiction **c)** civil jurisdiction **d)** original jurisdiction

3. D **4.** A

5. B **6.** C

7. D

LEVEL 2

8.

- ✓ ✗ I have defined a court hierarchy as 'a ranking of courts based on their 'status' and 'authority' to hear different types of matters' (or similar).[1]
- ✓ ✗ I have linked the court hierarchy to each court having a particular jurisdiction.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'court hierarchy', 'jurisdiction', etc.

Exemplar reponse

[A court hierarchy refers to the ranking of the courts within a system, based on their 'status' or 'authority' to hear different types of matters.[1]][The ranking of courts is closely related to their jurisdiction. That is, they are organised according to their power to hear and determine particular types of matters.[2]]

9.

- ✓ ✗ I have identified one reason for a court hierarchy.[1]
- ✓ ✗ I have explained this reason in greater detail.[2]
- ✓ ✗ I have provided an example to illustrate this reason.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'court hierarchy', etc.

Exemplar reponse

[One reason for the existence of a court hierarchy is to provide for specialisation.[1]][Specialisation refers to the expertise developed by each of the courts in hearing certain types of cases regularly. The court hierarchy allows court staff to specialise in providing particular services or hearing particular cases. If the court hierarchy did not exist and there was only one court hearing all matters, judges and staff within that court would not be able to specialise in hearing certain types of cases because such a court would resolve a huge range of disputes.[2]][For example, the Supreme Court has judges who are experts in managing juries and deciding legal questions related to serious indictable offences, such as murder cases.[3]]

Possible points to include

Other possible reasons for the existence of a court hierarchy:

- Administrative convenience – Administrative convenience comes from separating minor offences and disputes that are heard by lower courts while more serious, complex and time-consuming cases can be heard in higher courts. For example, the superior courts (such as 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.
- Appeals – 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. For example, a person unhappy with an outcome in the Magistrates' Court can appeal to have the decision reviewed in the County Court or the Supreme Court (depending on the type of appeal).
- The doctrine of precedent – The doctrine of precedent means that cases with similar facts will be decided in a similar manner to ensure consistency, predictability and justice. Courts lower in the hierarchy must follow the decisions of superior courts in the hierarchy when resolving cases that have similar facts. To uphold this principle, the courts must be ranked in a system of superior courts and lower courts. For example, an accused person that has been charged with a crime should not be surprised by the law applied or the decision made in their case, because this will be based on decisions made in similar cases in the past.

LEVEL 3

10.

✓	✗	I have defined specialisation as 'the expertise of each of the courts in hearing certain types of cases' (or similar).[1]
✓	✗	I have used a linking word to demonstrate contrast such as: 'however', 'on the other hand', 'whereas', etc.[2]
✓	✗	I have defined administrative convenience as 'the benefit we derive from organising cases according to how serious or complex matters are' (or similar).[3]
✓	✗	I have used key legal studies terminology effectively such as: 'specialisation', 'administrative convenience', etc.

Exemplar reponse

[Specialisation refers to courts (and judges) developing their own area of expertise. For example, Supreme Court justices develop skills and expertise in resolving complex civil disputes as this is what they hear and determine most often.[1]][However,[2]][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.[3]]

11. a)

✓	✗	I have identified the Supreme Court – Court of Appeal as the court that would hear Paul's appeal.[1]
✓	✗	I have stated that the Court of Appeal hears appeals from the County Court and the Supreme Court – Trial Division.[2]
✓	✗	I have used key legal studies terminology effectively such as: 'appeal', etc.

Exemplar reponse

[Paul's appeal would be heard in the Supreme Court – Court of Appeal.[1]][The Court of Appeal hears appeals from criminal matters tried in the County Court and the Supreme Court – Trial Division.[2]]

b)

- ✓ ✗ I have identified one reason, other than appeals, why a court hierarchy is beneficial in the case.[1]
- ✓ ✗ I have explained this reason in detail.[2]
- ✓ ✗ I have made explicit references to Paul's case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'appeal', etc.

Exemplar reponse

[Other than appeals, one reason why a court hierarchy would be beneficial in this case is to facilitate the doctrine of precedent.[1]] [The doctrine of precedent 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.[2]] [This will be beneficial in Paul's case because it means that Paul would have had some idea of the outcome of his case, based on previous cases of a similar nature. This provides greater certainty for Paul and would have prevented him from being greatly surprised by the law applied and the decision in his case.[3]]

Possible points to include

Other possible reasons for a court hierarchy:

- Administrative convenience – Administrative convenience comes from separating minor offences and disputes that are heard by lower courts while more serious, complex and time-consuming cases can be heard in higher courts. This will be beneficial in Paul's case because it means that Paul's trial will proceed in the County Court, since it is a more serious (indictable) offence and his trial will not be delayed by the County Court also resolving a lot of minor criminal cases at the same time.
- Specialisation – Specialisation refers to the expertise developed by each of the courts in hearing certain types of cases regularly. The court hierarchy allows court staff to specialise in providing particular services or hearing particular cases. This will be beneficial in Paul's case because it means that Paul's trial will be heard by a judge that has developed skills and expertise in dealing with indictable offences, such as armed robbery. This will likely result in a more just outcome and a quicker resolution for Paul.

Chapter 1 Review questions

LEVEL 5

1. a)

✓ ✗	I have described precedent as 'a principle of law created by a court when resolving one case which is then followed in similar cases in future' (or similar).[1]
✓ ✗	I have explained the effect of this precedent on future cases.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'precedent', 'court hierarchy', etc.

Exemplar response

[Precedent refers to a principle of law created by a court when resolving one case which is then followed in similar cases in future.[1]][The precedent established in this case will henceforth be binding on future cases in lower courts of the same court hierarchy, where the facts of the case are similar.[2]]

Possible points to include

An alternative impact on future cases is that the precedent and the statute will be read together to resolve disputes.

b)

✓ ✗	I have described statutory interpretation as 'the courts giving meaning to the words in legislation when resolving a dispute' (or similar).[1]
✓ ✗	I have identified the reason for statutory interpretation in this case: unforeseen circumstances.[2]
✓ ✗	I have described this reason in further detail.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'legislation', 'dispute', 'parliament', etc.

Exemplar response

[Statutory interpretation refers to the courts giving meaning to the words in legislation when resolving a dispute.[1]]
[Statutory interpretation was necessary in this case due to unforeseen circumstances.[2]][The words in statutes sometimes need to be interpreted because parliament is not always able to foresee a particular situation. For example, if new technology is created which could not have been predicted when an Act was created, the courts may need to interpret the Act to account for the advances in technology.[3]]

c)

✓ ✗	I have described codification as 'the classifying, restating and incorporation of common law into legislation' (or similar).[1]
✓ ✗	I have explained the process of codification.[2]
✓ ✗	I have provided one reason why parliament codifies laws.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'codification', 'common law', 'legislation', 'parliament', etc.

Exemplar response

[Codification refers to the classifying, restating and incorporation of common law into legislation.[1]][This occurs when parliament agrees with a principle of common law established by judges from a particular case and creates legislation to enshrine the legal principle so that it becomes statute law.[2]][One reason why parliament may choose to codify a law is to clarify the operation of the law for the future, beyond the parties to the dispute in which the common law principle was developed.[3]]

Possible points to include

Students may include an example as part of a full description of codification (such as the *Native Title Act* codifying the decision in *Mabo*), but this is not necessary.

REVIEW

d)

- ✓ ✗ I have described one reason why this proposed law would be effective, linking to the characteristics of an effective law.[1]
- ✓ ✗ I have described a second reason why this proposed law would be effective, linking to the characteristics of an effective law.[2]
- ✓ ✗ I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[3]
- ✓ ✗ I have described one reason why this proposed law would not be effective, linking to the characteristics of an effective law.[4]
- ✓ ✗ I have described a second reason why this proposed law would not be effective, linking to the characteristics of an effective law.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'law', 'enforce', etc.

Exemplar response

[One reason why this would be an effective law is because it is clear and easy to understand. Banning particular devices in a school is a simple act and would not be a complex change for members of society to understand.[1]][Furthermore, this would likely be an effective law because it reflects some of the changing views in society. Many people are beginning to advocate a move away from technology for children and have suggested that excessive use of technology can have a negative impact on education. Thus, removing some forms of technology from the classroom would likely be popular with many people.[2]]

[On the other hand,[3]][this law would not be easy to enforce and will therefore be less effective. It would be almost impossible for law enforcement to police a ban on devices in all schools, and it is likely that many people would break the law. It would require too many police resources to monitor such a law.[4]][Additionally, it is unlikely that a law like this would be able to remain stable, without constantly being changed or updated. With rapid advancements in technology occurring all the time, a law such as this would frequently need to be amended to include new forms of technology. It would therefore be difficult for people to keep track of what this law requires them to do or not do, making it less effective.[5]]

Possible points to include

Other reasons why it would be effective:

- It would not be difficult to make such a law known to the public.

Other reasons why it would not be effective:

- This law would likely cause controversy in society – it may reflect the values of some people, but there would also be many people opposed to the law. As such it may be disregarded in some schools.

2. a)

- ✓ ✗ I have stated that this case involved both criminal and civil law.[1]
- ✓ ✗ I have explained that criminal law was involved because Greg committed an offence by driving dangerously and was convicted in a trial.[2]
- ✓ ✗ I have explained that civil law was also involved because Trish sought compensation for the loss caused by Greg and initiated a civil claim.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal law', 'civil law', 'offence', 'claim', etc.

Exemplar response

[This case involved both criminal and civil law.[1]][Criminal law was involved because Greg committed an offence by driving dangerously, was convicted in a trial and imprisoned.[2]][Civil law was also involved because Trish wanted to gain compensation for the loss that Greg caused and initiated a civil claim against Greg.[3]]

b)

- ✓ ✗ I have identified the court that would hear Greg's appeal: Supreme Court – Court of Appeal.[1]
- ✓ ✗ I have outlined the original civil and criminal jurisdiction of this court.[2]
- ✓ ✗ I have outlined the appellate civil and criminal jurisdiction of this court.[3]

✓ ✗	I have used key legal studies terminology effectively such as: 'appeal', 'original jurisdiction', 'appellate jurisdiction', 'civil', etc.

Exemplar response

[If Greg were to appeal the decision made in the County Court, the appeal would go to the Supreme Court – Court of Appeal.[1]] [The Court of Appeal has no original jurisdiction.[2]] [In its appellate jurisdiction it can hear both criminal and civil appeals from the County Court and the Supreme Court – Trial Division.[3]]

c)

✓ ✗	I have identified a benefit of the court hierarchy in this case.[1]
✓ ✗	I have described this benefit in further detail, linking to the case.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'administrative convenience', 'dispute', etc.

Exemplar response

[One benefit of a court hierarchy in this case is administrative convenience.[1]] [Administrative convenience comes from separating minor offences and disputes that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts. For example, in this case both Greg and Trish were able to have their more serious cases heard in the County Court, with fewer delays than would have occurred if the County Court was 'clogged up' also resolving lots of minor cases.[2]]

Possible points to include

Other benefits of the court hierarchy:

- Specialisation – the expertise of each of the courts in hearing certain types of cases.
  - Trish and Greg both had their cases heard by judges who specialise in determining cases of a similar nature.
- Appeals – a request made to a superior court, to review and (if successful) alter a previous decision made by a lower court.
  - The court hierarchy means that Trish and Greg both had the option to appeal the decisions made by the County Court to the Court of Appeal.
- Doctrine of precedent – the legal mechanism by which decisions made in higher courts are followed in future, similar cases that arise in lower courts.
  - The doctrine of precedent ensures that the decisions made in these cases were fair for the parties and based on similar outcomes in previous cases where the facts were the same.

d)

✓ ✗	I have identified a way in which one of the principles of justice was upheld.[1]
✓ ✗	I have described this in further detail, linking specifically to the facts in this scenario.[2]
✓ ✗	I have identified a second way in which one of the principles of justice was upheld.[3]
✓ ✗	I have described this in further detail, linking specifically to the facts in this scenario.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'legal representation', 'sentencing', etc.

Exemplar response

[One way in which fairness was upheld in this case is through the provision of legal representation for both parties.[1]] [Trish was able to afford a private lawyer to present her civil case in the best possible light, and Greg was provided a lawyer from Victoria Legal Aid. This ensures that no party is at a serious disadvantage in presenting their case due to a lack of legal knowledge or understanding.[2]] [One way in which equality was upheld was through the use of current sentencing practices in Greg's case.[3]] [Sentencing statistics exist to ensure that the courts impose similar sanctions for similar offences. These guidelines often establish sentencing parameters, including a minimum and maximum sentence for a certain type of crime. Therefore, by sentencing Greg in accordance with these guidelines, the court ensured equality between Greg and other offenders.[4]]

Possible points to include

Other ways in which fairness was upheld:

- Both parties followed rules of evidence and procedure in presenting their cases – ensures that no party has an unfair advantage.

Ways in which access was upheld:

- Greg was provided assistance from Victoria Legal Aid because he could not afford a lawyer – this ensures that he will not be at a disadvantage to Trish who has a private lawyer and allows him to gain a better understanding of court procedures and legal terminology.

2A The purposes of criminal law

LEVEL 1

1. C

2. C

3. **a)** Set minimum standards of behaviour

b) Protection of society

c) Deterrence of crime

LEVEL 2

4.

- ✓ ✗ I have described protection of society as 'the responsibility of criminal law to protect individuals from harm and assist them to live peacefully within the community' (or similar).[1]
- ✓ ✗ I have provided an example of how the criminal law protects society from harm.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'criminal law', etc.

Exemplar response

[One purpose of criminal law is to protect individuals from harm and assist them to live peacefully within the community.[1]]
[For example, criminal law defines speed limits when driving to minimise accidents on the road.[2]]

5.

- ✓ ✗ I have described the deterrence of crime as a purpose of criminal law.[1]
- ✓ ✗ I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[2]
- ✓ ✗ I have described setting minimum standards of behaviour as a purpose of criminal law.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'punishment', 'consequences', etc.

Exemplar response

[Deterrence of crime refers to discouraging people from engaging in crime by clearly defining punishment and enforcing consequences.[1]][On the other hand,[2]][setting minimum standards of behaviour involves defining the minimum expectations of all individuals within society to adhere to and promote behaviour that does not negatively affect other people.[3]]

Possible points to include

Other examples of criminal laws that protect society from harm include:

- Assault laws making it unlawful to threaten or physically harm another person.
- Some breaches of health and safety laws that result in workplace injury can be punished by criminal sanctions.
- Arson laws that make deliberately lighting fires illegal protect people (and their property) from harm.

LEVEL 3

6.

- ✓ ✗ I have stated that the smoke-free example demonstrates defining minimum standards of behaviour as a purpose of criminal law.[1]
- ✓ ✗ I have described how the criminal law enforces this purpose, through codifying the standards of behaviour in law and punishing offenders who transgress these behavioural expectations (or similar).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'pro-social behaviour', 'punishing', etc.

Exemplar response

[This example demonstrates the role of criminal law in defining minimum standards of behaviour.[1]][Using the criminal law to discourage smoking in particular places is a codification of these standards in law, by punishing offenders who transgress these behavioural expectations.[2]]

2B The presumption of innocence

LEVEL 1

1. A **2.** A **3.** C

LEVEL 2

4.

✓ ✗	I have identified one way the presumption of innocence impacts a criminal trial.[1]
✓ ✗	I have described this impact in greater detail.[2]
✓ ✗	I have identified a second way the presumption of innocence impacts a criminal trial.[3]
✓ ✗	I have described this impact in greater detail.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'criminal', 'accused', 'trial', etc.

Exemplar response

[One way the presumption of innocence impacts a criminal trial is that prior convictions are not considered during trial.[1]][To have a court determine an individual's guilt based on their previous conduct would be unfair. As a result of this, prior criminal offences can only be heard during sentencing.[2]][A second way the presumption of innocence impacts a criminal trial is that accused individuals have a right to seek legal representation.[3]][An accused person is able to have a legal expert present their defence in its best light and challenge the accuracy of the evidence presented by the prosecution.[4]]

Possible points to include

Other possible impacts include (but are not limited to):

- The presumption of innocence is explicitly described to a jury before it considers its verdict in a criminal matter.
- Accused persons only face a jury trial if the police have collected enough evidence that suggests they are guilty. Due to the stressful nature of a criminal trial, the law ensures only strong cases proceed.
- A person charged with a crime can apply for bail, and if granted, can await their trial in the community. The right to apply for bail ensures individuals merely suspected of a crime are not punished prior to their trial.

5. a)

✓ ✗	I have explained that the burden of proof rests with the police and prosecution in criminal cases.[1]
✓ ✗	I have explained that the burden of proof resting with the prosecution and police upholds the presumption of innocence.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'prosecution', 'criminal', etc.

Exemplar response

[The burden of proof in criminal matters rests with the police and prosecution. This means that it is up to the prosecution to prove that the accused is guilty, rather than Jasmine having to prove her innocence.[1]][This upholds the idea that an accused individual is innocent until their guilt is proven.[2]]

b)

- ✓ ✗ I have described that the police are more powerful than individuals.[1]
- ✓ ✗ I have described that the presumption of innocence impacts police investigations to balance this power.[2]
- ✓ ✗ I have provided one example of how the presumption of innocence assisted Jasmine during the police investigation.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'suspect', etc.

Exemplar response

[When investigating a criminal trial, the police are in a more powerful position than the individual suspected of committing a crime in terms of resources and experience.[1]][The presumption of innocence attempts to restrict police powers during investigations to avoid any miscarraige of justice and balance the powers between police and the suspected individual.[2]][One example of how the presumption of innocence assisted Jasmine was by allowing her the right to remain silent and not answer police questions during the investigation process.[3]]

Other examples in the case include (but are not limited to):

- Jasmine's right to not be wrongly arrested; the police need evidence or a reasonable justification to arrest a person.
- Jasmine must be informed of the offence that she is believed to have committed.

LEVEL 3

6.

- ✓ ✗ I have identified one error in the scenario - judge directions to jury.[1]
- ✓ ✗ I have provided the correct procedure for this error.[2]
- ✓ ✗ I have identified a second error in the scenario - Judge stating prior convictions.[3]
- ✓ ✗ I have provided the correct procedure for this error.[4]
- ✓ ✗ I have identified a third error with the scenario - Max not proving his innocence.[5]
- ✓ ✗ I have provided the correct procedure for this error.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'accused', 'trial', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'guilt', etc.

Exemplar response

[One error in the scenario is that the judge misdirected the jury on the presumption of innocence.[1]][The judge is required to outline the presumption of innocence to the jury, explaining that the accused is assumed to be innocent until proven otherwise.[2]]

[A second error with the scenario is that the judge spoke about Max's prior convictions during trial.[3]][The court does not consider prior convictions until sentencing as it would be unfair to determine a person's guilt based on past conduct rather than evidence.[4]][A third error with the scenario is that Max did not prove his innocence.[5]][The burden of proof in criminal trials rests with the prosecution and police and they would be required to prove Max's guilt; he does not need to prove that he is innocent.[6]]

LEVEL 4

7.

- ✓ ✗ I have explained that in criminal cases the burden of proof rests on the prosecution and police.[1]
- ✓ ✗ I have stated that in exceptional circumstances the accused may have to prove their own innocence.[2]
- ✓ ✗ I have described how bail laws may require some accused persons to show they should not be imprisoned before their trial.[3]
- ✓ ✗ I have described how drug possession laws may require some accused persons to show they did not know there were illicit drugs on their property.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'prosecution', etc.

Exemplar response

[Justice Kirby's statement highlights that in criminal cases, the burden of proof rests on the prosecution and police rather than the individual suspected of committing a crime.[1]][However, the term 'ordinarily' suggests there are some rare exceptions to this presumption of innocence.[2]] [For example, under Victorian bail laws in some cases the courts will presume an accused person is not entitled to bail, and these accused must prove that certain exceptional circumstances exist if they are to be released.[3]]
[In addition, some drug possession laws state that an accused person is deemed to be in possession of illicit drugs if they are found in the property they own or live in, and the onus is on the accused person to prove they did not know the drugs were on the property.[4]]

2C Key concepts of criminal law

LEVEL 1

1. C **2.** B **3.** B **4.** C

5. A **6.** B **7.** D

LEVEL 2

8. ✓ ✗ I have described 'actus reus' as 'the element of the crime where the accused person did an act, or failed to do an act, that had criminal consequences' (or similar).[1]

✓ ✗ I have provided an example.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'element of crime', 'accused person', etc.

Exemplar response

[Actus reus refers to the element of the crime where the accused person did an act, or failed to do an act, that had criminal consequences. The act must have been the product of the accused person's will; it needs to have been a conscious decision.[1]][An example of actus reus in a crime is the physical act of punching someone.[2]]

Possible points to include

Other possible examples of actus reus:

- Stealing someone's property
- Shooting someone
- Hitting someone with a car

9. ✓ ✗ I have described mens rea as 'the requirement that the mental state of the accused involved an intention to commit the crime or knowledge that the accused's actions would cause a crime to be committed' (or similar).[1]

✓ ✗ I have identified the mens rea in the case.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'accused', etc.

Exemplar response

[Mens rea refers to the requirement that the mental state of the accused involved an intention to commit the crime or knowledge that the accused's actions would cause a crime to be committed.[1]][The element of mens rea is evident in the above case when Sunitha distracts the shop assistant so that she can deliberately steal from the store. This shows that the theft was a premeditated act that Sunitha had planned.[2]]

Possible points to include

Sunitha's conduct in deliberately placing the items in her bag also satisfies the mens rea element of the crime, because this is evidence that she acted intentionally.

10.

- ✓ ✗ I have provided a brief statement outlining strict liability offences.[1]
- ✓ ✗ I have described one reason for strict liability offences.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'mens rea', etc.

Exemplar response

[A strict liability offence is an offence where there is no need to prove any mental element (mens rea) of the crime for a person to be found guilty.[1]]

[One reason for strict liability offences is to deter criminal conduct. Because it is easier for a person to be convicted of these types of offences, it is thought that strict liability offences are a more effective deterrent of certain types of criminal behaviour.[2]]

Possible points to include

Other possible reasons for strict liability offences:

- To prevent a backlog of cases in the courts – it would take too long if mens rea had to be proven in every single case that goes through the courts, especially for minor offences such as speeding.
- To protect individuals – strict liability offences allow offenders to be charged for the simple act of committing the offence and therefore aim to protect society from these types of crimes.

11.

- ✓ ✗ I have stated that Thomas is not liable to be charged with a criminal offence.[1]
- ✓ ✗ I have provided a reason for my answer, explaining that Thomas is below the age of criminal responsibility.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offence', 'age of criminal responsibility', 'criminally liable', etc.

Exemplar response

[Thomas is not liable to be charged with a criminal offence.[1]][The age of criminal responsibility in Victoria is 10 years old. It is presumed that a child under the age of 10 years cannot form the intention to commit a crime. Therefore, Thomas is not considered to be criminally liable because he is below the age of 10 years old.[2]]

12.

- ✓ ✗ 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 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 that the accused does not need to prove their innocence, and does not need to give evidence that is incriminating.[2]]

13.

- ✓ ✗ I have described the standard of proof as 'the strength of evidence or level of confidence required for the decision maker to reach a verdict in a case' (or similar).[1]
- ✓ ✗ I have stated that the standard of proof in criminal cases is 'beyond reasonable doubt'.[2]
- ✓ ✗ I have outlined the meaning of 'beyond reasonable doubt'.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', etc.

Exemplar response

[The standard of proof refers to the strength of evidence or level of confidence required for the decision maker to reach a verdict in a case.[1]][The standard of proof in criminal cases is 'beyond reasonable doubt'.[2]][This is the highest standard of proof in cases in the Victorian legal system: it means a very strong case must be presented to obtain a conviction.[3]]

LEVEL 3

14.

- ✓ ✗ I have stated that the burden of proof rests with the prosecution.[1]
- ✓ ✗ I have supported my determination that the burden of proof rests with the prosecution because they are the party bringing the case.[2]
- ✓ ✗ I have stated that the standard of proof is not more strict in murder cases.[3]
- ✓ ✗ 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.[4]
- ✓ ✗ I have stated that it is not likely that David will be convicted of murder based on the jury's comments.[5]
- ✓ ✗ I have supported my determination that David is not likely to be charged with murder by stating that the jury's comment that David 'might' have had an intent (mens rea) to commit murder would not meet the standard of proof needed for a guilty verdict.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'prosecution', 'standard of proof', 'beyond reasonable doubt', 'actus reus', 'mens rea', etc.

Exemplar response

[The burden of proof rests with the prosecution[1]][because they are bringing the case against David and are thus responsible for proving his guilt.[2]][The standard of proof is not more strict in murder cases.[3]][In all criminal proceedings, regardless of the severity of the offence in question, the standard of proof is 'beyond reasonable doubt'.[4]][Furthermore, based on the comments made by the jury, David is not likely to be charged with murder.[5]][Although the jury are sufficiently sure that David committed the criminal act (actus reus), the jury's comment that David 'might' have had an intent (mens rea) to commit murder would not meet the standard of proof needed for a guilty verdict.[6]]

15. a)

- ✓ ✗ I have stated that Martin is liable to be criminally charged.[1]
- ✓ ✗ I have justified my answer by explaining that the age of criminal responsibility in Victoria is 10 years-old.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'age of criminal responsibility', 'offender', 'liable', etc.

Exemplar response

[As a 16 year-old, Martin is liable to be criminally charged.[1]][The age of criminal responsibility in Victoria is 10 years-old. Thus, as an offender over the age of 10, Martin is liable to be charged with a criminal offence.[2]]

b)

- ✓ ✗ I have stated that the prosecution could have proceeded with all five charges.[1]
- ✓ ✗ I have stated that the accused could only have been convicted of the three charges which occurred before he was 14 years old if the prosecution successfully rebutted the principle of doli incapax.[2]
- ✓ ✗ I have explained the principle of doli incapax in further detail, with reference to the case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'prosecution', 'accused', 'doli incapax', etc.

Exemplar response

[The prosecution in this case could have proceeded with all five charges against the accused, including those relating to conduct attributed to Martin when he was aged between 11 and 13.[1]]

[However, Martin could only have been found guilty of these three charges if the prosecution successfully rebutted the principle of doli incapax.[2]][This principle can only be overturned if the prosecution can prove that the child knew, at the time of committing a crime, that his or her actions were wrong. Thus, the prosecution would have to show that Martin knew that his actions were wrong before he could be convicted of the three offences which occurred when he was between the ages of 11-13 years-old.[3]]

16.

- ✓ ✗ I have detailed why the first statement is incorrect.[1]
- ✓ ✗ I have corrected this error – the prosecution will be required to prove she acted intentionally.[2]
- ✓ ✗ I have detailed why the second statement is incorrect.[3]
- ✓ ✗ I have corrected this error – she does not need to prove her innocence.[4]
- ✓ ✗ I have detailed why the third statement is incorrect.[5]
- ✓ ✗ I have corrected this error – the standard of proof is 'beyond reasonable doubt'.[6]
- ✓ ✗ I have signposted my response appropriately: 'Furthermore', 'Lastly', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'prosecution', 'accused', 'actus reus', etc.

Exemplar response

[Lisa is incorrect in thinking that she will be convicted of murder even if she did not have any intention to cause the death of another person.[1]][Since Lisa has not been charged with a strict liability offence, the prosecution would have to prove both elements of the crime, the act (actus reus) and the intent (mens rea), before Lisa could be found guilty of murder.[2]][Furthermore, Lisa does not need to prove her innocence in order to be acquitted of the crime that she has been charged with.[3]][The burden of proof rests with the prosecution in criminal proceedings, and the accused will be presumed innocent unless the prosecution can show, beyond reasonable doubt, that Lisa is guilty.[4]][Lastly, a jury cannot find an accused guilty if they only believe that they 'most likely' committed the crime.[5]][The jury must acquit Lisa unless they are satisfied 'beyond reasonable doubt' that she is guilty.[6]]

2D Types of crimes

LEVEL 1

1. D **2.** B

LEVEL 2

3.

- ✓ ✗ I have explained the term crimes against the person as 'criminal offences where a person is harmed' (or similar).[1]
- ✓ ✗ I have provided one example of a crime against the person.[2]
- ✓ ✗ I have provided a second example of a crime against the person.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'offence', etc.

Exemplar response

[A crime against the person is a criminal offence where a person is harmed.[1]][One example of a crime against the person is assault.[2]][A second example of a crime against the person is murder.[3]]

Possible points to include

Other examples include (but are not limited to):

- Manslaughter
- Attempted murder
- Culpable driving
- Kidnapping.

4.

- ✓ ✗ I have described crimes against property as 'criminal offences that involve using force or deception to obtain, damage or destroy property' (or similar.)[1]
- ✓ ✗ I have used an example of a crime against property to illustrate this.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'offence', etc.

Exemplar response

[Crimes against property are criminal offences that involve using force or deception to obtain, damage or destroy property.[1]]
[An example of a crime against property is vandalism as it involves using force to damage or destroy property.[2]]

Possible points to include

Other examples include (but are not limited to):

- Burglary
- Theft
- Fraud
- Identify theft
- Arson
- Shoplifting
- Trespass
- Motor vehicle theft.

LEVEL 3

5.

- ✓ ✗ I have stated that Louis was convicted of a crime against property.[1]
- ✓ ✗ I have provided a reason for my response – using force to damage property.[2]
- ✓ ✗ I have provided a second reason for my response – using force to obtain property.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'convicted', 'crime', etc.

Exemplar response

[Louis has been convicted of a crime against property.[1]][This is a crime against property as it involved the use of force to damage property.[2]][It is also a crime against property as it involved the use of force to obtain property.[3]]

6.

- ✓ ✗ I have stated that Samantha was charged with a crime against the person.[1]
- ✓ ✗ I have explained the term crimes against the person as 'criminal offences where a person is harmed' (or similar).[2]
- ✓ ✗ I have justified why this is a crime against the person – harm caused to Amanda.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'offence', etc.

Exemplar response

[Samantha has been charged with a crime against the person.[1]][A crime against the person is a criminal offence where a person is harmed.[2]][It is evident that Samantha has been charged with a crime against the person as she hit Amanda with her car, resulting in harm to a person.[3]]

7. ✓ ✗ I have explained the term crimes against the person as 'criminal offences where a person is harmed' (or similar).[1]

✓ ✗ I have provided an example of a crime against the person.[2]

✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[3]

✓ ✗ I have described crimes against property as 'criminal offences that involve using force or deception to obtain, damage or destroy property' (or similar).[4]

✓ ✗ I have provided an example of a crime against property.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'offence', etc.

Exemplar response

[Crimes against the person are criminal offences where a person is harmed.[1]][An example of a crime against the person is kidnapping.[2]] [On the other hand,[3]][crimes against property are criminal offences that involve using force or deception to obtain, damage or destroy property.[4]][An example of a crime against property is theft.[5]]

Possible points to include

Other examples of crimes against the person include (but are not limited to):

- Manslaughter
- Attempted murder
- Culpable driving
- Murder
- Assault.

Other examples of crimes against property include (but are not limited to):

- Burglary
- Vandalism
- Fraud
- Identify theft
- Arson
- Shoplifting
- Trespass
- Motor vehicle theft.

2E Summary and indictable offences

LEVEL 1

1. C **2.** B **3.** D **4.** B **5.** A

LEVEL 2

6. ✓ ✗ I have described summary offences as 'less serious or 'minor' criminal offences where the impact on society is relatively small and the matter is resolved by a single magistrate in the Magistrates' Court' (or similar).[1]

✓ ✗ I have provided an example of a summary offence.[2]

✓ ✗ I have provided a second example of a summary offence.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'offence', etc.

2E

Exemplar response

[Summary offences are less serious or 'minor' criminal offences where the impact on society is relatively small and the matter is resolved by a single magistrate in the Magistrates' Court.[1]][One example of a summary offence, as outlined by s. 23 of the *Summary Offences Act 1966* (Vic), is common assault.[2]][A second example of a summary offence, as outlined by s. 17A of the *Summary Offences Act 1966* (Vic), is disorderly conduct.[3]]

7.

- ✓ ✗ I have described indictable offences as 'more serious criminal offences where the impact on society is significant and the matter is resolved by a judge and jury in higher courts' (or similar).[1]
- ✓ ✗ I have provided one example of an indictable offence.[2]
- ✓ ✗ I have provided a second example of an indictable offence.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'criminal ', 'offence', etc.

Exemplar response

[Indictable offences are more serious criminal offences where the impact on society is significant and the matter is resolved by a judge and jury in higher courts.[1]][One example of an indictable offence, as outlined by s. 3 of the *Crimes Act 1958* (Vic), is murder.[2]][A second example of an indictable offence, as outlined by s. 254 of the *Crimes Act 1958* (Vic), is destruction of evidence.[3]]

LEVEL 3

8.

- ✓ ✗ I have stated that Nick committed an indictable offence.[1]
- ✓ ✗ I explained that kidnapping is in the *Crimes Act 1958* (Vic).[2]
- ✓ ✗ I have justified that all offences in the *Crimes Act 1958* (Vic) are indictable offences.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'kidnapping', 'offence', etc.

Exemplar response

[Nick has committed an indictable offence.[1]][Nick has kidnapped Jimmy, and kidnapping is an indictable offence from s. 63A of the *Crimes Act 1958* (Vic).[2]][All offences in the *Crimes Act 1958* (Vic) are indictable offences (unless otherwise stated).[3]]

9.

- ✓ ✗ I have identified that Daniel was charged with a summary offence.[1]
- ✓ ✗ I have explained one reason for my response – heard by a single magistrate.[2]
- ✓ ✗ I have linked this reason to the facts in the scenario.[3]
- ✓ ✗ I have explained a second reason for my response – the maximum penalty is a small fine.[4]
- ✓ ✗ I have linked this reason to the facts in the scenario.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'magistrate', 'sanction', 'fine', etc.

Exemplar response

[Daniel has committed a summary offence.[1]][Summary offences are heard in the Magistrates' Court by a single magistrate.[2]][As Daniel's case is being heard by a single magistrate, this suggests that he committed a summary offence.[3]][Sanctions imposed for summary offences are less severe (like a small fine or short term of imprisonment).[4]][As the maximum penalty for Daniel's offence is a small fine, this suggests that he committed a summary offence.[5]]

10.

- ✓ ✗ I have explained one similarity between indictable offences and indictable offences triable summarily.[1]
- ✓ ✗ I have explained one feature of indictable offences that differs from indictable offences triable summarily.[2]
- ✓ ✗ I have used distinguishing words such as 'however', 'whereas', 'on the other hand', to highlight differences.[3]
- ✓ ✗ I have explained the matching feature of indictable offences triable summarily.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'serious', 'offence ', etc.

Exemplar response

[One similarity between indictable offences and indictable offences triable summarily is that they are serious criminal offences with a larger impact on society than summary offences.[1]][However, most indictable offences are heard in a higher court by a judge and a jury,[2]][whereas,[3]][indictable offences triable summarily may be heard by a single magistrate in the Magistrates' Court.[4]]

11.

- ✓ ✗ I have explained one advantage of having an indictable offence heard summarily.[1]
- ✓ ✗ I have linked my advantage to the facts in the scenario – lower sanction.[2]
- ✓ ✗ I have explained a second advantage of having an indictable offence heard summarily.[3]
- ✓ ✗ I have linked my advantage to the facts in the scenario – cheaper.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offence ', 'sanction ', etc.

Exemplar response

[One advantage of having an indictable offence heard summarily is that a magistrate can impose a lower maximum sentence.[1]] [This means that the sanction imposed on Jacob, if found guilty, may be lower than if it were heard by a judge and a jury in a higher court.[2]][A second advantage of having an indictable offence tried summarily is that it is cheaper.[3]][It is much cheaper for Jacob to have a case heard in the Magistrates' Court due to the costs associated with legal representation in a jury trial and the cost of trial fees in a higher court.[4]]

Possible points to include

- It is quicker to have an indictable offence heard summarily, reducing delays and providing the outcome for Jacob faster than a higher court would be able to.

2F Participants in crime

LEVEL 1

1. B **2.** A **3.** D

LEVEL 2

4.

- ✓ ✗ I have described an accessory as 'any person who knows or believes a principal offender is guilty of a serious indictable offence and without reasonable excuse or lawful authority does an act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender' (or similar).[1]
- ✓ ✗ I have provided one example of a way an individual can be an accessory to a crime.[2]
- ✓ ✗ I have provided a second example of a way an individual can be an accessory to a crime.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'indictable offence', 'accessory', etc.

2F

Exemplar response

[An accessory is any person who knows or believes a principal offender is guilty of a serious indictable offence and does an act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender.[1]][One example of a way an individual can be an accessory is to lie to police about a principal offender's whereabouts at the time of an offence.[2]][A second example is to hide a principal offender.[3]]

Possible points to include

Other examples of ways an individual can be an accessory to a crime include:

- A person who hides, destroys or tampers with evidence.

5.

- ✓ ✗ I have explained that s. 324 of the *Crimes Act 1958* (Vic) states that an offender involved in the commission of an offence is taken to have committed the offence.[1]
- ✓ ✗ I have explained that s. 324 of the *Crimes Act 1958* (Vic) also outlines that a person involved in the commission of an offence can be liable for the maximum penalty assigned to the offence.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'indictable offence', 'principal offender', etc.

Exemplar response

[Section 324 of the *Crimes Act 1958* (Vic) states that a person involved in the commission of an offence is taken to have committed the offence, even where they did not physically carry out the actus reus component.[1]][Section 324 of the *Crimes Act 1958* (Vic) also states that a person involved in the commission of an offence can be liable for the maximum penalty associated with that offence.[2]]

LEVEL 3

6. a)

- ✓ ✗ I have identified that Piper is a principal offender.[1]
- ✓ ✗ I have explained that Piper is a principal offender due to physically committing the offence.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offence', 'offender', etc.

Exemplar response

[In this scenario, Piper is a principal offender.[1]][Piper is a principal offender as she carried out the actus reus of the offence in physically murdering her boyfriend.[2]]

b)

- ✓ ✗ I have identified that Minnie is an accessory to Piper's crime.[1]
- ✓ ✗ I have justified that she is an accessory by stating that she helped impede the apprehension, prosecution, conviction or punishment of the principal offender.[2]
- ✓ ✗ I have linked directly to the facts of the case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'crime', 'principal offender', etc.

Exemplar response

[In this scenario, Minnie is an accessory to Piper's crime.[1]][Minnie is an accessory as she helped impede the apprehension, prosecution, conviction or punishment of the principal offender[2]][through lying to the police, hiding Piper in her garage and cleaning the murder weapon.[3]]

c)

- ✓ ✗ I have identified that Minnie is liable for 20 years imprisonment as an accessory to murder.[1]
- ✓ ✗ I have explained that s. 325(4) of the *Crimes Act 1958* (Vic) provides the legal basis for this.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'indictable offence', 'accessory', etc.

Exemplar response

[As an accessory to murder, Minnie is liable to a maximum of 20 years imprisonment.[1]][Section 325(4) of the *Crimes Act 1958* (Vic) provides that where the principal offender is liable to a maximum penalty of life imprisonment, which is the case for murder, an accessory is liable to level 3 imprisonment (20 years).[2]]

7.

- I have identified one error with the scenario – Luke's trial not proceeding.[1]
- I have provided the correct procedure for this error – Luke's trial would proceed regardless of the outcome of Harry's trial.[2]
- I have identified a second error with the scenario – Lucy being found guilty as an accessory.[3]
- I have provided the correct procedure for this error – Lucy could be found guilty as a principal offender, not an accessory.[4]
- I have used key legal studies terminology effectively such as: 'principal offender', 'accessory', 'guilty', etc.

Exemplar response

[One error with the scenario is that Luke's trial did not proceed due to Harry being found not guilty.[1]][An accessory's trial is able to proceed regardless of the outcome of the principal offender's trial, meaning Luke's trial would still proceed even though Harry was acquitted.[2]][A second error with the scenario is that Lucy was found guilty as an accessory.[3]][A person who enters an agreement to commit an offence is involved in the commission of that offence and can be found guilty as a principal offender, not an accessory. This means Lucy would be tried as a principal offender as opposed to an accessory.[4]]

8. a)

- I have identified that Robert is a principal offender.[1]
- I have provided a reason for my response.[2]
- I have used key legal studies terminology effectively such as: 'principal offender', 'actus reus', 'offence', etc.

Exemplar response

[Robert is a principal offender in this crime.[1]][Robert is a principal offender as he was responsible for carrying out the actus reus component of the offence by stealing the motor vehicle.[2]]

b)

- I have explained that Harold is a principal offender.[1]
- I have justified that Harold is a principal offender as he intentionally assisted the commission of an offence.[2]
- I have used key legal studies terminology effectively such as: 'principal offender', 'commission', etc.

Exemplar response

[Harold is a principal offender as he is considered to be directly linked to the commission of the offence.[1]][In providing a distraction so that Robert could steal the motor vehicle, Harold would be seen as intentionally assisting in the commission of the offence.[2]]

c)

- I have identified that Jenny is a principal offender.[1]
- I have identified that Jenny is liable to the maximum penalty for the offence.[2]
- I have used key legal studies terminology effectively such as: 'principal offender', 'offence', etc.

Exemplar response

[Jenny is a principal offender as she was involved in the commission of the offence by encouraging and directing the offence.[1]][As a principal offender, Jenny is liable to the maximum penalty for the motor vehicle theft.[2]]

Chapter 2 Review questions

REVIEW

LEVEL 5

1. a)

- ✓ ✗ I have stated that this is a criminal case.[1]
- ✓ ✗ I have stated that the burden of proof in a criminal case lies with the prosecution.[2]
- ✓ ✗ I have stated that the standard of proof in a criminal case is 'beyond reasonable doubt'.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'prosecution', 'beyond reasonable doubt', etc.

Exemplar response

[This is a criminal case,[1]][and the burden of proof in a criminal case lies with the prosecution.[2]][The standard of proof in a criminal case is 'beyond reasonable doubt'.[3]]

b)

- ✓ ✗ I have identified the offence committed by Karatzas as an indictable offence.[1]
- ✓ ✗ I have provided justification by stating that Karatzas committed a serious criminal offence (murder).[2]
- ✓ ✗ I have provided further justification by stating that Karatzas' trial was heard by a jury in the Supreme Court.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'Supreme Court', 'indictable offence', etc.

Exemplar response

[Karatzas has committed an indictable offence.[1]][This is clear because Karatzas has been charged with murder, which is a serious criminal offence.[2]][Furthermore, Karatzas was tried by a jury in the Supreme Court of Victoria, which hears the most serious indictable offences.[3]]

c)

- ✓ ✗ I have stated that the difference between murder and manslaughter is the 'mens rea' element required.[1]
- ✓ ✗ I have explained that the offence of murder requires a person to possess malice aforethought: an intent to either kill or cause really serious injury, or being reckless as to whether they would kill/cause really serious injury.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
- ✓ ✗ I have explained that manslaughter is an offence where the accused did not intend to kill or commit grievous bodily harm.[4]
- ✓ ✗ I have explained that Karatzas was convicted of murder because the jury decided that he at least intended to inflict really serious injury.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'juror', 'liability', 'damages', 'plaintiff', 'defendant', etc.

Exemplar response

[Murder and manslaughter are both homicide offences, however, the 'mens rea' element required to constitute each offence is different.[1]][In order for a person to be convicted of murder, they must be shown to have possessed malice aforethought. In other words, they had an intent to either kill or cause really serious injury, or were reckless as to whether they would kill/cause really serious injury.[2]][Whereas,[3]][manslaughter is a homicide offence where the accused person did not intend to kill or commit grievous bodily harm.[4]][Karatzas was convicted of murder because the jury decided that when he strangled his wife he at least intended to inflict really serious injury.[5]]

2. a)

- ✓ ✗ I have stated that this is a criminal case.[1]
- ✓ ✗ I have stated that the burden of proof in a criminal case lies with the prosecution.[2]
- ✓ ✗ I have explained that the burden of proof resting with the prosecution upholds the presumption of innocence by reflecting that the accused does not need to prove their innocence.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'prosecution', 'beyond reasonable doubt', etc.

Exemplar response

[This is a criminal case,[1]] [and the burden of proof in a criminal case rests with the prosecution.[2]] [The burden of proof upholds 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.[3]]

b)

- ✓ ✗ I have identified a pre-trial/trial procedure that upholds the presumption of innocence.[1]
- ✓ ✗ I have explained how this procedure upholds the presumption of innocence in this case.[2]
- ✓ ✗ I have identified a second pre-trial/trial procedure that upholds the presumption of innocence.[3]
- ✓ ✗ I have explained how this procedure upholds the presumption of innocence in this case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'bail', 'prosecution', 'crime', etc.

Exemplar response

[One pre-trial procedure that would have been followed to uphold the presumption of innocence in this case is the right to apply for bail.[1]] [All three accused persons would have had the opportunity to apply for bail and, if bail was granted, to await their trial in the community. This upholds the presumption of innocence as it ensures in most cases that those individuals merely suspected of a crime are not punished (by being imprisoned) prior to their trial.[2]] [One trial procedure that would have been followed is the right to not have prior convictions considered during a trial.[3]] [This upholds the presumption of innocence as it would be unfair for prior offences of the accused to be considered in determining their guilt in this case.[4]]

Possible points to include

Other pre-trial/trial procedures that uphold the presumption of innocence include (but are not limited to):

- The right to seek legal representation.
- Accused persons only face a trial for serious offences if the police have collected a significant amount of evidence that suggests he/she is guilty.
- The presumption of innocence is explained to a jury before it considers its verdict in a criminal matter.

c)

- ✓ ✗ I have identified the first type of crime committed by the accused: crimes against property.[1]
- ✓ ✗ I have described this type of crime as 'criminal offences that involve using force or deception to obtain, damage or destroy property' (or similar).[2]
- ✓ ✗ I have provided an example of a crime against property that the accused committed in this case: aggravated burglary.[3]
- ✓ ✗ I have identified the second type of crime committed by the accused: crimes against the person.[4]
- ✓ ✗ I have described this type of crime as 'criminal offences where a person is harmed' (or similar).[5]
- ✓ ✗ I have provided an example of a crime against the person that the accused committed in this case: murder.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offences', 'crime', 'accused', etc.

Exemplar response

[One type of crime committed by the accused in this case was a crime against property.[1]][Crimes against property are criminal offences that involve using force or deception to obtain, damage or destroy property.[2]][The crime against property that the accused committed was aggravated burglary.[3]][The accused in this case also committed a crime against the person.[4]] [Crimes against the person are criminal offences where a person is harmed.[5]][The crime against the person that the accused committed was murder.[6]]

d)

- ✓ ✗ I have defined a principal offender as 'an offender that is considered to be most immediately linked to the crime and to have committed or commissioned the main part of the criminal act' (or similar).[1]
- ✓ ✗ I have explained why Milos Novakovic was indicted as a principal offender: he committed the actus reus elements of the murder and was also a principal offender in the burglary charges.[2]
- ✓ ✗ I have explained why Milan Jovic and Sasa Jovic were indicted as principal offenders: they were thought to be involved in the commission of the murder and were principal offenders in the burglary charges.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'prosecution', 'beyond reasonable doubt', etc.

Exemplar response

[A principal offender is an offender that is considered to be most immediately linked to the crime and to have committed or commissioned the criminal act.[1]][Milos Novakovic was tried as a principal offender because he committed the actus reus elements of the murder in this case and was also a principal offender in the burglary charges.[2]][Milan Jovic and Sasa Jovic were indicted as principal offenders because they were thought to be involved in the commission of the murder and also committed the actus reus elements of the burglary charges.[3]]

3A Murder: The offence & defences

LEVEL 1

1. D **2.** A **3.** A **4.** B

LEVEL 2

5.

- ✓ ✗ I have identified duress as one of the defences that may be raised for murder.[1]
- ✓ ✗ I have explained duress as being 'the legal recognition that a person may commit a crime while acting under compulsion due to a threat should they fail to comply' (or similar).[2]
- ✓ ✗ I have explained the elements of duress for murder.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'threat', 'crime', etc.

Exemplar response

[One defence that may be raised for murder is duress.[1]][Duress is the legal recognition that a person may commit a crime while acting under compulsion due to a threat should they fail to comply.[2]][To establish a successful duress defence for murder, the accused must establish that there was a threat of death or really serious injury, the conduct was the only reasonable way to avoid the threat and that the conduct was reasonable in the circumstances.[3]]

Possible points to include

Self-defence is another possible defence that can be raised for murder. Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another. To successfully establish self-defence for murder the accused must have believed the conduct was necessary in self-defence and that the conduct was a reasonable response.

6.

- ✓ ✗ I have described intentional murder as 'when an accused causes the death of another with the specific intention to either kill or cause grievous bodily harm while having no lawful excuse to do so' (or similar).[1]
- ✓ ✗ I have provided one way a person can be deemed to have the mental state for intentional murder – they acted with the desire to bring about the death.[2]
- ✓ ✗ I have provided the second way a person can be deemed to have the mental state for intentional murder – they acted with knowledge that the death was certain.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'grievous bodily harm', 'accused', etc.

Exemplar response

[Intentional murder refers to when an accused person causes the death of another person while attempting to kill or cause grievous bodily harm with no lawful excuse for doing so.[1]][A person could be found to possess the mental state for intentional murder if it is proven that they acted with a desire to bring about such a result,[2]][or if they acted with knowledge that the victim's death was almost certain to occur.[3]]

7.

- ✓ ✗ I have described causation as 'the requirement that there is a causal connection between the accused's voluntary act (or omission) and the consequences that result' (or similar).[1]
- ✓ ✗ I have provided one test that the courts may use when determining if the chain of causation has been broken.[2]
- ✓ ✗ I have explained this test in further detail.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'omission', etc.

Exemplar response

[Causation is the requirement of having a causal connection between the accused's voluntary act (or omission) and the consequences that result from this.[1]][One of the tests that may be used when determining whether the chain of causation has been broken is the substantial and operating cause test.[2]][This test requires that the defendant's act (or omission) must have significantly contributed to the death of the victim when there is a supervening event.[3]]

Possible points to include

The natural consequences test could also have been mentioned. This test is generally used for cases where the victim acts in a particular way due to fright or self-preservation, which results in their own death.

8.

- ✓ ✗ I have explained actus reus as 'the physical element of the crime: where the accused person did an act, or failed to do an act, that had criminal consequences' (or similar).[1]
- ✓ ✗ I have explained that actus reus for murder involves three components: a voluntary act, causation and death.[2]
- ✓ ✗ I have explained the voluntary act component.[3]
- ✓ ✗ I have explained the causation component.[4]
- ✓ ✗ I have explained the death component.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'crime', etc.

Exemplar response

[Actus reus is the physical element of the crime: where the accused person did an act, or failed to do an act, that had criminal consequences.[1]][For murder, actus reus has three components: a voluntary act, causation and death.[2]][A voluntary act requires the conduct to have been directed by the accused's conscious decision.[3]][Causation requires a causal connection between the accused's voluntary act (or omission) and the consequences that result.[4]][Death involves the life of a human being ending, which is deemed to be at the point of irreversible ending of brain function or blood circulation.[5]]

LEVEL 3

9. a)

- ✓ ✗ I have explained that Mark is involved in a criminal trial.[1]
- ✓ ✗ I have explained that in criminal cases the prosecution has the burden of proof.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'trial', 'prosecution', etc.

Exemplar response

[Mark is involved in a criminal trial.[1]][In criminal trials, the prosecution has the burden of proof, which would be the case for Mark's trial.[2]]

b)

- ✓ ✗ I have described that the type of mens rea Mark is likely to have possessed is the intent to kill.[1]
- ✓ ✗ I have described intentional murder as 'a situation where the accused causes the death of another with the specific intention to kill or cause grievous bodily harm (serious physical injury) while having no lawful excuse to do so' (or similar).[2]
- ✓ ✗ I have justified that Mark is likely to have intended the result due to the number of times Mark stabbed Ben.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'intent', 'grievous bodily harm', etc.

Exemplar response

[The mens rea Mark is likely to have possessed is an intent to kill.[1]][Intentional murder is a situation where the accused causes the death of another with the specific intention to kill or cause grievous bodily harm while having no lawful excuse to do so.[2]] [Mark is likely to have had the specific intention to kill or cause serious phsyical injury as shown by the number of times he stabbed Ben.[3]]

10.

✓ ✗	I have described murder as 'voluntarily causing the death of another person with malice aforethought, and without lawful excuse' (or similar).[1]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[2]
✓ ✗	I have described manslaughter as 'unlawfully causing the death of another person without malice aforethought' (or similar).[3]
✓ ✗	I have provided one feature of murder that differs from manslaughter.[4]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[5]
✓ ✗	I have provided the corresponding feature of manslaughter.[6]
✓ ✗	I have used key legal studies terminology effectively such as: 'malice aforethought', 'lawful', etc.

Exemplar response

[Murder refers to voluntarily causing the death of another person with malice aforethought, and without lawful excuse,[1]][whereas[2]] [manslaughter refers to unlawfully causing the death of another person without malice aforethought.[3]][The maximum penalty that can be imposed for murder is life imprisonment,[4]][whereas[5]][the maximum penalty that can be imposed for manslaughter is 20 years' imprisonment.[6]]

Possible points to include

Other differences between murder and manslaughter include:

- The mens rea element for each offence. The types of murder include intentional murder and reckless murder, whereas, the types of manslaughter include manslaughter by an unlawful and dangerous act and manslaughter by criminal negligence.
- The test for murder is subjective, whereas, the test for manslaughter is objective.

11.

✓ ✗	I have explained that Matilda could raise self-defence in her trial as a defence for murder.[1]
✓ ✗	I have explained self-defence as 'the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another' (or similar).[2]
✓ ✗	I have justified that self-defence would be appropriate in Matilda's case as she had been kidnapped and was going to be tortured.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'lawfully', 'defence', etc.

Exemplar response

[One defence that Matilda could raise in her trial is self-defence.[1]][Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another.[2]][Self-defence would be appropriate for Matilda to raise as the conduct was necessary to protect herself from serious harm after being kidnapped.[3]]

12.

✓ ✗	I have explained that Joseph is likely to have been charged with reckless murder.[1]
✓ ✗	I have explained reckless murder as 'a situation where the accused causes the death of another while acting with recklessness as to causing death or grievous bodily harm with no lawful excuse' (or similar).[2]
✓ ✗	I have justified that Joseph could be charged with reckless murder as death or grevious bodily harm is easily foreseeable from throwing a brick at someone's head.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'foreseeable', 'grievous bodily harm', etc.

Exemplar response

[The type of murder Joseph is likely to have been charged with is reckless murder.[1]][Reckless murder is a situation where the accused causes the death of another while acting with recklessness as to causing death or grievous bodily harm with no lawful excuse.[2]] [Even if Joseph did not intend the result, throwing a brick at Gale's head was reckless because death or grevious bodily harm is easily foreseeable from this action.[3]]

13.

✓ ✗ I have explained one similarity between intentional murder and reckless murder.[1]

✓ ✗ I have explained one feature of intentional murder that differs from reckless murder.[2]

✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]

✓ ✗ I have described the corresponding feature of reckless murder.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'grievous bodily harm', 'death', etc.

Exemplar response

[Intentional murder and reckless murder are both types of murder.[1]][However, intentional murder requires death or grievous bodily harm to be almost certain,[2]][whereas[3]][reckless murder involves death or grievous bodily harm being probable.[4]]

14.

✓ ✗ I have stated whether I believe Peter jumping from his balcony breaks the chain of causation.[1]

✓ ✗ I have provided one reason that justifies my stance.[2]

✓ ✗ I have provided the test the courts are likely to use when determining if Peter jumping from his balcony is a supervening event.[3]

✓ ✗ I have explained this test in further detail.[4]

✓ ✗ I have explained why the courts are likely to use this test.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'supervening event', 'causation', etc.

Exemplar response

[I do not believe that Peter jumping from his balcony breaks the chain of causation.[1]][Peter was acting out of fear and self-preservation which resulted from Bert's threats, meaning that Bert is still responsible for his death.[2]][A test that the courts are likely to use when determining if Peter's jump is a supervening event is the natural consequences test.[3]][This is used in cases where the victim acts in a particular way due to fright or self-preservation, resulting from the defendant's conduct, which consequently results in their own death.[4]][The courts are likely to refer to this test as Peter was acting out of fright and jumping from his balcony resulted in his own death.[5]]

Possible points to include

A stance that Peter jumping from his balcony breaks the chain of causation is also an acceptable response.

Justifications for this include (but are not limited to):

- Peter jumped from the 10th floor of his building, which constitutes a supervening event and which was not a reasonable way to escape.
- There may be an alternative mode of escape that Peter could have utilised.

15. a)

✓ ✗ I have explained that this is a criminal case.[1]

✓ ✗ I have explained that in criminal cases the standard of proof is beyond reasonable doubt.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'criminal', 'beyond reasonable doubt', etc.

Exemplar response

[Kylie's trial is for a criminal offence.[1]][In criminal trials, the standard of proof that must be met is beyond reasonable doubt.[2]]

b)

✓ ✗ I have explained that self-defence would be an appropriate defence for Kylie.[1]

✓ ✗ I have explained self-defence as 'the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another' (or similar).[2]

✓ ✗ I have justified that self-defence would be appropriate due to her history of family violence.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'threat', 'crime', etc.

Exemplar response

[Self-defence would be an appropriate defence for Kylie to raise in her murder trial.[1]][Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another.[2]] [Self-defence would be appropriate for Kylie to raise as she has been a victim of family violence and acted in a way to protect herself, even if she was not under a threat of immediate harm.[3]]

3B Murder: Trends & social impact

LEVEL 1

1. A **2.** D **3.** A **4.** D

LEVEL 2

5. ✓ ✗ I have identified an overall decrease in the frequency of recorded murders in NSW.[1]

✓ ✗ I have referred to the statistics provided.[2]

✓ ✗ I have used key legal studies terminology effectively, such as 'murder', 'conviction', etc.

Exemplar response

[Considering long-term trends in murder rates throughout NSW, the statistics clearly show an overall decrease in the frequency of recorded murders in NSW.[1]][For instance, since 1990, the number of recorded murders on a yearly basis has almost halved from 119 in 1990 to 69 in 2018.[2]]

6. ✓ ✗ I have defined re-victimsation as 'secondary difficulties and hardships that arise during the grieving process following the murder of a loved one' (or similar).[1]

✓ ✗ I have provided an example of how re-victimisation could occur.[2]

✓ ✗ I have used key legal studies terminology effectively, such as 'trial', 'victim', etc.

Exemplar response

[Re-victimisation refers to any secondary difficulties and harships that arise during the grieving process following the murder of a loved one.[1]][An example of re-victimisation could be that families feel isolated from their friends and their community due to the difficulties they feel in opening up and socialising after the incident.[2]]

LEVEL 3

7.

- ✓ ✗ I have explained that the victimisation rate is 'a measure of the number of individuals per 100,000 who were victims of a particular crime per year in a particular location' (or similar).[1]
- ✓ ✗ I have identified that the murder victimisation rates for both Victoria and NSW are relatively similar.[2]
- ✓ ✗ I have included statistics to show this similarity.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'victimisation', 'crime', etc.

Exemplar response

[The term victimisation rate refers to a measure of the number of individuals per 100,000 who were victims of a particular crime per year in a particular location.[1]][Particularly for murder, the victimisation rate between NSW and Victoria is relatively similar and remains around 1 per 100,000 each year.[2]][For example, in 2016, the victimisation rate in Victoria was 1 per 100,000, while in NSW it was 0.9 per 100,000.[3]]

8.

- ✓ ✗ I have described one way that murder might have a psychological impact on society.[1]
- ✓ ✗ I have made direct reference to the case as evidence of this impact.[2]
- ✓ ✗ I have described a second way that murder might have a psychological impact on society.[3]
- ✓ ✗ I have made direct reference to the case as evidence of this impact.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'murder', 'safety', etc.

Exemplar response

[Murder can have a psychological impact on society by increasing levels of fear and restrictions surrounding freedom of movement.[1]][For example, following the murder of 17-year-old Masa Vukotic by Price, some in the community grew fearful of walking alone in that particular park, particularly in the evenings.[2]][Murder can also have a psychological impact on society by creating a weaker attachment to and sense of community.[3]][For instance, in the case of Ms. Vukotic, people might become less likely to travel to that area and socialise within the park that the incident occured.[4]]

9. **a)**

- ✓ ✗ I have identified that manslaughter tends to receive a lesser sentence than murder.[1]
- ✓ ✗ I have referred to the statistics to justify this conclusion.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'imprisonment', 'murder', 'manslaughter', etc.

Exemplar response

[Based on the statistics provided, manslaughter tends to receive a lesser sentence than murder in Victoria.[1]][For example, the average length of imprisonment for manslaughter in 2017-2018 was 9 years, while the average length of imprisonment for murder was 23 years and 7 months.[2]]

Possible points to include

The median prison sentence imposed for manslaughter is between 8 and 9 years, whereas the median sentence for murder is over 20 years.

b)

- ✓ ✗ I have stated that the comment is incorrect.[1]
- ✓ ✗ I have explained why this statement is incorrect.[2]
- ✓ ✗ I have referred to the statistics provided to support my answer.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'murder', 'manslaughter', etc.

Exemplar response

[I disagree with this statement.[1]][Based on the statistics provided, in the five years between 2013 and 2018, more people were sentenced for murder than manslaughter.[2]][A total of 132 people were sentenced for murder across this period, whereas as only 69 individuals were sentenced for manslaughter.[3]]

LEVEL 4

10.

- ✓ ✗ I have identified one other potential impact of murder on the family of the victim.[1]
- ✓ ✗ I have explained this potential impact in further detail.[2]
- ✓ ✗ I have provided an example of this potential impact.[3]
- ✓ ✗ I have identified a second potential impact of murder on the family of the victim.[4]
- ✓ ✗ I have explained this potential impact in further detail.[5]
- ✓ ✗ I have provided an example of this potential impact.[6]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'trial', 'victim', 'murder', etc.

Exemplar response

[One other potential impact of murder on the family of the victim could be on their health and wellbeing.[1]][That is, the murder of a close relative has been shown to have a number of detrimental effects on both the mental and physical health of family members of the deceased.[2]]

[For example, studies have shown that family members can experience insomnia, memory loss and many other physical illnesses following the incident.[3]][Another potential impact could be a change in the stability of family relationships.[4]][Research has shown that the murder of a loved one can have negative effects on the maintenance of healthy family relationships, causing relationships between relatives to become strained.[5]][For example, many family environments have been found to exhibit greater levels of stress and discomfort, which can cause a weakening of familial ties.[6]]

3C Assault: The offence & defences

LEVEL 1

1. A **2.** B **3.** C **4.** D **5.** D

LEVEL 2

6.

- ✓ ✗ I have described common law assault as being when 'the accused makes unlawful contact with another person, or threatens to do so' (or similar).[1]
- ✓ ✗ I have identified the first branch of common law assault – common law contact assault.[2]
- ✓ ✗ I have identified the second branch of common law assault – common law apprehension assault.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'unlawful contact', 'accused', etc.

Exemplar response

[Common law assault occurs when the accused makes unlawful contact with another person, or threatens to do so.[1]][The first branch of common law assault is contact assault, which involves unlawful contact with another person.[2]]

[The second branch is common law apprehension assault, which is a threat to make unlawful contact with another person.[3]]

7.

- ✓ ✗ I have identified duress as the defence raised by Joseph.[1]
- ✓ ✗ I have explained duress as the 'legal recognition that a person may commit a crime where acting under compulsion due to a threat should they fail to comply' (or similar).[2]
- ✓ ✗ I have explained the elements of duress in further detail.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'crime', 'defence', 'threat', etc.

Exemplar response

[The defence that Joseph has raised for his assault charge is duress.[1]][Duress is the legal recognition that a person may commit a crime where acting under compulsion, due to a threat should they fail to comply.[2]][In order for the defence of duress to be proven there must be a threat of harm, the assault being the only reasonable way to avoid the threatened harm and the conduct being a reasonable response to the threat.[3]]

8.

- ✓ ✗ I have identified the first feature of statutory assaults – the victim suffered an injury.[1]
- ✓ ✗ I have described this feature in further detail.[2]
- ✓ ✗ I have identified the second feature of statutory assaults – the accused caused the victim's injury.[3]
- ✓ ✗ I have described this feature in further detail.[4]
- ✓ ✗ I have identified the third feature of statutory assaults – the accused intended to cause the injury or was reckless as to causing injury.[5]
- ✓ ✗ I have described this feature in further detail.[6]
- ✓ ✗ I have identified the fourth feature of statutory assaults – the accused acted without lawful excuse.[7]
- ✓ ✗ I have described this feature in further detail.[8]
- ✓ ✗ I I have used key legal studies terminology effectively, such as 'victim', 'accused', 'reckless', 'intent', 'negligent', etc.

Exemplar response

[The first general element for statutory assaults is that the victim suffered an injury.[1]][Depending upon the type of assault offence, this may be an injury (physical injury or harm to mental health) or a serious injury, such as an injury endangering the life of the victim.[2]] [The second general element for statutory assault is the accused causing the victim's injury.[3]][The culpability of the accused extends broadly and includes direct injury (like physical contact) and indirect conduct (like psychiatric illness).[4]][The third general element for statutory assault is that the accused intended to cause injury or was reckless as to causing the injury.[5]][This requires the accused to have a specific desire to cause an injury or have been reckless (or negligent) in doing so. The accused does not need to have intended to cause the specific injury that the victim suffered, any injury will suffice.[6]][The fourth general element for statutory assault is that the accused acted without lawful excuse.[7]][This means that the accused did not obtain consent from the victim, or the conduct exceeded what the victim had consented to (such as in a sporting event or medical procedure).[8]]

9.

- ✓ ✗ I have explained self defence as 'the legal recognition that a person may lawfully use force or the threat of force in order to prevent harm against themselves or another' (or similar).[1]
- ✓ ✗ I have explained that self-defence is a complete defence to an assault charge.[2]
- ✓ ✗ I have described a situation where someone may lawfully commit assault in self-defence.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'unlawful harm', 'defence', 'threat', etc.

Exemplar response

[Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent harm occurring to them or another person.[1]][Self-defence is a complete defence, meaning a person will be acquitted if the jury accepts they were acting in self defence.[2]][For example, a person would not be found guilty of assault if they can prove they were acting in a way that was needed to protect their property from being stolen.[3]]

Possible points to include

Other examples include:

- The defence of the person or another person.
  - For example, if assault was committed to prevent personal harm.
- The prevention or termination of the unlawful deprivation of the liberty of the person or another person.
  - For example, if assault was committed in order to escape a premises they are being unlawfully held at.

LEVEL 3

10.

✓ ✗	I have explained one similarity between common law assault and statutory assaults.[1]
✓ ✗	I have explained a second similarity between common law assault and statutory assaults.[2]
✓ ✗	I have described one feature of statutory assaults that differs from common law assault.[3]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[4]
✓ ✗	I have described the corresponding feature of common law assault.[5]
✓ ✗	I have described a second feature of statutory assaults that differs from common law assault.[6]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[7]
✓ ✗	I have described the corresponding feature of common law assault.[8]
✓ ✗	I have used key legal studies terminology effectively such as: 'mens rea', 'defence', 'threat', etc.

Exemplar response

[One similarity between statutory assaults and common law assault is that the penalties for statutory assault and common law assault are both outlined in the *Crimes Act*.[1]][A second similarity between statutory assaults and common law assault is that both require a degree of intent or recklessness with respect to causing injury to another person, meaning they have a similar mens rea component.[2]][One difference is that the penalties for statutory assaults can be up to twenty years' imprisonment,[3]][whereas,[4]][the penalty for common law assault is generally five years' imprisonment (but can be extended to ten years in exceptional circumstances.[5]][A second difference is that the legal basis for statutory assaults is the *Crimes Act*,[6]][whereas,[7]][common law assault is defined through judicial precedent rather than statute.[8]]

Possible points to include

Another difference :

- Statutory assaults require an injury to have resulted as a result of the contact, whereas common law assault does not require any injury to have resulted.

11. a)

✓ ✗	I have explained that the maximum penalty for causing serious injury intentionally is 20 years' imprisonment.[1]
✓ ✗	I have stated this is outlined in s. 16 of the *Crimes Act 1958*.[2]
✓ ✗	I have used key legal studies terminology effectively, such as 'penalty', 'causing serious injury intentionally', 'imprisonment', etc.

Exemplar response

[The maximum penalty for causing serious injury intentionally is 20 years imprisonment.[1]][This is outlined by s. 16 of the *Crimes Act*.[2]]

b)

- ✓ ✗ I have defined injury as 'physical injury or harm to an individual's mental health' (or similar).[1]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[2]
- ✓ ✗ I have defined serious injury as 'an injury that either endangers life, is substantial and protracted or involves the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman (or similar).[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'serious injury', 'injury', etc.

Exemplar response

[Injury refers to physical injury or harm to an individual's mental health,[1]][whereas,[2]][serious injury is an injury that either endangers life, is substantial and protracted or involves the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman.[3]]

c)

- ✓ ✗ I have identified self-defence as the possible defence that Bonnie could raise.[1]
- ✓ ✗ I have described self-defence as 'the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another' (or similar).[2]
- ✓ ✗ I have justified that this defence would be appropriate for Bonnie as she has been unlawfully deprived of her liberty and was trying to escape.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'threat', 'defence', 'deprivation of liberty', etc.

Exemplar response

[The most appropriate defence for Bonnie would be self-defence, as defined in s. 322K of the *Crimes Act*.[1]][Self-defence is the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another person.[2]][Self-defence can be raised to prevent or escape from the unlawful deprivation of liberty, which was the case for Bonnie as she had been kidnapped.[3]]

12.

- ✓ ✗ I have identified one error in the scenario – Julia being sentenced to twenty years' imprisonment.[1]
- ✓ ✗ I have provided the correct procedure for this error – the maximum would generally be five years' imprisonment (but could be extended to ten years in certain circumstances).[2]
- ✓ ✗ I have identified a second error in the scenario – Julia being charged and convicted of common law contact assault.[3]
- ✓ ✗ I have provided the correct procedure for this error – Julia would be charged with common law apprehension assault.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'actus reus', 'threat', 'imprisonment', etc.

Exemplar response

[One error in the scenario is that Julia was sentenced to twenty years' imprisonment.[1]][The maximum sentence for common law assault is generally five years' imprisonment, and only in certain circumstances can it be extended to ten years' imprisonment.[2]] [A second error in the scenario is that Julia is charged and convicted of common law contact assault.[3]][If Julia was charged with assault it would be common law apprehension assault as the actus reus component was a threat rather than physical contact.[4]]

13.

- ✓ ✗ I have explained one similarity between common law contact assault and common law apprehension assault.[1]
- ✓ ✗ I have explained a second similarity between common law contact assault and common law apprehension assault.[2]

- ✓ ✗ I have described one feature of common law contact assault that differs from common law apprehension assault.[3]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[4]
- ✓ ✗ I have described the corresponding feature of common law apprehension assault.[5]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'threat', 'actus reus', 'mens rea', etc.

Exemplar response

[One similarity between common law contact assault and common law apprehension assault is that they are the two branches of common law assault.[1]][A second similarity is that a conviction for both charges requires a degree of intention or recklessness on behalf of the accused, meaning they have the same mens rea component.[2]][One difference between common law contact assault and apprehension assault is that they have a different actus reus component. Common law contact assault requires direct physical contact on the victim,[3]][whereas,[4]][common law apprehension assault only requires a threat to satisfy the actus reus element of the offence.[5]]

14. a)

- ✓ ✗ I have described the accused causing the victim's injury as requiring the conduct of the accused to have been responsible for the injury obtained.[1]
- ✓ ✗ I have described that the term 'causing injury' is very broad and includes direct and indirect injury.[2]
- ✓ ✗ I have explained that it is likely Eden caused Vickie's injury since he kicked her in the rib and Vickie's injury is a broken rib.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'injury', 'accused', 'victim', etc.

Exemplar response

[The element 'the accused caused the victim's injury' requires the acts of the accused person to be responsible for the injury that the victim obtained.[1]][The term 'causing' is very broad and includes direct injury (physical contact) as well as indirect injury that occurred without any direct application of force (psychiatric illness).[2]][It is likely that Eden caused Vickie's injury as he kicked her in the ribs and the injury Vickie suffered is a broken rib.[3]]

b)

- ✓ ✗ I have explained that the maximum penalty that can be imposed on Eden is ten years' imprisonment (if injury is caused intentionally) or five years' imprisonment (if injury is caused recklessly).[1]
- ✓ ✗ I have explained that this is outlined in s. 18 of the *Crimes Act*.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'penalty', 'imprisonment', etc.

Exemplar response

[The maximum penalty that can be imposed on Eden is ten years' imprisonment if the court deems the injury was caused intentionally or five years' imprisonment if the court deems the injury was caused recklessly.[1]][This is provided for in s. 18 of the *Crimes Act 1958*.[2]]

c)

- ✓ ✗ I have stated duress is a defence that Eden could raise.[1]
- ✓ ✗ I have described duress as 'the legal recognition that a person may commit a crime where acting under compulsion due to a threat should they fail to comply' (or similar).[2]
- ✓ ✗ I have justified that duress would be appropriate as Eden was acting under compulsion due to the threat made by Paige.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'threat', 'defence', 'compulsion', etc.

Exemplar response

[One possible defence Eden could raise is duress.[1]][Duress is the legal recognition that a person may commit an assault when acting under compulsion due to a threat should they fail to comply.[2]]

[Duress would be an appropriate defence for Eden to raise as he harmed Vickie whilst acting under compulsion, due to a threat made by Paige.[3]]

Possible points to include

Self-defence may be an acceptable defence to raise in this situation. Eden was acting in a way to protect himself from the injury threatened by Paige.

d)

- ✓ ✗ I have stated that Paige would likely be charged with intentionally causing serious injury in an act of gross violence, under s 15A of the *Crimes Act*.[1]
- ✓ ✗ I have given one reason for this conclusion – the victim was incapacitated at the time the injury was caused.[2]
- ✓ ✗ I have given a second reason for this conclusion – the facts of the assault are very similar to those in the s. 15A case of *DPP v Whittle*.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'violence', 'injury', 'convicted', etc.

Exemplar response

[It is likely that Paige would be charged with intentionally causing serious injury in an act of gross violence, under s 15A of the *Crimes Act*.[1]] [This is because she continued to harm Vickie whilst she was unconscious, which is an example of an act of gross violence according to the Act.[2]] [In addition, the facts are very similar to those in the earlier gross violence case of *DPP v Whittle*.[3]]

3D Assault: Trends & social impact

LEVEL 1

1. D

2. C

3. **a.** False

b. False

c. True

d. True

4. C

LEVEL 2

5.

- ✓ ✗ I have identified one potential economic impact on the individual.[1]
- ✓ ✗ I have described this impact in further detail.[2]
- ✓ ✗ I have identified a second potential economic impact on the individual.[3]
- ✓ ✗ I have described this impact in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'victim', 'assault', etc.

Exemplar response

[One potential economic impact that assault could have on the victim is an increase in negative occupational behaviours.[1]]
[Research has found that the experience of assault can increase the prevalence of absenteeism and increase unemployment.[2]]
[A second potential impact could be an inability to re-engage in the workplace due to the development of mental health conditions.[3]]
[For example, one particular individual who was assaulted at his place of work was unable to continue running his business and was forced to pursue bankruptcy.[4]]

6.

- ✓ ✗ I have identified one way in which assaults can have a negative economic impact on society.[1]
- ✓ ✗ I have described an appropriate example.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'crime', 'assault', etc.

Exemplar response

[High rates of assaults and violence in particular areas or locations can cause those locations to develop a negative reputation, which can cause people to avoid them and therefore harm business activity and/or housing prices.[1]][For example, a study conducted by Infrastructure Victoria in 2018 found that as crimes against persons increased in areas of regional Victoria, housing prices decreased as a direct result.[2]]

Possible points to include

Violent crimes and assault can also cost society through an increased need for police presence in society, which is funded by tax-payers. For example, the Australian Football League (AFL) has had to deal with repeated instances of violence and fighting amongst spectators at games, causing a need to increase police presence and security measures.

LEVEL 3

7. a)

- ✓ ✗ I have stated that Commissioner Fuller's statement does apply to assault.[1]
- ✓ ✗ I have justified this conclusion by stating that assault trends in NSW are decreasing.[2]
- ✓ ✗ I have referred to the statistics provided.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'police', 'assault', etc.

Exemplar response

[Based on the trends of assault in NSW, Commissioner Fuller is correct[1]][in suggesting that crime is decreasing across NSW.[2]] [For example, according to the data in Figure 6 from the ABS, there has been an almost 12% decrease in recorded criminal incidents of assault from 2010 to 2017 in NSW.[3]]

b)

- ✓ ✗ I have described one other way in which a high prevalence of assault could impact on society.[1]
- ✓ ✗ I have provided an example to demonstrate this point.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'victim', 'assault', etc.

Exemplar response

[One other way in which assaults could impact on society is that continuing instances of violent crimes may prompt the government to pass harsher laws or limit access and movement between venues serving alcohol.[1]][For example, consider the lockout laws that apply throughout much of Sydney, which were introduced in early 2014 in an effort to minimise alcohol-fuelled violence.[2]]

Possible points to include

- Assaults can impact the extent to which people feel safe in the community and free to move in public and private space. For example, the NSW Government has continued its push to increase lighting in the streets of the CBD as well as residential areas identified as experiencing high rates of assaults during night-time hours.
- High rates of assaults and violence in particular areas or locations can cause those locations to develop a negative reputation, which can cause people to avoid them and therefore harm business activity and/or housing prices. For example, a study conducted by Infrastructure Victoria in 2018 found that as crimes against persons increased in areas of regional Victoria, housing prices decreased as a direct result.

8.

✓ ✗	I have stated the reporter's comment is partially correct – the rate of assault is falling in NSW.[1]
✓ ✗	I have stated the reporter's comment is partially incorrect – based on assault data NSW is not safer than Victoria.[2]
✓ ✗	I have provided the assault incident rate for both states and explained that it is higher in NSW than in Victoria.[3]
✓ ✗	I have further interpreted the assault incident rate.[4]
✓ ✗	I have explained why it is important to consider the assault incident rate, with specific reference to population size.[5]
✓ ✗	I have used key legal studies terminology effectively, such as: 'victim', 'trends', etc.

Exemplar response

[The reporter is partially correct, as the data in Figure 7 shows assault rates are falling in NSW.[1]][However she is partially incorrect, because NSW has a higher assault rate than Victoria and therefore may not be the safest place in Australia.[2]][The assault incident rate for 2017, which shows how likely an assault is to occur per 100,000 members of the population, is higher in NSW (832.7) than it is in Victoria (632.6).[3]][This suggests that a person is more likely to be a victim of assault in NSW than they are in Victoria.[4]][It is important to consider the assault incident rate when comparing assault trends, as this accounts for the difference in population among states by comparing assault prevalence per 100,000 persons.[5]]

3E Culpable driving: The offence & defences

LEVEL 1

1. D **2.** B **3.** B **4.** C

LEVEL 2

5.

✓ ✗	I have described driving as 'where a person has the ability to accelerate, brake and control the movement of the motor vehicle' (or similar).[1]
✓ ✗	I have described a motor vehicle as 'a vehicle to be intended for highway use and is built to be propelled by a motor' (or similar).[2]
✓ ✗	I have provided one example of a motor vehicle .[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'motor vehicle', 'driving', etc.

Exemplar response

[Driving occurs when a person has the ability to accelerate, brake and control the movement of the motor vehicle.[1]][A motor vehicle is a vehicle to be intended for highway use and is built to be propelled by a motor.[2]][One example of a motor vehicle is a car.[3]]

Possible points to include

Other examples of motor vehicles include:

- A motorbike
- A truck
- A van
- Lifeboats
- Speedboats
- Jet skis.

6.

- ✓ ✗ I have explained that the maximum penalty for culpable driving is 20 years' imprisonment, a fine, or both.[1]
- ✓ ✗ I have explained that this is outlined by s. 318 of the *Crimes Act 1958* (Vic).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'penalty', 'imprisonment', 'fine', etc.

Exemplar response

[The maximum penalty for culpable driving is 20 years imprisonment, a fine or both.[1]][This is stated in s. 318 of the *Crimes Act 1958* (Vic).[2]]

7.

- ✓ ✗ I have explained automatism as 'where an offence is committed when the accused was suffering from an involuntary state of mind' (or similar).[1]
- ✓ ✗ I have explained that there are two branches of automatism: sane and insane.[2]
- ✓ ✗ I have explained sane automatism as 'when a person's mental capacity is severely influenced by external factors' (or similar).[3]
- ✓ ✗ I have explained insane automatism as 'where the accused is reacting to their own internal illusions' (or similar).[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offence', 'involuntary', etc.

Exemplar response

[Automatism is a defence that may be raised where an offence is committed and the accused was suffering from an involuntary state of mind.[1]][There are two branches of automatism: sane and insane.[2]][Sane automatism is where a person's mental capacity is severely influenced by external factors.[3]][Insane automatism is where the accused is reacting to their own internal illusions.[4]]

8.

- ✓ ✗ I have identified one of the four mental states a person may possess to be 'culpable'.[1]
- ✓ ✗ I have described that mental state.[2]
- ✓ ✗ I have described that mental state in further detail.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'culpable', 'mens rea', etc.

Exemplar response

[One of the mental states a person may have in order to be held culpable is to be negligent.[1]]['Negligently' for the mens rea in culpable driving is defined as an accused person failing to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.[2]][The level of negligence required is high and must involve a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct, such as excessive speeding whilst drunk.[3]]

Possible points to include

Other mental states include:

- Reckless: where the accused consciously and unjustifiably disregards a substantial risk that death of another person or the infliction of grievous bodily harm upon another person may result from their driving.
- Under the influence of alcohol: where the accused is so affected by alcohol that they are incapable of having proper control of the motor vehicle.
- Under the influence of drugs: Where the accused is so affected by drugs that they are incapable of having proper control of the motor vehicle.

LEVEL 3

9.

- ✓ ✗ I have explained sane automatism as 'when a person's mental capacity is severely influenced by external factors' (or similar).[1]
- ✓ ✗ I have provided one example of sane automatism.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[3]
- ✓ ✗ I have explained insane automatism as 'where the accused is reacting to their own internal illusions' (or similar).[4]
- ✓ ✗ I have provided one example of insane automatism.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'automatism', 'offence', 'accused', etc.

Exemplar response

[Sane automatism occurs when a person's mental capacity is severely influenced by external factors.[1]][An example of sane automatism is where an offence is committed while the accused was sleepwalking.[2]][On the other hand,[3]][insane automatism occurs where the accused is reacting to their own internal illusions.[4]][An example of insane automatism is where an offence is committed while the accused is suffering from an epileptic seizure.[5]]

Possible points to include

Other examples of sane automatism include:

- Concussion
- Involuntary movement or spasm.

Other examples of insane automatism include:

- Mental illnesses such as schizophrenia
- Brain injuries, tumors and disorders
- Dissociation.

10.

- ✓ ✗ I have identified that the element 'driving a motor vehicle' was not satisfied in *Hughes v McFarlane*.[1]
- ✓ ✗ I have explained that driving a motor vehicle requires the accused to have the ability to accelerate, brake and control the movement of the motor vehicle.[2]
- ✓ ✗ I have explained that steering a car as it was being towed does not amount to 'driving'.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'driving', 'court', 'motor vehicle', etc.

Exemplar response

[In *Hughes v McFarlane,* the element 'driving a motor vehicle' was not satisfied.[1]][In order to be driving, a person must have the ability to accelerate, brake and control the movement of the motor vehicle.[2]][In *Hughes v McFarlane,* the court clarified that steering a car as it is being towed does not amount to 'driving'.[3]]

11.

- ✓ ✗ I have identified one error in the scenario – Moses was driving a motor vehicle.[1]
- ✓ ✗ I have provided the correct procedure for this error – Moses would not be found to have been driving a motor vehicle for the purpose of culpable driving.[2]
- ✓ ✗ I have identified a second error in the scenario – Moses was sentenced to 25 years' imprisonment.[3]
- ✓ ✗ I have provided the correct procedure for this error – the maximum penalty a person can be sentenced to for culpable driving is 20 years' imprisonment.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'motor vehicle', 'imprisonment', 'culpable driving', etc.

Exemplar response

[One error in the scenario is that Moses was driving a motor vehicle.[1]][A bicycle would not satisfy the definition of a motor vehicle as it is not intended for highway use or to be propelled by a motor.[2]][A second error is that Moses was sentenced to 25 years' imprisonment for culpable driving.[3]][The maximum prison sentence that may be imposed for culpable driving is 20 years.[4]]

Possible points to include

Other errors include:

- Moses caused the death of another person. An animal is not a person and causing the death of an animal would not satisfy the element 'death of another person'. He therefore cannot be convicted of culpable driving.

12.

- ✓ ✗ I have explained one similarity between dangerous driving causing death and culpable driving.[1]
- ✓ ✗ I have described one feature of dangerous driving causing death that differs from culpable driving.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[3]
- ✓ ✗ I have described the matching feature of culpable driving.[4]
- ✓ ✗ I have described a second feature of dangerous driving causing death that differs from culpable driving.[5]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[6]
- ✓ ✗ I have described the matching feature of culpable driving.[7]
- ✓ ✗ I have stated that culpable driving is a more serious offence than dangerous driving causing death.[8]
- ✓ ✗ I have given a reason for this conclusion.[9]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'actus reus', 'mens rea', 'imprisonment', etc.

Exemplar response

[One similarity between dangerous driving causing death and culpable driving is that they have the same actus reus components. Both offences involve the accused driving a motor vehicle and this driving results in the death of another person.[1]][One difference is that they have different mens rea components. Dangerous driving causing death focuses on whether the speed or manner of the accused's driving was dangerous to the public.[2]][On the other hand,[3]][the mens rea element for culpable driving requires that the accused was driving recklessly, highly negligently or was so affected by drugs/alcohol that they were unable to control the vehicle.[4]][A second difference is the maximum penalty for each offence. Dangerous driving causing death has a maximum penalty of 10 years' imprisonment,[5]][whereas,[6]][culpable driving has a maximum penalty of 20 years' imprisonment and/or a fine.[7]][Culpable driving is a much more serious offence than dangerous driving causing death,[8]][as reflected by the maximum penalty for culpable driving being double the maximum penalty for dangerous driving causing death.[9]]

13.

- ✓ ✗ I have defined the term motor vehicle as 'a vehicle to be intended for highway use and is built to be propelled by a motor' (or similar).[1]
- ✓ ✗ I have explained that this definition has been extended to include vessels.[2]
- ✓ ✗ I have defined a vessel as something 'used, or capable of being used in navigation by water, however propelled or moved' (or similar).[3]
- ✓ ✗ I have explained that a jet ski fits into the definition of a vessel and therefore is a motor vehicle for the purposes of culpable driving causing death.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'motor vehicle', 'vessel', etc.

Exemplar response

[A motor vehicle is a vehicle to be intended for highway use and is built to be propelled by a motor.[1]][While a water-going vessel does not appear to fall into the definition of a motor vehicle, it has been explicitly included by s. 317B of the *Crimes Act 1958* (Vic).[2]]

[A vessel is something used, or capable of being used in navigation by water, however propelled or moved.[3]] [As a jet ski is by definition a vessel, it is therefore a motor vehicle for the purposes of the legal definition of culpable driving causing death.[4]]

14. a)

- ✓ ✗ I have identified that this is a criminal trial.[1]
- ✓ ✗ I have explained that in criminal trials the standard of proof that must be met is beyond reasonable doubt.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'beyond reasonable doubt', 'standard of proof', 'criminal', etc.

Exemplar response

[Link's culpable driving charge would be heard in a criminal trial.[1]] [In criminal trials, the standard of proof that must be met to find Link guilty is beyond reasonable doubt.[2]]

b)

- ✓ ✗ I have identified that Link most likely met the definition of a reckless state of mind at the time of the offence.[1]
- ✓ ✗ I have explained reckless as the mens rea element 'where the accused consciously and unjustifiably disregards a substantial risk that death of another person or the infliction of grievous bodily harm upon another person may result from their driving' (or similar).[2]
- ✓ ✗ I have explained that excessive speeding while drag racing is an example of driving recklessly.[3]
- ✓ ✗ I have explained that Link was driving at 110km/h over the speed limit in a drag race, which is likely to be deemed as reckless.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reckless', 'offence', etc.

Exemplar response

[Link is likely to have had a reckless mental state at the time of the offence.[1]] [Reckless driving occurs where the accused knowingly disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from their driving.[2]] [Excessive speeding while participating in a drag race is an example of driving recklessly.[3]] [As Link was driving at 110km/h over the speed limit when participating in a drag race, a jury could conclude that he must have known death or serious injury would result but continued to drive this way regardless. That is, he was driving recklessly.[4]]

c)

- ✓ ✗ I have identified the maximum penalty that can be imposed on Link is 20 years' imprisonment and a fine.[1]
- ✓ ✗ I have stated that this is outlined by s. 318 of the *Crimes Act 1958* (Vic).[2]
- ✓ ✗ I have identified the standard sentence for mid-range offending in this matter to be 8 years' imprisonment.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'imprisonment', 'standard sentence', etc.

Exemplar response

[The maximum penalty that can be imposed on Link for culpable driving is 20 years' imprisonment and a fine.[1]] [This is outlined by s. 318 of the *Crimes Act 1958* (Vic).[2]] [If the court judges Link's offending to be in the middle range of seriousness for culpable driving cases, his sentence is likely to be around 8 years based on the standard sentence for this crime.[3]]

3F Culpable driving: Trends & social impact

LEVEL 1

1. C **2.** E **3.** D

LEVEL 2

4.

- ✓ ✗ I have identified one negative impact that culpable driving causing death could have on the offender.[1]
- ✓ ✗ I have referred to the case of *Khoja v The Queen* [2014] as evidence of this potential impact.[2]
- ✓ ✗ I have identified a second negative impact that culpable driving causing death could have on the offender.[3]
- ✓ ✗ I have referred to the case of *Khoja v The Queen* [2014] as evidence of this potential impact.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'culpable driving', 'court', etc.

Exemplar response

[One negative impact that culpable driving causing death could have on the offender is mental health consequences such as guilt, regret and other conditions like depression and anxiety.[1]][For example, in the case of *Khoja v The Queen* [2014], the court found that Khoja (the offender) had developed PTSD and depression as a result of the incident.[2]][A second negative impact could be various social consequences such as feelings of isolation.[3]][For example, the court also reported that Khoja had been spending approximately 20 hours a day in his bedroom with his curtains closed prior to his sentencing.[4]]

Possible points to include

Students could have also referred to imprisonment and loss of liberty as a likely negative impact on the offender:

- Imprisonment will add to the impact on the offender by removing their liberty and freedom of movement. Many offenders leave prison unemployed and disconnected from family and friends. For example, Mr. Khoja received a sentence of 8 years and 6 months (with a non-parole period of 5 years and 6 months).

5.

- ✓ ✗ I have identified that the most common length of imprisonment was between 5 to 7 years.[1]
- ✓ ✗ I have referred to the statistics provided to support this.[2]
- ✓ ✗ The sentences imposed for culpable driving causing death in Victoria are likely to become more harsh.[3]
- ✓ ✗ I have described a reason for this conclusion – the standard sentencing scheme.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'sentenced', 'offences', etc.

Exemplar response

[The most commonly imposed period of prisonment was between 5 to 7 years.[2]][A total of 26 people fell into this category, which is 48% of the 54 people sentenced to imprisonment for culpable driving causing death (2013-2018).[2]][The sanctions imposed for this offence are now likely to become more harsh than this,[3]][because the recent introduction of the standard sentencing scheme is designed to increase the average prison term for culpable driving, with the standard sentence for this offence being 8 years' imprisonment.[4]]

LEVEL 3

6. a)

- ✓ ✗ I have described the early approach to road trauma as 'an inevitable part of the costs and benefits associated with economic growth' (or similar).[1]
- ✓ ✗ I have used a linking word such as 'however', 'on the other hand' to highlight difference.[2]
- ✓ ✗ I have described the modern approach to road trauma as 'focusing on a lack of thoughtful protection and improving car and road design' (or similar).[3]
- ✓ ✗ I have referred to the 'Towards Zero' campaign as evidence of this shift.[4]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'culpable driving', 'offence', etc.

Exemplar response

[During the growth of the Australian population in the 20th century, road trauma was thought of as simply an inevitable part of the costs and benefits associated with economic growth.[1]][However,[2]][today there has been a shift in the way society thinks about road trauma. Rather than thinking of accidents as an unavoidable byproduct of growth, society now considers them as an indication of insufficiently designed development and a lack of thoughtful protection.[3]][This is evidenced in campaigns such as 'Towards Zero' in Victoria, which emphasises reducing deaths and injuries on Victorian roads through research-driven protective strategies.[4]]

b)

- ✓ ✗ I have identified one other way that the change in societal approach to road trauma has benefited the government's efforts to reduce dangerous driving.[1]
- ✓ ✗ I have identified an example to illustrate this point.[2]
- ✓ ✗ I have explained this in further detail.[3]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'government', etc.

Exemplar response

[This shift in society's thinking towards road trauma has prompted the government to use more detailed analysis of road trauma, allowing for more targeted research and education.[1]][For example, the TAC has learned that the majority of drink driving offenders are male (84%), while instances of drink driving decrease as a driver gets older.[2]][This allows education efforts to be targeted more closely with those who will benefit the most from them (such as males and young people).[3]]

4A Purposes and types of civil law

LEVEL 1

1. B **2.** A

LEVEL 2

3.

✓ ✗	I have explained that the purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss (or similar).[1]
✓ ✗	I have explained that this purpose is achieved through a remedy.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'loss', 'remedy' etc.

Exemplar response

[The purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss.[1]][In civil law, the plaintiff will be restored to their original position through a remedy.[2]]

4.

✓ ✗	I have described civil law as 'laws that are made by judges (common law) or made by parliament (statute law or legislation) that aim to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights' (or similar).[1]
✓ ✗	I have provided an example of one type of civil law.[2]
✓ ✗	I have provided an example of a second type of civil law.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'remedy', 'judges', etc.

Exemplar response

[Civil law refers to the laws that are made by judges or made by parliament that aim to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights.[1]][One type of civil law is property law, which focuses on the buying, selling or renting of houses and commercial property leases.[2]][Another type of civil law is defamation law, which protects a person's reputation from being damaged by lies.[3]]

Possible points to include

Other types of civil law include (but are not limited to):

- **Workplace law;** regulates the relationship between employees and their employers and includes matters such as pay and working conditions.
- **Contract law;** aims to protect the rights of parties to make enforceable agreements.
- **Family law;** guides the decision around the care of children and division of assets when families have broken down.
- **Defamation law;** protects a person's reputation from being damaged by lies.
- **Negligence law;** requires certain individuals to take reasonable care in preventing foreseeable damage from occurring.
- **Consumer protection laws;** ensures that individual's purchasing goods and services from businesses do not have their rights infringed. This is enforced by numerous Acts throughout Australia, but primarily by *Australian Consumer Law*.
- **Wills and probate law;** concerned with the creation and enforcement of wills.

LEVEL 3

5.

- ✓ ✗ I have identified one error in the scenario – Police arresting Happy Times.[1]
- ✓ ✗ I have provided the correct procedure for this error.[2]
- ✓ ✗ I have identified a second error in the scenario – Happy Times being imprisoned.[3]
- ✓ ✗ I have provided the correct procedure for this error.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'remedy', 'proceeding', etc.

Exemplar response

[One error in the scenario is that the police arrested Happy Times for breaching *Australian Consumer Law*. This is incorrect, as the police do not get involved in civil matters.[1]][Instead, Alice would have to commence a civil proceeding against Happy Times for breaching her rights.[2]]

[A second error in the scenario is that Happy Times was imprisoned for breaching Alice's rights. This is incorrect, as the conduct of Happy Times falls under civil law and would not result in imprisonment.[3]][Instead, Happy Times would likely be ordered to provide Alice with a remedy to restore her to her original position.[4]]

Possible points to include

- Another possible error includes Happy Times being found 'guilty'. In civil proceedings, the defendant is found 'liable' for their misconduct.

LEVEL 4

6.

- ✓ ✗ I have described that the purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss (or similar).[1]
- ✓ ✗ I have provided one way that remedies can achieve the purpose of civil law.[2]
- ✓ ✗ I have linked this reason to the facts in the scenario – Bailey's medical bills.[3]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[4]
- ✓ ✗ I have provided one way that remedies do not achieve the purpose of civil law.[5]
- ✓ ✗ I have linked this reason to the facts in the scenario – Bailey's permanent loss of vision.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'remedy', 'plaintiff', etc.

Exemplar response

[The purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss.[1]][Remedies are able to achieve this purpose by providing some form of relief from the harm suffered.[2]][In Bailey's case, the remedy of monetary compensation is likely to assist with the medical costs that he has incurred as a result of Jasmine's negligence.[3]] [However,[4]][remedies may be unable to achieve this purpose where the plaintiff has suffered some form of irreversible or permanent harm.[5]][This is the case for Bailey, who has permanently lost his vision and consequently cannot be returned to his original position through a remedy.[6]]

4B Key concepts of civil law

LEVEL 1

1. B **2.** C **3.** D **4.** D

5. B **6.** A

LEVEL 2

7. ✓ ✗ I have described breach as 'when a person does not abide by civil law by failing to perform a legal or moral obligation that is owed to another person or the public' (or similar).[1]

✓ ✗ I have provided an example of a breach of civil law.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'breach', 'civil law', etc.

Exemplar response

[A breach in civil law is when a person does not abide by civil law by failing to perform a legal or moral obligation that is owed to another person or the public.[1]][For example, under contract law, a breach will have occurred when one party fails to adhere to an agreement made in a written contract.[2]]

Possible points to include

Other possible examples of a breach include (but are not limited to):

- A breach in negligence law occurs when a person does not uphold the duty of care that they owe to another person or to the public.
- A breach in defamation law occurs when a person publishes or communicates false information about another person to a third party.

8. ✓ ✗ I have described causation as 'the requirement for a plaintiff to prove that the defendant's actions resulted in the loss or injury that they suffered' (or similar).[1]

✓ ✗ I have made reference to the 'but for' test.[2]

✓ ✗ I have explained that the court will determine whether or not the defendant caused the loss suffered by the plaintiff by considering whether or not the loss would still have occurred regardless of the defendant's actions.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'causation', 'plaintiff', 'defendant', etc.

Exemplar response

[Causation refers to the requirement that a plaintiff must prove that the defendant's actions directly resulted in the loss or injury that they suffered.[1]][In most cases, a simple application of the 'but for' test will resolve the question of causation in civil law. That is, 'but for' the defendant's actions, would the plaintiff have suffered the loss?[2]][The court will determine whether or not the defendant caused Jason's injury by considering whether or not the injury would still have occurred regardless of the defendant's actions. For example, if the defendant had not been negligent in checking machinery and workplace health and safety requirements, would Jason's injury still have occurred? The outcome of this consideration would determine the liability of the defendant.[3]]

9. ✓ ✗ I have described the limitation of actions as 'a set period of time in which a person who feels that their rights have been infringed must initiate a civil claim' (or similar).[1]

✓ ✗ I have described one other feature of the limitation of actions.[2]

✓ ✗ I have provided one example of a limitation period.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'element of crime', 'accused person', etc.

Exemplar response

[The limitation of actions refers to a set period of time in which a person who feels that their rights have been infringed must initiate a civil claim.[1]][The purpose of the limitation of actions is to ensure that civil cases are resolved in a timely manner. This means that evidence is readily available and the defendant does not have cases pending for an unlimited amount of time.[2]][One example of the limitation of actions is the six year limitation period on claims under contract law.[3]]

Possible points to include

Other possible features of the limitation of actions:

- The limitation of action laws are statutory – that is, passed by parliament, who can also change the law to amend the limitations that will apply.
- 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).

Other possible examples of a limitation period:

- The limitation period for negligence is three years.
- The limitation period for defamation is one year.

4B

10.

- ✓ ✗ I have stated that Sue has the burden of proof in this case as she is the plaintiff.[1]
- ✓ ✗ I have stated that the standard of proof in this case is 'on the balance of probabilities', as this is a civil case.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'element of crime', 'accused person', etc.

Exemplar response

[Sue has the burden of proof in this case as she is the plaintiff, bringing the action against the council.[1]][The standard of proof in this case is 'on the balance of probabilities', as this is a civil case.[2]]

LEVEL 3

11. a)

- ✓ ✗ I have stated that Pamela has the burden of proof in this case as she is the plaintiff.[1]
- ✓ ✗ I have explained that this is fair because Pamela is the party alleging that the council have breached civil law.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'action', etc.

Exemplar response

[Pamela has the burden of proof in this case as she is the plaintiff.[1]][It is fair that Pamela has the burden of proof because she is the party bringing the action against the council and alleging that they have breached civil law. Therefore, she should have to prove the facts of the case.[2]]

b)

- ✓ ✗ I have stated that the standard of proof is not more strict in civil cases.[1]
- ✓ ✗ I have identified that the standard of proof in civil cases is 'on the balance of probabilities'.[2]
- ✓ ✗ I have explained that this is less strict than the standard of proof in criminal cases – 'beyond reasonable doubt'.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'standard of proof', 'on the balance of probabilities', 'beyond reasonable doubt', etc.

Exemplar response

[Pamela is incorrect in thinking that the standard of proof is more strict in a civil case than a criminal case.[1]][The standard of proof in a civil case is 'on the balance of probabilities'.[2]][This is less strict than the standard of proof in criminal cases – 'beyond reasonable doubt'.[3]]

c)

- ✓ ✗ I have stated that the limitation period for a defamation claim is one year.[1]
- ✓ ✗ I have explained that after the limitation period has passed, the defendant in this case can use the limitation of actions as a defence.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'limitation period', 'civil claim', 'liable', etc.

Exemplar response

[The limitation period for a defamation claim is one year.[1]][If Pamela attempts to initiate a civil claim against the defendant after the limitation period has elapsed, the defendant will be able to raise the limitation of actions as a defence in court and will not be liable for any civil wrong that may have occurred.[2]]

12. a)

- ✓ ✗ I have described breach as 'when a person or company fails to abide by an obligation arising in civil law' (or similar).[1]
- ✓ ✗ I have identified the 'breach' that occurred in the case.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'breach', 'duty of care', etc.

Exemplar response

[Breach refers to when a person or company fails to perform a legal or moral obligation owed to a person or to the public at the time.[1]][In this case, The Age have 'breached' the duty of care that they owed to YZ as an employee by failing to provide psychological support following exposure to trauma.[2]]

b)

- ✓ ✗ I have described causation as 'the requirement that a plaintiff must prove that the defendant's actions directly resulted in the loss or injury that they suffered' (or similar).[1]
- ✓ ✗ I have identified 'causation' in the case.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'causation', 'defendant', 'plaintiff', etc.

Exemplar response

[Causation refers to the requirement that a plaintiff must prove that the defendant's actions directly resulted in the loss or injury that they suffered.[1]][In this case, The Age have caused injury to the plaintiff by failing to provide a system which would assist her in dealing with the stress and trauma of her work. In other words, but for The Age's failure to provide support the plaintiff would likely not have developed PTSD.[2]]

c)

- ✓ ✗ I have described loss as 'the requirement that a plaintiff must have suffered financial, emotional or physical injury or deprivation in order to be granted a remedy by the courts' (or similar).[1]
- ✓ ✗ I have identified the loss and consequent remedy in the case.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'loss', 'remedy', etc.

Exemplar response

[Loss refers to the requirement that a plaintiff must have suffered financial, emotional or physical injury or deprivation in order to be granted a remedy by the courts.[1]][In this case, YZ's loss was the PTSD she suffered as a result of The Age's negligence and she was therefore awarded $180,000 in damages by the County Court.[2]]

4C Possible plaintiffs and defendants

LEVEL 1

1. B

2. C

LEVEL 2

3.

- ✓ ✗ I have described a plaintiff as 'the party bringing the action in a civil dispute' (or similar).[1]
- ✓ ✗ I have provided one example of a possible plaintiff to a civil dispute.[2]
- ✓ ✗ I have provided a second example of a possible plaintiff to a civil dispute.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'civil', 'dispute', 'plaintiff', etc.

Exemplar response

[A plaintiff is the party bringing the action in a civil dispute.[1]] [One example of a possible plaintiff to a civil dispute is the government.[2]] [A second example of a possible plaintiff to a civil dispute are households.[3]]

Possible points to include

Other possible plaintiffs include (but are not limited to):

- Patients
- Employees
- Partners/spouses
- Students/parents.

4.

- ✓ ✗ I have described a defendant as 'the party defending their case in court' (or similar).[1]
- ✓ ✗ I have identified vicarious liability as the way a defendant is not directly responsible for breaching an individual's rights.[2]
- ✓ ✗ I have explained how vicarious liability arises.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'liability', 'party', 'court' etc.

Exemplar response

[A defendant is the party defending their case in court.[1]] [In some situations the defendant may not be directly responsible for the plaintiff's harm, which is known as vicarious liability.[2]] [Vicarious liability arises in situations where accountability is imposed on one party (often on a company) as a result of the actions of another (often an employee).[3]]

LEVEL 3

5.

- ✓ ✗ I have identified one possible defendant that Justin could commence proceedings against.[1]
- ✓ ✗ I have justified why this individual/group could be a possible defendant.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'liable', 'proceedings', etc.

Exemplar response

[One possible defendant that Justin could commence proceedings against is Style n' Wave.[1]] [As Style n' Wave is a company they may be vicariously liable for the actions of their employees, including Jackie. Consequently, Style n' Wave may be legally responsible for the discrimination and harassment that Justin has endured in the workplace.[2]]

Possible points to include

Jackie could also be a possible defendant that justin could commence proceedings against. Jackie is directly responsible for breaching Justin's rights and could be held legally responsible for her misconduct in the workplace.

6.

- ✓ ✗ I have identified that Chase would be the plaintiff in this situation.[1]
- ✓ ✗ I have justified that Chase would be the plaintiff as he is bringing the action.[2]
- ✓ ✗ I have identified that Billy would be the defendant in this situation.[3]
- ✓ ✗ I have justified that Billy would be the defendant as he is defending the action.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'civil', 'party', etc.

Exemplar response

[Chase would be the plaintiff in this situation.[1]][Chase would be the plaintiff as he is the party bringing the action in a civil dispute.[2]] [Billy would be the defendant in this case[3]][as Billy is the party defending the case in a civil dispute.[4]]

7.

- ✓ ✗ I have described representative proceedings as 'a case brought on behalf of at least seven people where the incident involves the same or related circumstances and raises common factual and legal implications' (or similar).[1]
- ✓ ✗ I have explained one reason why a representative proceeding would be appropriate - ten individuals.[2]
- ✓ ✗ I have explained a second reason why a representative proceeding would be appropriate - same circumstances and legal implications.[3]
- ✓ ✗ I have explained a third reason why a representative proceeding would be appropriate - minor compensation per individual.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'case', 'civil', etc.

Exemplar response

[A representative proceeding is a civil case brought on behalf of at least seven people where the incident involves the same or related circumstances and raises common factual and legal implications.[1]][A representative proceeding would be appropriate for the investors as there are ten individuals who could bring the case.[2]][A representative proceeding would also be appropriate as the incident involves the same circumstances, being the $75 per month unpaid, which raises the same factual and legal implications.[3]][A representative proceeding would be appropriate as it involves a small amount of monetary compensation per individual but as a group their rights have been severely breached.[4]]

Chapter 4 Review questions

REVIEW

LEVEL 5

1. a)

✓ ✗	I have stated that this is a civil case.[1]
✓ ✗	I have stated that the burden of proof in a civil case lies with the plaintiff - in this case, Sophie Mirabella.[2]
✓ ✗	I have stated that the standard of proof in a civil case is 'on the balance of probabilities'.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'burden of proof', 'plaintiff', 'standard of proof', etc.

Exemplar response

[This is a civil case.[1]][The burden of proof will therefore rest with the plaintiff, Sophie Mirabella.[2]][The standard of proof in civil cases is 'on the balance of probabilities'.[3]]

b)

✓ ✗	I have identified the type of civil law in this case as defamation law.[1]
✓ ✗	I have described defamation law as 'law which protects a person's reputation from being damaged by unfair or inaccurate statements' (or similar).[2]
✓ ✗	I have named the relevant Act that outlines this law: *Defamation Act 2005* (Vic).[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'defamation', 'claim', etc.

Exemplar response

[The type of law under which Mirabella's claim can be categorised is defamation law.[1]][Defamation law refers to laws which protect a person's reputation from being damaged by unfair or inaccurate statements.[2]][This is enforced in Victoria by the *Defamation Act 2005* (Vic).[3]]

c)

✓ ✗	I have identified the limitation of actions period for a defamation claim as one year.[1]
✓ ✗	I have explained that if the limitation period had passed, the defendants in this case could have used the limitation of actions as a defence.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'limitation of actions', 'claim', 'defendant', 'liable', etc.

Exemplar response

[The limitation of actions period for a defamation claim requires a claim to be made within one year of the defamatory material being published.[1]][If Mirabella had initiated a claim after the limitation period elapsed, the defendants in this case could have used the limitation of actions as a defence and would likely not be liable.[2]]

d)

✓ ✗	I have described causation as 'the requirement for a plaintiff to prove that the defendant's actions directly resulted in the loss or injury that they suffered' (or similar).[1]
✓ ✗	I have identified causation in the case.[2]
✓ ✗	I have described loss as 'the requirement that a plaintiff must have suffered financial, emotional or physical injury or deprivation in order to be granted a remedy by the courts' (or similar).[3]
✓ ✗	I have identified loss in the case.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'causation', 'loss', 'defendant', 'plaintiff', 'damages', etc.

Exemplar response

[Causation refers to the requirement for a plaintiff to prove that the defendant's actions directly resulted in the loss or injury that they suffered.[1]][In this case, Libby Price and Benalla Newspapers have caused injury to Mirabella by publishing a defamatory article which had a negative impact on her reputation and her election campaign. In other words, but for the defendants' actions, Mirabella's reputation would not have been damaged.[2]]

[Loss refers to the requirement that a plaintiff must have suffered financial, emotional or physical injury or deprivation in order to be granted a remedy by the courts.[3]][In this case, Mirabella's loss was the damage to her reputation suffered as a result of the publication, and she was therefore awarded $175,000 in damages by the courts.[4]]

2. a)

- ✓ ✗ I have identified the plaintiff in this case as Eleanor, as she is the party bringing the claim.[1]
- ✓ ✗ I have identified the defendant in this case as the supermarket, as they are the party responding to the claim.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'claim', 'defendant', etc.

Exemplar response

[The plaintiff in this case is Eleanor, as she is the party bringing the claim against the supermarket.[1]][The defendant in this case is the supermarket, as they are the party responding to the claim.[2]]

b)

- ✓ ✗ I have explained that the supermarket caused injury to Eleanor by failing to clean up the spill, and therefore breaching the duty of care that they owe to customers.[1]
- ✓ ✗ I have stated that 'but for' the supermarket's negligence, Eleanor likely would not have been injured.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'injury', 'loss', 'duty of care', etc.

Exemplar response

[The supermarket in this case has 'caused' Eleanor to suffer injury and loss by failing to clean up the spill, and therefore breaching the duty of care that they owe to their customers.[1]][In other words, 'but for' the supermarket's negligence, Eleanor likely would not have fallen and suffered injury.[2]]

c)

- ✓ ✗ I have described the purpose of civil law as 'to restore the plaintiff to their original position, being the position they were in before they suffered any loss, by awarding the plaintiff a remedy' (or similar).[1]
- ✓ ✗ I have explained how this purpose was achieved in the case.[2]
- ✓ ✗ I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[3]
- ✓ ✗ I have explained how this purpose may not have been achieved in this case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'loss', 'remedy', 'damages', etc.

Exemplar response

[The purpose of civil law is to restore the plaintiff to their original position, being the position they were in before they suffered any loss, via a remedy.[1]][The purpose of civil law has been achieved in this case because the plaintiff was awarded damages to compensate for the loss and injury that she suffered, including medical bills and pain and suffering.[2]][However,[3]][this purpose may not have been fully achieved if Eleanor suffers permanent injury or loss as a result of the civil wrong. In other words, no amount of damages will be able to restore Eleanor to her former position if she continues to experience mental or physical suffering due to the injury.[4]]

Possible points to include

The achievement of the purpose of civil law may also be undermined by the difficulty of measuring Eleanor's physical suffering; it is hard to objectively assign a dollar value to an individual's pain and injury.

5A Negligence: The tort & defences

LEVEL 1

1. C **2.** C **3.** D **4.** B

LEVEL 2

5.

- ✓ ✗ I have described duty of care as 'an obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour' (or similar).[1]
- ✓ ✗ I have provided one example of an established category.[2]
- ✓ ✗ I have provided a second example of an established category.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reasonably foreseeable', 'neighbour', etc.

Exemplar response

[Duty of care is an obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour.[1]] [One established category is that schools owe a duty of care to their students.[2]] [A second established category is that manufacturers owe a duty of care to consumers who purchase their goods.[3]]

Possible points to include

Other established categories include:

- Doctors owe a duty of care to their patients.
- Drivers owe a duty of care to other road users.
- Employers owe a duty of care to employees relating to a safe system of work.
- Solicitors owe a duty of care to their clients.
- Land owners owe a duty of care to tenants.

6.

- ✓ ✗ I have described limitation of actions as 'any time-based restrictions placed on individuals who wish to commence legal action' (or similar).[1]
- ✓ ✗ I have explained that a claim in negligence must be pursued within 3 years of the cause of action.[2]
- ✓ ✗ I have explained that the cause of action is assumed to have occurred on the date the plaintiff first knows that they suffered personal injuries and that those injuries were caused by the act or omission of some person.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'omission', 'cause of action', etc.

Exemplar response

[Limitation of actions is the restrictions placed on individuals who wish to commence a legal proceeding.[1]] [Section 5 of the *Limitation of Actions Act 1958* (Vic) dictates that a claim in negligence must be pursued within 3 years of the cause of action arising.[2]] [The cause of action is assumed to have occurred on the date the plaintiff first knows that they suffered injury and that the injury was caused by the act or omission of some person.[3]]

7.

- ✓ ✗ I have identified one of the defences that Suzie could raise in her negligence case.[1]
- ✓ ✗ I have described this defence.[2]
- ✓ ✗ I have explained the impact this defence would have on Suzie's liability if raised successfully.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'liability', 'harm', 'defence', etc.

Exemplar response

[Contributory negligence is a defence that Suzie could raise in her negligence case.[1]][Contributory negligence is a defence that may be raised where the plaintiff also played a part in causing their own loss or damage by failing to take reasonable care for themselves.[2]] [A successful defence of contributory negligence will reduce Suzie's liability to the extent of the plaintiff's contribution to their own harm, but is not a complete defence.[3]]

Possible points to include

Voluntary assumption of risk is another defence that could be raised in a negligence case. Voluntary assumption of risk is a defence that can be raised where the plaintiff willingly accepts the likelihood of risk when participating. If a defence of voluntary assumption of risk is successfully raised, the defendant will not be liable in negligence.

8.

- ✓ ✗ I have described a duty of care as 'an obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour' (or similar).[1]
- ✓ ✗ I have explained a duty of care in further detail.[2]
- ✓ ✗ I have described breach of duty as 'when the defendant has fallen below the standard of care that would be expected of a reasonable person in the same situation' (or similar).[3]
- ✓ ✗ I have explained breach of duty in further detail.[4]
- ✓ ✗ I have described causation as 'a causal link between the breach of duty and the harm suffered by the plaintiff' (or similar).[5]
- ✓ ✗ I have explained causation in further detail.[6]
- ✓ ✗ I have described remoteness of damage as 'the defendant's act or omission being the main cause for the harm suffered by the plaintiff' (or similar).[7]
- ✓ ✗ I have explained remoteness of damage in further detail.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'element', 'reasonable foreseeability', 'reasonable person', 'causal link', etc.

Exemplar response

[The first element that must be shown in negligence is a duty of care. Duty of care is an obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour.[1]][In some particular relationships, such as a doctor and their patient, the law assumes a duty of care exists.[2]][The second element that must be shown in negligence is a breach of that duty. A breach of duty is when the defendant has fallen below the standard of care that would be expected of a reasonable person in the same situation.[3]] [This requires the defendant to take reasonable care in trying to prevent harm from occuring.[4]][The third element that must be shown in negligence is causation. Causation requires a causal link between the breach of duty and the harm caused.[5]][The plaintiff must show that 'but for' the actions of the defendant, their injury would not have occured.[6]][The fourth element that must be proven in negligence is remoteness of damage. This requires that the defendant's act or omission be the main cause for the harm suffered by the plaintiff.[7]] [This limits liability in negligence to any harm that was a reasonably foreseeable outcome of the negligent act rather than a defendant being liable for any and all harm that occurs to a plaintiff.[8]]

LEVEL 3

9.

- ✓ ✗ I have explained that there are restrictions on a person's ability to initiate a claim in negligence.[1]
- ✓ ✗ I have explained that the cause of action is assumed to have occurred on the date the plaintiff first knows that they suffered personal injuries and that those injuries were caused by the act or omission of some person.[2]
- ✓ ✗ I have explained that Jasmine would likely be unsuccessful in a claim in negligence as the cause of action was four years ago (unless the court extended the limitation period).[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'cause of action', 'act or omission', etc.

Exemplar response

[A claim in negligence must be pursued within 3 years of the cause of action.[1]][The cause of action is assumed to have occurred on the date the plaintiff first knows that they suffered personal injuries and that those injuries were caused by the act or omission of some person.[2]][As the cause of action was four years ago, Jasmine would likely be unsuccessful in a claim in negligence against her employer due to the statutory limitation of actions, unless the court extended the limitation period.[3]]

10.

- ✓ ✗ I have identified one of the types of compensatory damages the court may award to Lucinda.[1]
- ✓ ✗ I have explained this type of compensatory damages.[2]
- ✓ ✗ I have justified why this type of compensatory damages would be appropriate for Lucinda.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'quantifiable', 'compensatory damages', etc.

Exemplar response

[One of the types of compensatory damages the court could award to Lucinda is general damages.[1]][General damages do not have a precise value and are not easily quantifiable.[2]][As Lucinda's quality of life has been reduced as a result of blindness, and this is not easily quantifiable, the court may award general damages to Lucinda in recognition of this.[3]]

Possible points to include

Specific damages is another type of compensatory damages the court could award to Lucinda. Specific damages have a precise value and are easily quantifiable. As Lucinda has provided evidence of medical bills and the cost of ongoing care due to her blindness, which have exact quantities, this would be an appropriate type of damages to award her.

5A

11. a)

- ✓ ✗ I have described the neighbour principle as 'the requirement that all individuals and organisations take reasonable care to avoid acts or omissions that can reasonably be foreseen to injure their neighbour' (or similar).[1]
- ✓ ✗ I have identified a neighbour as 'persons who are so closely and directly affected by my act that I should have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[2]
- ✓ ✗ I have explained that Mountain Climbin's argument would not be successful as Mildred is likely to be impacted by their actions as a consumer of their product.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'injure', 'omissions', etc.

Exemplar response

[The neighbour principle requires all individuals and organisations to take reasonable care to avoid acts or omissions that can reasonably be foreseen to injure their 'neighbour'.[1]][A person's neighbour was defined in *Donoghue v Stevenson* as 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[2]][Given this, Mountain Climbin's argument that they had no direct interaction with Mildred would be unsuccessful. Mildred, as a consumer of their product, is closely and directly affected by the quality of their products and they should have taken reasonable care in making sure they would not harm her.[3]]

b)

- ✓ ✗ I have identified contributory negligence as the defence that Mountain Climbin' should raise.[1]
- ✓ ✗ I have described contributory negligence as 'where the plaintiff also played a part in causing their own loss or damage by failing to take reasonable care for themselves' (or similar).[2]
- ✓ ✗ I have justified why contributory negligence would be an appropriate defence in this case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reasonable care', 'defence', etc.

Exemplar response

[The defence that Mountain Climbin' should raise is contributory negligence.[1]][Contributory negligence occurs when the plaintiff also played a part in causing their own loss or damage by failing to take reasonable care for themselves.[2]]

[This would be an appropriate defence in this case as Mildred did not wear socks with the hiking boots despite being aware that she should. While Mountain Climbin' were still negligent by leaving a dangerous chemical in the hiking boots, Mildred partly contributed to her own harm.[3]]

12.

✓ ✗	I have identified that causation was not satisfied in *Amaca Pty Ltd v Ellis.*[1]
✓ ✗	I have described causation as 'a causal link between the breach of duty and the harm suffered' (or similar).[2]
✓ ✗	I have explained that in *Amaca Pty Ltd v Ellis,* factual causation was not satisfied as the but-for test failed.[3]
✓ ✗	I have explained that because the but-for test failed, there was no causal link between the breach of duty and the harm that resulted.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'causal link', 'but-for', 'harm' etc.

Exemplar response

[In *Amaca Pty Ltd v Ellis,* causation is the element that was not satisfied.[1]][Causation requires a causal link between the breach of duty and the harm suffered by the plaintiff.[2]][In this case, factual causation failed as the but-for test was not satisfied.[3]][As the but-for test failed, the court held that there was no causal link between the breach of duty and the harm that resulted.[4]]

13.

✓ ✗	I have described the first element of voluntary assumption of risk – 'that the plaintiff had full knowledge of the nature and extent of the risk' (or similar).[1]
✓ ✗	I have related this element to the scenario – skydiving is an obvious risk and it is assumed that Penny would be aware of the risk involved.[2]
✓ ✗	I have described the second element of voluntary assumption of risk – 'that the plaintiff freely and voluntarily agreed to incur the risk of injury' (or similar).[3]
✓ ✗	I have related this to element to the scenario – Penny signed a document accepting liability for any injury obtained.[4]
✓ ✗	I have stated that the defence is likely to be successful as both elements have been proven.[5]
✓ ✗	I have used key legal studies terminology effectively such as: 'risk', 'liability', 'defence', etc.

Exemplar response

[The first element that Jump for Joy would need to prove for voluntary assumption of risk is that Penny had full knowledge of the nature and extent of the risk.[1]][As skydiving is an obvious risk, it is assumed that Penny was aware of the risks involved with this activity.[2]] [The second element that Jump for Joy would need to prove for voluntary assumption of risk is that Penny freely and voluntarily agreed to incur the risk of injury.[3]][As Penny signed a document that stated she accepted liability for the risks, she expressly consented to the risk of injury and gave up her right to bring action.[4]][Therefore, the voluntary assumption of risk defence is likely to be successful in this case as both elements of the defence are satisfied.[5]]

5B Negligence: Impact

LEVEL 1

1. B **2.** D **3.** B

LEVEL 2

4.

- ✓ ✗ I have identified one potential impact.[1]
- ✓ ✗ I have described that impact in further detail.[2]
- ✓ ✗ I have identified a second potential impact.[3]
- ✓ ✗ I have described that impact in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'breach', 'duty', etc.

Exemplar response

[One impact that a negligence claim can have on the defendant is significant reputational damage.[1]][Having consumers associate your goods or services with a breach of a legal duty of care can be debilitating for the future health of a business if sales decline due to the reputational damage.[2]][A second impact on the defendant could be financial loss.[3]][Compensatory damages can be extremely high in value, and may only be partially covered by insurance.[4]]

Possible points to include

Students could include other potential impacts, such as:

- Cultural changes: major negligence cases in a particular industry can prompt cultural changes and behavioural improvements within that industry to avoid future negligence claims. For example, consider the way hospitals constantly improve their health and safety measures to avoid any potential breaches of their duty of care.
- Third-party claims and class actions: cases of negligence brought against a particular defendant can prompt other plaintiffs to bring similar claims or join together to form a representative proceeding. This can prove devastating for a defendant, as the settlements or payouts associated with class actions can be much greater than an individual negligence claim.

5.

- ✓ ✗ I have identified a potential impact.[1]
- ✓ ✗ I have made reference to the case to describe this impact in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', etc.

Exemplar response

[One potential impact that negligence may have on the plaintiff is the psychological consequences associated with the incident.[1]][For example, in the case of *Oyston* the plaintiff reported suffering from panic attacks, anxiety and depression as a result of the bullying she suffered at school.[2]]

Possible points to include

Students could also refer to other impacts, including (but not limited to):

- Financial loss: Oyston claimed damages for her decreased capacity to work later in life as a direct result of the bullying. She also claimed damages to meet the costs associated with her need for ongoing domestic assistance and treatment for her mental health conditions.

LEVEL 3

6.

- ✓ ✗ I have identified that the advice given by Lauren's lawyer is incorrect.[1]
- ✓ ✗ I have provided the correct advice.[2]
- ✓ ✗ I have referred directly to the case as evidence of my point.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'compensated', 'monetary', etc.

Exemplar response

[The advice given by Lauren's lawyer is incorrect.[1]][Future losses can be compensated by the courts, who are able to assign a predictive monetary value to harms occuring in the future.[2]]

[For example, in the case of *Riverman Orchards Pty Ltd v Hayden,* the plaintiff was awarded a record payout of over $7 million which was to cover the costs associated with the rehabilitation of his land and the future loss of grape sales while this rehabilitation took place.[3]]

7.

- ✓ ✗ I have described one way that a representative proceeding could negatively impact TedRolla.[1]
- ✓ ✗ I have explained this impact in further detail.[2]
- ✓ ✗ I have made reference to the case of *Ash Sounds* to justify this statement.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'class action', 'plaintiff', etc.

Exemplar response

[A representative proceeding could negatively impact TedRolla by increasing the time it takes to resolve the issue.[1]] [Representative proceedings with multiple plaintiffs can be more time consuming and difficult to resolve quickly due to the differing injury and compensation sought by each plaintiff.[2]] [Consider the case of *Ash Sounds Pty Ltd,* which remains in discussions with a large number of plaintiffs many years after the incident first occured.[3]]

Possible points to include

Students could have also referred to the financial impact of a class action:

- The settlements or payouts associated with class actions can be much greater than an individual negligence claim. For example, *Ash Sounds Pty Ltd* has reached a number of out-of-court settlements with multiple plaintiffs.

5C Defamation: The tort & defences

LEVEL 1

1. D **2.** C **3.** B **4.** D

5. A **6.** C

LEVEL 2

7.

- ✓ ✗ I have explained that defamation law protects a person's right to not have their reputation damaged by false statements (or similar).[1]
- ✓ ✗ I have explained this includes personal, professional and business reputations.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reputation', 'right', etc.

Exemplar response

[Defamation law protects a person's right to not have their reputation damaged by false statements.[1]] [This protects personal reputations, professional reputations and business reputations.[2]]

8.

- ✓ ✗ I have described the first element, that the matter conveys defamatory imputations as 'the overall message that is published by the material must lower the plaintiff's reputation' (or similar).[1]
- ✓ ✗ I have explained the matter conveys defamatory imputations in further detail.[2]
- ✓ ✗ I have described the second element, that the matter identifies the plaintiff as the person defamed as 'the published material identifies the plaintiff either explicitly or their identity is implied' (or similar).[3]

- ✓ ✗ I have explained the matter identifies the plaintiff as the person defamed in further detail.[4]
- ✓ ✗ I have described the third element, that the matter was published to a third party as as 'the matter was fully comprehended by at least one person' (or similar).[5]
- ✓ ✗ I have explained the matter was published to a third party in further detail.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'matter', 'imputations', 'ordinary or reasonable person', etc.

Exemplar response

[The first element that must be shown in defamation is that the matter conveys defamatory imputations. This means the overall message that is published by the material must lower the plaintiff's reputation.[1]][This involves determining what meanings the ordinary or reasonable person would give to the matter, and whether these meanings would lower the plaintiff's reputation.[2]][The second element that must be shown is that the matter identifies the plaintiff as the person defamed. The plaintiff must be identifiable from the matter, either expressly or impliedly.[3]][This is determined by whether the ordinary or reasonable person would identify the plaintiff as the subject upon viewing the matter.[4]][The third element that must be shown is that the matter was published to a third party. This requires the matter to be fully comprehended by at least one person.[5]][For matter published online, it must be shown that it was downloaded and comprehended by at least one person.[6]]

9.

- ✓ ✗ I have explained one defence that could be raised in a defamation case.[1]
- ✓ ✗ I have explained one feature of that defence.[2]
- ✓ ✗ I have explained a second feature of that defence.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defence', 'defamation',

Exemplar response

[One defence that could be raised in a defamation case is truth. Truth is a defence that protects the defendant where the matter is actually true. The truth defence has two categories: substantial truth and contextual truth.[1]][Substantial truth may be raised where the matter is true in substance or not materially different from the truth.[2]][Contextual truth may be raised where the imputation does not damage the plaintiff's reputation when read in context with other truthful imputations.[3]]

Possible points to include

Other defences that could be raised include:

- Fair comment - where the defamatory matter was a statement of opinion that was honestly held by the defendant.
- Absolute privilege - where the publication of the defamatory matter is always exempt from defamation law.
- Qualified privilege - where the publication of the defamatory matter was driven by a legal or moral duty.

10.

- ✓ ✗ I have described the limitation of actions that exists in defamation cases as one year.[1]
- ✓ ✗ I have described this in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'limitations of actions', 'restrictions', 'court', etc.

Exemplar response

[There are time restrictions that limit when a claim may be pursued in defamation. Section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic) outlines that a claim in defamation must be brought within one year of the date of publication.[1]][The court may extend this to three years in certain circumstances.[2]]

11.

- ✓ ✗ I have explained one remedy Maple could seek.[1]
- ✓ ✗ I have justified why this remedy could be appropriate for Maple.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'remedy', 'plaintiff', 'defendant', etc.

Exemplar response

[One remedy that Maple could seek is damages. Damages are an award of monetary compensation to the plaintiff, to be paid by the defendant.[1]][Damages could be an appropriate remedy for Maple as it would recognise any non-economic loss she suffered from the status such as humiliation or pain and suffering.[2]]

Possible points to include

Maple could also seek an injunction. Injunctions are court orders compelling a party to do something, or preventing a party from doing something. Maple could either seek a mandatory injunction or a restrictive injunction.

- A mandatory injunction forcing Lewis to post an online status that apologises for the defamatory statement could be appropriate for Maple as it would help fix her reputation.
- A restrictive injunction that prohibits Lewis from posting online statuses about Maple could be appropriate as it ensures that her reputation cannot be further damaged in the future.

LEVEL 3

12.

- ✓ ✗ I have described one defence that Michael could raise against the defamation accusation.[1]
- ✓ ✗ I have explained this defence in further detail.[2]
- ✓ ✗ I have justified why this would be an appropriate defence for Michael.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reputation', 'defence', 'matter', 'imputation', etc.

Exemplar response

[One defence Michael could raise against the accusation of defamation is substantial truth. The truth defence protects a defendant where the matter is substantially true.[1]][A claim in defamation will not be successful where the matter is true because this does not unjustly lower the plaintiff's reputation but instead adjusts it to the appropriate level.[2]][This would be an appropriate defence for Michael to raise as he saw Richard copying from his exam, and Richard's answers matched his own. Therefore, it is likely that Michael's statement was substantially true, making this an appropriate defence to raise.[3]]

Possible points to include

Qualified privilege is another defence that Michael could raise. This defence protects the publication of the defamatory matter where it was driven by a legal or moral duty. This would be an appropriate defence for Michael to raise as he only reported the suspected misconduct to his maths teacher. Michael had an interest to report the suspected academic misconduct and his teacher had an interest in receiving this information.

13.

- ✓ ✗ I have stated whether I think Kelly would be successful in a defamation claim against Graham.[1]
- ✓ ✗ I have explained the first element of defamation - the matter conveys defamatory imputations.[2]
- ✓ ✗ I have justified whether I think Kelly would be able to establish this element.[3]
- ✓ ✗ I have explained the second element of defamation - the matter identifies the plaintiff as the person defamed.[4]
- ✓ ✗ I have justified whether I think Kelly would be able to establish this element.[5]
- ✓ ✗ I have explained the third element of defamation - the matter has been published to a third party.[6]
- ✓ ✗ I have justified whether I think Kelly would be able to establish this element.[7]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'element', 'matter', 'imputation', etc.

Exemplar response

[I think that Kelly would be able to successfully establish the elements of defamation concerning Graham's status.[1]][The first element Kelly would have to prove is that the matter conveys defamatory imputations. This requires that the overall message that is published by the material must lower the plaintiff's reputation.[2]][This element is likely to be satisfied as the status imputes that she is abusive and a bully, both of which would lower her reputation in the eyes of the ordinary or reasonable person.[3]]

[The second element Kelly would have to prove is that the matter identifies her, the plaintiff, as the person defamed.[4]][This element is likely to be satisfied as the status clearly states her full name. In addition, the ordinary or reasonable person would likely identify this specific Kelly as the subject of the matter as she had a long-term relationship with Graham.[5]][The third element Kelly would have to prove is that the matter was published to a third party. This requires the matter to have been comprehended by at least one other person.[6]][This element is likely to be satisfied as the status was seen by Kelly's entire class and had two comments, indicating it was downloaded and comprehended by multiple people.[7]]

14.

- ✓ ✗ I have explained one of the defences raised by Bauer Media.[1]
- ✓ ✗ I have provided one possible reason as to why it was not successful.[2]
- ✓ ✗ I have provided a second possible reason as to why it was not successful.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defence', 'matter', 'publication', etc.

Exemplar response

[One of the defences raised by Bauer Media is qualified privilege. Qualified privilege is a defence that can be raised where the publication of the defamatory matter was driven by a legal or moral duty.[1]][One reason the qualified privilege defence raised by Bauer may have been unsuccessful is that no reciprocal duty of interest existed between them and the world at large. Therefore, they had no legal or moral duty to publish the information.[2]][A second reason why this defence may have been unsuccessful is the publication may have been motivated by malice.[3]]

Possible points to include

Bauer Media also raised the substantial truth defence. Substantial truth can be raised where the defendant claims the matter was true and therefore not defamatory. One reason this defence may have been unsuccessful is that the information published was not substantially true, meaning it was not true in substance or was materially different from the truth. A second reason this defence may have been unsuccessful is that the ordinary or reasonable person would not consider Wilson to be a serial liar who is untrustworthy.

15. a)

- ✓ ✗ I have explained that there are limitations on corporations that are able to bring a case in defmation.[1]
- ✓ ✗ I have explained that Seafolly are not exempt from this limitation and were therefore prohibited from bringing an action in defamation against Madden.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'limitation', 'prohibit', 'exempt', etc.

Exemplar response

[Seafolly was unable to commence an action in defamation because there are restrictions on a corporation's ability to bring an action in defamation. Section 9 of the *Defamation Act 2005* (Vic) prohibits certain corporations from commencing an action in defamation.[1]][As Seafolly are a for-profit organisation who employ more than ten individuals, they would not be exempt from this and were therefore prohibited from bringing an action in defamation against Madden.[2]]

b)

- ✓ ✗ I have explained qualified privilege as 'a defence that can be raised where the publication of the defamatory matter was driven by a legal or moral duty' (or similar).[1]
- ✓ ✗ I have explained how self-defence applies to the defence of qualified privelege.[2]
- ✓ ✗ I have explained in further detail what the defendant must prove.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'reputation', 'right', etc.

Exemplar response

[Qualified privilege is a defence that can be raised where the publication of the defamatory matter was driven by a legal or moral duty.[1]][Qualified privilege also applies to self-defence and protects the defendant from statements to the public when they have a duty to protect their reputation and the receiver will have an interest in receiving this information.[2]][In order for self-defence to be shown, the defendant must prove that the comments were made in response to an attack on the defendant's reputation, the defendant's response related to the initial attack and the response was made in order to protect the defendant's reputation.[3]]

5D Defamation: Impact

LEVEL 1

1. C **2.** C **3.** A

LEVEL 2

4.

- ✓ ✗ I have identified the position of NewsCorp regarding the potential danger to freedom of speech.[1]
- ✓ ✗ I have referred to the case study to support this conclusion.[2]
- ✓ ✗ I have used key legal studies terminology effectively, such as 'defamation', 'trial', etc.

Exemplar response

[NewsCorp have argued the decision of Justice Wigley could harm freedom of speech.[1]][They described the decision as potentially having 'a chilling effect on future reporting' surrounding the 'me too' movement.[2]]

5. a)

- ✓ ✗ I have explained how defamation can cause reputational damage to a plaintiff – by harming their public image.[1]
- ✓ ✗ I have referred to the case of TSFX to demonstrate this point.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defendant', 'defamatory statement', etc.

Exemplar response

[When a defamatory statement is made, a plaintiff has suffered some degree of damage to their public image, reputation and character.[1]][For example, in the case of TSFX, the court heard that there have been derogatory and abusive posts made in regards to the plaintiff's business and that the defendant was in effect provoking a campaign of harassment against the plaintiff.[2]]

b)

- ✓ ✗ I have explained how defamation can cause reputational damage to a defendant – by harming their credibility.[1]
- ✓ ✗ I have referred to a specific case of NewsCorp defending a defamation claim to demonstrate this point.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'legitimacy', 'credibility', etc.

Exemplar response

[Following the publication of defamatory information, the credibility and accuracy of the defendant's information may be questioned in the future.[1]][For example, NewsCorp have recently faced high profile defamation cases involving Daniel Johns and Geoffrey Rush, which could damage the believability of their future reporting.[2]]

LEVEL 3

6.

- ✓ ✗ I have identified what is meant by defamation law being 'a threat to freedom of speech'.[1]
- ✓ ✗ I have described this point in further detail.[2]
- ✓ ✗ I have used an example to support this statement.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'enforcement', etc.

Exemplar response

[Defamation laws in Australia serve to protect the plaintiff's reputation, and therefore may have a potential side-effect of impacting on free-speech, especially in the media.[1]][That is, the strict enforcement of defamation laws can limit the readiness of people to come forward and report controversial allegations.[2]][For example, in the case of Geoffrey Rush and NewsCorp, the judge decided in favour of Rush, which NewsCorp argues could have a negative effect on future reporting of instances of inappropriate behaviour towards women in the workplace.[3]]

Possible points to include

Another example that students may use is *The School for Excellence:*

- Facebook is often seen as a place to discuss opinions and air grievances. However, in recent times and through defamation cases such as this, this function of Facebook has been called into question. Pages that disseminate unsavoury material about a business, and call for 'discussions' of a similar nature from their followers, may well be in breach of defamation law. It could be argued this harms the freedom of speech within online platforms like Facebook.

5E Misleading or deceptive conduct: Claims & defences

LEVEL 1

1. D **2.** C **3.** A **4.** B

5. A **6.** B

LEVEL 2

7. ✓ ✗ I have described that s. 18 of the *ACL* protects consumers from being misled or deceived by businesses when engaging in commercial transactions.[1]

✓ ✗ I have explained one way this right is upheld for Victorians.[2]

✓ ✗ I have explained a second way this right is upheld for Victorians.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'right', '*ACL*', etc.

Exemplar response

[Section 18 of the *Australian Consumer Law* (*ACL*) protects consumers from being misled or deceived by corporations when engaging in commercial transactions.[1]][This right applies to Victorians as a result of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic), and a consumer who has been misled can take action to recover damages in VCAT.[2]][The Australian Competition and Consumer Commission (ACCC) is the national regulator for misleading or deceptive conduct claims and may commence a claim in this area to penalise misleading or deceptive conduct by businesses in Victoria.[3]]

8. ✓ ✗ I have identified one of the ways 'conduct' may be challenged.[1]

✓ ✗ I have described this way to challenge the 'conduct' element in further detail.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'element', 'challenged', etc.

Exemplar response

[One way the element 'conduct' may be challenged is through claiming the plaintiff acted on an 'erroneous assumption'.[1]][The defendant may argue that the error was caused by a mistake by the plaintiff drawing an incorrect conclusion about a product, rather than the conduct of the defendant misleading them about the product.[2]]

Possible points to include

The other way the 'conduct' element may be challenged is by 'confusion'. The defendant may argue that the ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.

9. **a)**

- ✓ ✗ I have described limitation of actions as 'the time restrictions placed on individuals who wish to commence legal action' (or similar).[1]
- ✓ ✗ I have explained that a person who wants to pursue a claim for misleading or deceptive conduct must do so within six years of the cause of action.[2]
- ✓ ✗ I have explained that Nickie would be able to pursue a claim for misleading or deceptive conduct as the cause of action was two years ago.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'cause of action', 'claim', etc.

Exemplar response

[Limitation of actions are the time restrictions placed on individuals who wish to commence legal action.[1]][A person who wants to pursue a claim for misleading or deceptive conduct must do so within six years of the cause of action.[2]][As the cause of action for Nickie was two years ago, she would be able to pursue a claim for misleading or deceptive conduct.[3]]

b)

- ✓ ✗ I have stated this defence is not likely to succeed.[1]
- ✓ ✗ I have defined the defence of puffery as 'a statement that has a high level of generality, is indefinite and exaggerated' (or similar).[2]
- ✓ ✗ I have linked the facts in this case to this definition of puffery to conclude that it was not puffery, but was instead definitive.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'puffery', 'claim', etc.

Exemplar response

[This defence would likely not succeed.[1]][One way to challenge whether conduct is misleading is to argue it is puffery, which is a statement that has a high level of generality, is indefinite and exaggerated,[2]][however this statement that the device's impact on reading is supported by university research is not likely to be seen as exaggerated and too general, rather it is a definitive statement that misled consumers like Nickie into error.[3]]

10.

- ✓ ✗ I have described the element of engaged in conduct as 'doing an act or omitting to do an act' (or similar).[1]
- ✓ ✗ I have described 'engaged in conduct' in further detail.[2]
- ✓ ✗ I have described the element of misleading or deceptive or likely to mislead or deceive as 'where the conduct conveys a meaning which is likely to lead the ordinary or reasonable member of the target audience into error' (or similar).[3]
- ✓ ✗ I have described 'misleading or deceptive or likely to mislead or deceive' in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: '*ACL*', 'target audience', etc.

Exemplar response

[One of the other elements of misleading or deceptive conduct under s. 18 of the *ACL* is 'engaged in conduct'. This element refers to doing an act or omitting to do an act.[1]][This element is concerned with whether there is a causal relationship between the conduct of the defendant and the error or loss suffered by the plaintiff, and often requires the plaintiff to show they relied on the statements of the defendant in some way when making a purchase.[2]][The fourth element of misleading or deceptive conduct under s. 18 of the *ACL* is proving the conduct was 'misleading or deceptive or likely to mislead or deceive'. Conduct will be misleading or deceptive where it conveys a meaning which is likely to lead the ordinary or reasonable member of the target audience into error.[3]][The target audience is the intended group of consumers to which the conduct is directed.[4]]

LEVEL 3

11.

- ✓ ✗ I have described a person as 'the individual or organisation that allegedly engaged in misleading or deceptive conduct' (or similar).[1]
- ✓ ✗ I have explained that in practice this generally refers to corporations.[2]
- ✓ ✗ I have explained that Bikerz Pty Ltd is a trading corporation and therefore satisfies this element.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Australian Consumer Law', etc.

Exemplar response

[A 'person' under s. 18 of the *Australian Consumer Law* (*ACL*) is the individual or organisation that allegedly engaged in misleading or deceptive conduct.[1]][In practice, a 'person' will generally refer to a corporation.[2]][Therefore, despite not being an actual person, Bikerz Pty Ltd would still satisfy the definition of a 'person' for s. 18 of the *ACL*.[3]]

12.

- ✓ ✗ I have explained the trade or commerce element as 'conduct that occurs during a commercial dealing or transaction' (or similar).[1]
- ✓ ✗ I have stated whether I think Sally's conduct occurred in trade or commerce.[2]
- ✓ ✗ I have justified my response, linking the facts of this case to the definition of the element.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Australian Consumer Law', 'a person', 'trade or commerce', etc.

Exemplar response

['Trade or commerce' refers to conduct that occurs during a commercial dealing or transaction.[1]][It is unlikely that Sally's conduct occurred in trade or commerce[2]][as the status was posted about Marcus following a personal dispute. The status has no commercial context (for example, it's not like the Facebook post in the *Seafolly* dispute, which was a post about a rival competitor) and was not part of a transaction, so Sally's conduct would unlikely be considered as happening 'in trade or commerce'.[3]]

13.

- ✓ ✗ I have explained limitation of actions as 'the time restrictions placed on individuals who wish to commence legal action'.[1]
- ✓ ✗ I have explained that a person must bring a claim for misleading or deceptive conduct within six years of the cause of action.[2]
- ✓ ✗ I have concluded that Maddison would not be able to bring a claim for misleading or deceptive conduct as the cause of action arose eight years ago.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'claim', 'limitation of actions', etc.

Exemplar response

[Limitation of actions are the time restrictions placed on individuals who wish to commence legal action.[1]][A person must pursue a claim for misleading or deceptive conduct within six years of the cause of action. The cause of action for misleading or deceptive conduct arises on the date that the alleged conduct occurred.[2]][Maddison would therefore be unable to bring a claim for misleading or deceptive conduct as the cause of action arose eight years ago, which exceeded the six year time restriction.[3]]

14.

- ✓ ✗ I have stated whether I think Tech Lovers Pty Ltd's conduct was misleading or deceptive or likely to mislead or deceive.[1]
- ✓ ✗ I have described one way to challenge the misleading or deceptive conduct element.[2]
- ✓ ✗ I have linked this way to challenge the element to the facts of this dispute.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'target audience', 'puffery, etc.

5E

Exemplar response

[I do not think that Tech Lovers Pty Ltd's conduct would be misleading or deceptive or likely to mislead or deceive.[1]][One way to challenge whether conduct is misleading is to argue it is puffery, which is a statement that has a high level of generality, is indefinite and exaggerated,[2]][and this statement that the television is 'the best in Australia' is likely to be seen as exaggerated and too general, rather than a definitive statement misleading consumers into error.[3]]

Possible points to include

The defendant could challenge the misleading and deceptive conduct element with reference to the target audience:

- The advertisement was online and directed at a cross-section of the community; this target audience is not careless or gullible and is of average intelligence.
- Therefore, it is unlikely that a statement such as 'best televisions in Australia' would mislead or deceive this target audience into error.

5F Misleading or deceptive conduct: Impact

LEVEL 1

1. D **2.** C **3.** A

LEVEL 2

4.

✓ ✗	I have identified that the likely impact of a case of misleading or deceptive conduct on a plaintiff will be some form of financial loss.[1]
✓ ✗	I have made direct reference to the case of *Selig v Wealthsure* as an example to support my answer.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'misleading representation', etc.

Exemplar response

[Cases of misleading and deceptive conduct will often cause some form of financial loss for the plaintiff/s involved.[1]][For example, in the case of *Selig v Wealthsure,* the Seligs lost a significant financial investment based on misleading representations from their financial advisors.[2]]

5.

✓ ✗	I have identified one likely consequence for a defendant – financial loss.[1]
✓ ✗	I have described this impact in further detail.[2]
✓ ✗	I have identified a second likely consequence for a defendant – reputational damage.[3]
✓ ✗	I have described this impact in further detail.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'misleading representation', etc.

Exemplar response

[One effect of being a defendant found liable for misleading a consumer will be financial loss.[1]][These financial consequences will be driven by the remedy to the plaintiff that may include damages and a refund of the purchase price of the goods or services involved, and the need to meet their own legal expenses and probably the legal costs of the plaintiff.[2]][A second consequence is reputational damage.[3]][A business that is found to regularly mislead consumers or is subject to negative publicity following a misleading conduct finding may be less-trusted by consumers and other firms, damaging the business' long-term health.[4]]

LEVEL 3

6.

- ✓ ✗ I have stated that it is unlikely that Instantconnect will be held liable for the advert.[1]
- ✓ ✗ I have made reference to the decision in *Google v ACCC* to support my conclusion.[2]
- ✓ ✗ I have linked to the facts in the scenario to support my contention.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'liable', 'conduit', etc.

Exemplar response

[It is unlikely that Instantconnect will be held to be liable for the advert.[1]][This is based on the decision of the High Court in the case of *Google v ACCC,* which held that online advertisers that host other firms' advertising will not be held liable for misleading and deceptive conduct carried out by those businesses utilising their services.[2]][As Instantconnect are acting as a mere conduit for advertisers to present information, as well as making it clear that they do not fact-check adverts for accuracy, it is unlikely that a court will find them liable for a misleading or deceptive representation in this case.[3]]

6A Sanctions – Principles of justice

LEVEL 1

1. B **2.** A **3.** C

LEVEL 2

4.

- ✓ ✗ I have described fairness as 'ensuring equitable legal processes are in place, and all parties receive an unbiased hearing' (or similar).[1]
- ✓ ✗ I have provided one example of how fairness is upheld in criminal matters.[2]
- ✓ ✗ I have been careful not to re-use the word 'fair' in my definition.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', 'parties', etc.

Exemplar response

[Fairness is defined as ensuring equitable legal processes are in place, and all parties receive an unbiased hearing.[1]] [One example of how fairness is upheld in criminal matters is that decision-makers such as magistrates are independent and unbiased.[2]]

Possible points to include

Other examples of how fairness is upheld through criminal proceedings in Victoria include:

- Offenders are sentenced with minimal delay.
- Offences have maximum sentences to ensure offenders are not unfairly punished.
- Accused persons having their personal characteristics taken into account in sentencing (such as younger age).

5.

- ✓ ✗ I have described equality as 'ensuring all people are treated the same before the law, with an equivalent opportunity to present their case' (or similar).[1]
- ✓ ✗ I have provided one example of how equality is upheld in criminal matters.[2]
- ✓ ✗ I have been careful not to re-use the word 'equal' in my definition.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sanctions', 'offences', etc.

Exemplar response

[Equality is defined as ensuring all people are treated the same before the law, with an equivalent opportunity to present their case.[1]] [One example of how equality is upheld in the criminal justice system is that all members of the community are subject to the standards of behaviour set by the criminal law.[2]]

Possible points to include

Other examples of how equality is upheld through criminal proceedings in Victoria include:

- All accused persons receive a sanction that is not influenced by personal characteristics such as language background, ethnicity or religion.
- All victims of crime are able to remain informed about proceedings and contribute to the sentencing process.

6.

- ✓ ✗ I have defined access as 'ensuring individuals in society have an understanding of legal rights and the ability to pursue their case' (or similar).[1]
- ✓ ✗ I have provided one example of how access is upheld in criminal matters.[2]
- ✓ ✗ I have been careful not to re-use the word 'access' in my definition.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', etc.

Exemplar response

[Access is defined as ensuring individuals in society have an understanding of legal rights and the ability to pursue their case.[1]]
[One example of how access is upheld in criminal matters is that individuals who are found guilty know whether they have the right to appeal the sanction imposed.[2]]

Possible points to include

Other examples of how access is upheld through criminal proceedings in Victoria include:

- Understanding the criminal law and legal defences an accused person is able to present.
- Victims of crime understanding their legal entitlements (in presenting evidence, informing sentencing, etc).
- Individuals are able to engage with services to support those in the court system.

6B Institutions enforcing criminal law

LEVEL 1

1. B **2.** D **3.** A

LEVEL 2

4. ✓ ✗ I have explained that Victoria Police's responsibility to prevent crime refers to 'discouraging criminals from engaging in criminal behaviour so that society is protected from harm' (or similar).[1]

✓ ✗ I have provided one example of how police might try to prevent crime.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'deterring', 'crime', etc.

Exemplar response

[Victoria Police has the responsibility to prevent crime. This means deterring individuals from engaging in criminal behaviour, so society is protected from harm.[1]][For example, one way police might try to prevent crime is through concentrating a visible police presence in areas where crime is more likely to occur.[2]]

Possible points to include

Another example of how police might work to prevent crime is through educating society. This is known as 'proactive crime prevention', and is achieved through educating the community on the dangers of criminal behaviour and the consequences involved in breaking the law.

5. ✓ ✗ I have explained the reason for protecting individual rights by referring to the balance of police powers with the personal rights of individuals.[1]

✓ ✗ I have identified an example of an individual right.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'self-incrimination', 'abuses of power', etc.

Exemplar response

[The criminal justice system establishes individual rights when engaging with police in order to balance police officers' significant powers with the personal rights of individuals in a free and democratic society, and protect against possible abuses of power.[1]]
[One example of an individual rights is the right to remain silent, which safeguards against the possibility of self-incrimination and balances against the police power to question individuals.[2]]

Possible points to include

Other examples of individual rights include (but are not limited to):

- Right to be informed of the charge.
- Right to request officer's name and other details.

- Right to legal representation.
- Right to have an interpreter present.
- Right to read any written statements taken by police during questioning.

6C Institutional powers v individual rights

LEVEL 1

1. A **2.** D **3.** B **4.** A

LEVEL 2

5.

✓ ✗	I have described one police power.[1]
✓ ✗	I have explained one corresponding individual right.[2]
✓ ✗	I have explained why this individual right balances against this police power.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'power', 'alleged', 'offender', etc.

Exemplar response

[One police power is the right to question the alleged offender who is in custody. This gives the police the ability to ask a suspect in custody questions that can be used as evidence in a trial.[1]][One corresponding individual right is that an accused person does not have to answer any questions, other than providing their name and address.[2]][This individual right balances against the police power as individuals may be intimidated by police and cannot be forced to answer questions that may result in self-incrimination.[3]]

Possible points to include

Students should ensure a logical pair of police powers and individual rights are matched.

Other possible police powers include (but are not limited to):

- Police have the right to arrest a suspect if they have a warrant.
- Police also have the right to arrest a suspect without a warrant if they have grounds to reasonably believe that person has committed a criminal offence, is a danger to themselves and society and to make sure they attend court.

Other possible individual rights include (but are not limited to):

- Minors are afforded the mandatory requirement to have a parent or guardian present during questioning.
- The right to contact a friend or legal representative when in custody.
- The right to meet with a lawyer in private.
- The right to have their case brought to the court in a timely manner.

6.

✓ ✗	I have identified one right individuals have during court proceedings.[1]
✓ ✗	I have explained this right in more detail.[2]
✓ ✗	I have identified a second right individuals have during court proceedings.[3]
✓ ✗	I have explained this right in more detail.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'accused', 'trial', etc.

Exemplar response

[One right individuals have during court proceedings is to have a bail hearing.[1]][A bail hearing gives the accused a chance to await trial in the community as opposed to being held in remand.[2]]

[A second right individuals have during court proceedings is the right to have their trial heard by an impartial third-party.[3]][This ensures that the outcome is based on facts rather than any bias that could exist.[4]]

Possible points to include

Other individual rights during court proceedings include (but are not limited to):

- The right to have a trial heard by an impartial jury for indictable offences.
- The right to have fair and consistent rules of evidence and procedure.
- The presumption of innocence.
- The right to have legal representation (and if they are unable to afford it, he or she can apply for assistance from Legal Aid).
- The right to an interpreter (if needed).

LEVEL 3

7.

- ✓ ✗ I have explained the balance between individual rights and institutional powers.[1]
- ✓ ✗ I have explained one right that police have.[2]
- ✓ ✗ I have explained a corresponding right that Felix has.[3]
- ✓ ✗ I have explained a second right that police have.[4]
- ✓ ✗ I have explained a corresponding right that Felix has.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'suspect', 'evidence', 'custody', etc.

Exemplar response

[Individual rights and institutional powers are balanced in a way that enables justice to be carried out without infringing on the rights of individuals, such as Felix.[1]][One right that police have is the right to question a suspect in custody in order to obtain evidence that can be used during trial.[2]][To balance this, Felix has the right to not answer any questions (other than his name and address). This ensures that Felix is not pressured into incriminating himself during police questioning.[3]]

[A second right police have is the right to arrest a suspect with a warrant, which has occured in Felix's case.[4]][To balance this, Felix is afforded a number of rights after being arrested, including having the right to contact a legal representative in private while in custody. This gives Felix the best opportunity to prepare for any legal proceedings that may follow his arrest.[5]]

Possible points to include

Other possible police powers include (but are not limited to):

- Police have the right to obtain a person's name and address if they are driving a motor vehicle or if they believe the person is a witness to or involved in a criminal offence.
- Police also have the right to arrest a suspect without a warrant if they have grounds to reasonably believe that person has committed a criminal offence, is a danger to themselves and society, or if there is a risk that they may not attend court.

Other possible individual rights Felix has include (but are not limited to):

- Minors are afforded the mandatory requirement to have a parent or guardian present during questioning. This is relevant if Felix is a child.
- The right to contact a friend or legal representative when in custody.
- The right to have their case brought to the court in a timely manner.

8.

- ✓ ✗ I have identified one individual right that was not upheld.[1]
- ✓ ✗ I have explained how this right should have been upheld.[2]
- ✓ ✗ I have identified the second individual right that was not upheld.[3]
- ✓ ✗ I have explained how this right should have been upheld.[4]

- ✓ ✗ I have identified the court's power that was not upheld.[5]
- ✓ ✗ I have explained how this right should have been upheld.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'rights', 'powers', 'courts', etc.

Exemplar response

[The first individual right that Aston was not given is his right to an impartial third-party, as the judge in Aston's case is his ex-girlfriend who is likely to have biases.[1]][Instead, the judge should be an individual with no affiliation to Aston to uphold this right.[2]][The second individual right that Aston was not given is his right to an impartial jury for indictable offences. As Aston's trial is for an indictable offence and he has been refused a jury, this individual right was not upheld.[3]][Despite the claim that there are insufficient funds to empanel a jury, this must be provided to every individual standing trial for an indictable offence.[4]][The court's power that was not upheld was that the prosecution cannot provide witnesses for the case.[5]][In the trial process, the prosecution has the right to present evidence by examining witnesses.[6]]

6D Criminal jurisdictions of Victorian courts

LEVEL 1

1. C **2.** A **3.** D **4.** B

LEVEL 2

5. ✓ ✗ I have defined the term original jurisdiction as 'the power or authority given to a court to hear particular cases in the first instance' (or similar).[1]

- ✓ ✗ I have described the original criminal jurisdiction of the County Court.[2]
- ✓ ✗ I have included an example of an offence tried in the County Court's original jurisdiction.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'indictable', 'authority', etc.

Exemplar response

[The term 'original jurisdiction' refers to the power or authority given to a court to hear particular cases in the first instance.[1]]
[The County Court has original criminal jurisdiction to hear all indictable offences, except those very serious cases that are reserved for the Supreme Court.[2]][For example, the County Court tries manslaughter cases in its original jurisdiction.[3]]

Possible points to include

Other possible examples of indictable offences tried in the County Court include:

- Arson
- Culpable driving
- Armed robbery

6. ✓ ✗ I have identified the Magistrates' Court as the court in which this case would have been heard.[1]

- ✓ ✗ I have justified my answer by explaining this case is within the original jurisdiction of the Magistrates' Court.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'summary', 'jurisdiction', etc.

Exemplar response

[This case would most likely have been heard in the Magistrates' Court.[1]][Shoplifting is a summary offence and therefore comes under the original criminal jurisdiction of the Magistrates' Court, which has the authority to hear all summary offences.[2]]

LEVEL 3

7.

- ✓ ✗ I have identified one other reason for a court hierarchy.[1]
- ✓ ✗ I have described this reason for a court hierarchy.[2]
- ✓ ✗ I have explained this reason in relation to Nick's case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'specialisation', 'jurisdiction', 'expertise', etc.

Exemplar response

[One other reason for a court hierarchy in this case is specialisation.[1]][Specialisation refers to the expertise of each of the courts in hearing certain types of cases. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction, which is a set of criminal offences that each court hears regularly.[2]][For example, the judge in Nick's case at the Supreme Court - Trial Division will have extensive experience dealing with serious indictable offences, including charges of murder like in Nick's case. This promotes fairness in Nick's case as it ensures that his case will be conducted by an experienced legal professional.[3]]

Possible points to include

Students may also have discussed administrative convenience as another possible reason for a court hierarchy in this case:

- Arranging the courts in a hierarchy allows for summary offences to be heard by lower courts, while more serious and complex matters can be heard in higher courts.
- This would benefit Nick, who is charged with murder, as his case is a serious indictable offence that is likely to be time-consuming. Rather than having his case heard in a court where there might be a backlog of cases, Nick is able to avoid delays and have his case heard in the Supreme Court - Trial Division, which is not 'clogged' up' by also hearing lots of minor criminal cases.
- This allows for Nick's case to be heard as quickly as possible and promotes better access to an efficient administration of justice.

8.

- ✓ ✗ I have identified the court in which Duncan's appeal is likely to be heard.[1]
- ✓ ✗ I have outlined the criminal appellate jurisdiction of the County Court.[2]
- ✓ ✗ I have linked my answer to Duncan's case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'conviction', 'sentence', etc.

Exemplar response

[Duncan's appeal is likely to be heard in the County Court.[1]][The County Court has appellate jurisdiction to hear criminal appeals from the Magistrates' Court against either a conviction or a sentence,[2]][meaning that Duncan's appeal against his conviction will go to the County Court.[3]]

9.

- ✓ ✗ I have identified one error in the above scenario.[1]
- ✓ ✗ I have explained the correct process which should have occured.[2]
- ✓ ✗ I have identified a second error in the above scenario.[3]
- ✓ ✗ I have explained the correct process which should have occured.[4]
- ✓ ✗ I have identified a third error in the above scenario.[5]
- ✓ ✗ I have explained the correct process which should have occured.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'appeal', 'offender', etc.

Exemplar response

[One error in the above scenario is that Corey's case went directly to the Supreme Court to begin the trial.[1]][As Corey was charged with murder (an indictable offence), his case would usually first go to the Magistrates' Court for a committal hearing rather than proceeding straight to the Supreme Court. It is the committal hearing which will then determine whether the case should progress to trial in the Supreme Court.[2]][A second error in the above scenario is that a magistrate presided over his trial in the Supreme Court.[3]][A magistrate does not preside over proceedings that take place in the Supreme Court, instead a Supreme Court justice conducts criminal cases in this court.[4]][A third error in the above scenario is that Corey was able to exercise his automatic right to appeal.[5]][An appeal to the Court of Appeal is not automatic. An offender must first receive leave (consent) from the Court of Appeal before having their appeal heard.[6]]

Possible points to include

Another error in the scenario was that the judge found Corey guilty. Instead, a jury is used to deliver a guilty verdict in Supreme Court cases.

10. a)

✓ ✗	I have stated that the original decision is most likely to have been made in the County Court.[1]
✓ ✗	I have justified my answer by explaining that because Davies 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 most likely have been made in the County Court.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'indictable', 'original criminal jurisdiction', etc.

Exemplar response

[The court in which this case is most likely to have been heard originally is the County Court of Victoria.[1]][As Davies was convicted of arson, an indictable offence not reserved for the Supreme Court (such as murder or treason), the original decision would likely have been made in the County Court within its original criminal jurisdiction.[2]]

Possible points to include

Other possible courts that may have heard this case in the first instance:

- As stated, it is most likely that the trial was conducted in the County Court. However the Supreme Court (Trial Division) does have unlimited criminal jurisdiction and therefore could have conducted this trial as well.
- The appeal being heard in the Court of Appeal confirms that the original sentence was imposed in either 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 Court or the Supreme Court.

b)

✓ ✗	I have identified one other reason for having a court hierarchy.[1]
✓ ✗	I have described how a court hierarchy facilitates this reason.[2]
✓ ✗	I have explained how this reason for having a court hierarchy could have benefited Davies.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'indictable', 'original criminal jurisdiction', etc.

Exemplar response

[One other reason for having a court hierarchy is for administrative convenience.[1]][Having the courts arranged in a hierarchy allows for summary offences to be heard by lower courts, leaving the higher courts more time and resources to resolve more serious and complex cases.[2]][In this case, Davies was able to have his indictable offence of arson tried in the County Court, avoiding a backlog of more minor cases, allowing for the administration of justice to be as efficient as possible.[3]]

Possible points to include

Other possible reasons for the court hierarchy:

- Another reason for a court hierarchy that could have been mentioned is specialisation. Having a court hierarchy that separates courts based on the types of matters they usually hear allows for each court to develop a level of expertise when it comes to deciding on those particular matters.
- This would have benefited Davies in that having his case tried in the County Court, the presiding judge would have been familiar with the law regarding arson, promoting fairness in the provision of justice by ensuring that his case was conducted by an experienced legal professional.

LEVEL 4

11.

- ✓ ✗ I have stated the extent to which I agree with the statement.[1]
- ✓ ✗ I have identified one way the court hierarchy promotes fairness.[2]
- ✓ ✗ I have described this strength of the court hierarchy in further detail.[3]
- ✓ ✗ I have signposted my response by using a distinguishing word such as: 'however', 'on the other hand' etc. to show I am discussing 'both sides'.[4]
- ✓ ✗ I have identified one way the court hierarchy might not promote fairness.[5]
- ✓ ✗ I have described this weakness of the court hierarchy in detail.[6]
- ✓ ✗ I have identified a second way the court hierarchy promotes fairness.[7]
- ✓ ✗ I have described this strength in further detail.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'specialisation', 'appeals', etc.

Exemplar response

[I agree to a large extent that the existence of a court hierarchy promotes the principle of fairness.[1]][One way in which the hierarchy promotes fairness is by allowing appeals.[2]][The court hierarchy promotes justice by enabling superior courts to review the decisions of lower courts. This appeals process allows for mistakes to be corrected, which is fair.[3]]

[On the other hand,[4]][although the court hierarchy allows for appeals this may not be accessible to all offenders[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 to prepare and present an appeal, limiting their ability to have mistakes corrected. In such cases the hierarchy does not deliver fairness for these offenders.[6]][Another way in which the court hierarchy provides for fairness in the criminal justice system is because it delivers specialisation.[7]][The specialisation developed by judges within different courts in the court hierarchy allows for cases to be presided over by skilled and knowledgeable judges who are able to ensure a just and timely outcome for the parties involved.[8]]

12.

- ✓ ✗ I have stated whether I agree with the contention.[1]
- ✓ ✗ I have identified the first reason for my contention.[2]
- ✓ ✗ I have described this reason in further detail, linking it to the principles of justice.[3]
- ✓ ✗ I have identified a second reason for my contention.[4]
- ✓ ✗ I have described this reason in further detail, linking it to the principles of justice.[5]
- ✓ ✗ I have identified a third reason for my contention.[6]
- ✓ ✗ I have described this reason in further detail, linking it to the principles of justice.[7]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'specialisation', 'appeals', etc.

Exemplar response

[I disagree entirely with this statement, and believe that the effective operation of our criminal justice system relies greatly on the organisation of the courts into a court hierarchy.[1]][Firstly, the court hierarchy facilitates the system of appeals, meaning that decisions made by lower courts may be reviewed by superior courts in the hierarchy.[2]][This promotes fairness for all parties by ensuring that any errors in the application of the law are corrected. This could not operate if there was only one court.[3]]

[Secondly, the court hierarchy allows for specialisation, meaning that each of the different courts is able to specialise and gain expertise in particular criminal disputes.[4]][This promotes fairness in our criminal justice system by ensuring that cases are heard by legal professionals with expertise in the relevant areas, and would not be possible without the existence of a court hierarchy within which each court has its own jurisdiction.[5]]

[The last reason I disagree and think the hierarchy is necessary is that it allows for administrative convenience, meaning that summary offences and minor matters can be heard by lower courts in the hierarchy, while more serious and complex matters can be heard in the higher courts.[6]][This promotes access by avoiding delays in the processing of criminal cases. Without a court hierarchy, all cases would proceed to the same court and potentially cause a major backlog of cases, with complex and serious cases held up due to judges also having to resolve minor disputes.[7]]

Possible points to include

Students could have responded differently to the prompt. For example, students may have decided to:

- Agree with the statement 'to some extent' and describe reasons that include both strengths and weaknesses of the court hierarchy.

6E Role of the jury in a criminal trial

LEVEL 1

1. D	**2.** D	**3.** C	**4.** A
5. A	**6.** B	**7.** D	**8.** A

LEVEL 2

9.

✓ ✗	I have identified one responsibility of a jury in a criminal trial.[1]
✓ ✗	I have described this responsibility in further detail.[2]
✓ ✗	I have identified a second responsibility of a jury in a criminal trial.[3]
✓ ✗	I have described this responsibility in further detail.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'unbiased', 'evidence', 'submissions' etc.

Exemplar response

[One responsibility of the jury in a criminal trial is to be objective and unbiased when reaching decisions.[1]][This involves disregarding media reports and personal assumptions and relying only on the evidence presented during the trial.[2]][A second responsibility of the jury in a criminal trial is to listen attentively to all the evidence presented during the trial.[3]][This includes all submissions from both parties and any directions given to them by the judge.[4]]

Possible points to include

Other possible responsibilities of a jury in a criminal trial include:

- Selecting a foreperson to communicate on behalf of the jury.
- To determine whether the accused is guilty beyond reasonable doubt. Jurors who hold a reasonable doubt are required to deliver a verdict of 'not guilty'.

10.

✓ ✗	I have described one reason why someone may be deemed ineligible for jury service.[1]
✓ ✗	I have provided an example.[2]
✓ ✗	I have described a second reason why someone may be deemed ineligible for jury service.[3]
✓ ✗	I have provided an example.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'juror', etc.

Exemplar response

[One reason why someone may be deemed ineligible for jury service is that they work in the legal system or have done so in the previous 10 years.[1]][An example of this would be a police officer.[2]][A second reason why someone may be deemed ineligible is if they could have difficulty performing the necessary tasks of a juror due to personal reasons.[3]][An example of this would be someone who doesn't speak or understand English.[4]]

11.

- ✓ ✗ I have described a peremptory challenge as being exercisable only by the accused.[1]
- ✓ ✗ I have described a peremptory challenge as not requiring a reason.[2]
- ✓ ✗ I have used a linking word or phrase such as 'however' or 'on the other hand' to distinguish.[3]
- ✓ ✗ I have described a challenge for cause as being exercisable by both the accused and the prosecution.[4]
- ✓ ✗ I have described a challenge for cause as requiring a valid reason to exclude the person from the jury.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'jurors', 'prosecution', etc.

Exemplar response

[A peremptory challenge is a challenge exercisable by the accused party only.[1]][When exercising a peremptory challenge the accused does not need to provide a reason for the removal of the potential juror.[2]][On the other hand,[3]][a challenge for cause is exercisable by both the accused and the prosecution.[4]][Furthermore, in a challenge for cause the parties must provide a valid reason to have that person excluded from the jury.[5]]

Possible points to include

Other possible differences include:

- Parties have unlimited challenges for cause, whereas the law places a limit on how many peremptory challenges an accused is permitted.

12.

- ✓ ✗ I have identified one other strength of the role of the jury in a criminal trial.[1]
- ✓ ✗ I have described this strength in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'justice', etc.

Exemplar response

[One other strength of the role of the jury in a criminal trial is that it allows for community involvement in the criminal justice system.[1]][This is a strength because it increases the confidence that society has in its legal system and ensures that decisions will better reflect the values of the wider community.[2]]

Possible points to include

Other possible strengths of having a jury include:

- 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 the accused can understand the process being used against them, which promotes access to justice (by improving understanding of the legal process).
- Democratic – Trial by peers protects democracy by ensuring decisions are based on the facts and the law and not politically-motivated, which is fair.
- Used in all indictable offences – All accused persons charged with an indictable offence who have pleaded not guilty will have the same opportunity for their case to be heard and determined by a jury at the state's expense, ensuring equal access to jury trials.

LEVEL 3

13.

- ✓ ✗ I have identified one error in the scenario.[1]
- ✓ ✗ I have explained the correct process that should have occurred.[2]
- ✓ ✗ I have identified a second error in the scenario.[3]
- ✓ ✗ I have explained the correct process that should have occcurred.[4]
- ✓ ✗ I have identified a third error in the scenario.[5]
- ✓ ✗ I have explained the correct process that should have occurred.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'ineligible', 'excused', 'impartial' etc.

Exemplar response

[One error in this scenario is that the judge elected the foreperson of the jury.[1]][Electing a foreperson to communicate on behalf of the jury is a responsibility of the jury themselves, and not the responsibility of the judge.[2]][A second error in this scenario was the presence of Scott as a juror.[3]][Scott is a lawyer by profession and is therefore ineligible for jury service pursuant to Schedule 2 of the *Juries Act 2000*.[4]][A third error in this scenario was that one of the jurors knew Nicholas' wife.[5]][This juror should have asked to be excused from the jury once they became aware of the identity of the accused, and should have notified the court as to a potential problem with their ability to make an impartial decision.[6]]

Possible points to include

Another error that could be identified is that the jury sentenced Nicholas. The jury's role is to determine the guilt of the accused, and does not extend to deciding on a sentence. Instead, a sentence will be handed down by the judge if the accused is found guilty by the jury.

14.

- ✓ ✗ I have identified that Jason will not receive a summons for jury service.[1]
- ✓ ✗ I have stated that Jason is ineligible for jury service due to his occupation.[2]
- ✓ ✗ I have explained that individuals employed in the legal system are ineligible for jury service.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'ineligible', 'unbiased', etc.

Exemplar response

[Jason will not receive a summons for jury service after returning the questionnaire.[1]][Because of Jason's job as a police officer, he will be deemed ineligible for jury service.[2]][People within the legal system, such as police officers and legal practitioners, are seen to have a level of expertise or legal knowledge that would jeopardise their ability to act as an unbiased representative of broader society in a jury, so the law deems such individuals to be ineligible.[3]]

15.

- ✓ ✗ I have identified that this is a peremptory challenge.[1]
- ✓ ✗ I have provided one justification for my answer, stating that peremptory challenges are made by the accused.[2]
- ✓ ✗ I have provided a second justification for my answer, stating that peremptory challenges do not require a reason.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', 'peremptory', etc.

Exemplar response

[It was a peremptory challenge used to remove Jennie in this case.[1]][This is evident because a peremptory challenge is a challenge made by the accused party, which is what occurred in this case,[2]][and a peremptory challenge does not require a reason, which was not provided in this case.[3]]

16.

- ✓ ✗ I have identified one other stage of the jury empanelment process.[1]
- ✓ ✗ I have described this stage in further detail.[2]
- ✓ ✗ I have identified a second stage of the jury empanelment process.[3]
- ✓ ✗ I have described this stage in further detail.[4]
- ✓ ✗ I have identified a third stage of the jury empanelment process.[5]
- ✓ ✗ I have described this stage in further detail.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'excused', 'oath', 'affirmation' etc.

Exemplar response

[One stage of the jury empanelment process involves potential jurors asking to be excused.[1]][At this stage, if a juror has a legitimate reason why they should not be on the jury in this particular trial, they may apply to the judge to be excused. A legitimate reason might be if the juror knows a party involved in the case and cannot be impartial.[2]][A second stage of the jury empanelment process is the random selection of individuals from the jury pool.[3]][At this stage, a panel of people are chosen at random from the larger jury pool present at the court to enter the courtroom.[4]][A third stage of the jury empanelment process involves selected jurors taking an oath or affirmation.[5]][At this stage, if selected as a member of the jury, the juror must take an oath or affirmation to confirm that they will carry out their duties as a juror honestly and in good faith.[6]]

Possible points to include

Other possible stages of the jury empanelment process include:

Entering the courtroom: once the jury panel has been randomly selected, the potential jurors will enter the courtroom and the judge will then provide basic information regarding the case, including the anticipated length of the trial, the names of the parties involved and the nature of the charges.

3E

LEVEL 4

17.

- ✓ ✗ I have stated the extent to which I agree with the statement.[1]
- ✓ ✗ I have identified one weakness of the jury in a criminal trial.[2]
- ✓ ✗ I have described this weakness in further detail, linking to the principles of justice.[3]
- ✓ ✗ I have used a linking word/phrase such as 'however', 'on the other hand' to show both sides.[4]
- ✓ ✗ I have identified a corresponding strength of the jury in a criminal trial.[5]
- ✓ ✗ I have described this strength in detail, linking to the principles of justice.[6]
- ✓ ✗ I have identified a second weakness of the jury in a criminal trial.[7]
- ✓ ✗ I have described this weakness in detail, linking to the principles of justice.[8]
- ✓ ✗ I have used a linking word/phrase such as 'however', 'on the other hand' to show both sides.[9]
- ✓ ✗ I have identified a corresponding second strength of the jury in a criminal trial.[10]
- ✓ ✗ I have described this strength in detail, linking to the principles of justice.[11]
- ✓ ✗ I have explicitly linked my discussion back to the prompt.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'fairness', 'impartial', etc.

Exemplar response

[I somewhat agree with this statement. While the jury system does have some flaws, it also has some significant strengths as well.[1]]

[One reason why the jury system is flawed in a criminal trial is that the use of a jury may result in significant delays for the case,[2]] [considering that evidence and directions have to be explained in detail to the jury and it takes time to empanel. Delays add to the stress and suffering of victims, accused persons and witnesses, which is unfair on these individuals.[3]]

[On the other hand,[4]] [a benefit of using a jury is that jurors are selected from the community,[5]] [which allows for the values and beliefs of broader society to play a part in decision making and thus justifies the extra time taken.[6]]

[Another flaw of the jury system is that juries are not required to give reasons for their decision,[7]] [meaning that some people may question whether there has been proper understanding of the law and facts in reaching their verdict, which may seem unfair to the parties or a victim of crime.[8]] [Conversely,[9]] [jurors are independent and impartial members of society[10]] [randomly selected and separate from the legal system, meaning that fairness is promoted by using them as independent decision-makers.[11]]

Possible points to include

Other possible weaknesses of having a jury in a criminal trial (reasons to agree with the prompt) include:

- The potential bias of a juror may unfairly influence the decision.
- The difficulty of deciding on a verdict beyond reasonable doubt may be seen as beyond the capabilities of ordinary members of the community, especially when there is particularly complicated evidence.

Other possible strengths of having a jury in a criminal trial (reasons to disagree with the prompt) include:

- Having a jury spreads decision making power across the hands of 12 people, rather than simply leaving it with the judge.
- Having a jury allows for the community to be involved in the legal process, increasing the confidence that society has in its justice system.

18.

✓	✗	I have stated the extent to which I believe the use of a jury helps the justice system achieve the principle of fairness.[1]
✓	✗	I have identified one way that the use of a jury promotes the principle of fairness.[2]
✓	✗	I have described this strength of the jury system in further detail.[3]
✓	✗	I have used a linking word/phrase such as 'however', 'on the other hand' to show 'both sides'.[4]
✓	✗	I have identified one way that the use of a jury may not uphold the principle of fairness.[5]
✓	✗	I have described this weakness of the jury system in further detail.[6]
✓	✗	I have identified a second way that the use of a jury promotes the principle of fairness.[7]
✓	✗	I have described this strength of the jury system in further detail.[8]
✓	✗	I have used a linking word/phrase such as 'however', 'on the other hand' to show 'both sides'.[9]
✓	✗	I have identified a second way that the use of a jury may not uphold the principle of fairness.[10]
✓	✗	I have described this weakness of the jury system in further detail.[11]
✓	✗	I have used key legal studies terminology effectively such as: 'impartial', 'unbiased', etc.

Exemplar response

[The use of a jury in a criminal trial helps the Victorian justice system achieve fairness to some extent.[1]] [One way in which the use of a jury promotes the principle of fairness is by allowing trial by peers.[2]] [That is, the use of a jury means that a cross-section of the community is used as the decision-maker, allowing the accused to feel that their case has been decided by their equals.[3]] [However,[4]] [a jury may not achieve fairness in that it could allow for undue influence or prejudice to inform the outcome of the trial.[5]] [That is, jurors may sometimes 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 and not only the evidence presented in court. However this is a small weakness, as juries are instructed to ignore such information and courts can suppress media coverage to ensure a fair trial is conducted.[6]]

[A second way that a jury promotes fairness is that jurors are independent of all parties to a dispute.[7]][Jurors are randomly selected from the community and have no connection to the case. This means that they are able to be impartial in their decision-making.[8]] [However,[9]][having a jury can add delays to a trial through added requirements like empanelling the jury, explaining court procedures and allowing time for a jury to reach a decision. There is also the risk of a hung jury, meaning a retrial is conducted.[10]][Significant delays can be unfair on an accused and their victims by compounding the stress involved.[11]]

6F Types of sanctions

LEVEL 1

1. A **2.** B **3.** B

LEVEL 2

4. ✓ ✗ I have defined a fine as 'a monetary payment that the court will order an offender to make' (or similar).[1]

✓ ✗ I have used key legal studies terminology effectively such as: 'monetary', 'penalty', etc.

Exemplar response

[A fine is a monetary payment that the court will order an offender to make as a penalty for an offence and is regarded as less severe than imprisonment or a community correction order.[1]]

5. ✓ ✗ I have identified a likely sanction in this case.[1]

✓ ✗ I have defined the sanction I have identified.[2]

✓ ✗ I have provided a reason why this sanction may be the most appropriate sanction in this case, linking to the facts given in the scenario.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', 'reoffending', etc.

Exemplar response

[One sanction that would be appropriate in this case would be a community correction order,[1]][which is a sanction that is served by the offender while remaining in the community, and will include specific conditions that the offender must follow.[2]][The court is likely to believe that Ellanora will need counselling for her drug addiction to avoid reoffending, and is therefore likely to impose a CCO as it can be incorporated into the CCO's conditions.[3]]

Possible points to include

Other possible points of justification for choosing a CCO include:

- Ellanora being a very young offender.
- Ellanora having no other criminal history.

Another appropriate response could have been to suggest imprisonment as an appropriate sanction.

Imprisonment is defined as a sanction that restricts an offender's freedom by removing them from the community for a set period of time, and is seen as the most severe sanction available to Australian courts.

Possible points of justification for choosing imprisonment as an appropriate sanction include:

- The large quantity of cocaine and stolen goods found in Ellanora's possession indicate very serious offending.
- The fact that a term of imprisonment can provide opportunity for the rehabilitation of a drug dependency and discourage future offending.

6. ✓ ✗ I have defined imprisonment as 'restricting an offender's freedom by removing them from the community for a set period of time' (or similar).[1]

✓ ✗ I have provided one reason why Da Costa may be released on parole.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'restricting', 'sentence', etc.

Exemplar response

[Imprisonment is the most severe sanction available to Australian courts and involves restricting an offender's freedom by confining them in custody for a set period of time.[1]][One reason why Da Costa may be released on parole is if he has behaved well in prison throughout his sentence.[2]]

Possible points to include

Other reasons why Da Costa may be released on parole include:

- He has shown signs of rehabilitation.
- He is no longer regarded as a threat to public safety.

LEVEL 3

7. ✓ ✗ I have identified an appropriate sanction to impose.[1]

✓ ✗ I have defined the sanction chosen.[2]

✓ ✗ I have provided one justification for my answer, making reference to James' case.[3]

✓ ✗ I have provided a second justification for my answer, making reference to James' case.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', 'community correction order', 'rehabilitation' etc.

Exemplar response

[One appropriate sanction that the judge ought to impose is a community correction order.[1]][A community correction order is a sanction that is served by the offender while remaining in the community, and will include specific conditions that the offender must follow. The conditions are chosen based on the individual circumstances of the offender and will often aim to address the underlying causes of the criminal behaviour.[2]][This is appropriate in James' case, as it could allow for effective rehabilitation of his drug dependency issues, which have likely contributed to his offending.[3]][Additionally, James is of relatively young age and is therefore seen as having strong rehabilitative chances.[4]]

6G Purposes of sanctions

LEVEL 1

1. B **2.** C **3.** B **4.** C

5. D **6.** C **7.** A

LEVEL 2

8. ✓ ✗ I have described the purpose of denunciation as 'to publicly condemn (or criticise) the offender's criminal behaviour, and to highlight the offender's violation of moral and ethical codes (or similar).[1]

✓ ✗ I have not repeated the words 'denounce' or 'denunciation' in my definition.

I have used key legal studies terminology effectively such as: 'offender', 'criminal behaviour', etc.

Exemplar response

[To denounce is to publicly condemn (or criticise) the offender's criminal behaviour, thus highlighting the offender's extreme violation of moral and ethical codes. A court aiming to denunciate will impose a harsher sentence on the accused.[1]]

9.

I have described one reason why punishment is a necessary purpose of criminal sanctions.[1]

I have described a second reason why punishment is a necessary purpose of criminal sanctions.[2]

I have used key legal studies terminology effectively such as: 'offender', 'criminal sanction', 'justice', etc.

Exemplar response

[One reason why offenders need to be punished by criminal sanctions is to achieve retribution for the harm caused by their actions, thus securing justice for victims of crime and for society as a whole.[1]] [Another reason why punishment is a purpose of criminal sanctions is to ensure that victims and/or their families do not feel the need to exact revenge themselves outside of the legal system.[2]]

10.

I have described specific deterrence as 'when an offender themselves is discouraged from committing offences of the same or similar character through the provision of a sanction' (or similar).[1]

I have provided one reason why imprisonment does/does not achieve specific deterrence.[2]

I have used a contrasting linking word, such as: 'however', 'whereas', 'on the other hand', 'in contrast', etc.[3]

I have described general deterrence as 'when someone other than the offender is discouraged from committing offences of the same or similar character through the provision of a sanction' (or similar).[4]

I have provided one reason why imprisonment does/does not achieve general deterrence.[5]

I have not re-used any of the words that I am defining.

I have used key legal studies terminology effectively such as: 'sanction', 'offender', etc.

Exemplar response

[Specific deterrence refers to the offender themselves being discouraged from committing crimes of the same or similar nature in the future.[1]] [One reason why imprisonment does not achieve specific deterrence is because the negative impact of spending time in prison often leads to reoffending after offenders are released, as evidenced by the 40% rate of recidivism in Victoria.[2]] [On the other hand,[3]] [general deterrence refers to individuals other than the offender being discouraged from engaging in criminal behaviour similar to that of the offender.[4]] [One reason why imprisonment does achieve general deterrence is because the imposition of such a harsh sanction will prevent members of the community from committing offences of a similar nature.[5]]

Possible points to include

Other possible reasons why imprisonment does achieve specific deterrence:

- Prison's harsh environment will discourage offenders like Ben from reoffending once released.

Other possible reasons why imprisonment does/does not achieve general deterrence:

- Research by the Sentencing Advisory Council suggests that as prison sentences become longer, there is no increase in the extent to which the general public is discouraged from offending.
- Many crimes that lead to prison terms are committed spontaneously and/or when offenders are under the influence of drugs/alcohol. These offenders are not discouraged by a possible term of imprisonment.

11.

I have described rehabilitation as 'to address any underlying causes of criminal behaviour, to reduce the likelihood of future offending' (or similar).[1]

I have explained how my chosen sanction achieves rehabilitation.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'offending', 'criminal behaviour', etc.

Exemplar response

[To rehabilitate an offender is to address any underlying causes of criminal behaviour, to reduce the likelihood of future offending.[1]] [Community correction orders (CCOs) achieve rehabilitation by providing treatment for drug/alcohol addiction where this is a cause of criminal offending, or by building the skills and self-esteem of the offender through community work.[2]]

12. ✓ ✗ I have described protection as 'ensuring that offenders who pose a significant risk to the welfare of society (and/or their victims) are restricted from engaging in further criminal behaviour through the imposition of a sanction' (or similar).[1]

✓ ✗ I have explained how imprisonment does achieve protection in this case.[2]

✓ ✗ I have explained how imprisonment does not achieve protection in this case.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'criminal behaviour', 'sanction', etc.

Exemplar response

[To protect is to ensure that offenders who pose a significant risk to the welfare of society (and/or their victims) are restricted from engaging in further criminal behaviour through the imposition of a sanction.[1]] [Imprisonment will achieve protection by removing Robert from the community, inhibiting his access to society or to the victims of his crimes.[2]] [However, imprisonment does not always achieve protection because many prisoners who are released will reoffend due to the negative environment and lack of rehabilitation available in prison. For example, the lack of rehabilitation in prison may lead to Robert reoffending once he is released.[3]]

LEVEL 3

13. a) ✓ ✗ I have identified the purpose of sanctions that is prioritised in the sentence.[1]

✓ ✗ I have provided justification for why I chose this purpose of sanctions.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'criminal behaviour', etc.

Exemplar response

[In sentencing Tripp to a community correction order, Judge Cahill has prioritised the purpose of rehabilitation.[1]] [This is clear because the judge has imposed a CCO, which addresses the underlying causes that contributed to the criminal behaviour of Daniel Tripp, rather than imposing a term of imprisonment which is directed more toward other purposes of sanctions, such as punishment.[2]]

b) ✓ ✗ I have explained how a CCO achieves rehabilitation.[1]

✓ ✗ I have referenced the case study in my answer to describe how this CCO promotes rehabilitation.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'criminal behaviour', ' etc.

Exemplar response

[A community correction order is able to achieve the purpose of rehabilitation because it includes conditions which address the underlying causes of criminal behaviour, including treatment for mental health or drug and alcohol abuse. Additionally, CCOs which include community work can build Tripp's self-esteem and provide skills that may be useful in securing employment.[1]] [For example, the community correction order in the above case achieves rehabilitation for Tripp by requiring that he receive treatment for alcoholism and mental health problems, both of which contributed to his offending.[2]]

14. ✓ ✗ I have described 'general deterrence' as 'discouraging individuals other than the offender from committing crimes of the same or similar nature through the provision of a sanction' (or similar).[1]

- ✓ ✗ I used linking words to distinguish, such as: 'however', 'whereas', 'on the other hand', etc.[2]
- ✓ ✗ I have described 'denunciation' as 'a public condemnation of the criminal behaviour of the offender, highlighting the offender's violation of moral and ethical codes' (or similar).[3]
- ✓ ✗ I have explained the impact of general deterrence on the sanction imposed in this case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'sanction', etc.

Exemplar response

[General deterrence refers to when individuals other than the offender are discouraged from committing crimes of the same or similar nature through the provision of a sanction.[1]][On the other hand,[2]][denunciation occurs when the courts impose a sanction which condemns the criminal behaviour of the offender, and highlights the offender's transgression of moral and ethical codes.[3]][In this case, the need to achieve general deterrence, as expressed by Judge Bourke, would likely have resulted in a longer term of imprisonment being imposed on the offender in order to discourage others in the community from committing similar crimes.[4]]

15. a)

- ✓ ✗ I have identified the most appropriate sanction for the offender.[1]
- ✓ ✗ I have described the sanction.[2]
- ✓ ✗ I have justified why the sanction is appropriate.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sanction', 'offender', 'custody', etc.

Exemplar response

[The most appropriate sanction for the judge to impose in this case would be a term of imprisonment.[1]][Imprisonment refers to an offender being held in custody for a given period of time, and it is the harshest sanction available to the courts.[2]][Imprisonment is the most appropriate sanction for Simone because she has committed a serious indictable offence and poses a direct threat to the community.[3]]

b)

- ✓ ✗ I have explained how imprisonment achieves one purpose of sanctions.[1]
- ✓ ✗ I have linked back to the case in my explanation.[2]
- ✓ ✗ I have explained how imprisonment achieves a second purpose of sanctions.[3]
- ✓ ✗ I have linked back to the case in my explanation.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender ', 'criminal behaviour', etc.

Exemplar response

[Imprisonment achieves punishment by placing the offender in a harsh environment and depriving them of their liberty.[1]][For example, in the above case a term of imprisonment would punish Simone for her criminal behaviour by restricting her movement, leading to loss of contact with family and friends and a probable loss of employment.[2]][Imprisonment also achieves protection by removing the offender from society.[3]][For example, in the above case a term of imprisonment would prevent Simone from having access to society and to any victims of her criminal behaviour, thus ensuring protection.[4]]

Possible points to include

Deterrence

- Imprisonment achieves specific and general deterrence because the harsh environment of prison discourages offenders and members of the community from committing crimes of a similar nature.
- For example, in the above case a term of imprisonment would aim to prevent Simone from reoffending after her release because she will not want to go back to prison and others will be discouraged from similar offending.

Denunciation

- Imprisonment achieves denunciation because it is the harshest sanction available to the courts and therefore conveys the court's disapproval for the criminal behaviour of the offender.

- For example, if the judge in the above case were to impose a longer term of imprisonment on Simone, this would denounce her actions.

Rehabilitation

- Imprisonment achieves rehabilitation because prisons do provide some programs to address alcohol and drug dependencies, which cause many offenders to engage in criminal behaviour.
- For example, if the offender in the above case were to receive treatment for the underlying causes of her criminal behaviour whilst in prison, she may be effectively rehabilitated and/or she may be imprisoned for a shorter period if the court believes she has good prospects for rehabilitation.

LEVEL 4

16.

- ✓ ✗ I have identified a sanction that could be imposed on the offender.[1]
- ✓ ✗ I have explained how this sanction is able to achieve specific deterrence.[2]
- ✓ ✗ I have explained how this sanction may not be able to achieve specific deterrence.[3]
- ✓ ✗ I have explained how this sanction is able to achieve general deterrence.[4]
- ✓ ✗ I have explained how this sanction may not be able to achieve general deterrence.[5]
- ✓ ✗ I have signposted my response appropriately, using terms such as, 'one sanction is', 'however', 'on the other hand', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'sanction', 'deterrence', etc.

Exemplar response

[One sanction that may be imposed on this offender is a fine.[1]][Fines are able to achieve specific deterrence because the economic loss that the offender incurs will discourage them from committing further crimes of a similar nature.[2]][However, the extent to which fines result in specific deterrence can be limited by the fact that, in cases where the offender is particularly wealthy, the maximum fine that can be imposed may not be high enough to discourage the offender.[3]][Fines are also able to achieve general deterrence because the economic loss suffered by the offender should discourage other offenders from committing crimes of a similar nature.[4]][On the other hand, the imposition of fines in the Magistrates' Court for summary offences is often not publicised, reducing the extent to which general deterrence is achieved by fines.[5]]

Possible points to include

Other possible sanctions that could have been chosen:

CCO

Specific deterrence

- The inconvenience of community work and the restrictions imposed by curfews, alcohol bans and other aspects of a CCO, discourage the offender from reoffending.
- 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.
- However, a CCO may not be a harsh enough sanction to sufficiently deter the offender from reoffending.

General deterrence

- The inconvenience of community work and the restrictions imposed by curfews, alcohol bans and other aspects of a CCO, discourage the would-be offenders from committing crimes of a similar nature.
- However, the wider community may not see a CCO as very severe/harsh and therefore may not be discouraged from criminal activity.

or

Imprisonment

Specific deterrence

- Prison's harsh punishment will discourage offenders from committing similar offences.
- However, approximately 40% of those released from Victorian prisons re-offend to such a serious extent that they are in prison again within 2 years. This suggests that prison is not an effective specific deterrent.

General deterrence

- Prison's harsh punishment will discourage members of the community from committing similar offences.
- However, research by the Sentencing Advisory Council suggests that as prison sentences become longer, there is no increase in the extent to which the general public is discouraged from offending.
- Many crimes that lead to prison terms are committed spontaneously and/or when offenders are under the influence of drugs/alcohol. These offenders are not discouraged by a possible term of imprisonment.

17.

- ✓ ✗ I have responded to the statement.[1]
- ✓ ✗ I have explained how imprisonment is able to achieve protection.[2]
- ✓ ✗ I have explained how imprisonment may not be able to achieve protection.[3]
- ✓ ✗ I have identified another sanction that achieves protection.[4]
- ✓ ✗ I have explained how this sanction is able to achieve protection.[5]
- ✓ ✗ I have explained how this sanction may not be able to achieve protection.[6]
- ✓ ✗ I have signposted my response appropriately using terms such as: 'another sanction is', 'on the other hand', 'further', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'sanction', 'victims', etc.

Exemplar response

[Imprisonment is, to some extent, the best sanction to ensure the protection of the community from dangerous offenders. However, imprisonment is not always able to achieve protection.[1]][Imprisonment achieves protection by removing dangerous offenders from society and inhibiting their access to the community and to their victims.[2]][On the other hand, the negative environment within the prison system means that many offenders will reoffend once released from prison, and thus pose a renewed threat to society. For example, there is limited access to rehabilitation programs in prison, and most offenders will leave prison unemployed and completely disconnected from society. In this way, a term of imprisonment may not protect society as many offenders re-offend after being released.[3]]

[Another sanction that can achieve protection is a community correction order (CCO).[4]][CCOs ensure the protection of the community by restricting the actions or movement of the offender. For example, CCOs may impose a curfew or an alcohol ban on the offender, or alternatively prevent the offender from visiting certain places or people.[5]][However, the fact that an offender serving a CCO remains in the community and may not adhere to the conditions of the CCO limits the extent to which protection can be achieved by this sanction.[6]]

Possible points to include

- Fines could not have been chosen as the second sanction, because fines do not achieve protection.

6H Factors considered in sentencing

LEVEL 1

1. D **2.** B **3.** C **4.** C

5. B **6.** A

LEVEL 2

7.

- ✓ ✗ I have described mitigating factors as 'factors that decrease the culpability of the offender' (or similar).[1]
- ✓ ✗ I have provided an example of a mitigating factor.[2]

✓ ✗	I have explained that mitigating factors will likely reduce the severity of the sanction imposed.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'mitigating factors', 'offence' 'offender', 'sanction', etc.

Exemplar response

[Mitigating factors are aspects of the offence and/or offender that decrease the culpability of the offender.[1]][An example of a mitigating factor is the offender having genuine remorse for their actions.[2]][When mitigating factors are present, the courts are likely to reduce the severity of the sanction imposed on the offender to reflect this.[3]]

8.

✓ ✗	I have described aggravating factors as 'factors that increase the culpability of the offender' (or similar).[1]
✓ ✗	I have provided one example of an aggravating factor.[2]
✓ ✗	I have provided a second example of an aggravating factor.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'aggravating factors', 'offence', 'offender', etc.

Exemplar response

[Aggravating factors are aspects of the offence and/or offender that increase the culpability of the offender.[1]][One example of an aggravating factor is the use of a weapon during the commission of a crime.[2]][A second example of an aggravating factor is the offender having a prior criminal history.[3]]

Possible points to include

Other possible aggravating factors include, but are not limited to:

- The crime was planned.
- The crime was based on prejudice of a particular group.
- The victim a vulnerable person.
- The crime was committed on an outnumbered victim.

9.

✓ ✗	I have identified a factor that may reduce the severity of a sanction.[1]
✓ ✗	I have described this factor.[2]
✓ ✗	I have explained why this factor may reduce the sentence imposed.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'offender', 'sentence', 'sanction', etc.

Exemplar response

[One factor the courts may consider during sentencing is a guilty plea.[1]][A guilty plea is a full admission by an accused person of an offence for which they have been charged.[2]][This could reduce the severity of the sanction imposed as the courts generally apply a sentencing discount due to an offender's guilty plea.[3]]

Possible points to include

- Mitigating factors could reduce the sentence imposed as they reduce the severity of the offence/culpability of the offender.
- A victim impact statement may be an appropriate answer where the focus is on a victim indicating that they forgive the offender. This could also result in the sanction imposed being less severe.

10.

✓ ✗	I have described a victim impact statement as 'a written and/or verbal statement to the court explaining the impact of the offence on the victim/s' (or similar).[1]
✓ ✗	I have explained that this victim impact statement will likely increase the severity of the sanction imposed on Justin.[2]
✓ ✗	I have linked my explanation to the facts in the scenario – physical and emotional harm.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'sanction' etc.

Exemplar response

[A victim impact statement is a written and/or verbal statement to the court about the impact of an offence upon the victim.[1]][This victim impact statement is likely to increase the severity of the sanction imposed on Justin.[2]][This is because William has stated that he endured physical and emotional harm, which is likely to influence the court to impose a harsher sanction on Justin.[3]]

LEVEL 3

11.

- ✓ ✗ I have described aggravating factors as 'factors that increase an offender's culpability' (or similar).[1]
- ✓ ✗ I have identified one aggravating factor in James' case.[2]
- ✓ ✗ I have used a distinguishing term such as: 'whereas', 'on the other hand', 'conversely', etc.[3]
- ✓ ✗ I have described mitigating factors as factors that decrease an offender's culpability (or similar).[4]
- ✓ ✗ I have identified one mitigating factor in James' case.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'culpability', etc.

Exemplar response

[Aggravating factors are the aspects of the offence and/or offender that increase the culpability of the offender.[1]][One example of an aggravating factor present in James' case is that he was serving a CCO at the time of the offence, meaning he has a prior criminal history.[2]][Conversely,[3]][mitigating factors are aspects of the offence and/or offender that decrease the culpability of the offender.[4]][One example of a mitigating factor present in James' case is that he is remorseful of his actions.[5]]

Possible points to include

Other possible aggravating factors include:

- Offence was committed against a vulnerable person (Frank's older age).

Other possible mitigating factors include:

- James' young age.
- Offence was due to provocation and not planned.

12.

- ✓ ✗ I have identified one factor that influenced Younan's sentence.[1]
- ✓ ✗ I have identified a second factor that influenced Younan's sentence.[2]
- ✓ ✗ I have explained that these factors reduced Younan's sentence.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sentence', 'offender', 'culpability' etc.

Exemplar response

[One factor that influenced Younan's sentence is that he had genuine remorse for his actions.[1]][A second factor that influenced Younan's sentence is that he assisted with police investigations.[2]][These are both mitigating factors and reduce the culpability of the offender. Due to the presence of these mitigating factors, Younan's sentence was reduced.[3]]

Possible points to include

Other mitigating factors for Younan's case include:

- Younan's young age (22).
- The absence of prior convictions.

13.

- ✓ ✗ I have identified one error in the scenario.[1]
- ✓ ✗ I have provided the correct procedure for this error.[2]

✓ ✗	I have identified a second error in the scenario.[3]
✓ ✗	I have provided the correct procedure for this error.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'offender', 'prosecution', etc.

Exemplar response

[One error in this scenario is that the victim impact statement was presented as evidence to support a conviction.[1]][A victim impact statement is presented after the offender has been found or pleaded guilty and is presented to influence the severity of the sanction imposed. Therefore, this would occur during sentencing as opposed to during the trial.[2]][A second error in this scenario is that the prosecution entered a guilty plea on the accused person's behalf.[3]][A guilty plea is a full admission by an accused person of an offence for which they have been charged. As a plea of guilt can only be made by the accused, the prosecution could not do this for Alison.[4]]

Possible points to include

- The trial for murder was heard in the Magistrates' Court of Victoria – it would be heard in the Supreme Court of Victoria (Trial Division).

14. a)

✓ ✗	I have explained that the purpose of a victim impact statement is to inform the court of the impact that a crime has had on those directly affected by the offence (or similar).[1]
✓ ✗	I have explained that this victim impact statement shows a severe impact on the victim.[2]
✓ ✗	I have justified that this is likely to increase the severity of the sanction imposed on Forde.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'impact ', 'offender', etc.

Exemplar response

[The purpose of a victim impact statement is to inform the court of the impact that a crime has had on those directly affected by the offence.[1]][This victim impact statement shows a severe negative effect on Jessica with lasting consequences.[2]][As a result of this, the court is likely to have imposed a more severe sanction on Forde.[3]]

b)

✓ ✗	I have identified one reason Forde received a harsh sentence.[1]
✓ ✗	I have explained why this reason increased Forde's sentence.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'sentence', 'mitigating factor', 'offender' etc.

Exemplar response

[One possible reason Forde received a severe sentence is his prior criminal history.[1]][Forde was previously convicted of three other similar offences which is likely to have contributed to his harsh sentence, because prior offending is an aggravating factor.[2]]

Possible points to include

Another aggravating factor that may have led to Forde's harsh punishment is the significant impact of his crime upon the victim.

15.

✓ ✗	I have described a guilty plea as 'a full admission by an offender for their crimes' (or similar).[1]
✓ ✗	I have provided one reason for the high guilty plea rate.[2]
✓ ✗	I have provided a second reason for the high guilty plea rate.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'offender', 'sentence ', etc.

Exemplar response

[A guilty plea ia a full admission by an accused person of an offence for which they have been charged.[1]][One reason that could explain the high guilty plea rate is the sentencing discount offered when offenders enter a guilty plea.[2]][A second reason that could explain the high guilty plea rate is that an early guilty plea avoids the stress, time and costs involved with going to trial.[3]]

6I Alternative approaches to sentencing

LEVEL 1

1. A **2.** C **3.** C

LEVEL 2

4.

- ✓ ✗ I have identified a second criterion of eligibility for a diversion program.[1]
- ✓ ✗ I have identified one other criterion of eligibility for a diversion program.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'fixed penalty', 'fine', etc.

Exemplar response

[A second criterion that an individual must meet before being recommended for a diversion program is that the offence committed cannot be subject to a mandatory or fixed penalty, such as a minimum fine.[1]] [One other criterion that an individual must meet before being recommended for a diversion program is that the offender must acknowledge and take responsibility for the offence.[2]]

Possible points to include

One other criterion is that there must be sufficient evidence to gain a conviction should the matter proceed to trial.

5.

- ✓ ✗ I have defined a DTO as 'an order imposed on an offender, usually by the Drug Court, that combines a term of imprisonment with drug/alcohol treatment' (or similar).[1]
- ✓ ✗ I have explained the custodial feature of a DTO.[2]
- ✓ ✗ I have explained the treatment feature of a DTO.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'imprisonment', 'offender', 'custodial', etc.

Exemplar response

[A Drug Treatment Order (DTO) is an order imposed by the Drug Court on an offender who pleads 'guilty' to a drug-related offence that combines a term of imprisonment with drug/alcohol treatment.[1]] [The first feature of a DTO is a custodial sentence. This involves a maximum term of imprisonment of two years, which is suspended while the offender engages in treatment conditions.[2]]

[The second feature of a DTO is treatment. This involves particular conditions aimed at addressing the underlying drug and/or alcohol dependency of the offender, such as regular drug testing.[3]]

LEVEL 3

6.

- ✓ ✗ I have identified one other benefit of diversion programs.[1]
- ✓ ✗ I have linked this benefit to the scenario, explaining its relevance to Illegalville.[2]
- ✓ ✗ I have identified a second benefit of diversion programs.[3]
- ✓ ✗ I have linked this benefit to the scenario, explaining its relevance to Illegalville.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', etc.

Exemplar response

[One benefit of diversion programs in this case is that they require offenders to undertake voluntary work in the local community.[1]] [This would be beneficial for Illegalville, as businesses and community groups are having a difficult time retaining employees and volunteers.[2]] [A second benefit of diversion programs is that the offender must engage in conditions aimed at reducing their likelihood of reoffending.[3]] [This would be beneficial for Illegalville, which has a problem with petty criminals and a need to minimise criminal activity in the community.[4]]

Possible points to include

Victims may receive an apology and/or restitution for the offence. This is beneficial for Illegalville in that it could improve the relationship between local businesses and young adults, and may allow for goods to be returned to shops and order restored.

7.

- ✓ ✗ I have identified one of the objectives of the Koori Court.[1]
- ✓ ✗ I have described one way in which the Koori Court works to achieve this objective.[2]
- ✓ ✗ I have described a second way in which the Koori Court works to achieve this objective.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'informal', 'magistrate', etc.

Exemplar response

[One of the objectives of the Koori Court is to promote greater participation by the Indigenous community in the sentencing process.[1]] [One way the Koori Court works to achieve this objective is to provide a more informal atmosphere than traditional courts with Indigenous community members present to discuss the impact of the offence. This informality allows the Indigenous community and offenders to feel more comfortable participating and can speak more freely.[2]] [A second way in which the court achieves this objective is by having the magistrate sit at the table with all other participants, rather than sitting behind a raised bench. This adds to the informal nature of proceedings and promotes participation by all parties.[3]]

Possible points to include

Other objectives of the Koori Court are:

- Increasing accountability of the Aboriginal community in exploring sentencing alternatives and reducing incarceration.
- Increasing community awareness of the cultural needs and practices of Aboriginal people.
- Encouraging Aboriginal ownership over the administration of justice.
- Reducing reoffending by Indigenous offenders.

Other ways in which the Koori Court works to achieve its objectives include:

- The offender is able to sit with a family member/support person during the discussions.
- The discussion will be in plain english, rather than using technical legal language.
- The offender is able to talk about their past and provide reasons for their offending. This includes discussing what they can do about their offending in the future as well as how their community can help.

8. **a)**

- ✓ ✗ I have identified that Jerry would not be eligible for a DTO.[1]
- ✓ ✗ I have provided one reason why Jerry would not be eligible for a DTO.[2]
- ✓ ✗ I have provided a second reason why Jerry would not be eligible for a DTO.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'guilty', 'parole', etc.

Exemplar response

[Jerry would not be eligible for a DTO,[1]] [because he has not pleaded 'guilty' to the offence[2]] [and was on parole at the time of his arrest.[3]]

b)

- ✓ ✗ I have identified one benefit of a DTO for an offender.[1]
- ✓ ✗ I have described this benefit of a DTO for Tom.[2]

✓ ✗	I have identified a second benefit of a DTO for an offender.[3]
✓ ✗	I have described this benefit of a DTO for Tom.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'guilty', 'parole', etc.

Exemplar response

[A DTO is able to address underlying drug and/or alcohol dependencies that often contribute to offending behaviour in addicted individuals.[1]][This could be directly beneficial for Tom, who has recently developed a drug dependency which has resulted in him being charged with his first drug-related offences.[2]]

[Secondly, having a suspended sentence through a DTO allows the offender to remain in the community while dealing with the underlying reasons for their offending.[3]][This could be directly beneficial for Tom, who could benefit from being around his family and support networks during his relationship breakdown and treatment for his drug dependence.[4]]

Possible points to include

Other benefits of a DTO include:

- When successfully completed, a DTO will allow Tom to avoid being exposed to the negative environment of prison.

6J Aspects of sentencing in Victoria and Texas

LEVEL 1

1. C **2.** D **3.** A **4.** D

LEVEL 2

5.

✓ ✗	I have explained one other similarity between the sentencing practices of Victoria and Texas.[1]
✓ ✗	I have explained this similarity in further detail.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'summary offences', 'misdemeanors', etc.

Exemplar response

[One other similarity between sentencing in Victoria and Texas is the categorisation of offences according to severity. For example, in Victoria the least serious criminal offences are called summary offences, and in Texas they are called misdemeanors.[1]]
[Categorising crime in this way assists in the sentencing of different offences, including the severity of the punishment imposed.[2]]

Possible points to include

Other similarities between the sentencing practices of Victoria and Texas:

- Mitigating and aggravating factors
  - Both states consider mitigating and aggravating factors relevant to the circumstances of the offender and/or case when imposing a sentence. These factors could alter the punishment that is specified in the sentencing guidelines.
- Specialised courts as alternative sentencing options
  - Both states make use of specialised courts as alternative sentencing options. These specialised courts, such as drug courts, serve to promote fairness in their pursuit of criminal justice.

LEVEL 3

6.

- ✓ ✗ I have identified the maximum sentence that Kyle could receive, including both the maximum term of imprisonment and the maximum fine.[1]
- ✓ ✗ I have described determinate sentencing as 'the practice of using detailed sentencing guidelines and minimum and maximum terms as a means of ensuring consistency in sentencing offenders' (or similar).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'imprisonment', 'penalty', etc.

Exemplar response

[In Victoria, the maximum penalty Kyle could recieve for culpable driving causing death is 20 years' imprisonment or a fine of up to 2,400 penalty units (or both).[1]][This maximum sentence comes as a result of determinate sentencing, which refers to the practice of using detailed sentencing guidelines and minimum and maximum terms as a means of ensuring consistency in sentencing offenders.[2]]

7.

- ✓ ✗ I have identified the trends in incarceration between Victoria and Texas, explaining that Victoria's prison population is increasing, whereas Texas is decreasing its incarceration rate.[1]
- ✓ ✗ I have described Texas' focus on rehabilitative programs as a means of reducing recidivism rates.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'rehabilitating', 'recidivism', etc.

Exemplar response

[The trends surrounding incarceration rates differ between Victoria and Texas in that Victoria has experienced an 81.5% increase in its prison population over the last ten years, whereas the rate of incarceration in Texas has fallen by 17% across a similar period.[1]]

[One possible explanation for the reduction in incarceration rates seen in Texas is the state's increased emphasis on evidence-based programs focused on rehabilitating offenders. A commitment of almost $250 million into these programs has helped Texas to achieve a 25% reduction in its recidivism rate.[2]]

LEVEL 4

8.

- ✓ ✗ I have stated the extent to which I agree with the statement.[1]
- ✓ ✗ I have provided one similarity/difference between the sentencing practices of Victoria and Texas to support my position.[2]
- ✓ ✗ I have explained this similarity/difference in further detail.[3]
- ✓ ✗ I have provided a second similarity/difference between the sentencing practices of Victoria and Texas to support my position.[4]
- ✓ ✗ I have explained this similarity/difference in further detail.[5]
- ✓ ✗ I have provided a third similarity/difference between the sentencing practices of Victoria and Texas to support my position.[6]
- ✓ ✗ I have explained this similarity/difference in further detail.[7]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'punishment', 'fairness', etc.

Exemplar response

[I mostly disagree with this statement.[1]][One difference between the two states is the use of the death penalty.[2]][Texas regularly impose the death penalty during sentencing, and are often seen as 'the death-penalty capital' of America, whereas Victoria formally abolished all forms of capital punishment in 1975.[3]][On the other hand, one similarity between the two is that both states consider mitigating and aggravating factors when imposing a sentence.[4]][These factors could alter the punishment that is specified in sentencing guidelines, perhaps reducing or increasing the severity of the sentence imposed.[5]]

[Another similarity is that both states make use of specialised courts as alternative sentencing options.[6]][These specialised courts, such as drug courts, serve to promote fairness in their pursuit of criminal justice.[7]]

Possible points to include

Other differences between the sentencing practices of Victoria and Texas:

- Incarceration rates
  - Per 100,000 individuals, Texas incarcerates more people (891) compared to Victoria (152). Further, over the last decade Victoria has experienced an increase of 81.5% to its prison population, whereas Texas has seen the rate of incarceration in state prisons fall by 17% across a similar period.

Other similarities between the sentencing practices of Victoria and Texas:

- Categorising offences
  - One other similarity between the two states is the categorisation of offences according to severity. For example, in Victoria the least serious criminal offences are called summary offences, whereas in Texas they are called misdemeanors.
- Determinate sentencing
  - Both Victoria and Texas have adopted a form of determinate sentencing. This means that detailed sentencing guidelines are used to help courts determine what sentence should be imposed for particular crimes, and that the severity of punishment is defined by statute in minimum and maximum terms.

Chapter 6 Review questions

1. 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 Ethan committed an indictable offence.[2]
- ✓ ✗ I have provided a second reason for my answer by explaining that the crime Ethan 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]][Ethan 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 Ethan 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 Ethan's case.[1]
- ✓ ✗ I have explained this reason in detail.[2]
- ✓ ✗ I have made explicit references to Ethan's 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 Ethan's 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 Ethan 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, Ethan's case will most likely be heard in the County Court of Victoria, where the judge and court staff are familiar with the law and evidence often presented in culpable driving trials. 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 Ethan.

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 Ethan's 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 Ethan's 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 Ethan was serving a community correction order (CCO) when he committed the offence would act as an aggravating factor in this case, likely resulting in a harsher sentence for Ethan.[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 Ethan 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 Ethan's case:

- Ethan has prior convictions of a similar nature.

Other possible examples of mitigating factors in Ethan's case:

- Ethan is still reasonably young in age and therefore has good prospects for rehabilitation.

d)

✓ ✗ I have explained how imprisonment achieves rehabilitation in Ethan's 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 Ethan's case.[3]

✓ ✗ I have explained how imprisonment achieves protection in Ethan's 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 Ethan's 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 Ethan by providing access to rehabilitative programs. For example, while he is in prison Ethan might undertake programs which aim to address his alcoholism.[1]]

[However,[2]][imprisonment may not be able to successfully rehabilitate Ethan 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 serious offenders, prison can often have an adverse effect on rehabilitation. For example, Ethan 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 Ethan's case by removing Ethan 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 Ethan will likely be released back into the community at some point in the future. Considering the negative impact that prison may have on Ethan, and the fact that he committed this offence whilst serving a CCO, it is quite possible that Ethan will continue to pose a threat to society once released, thus limiting the ability of imprisonment to achieve protection.[6]]

2.

✓ ✗ I have stated that I agree with Hilary's advice.[1]

✓ ✗ I have stated that Hilary is correct in saying that Damien's case could be heard in the Magistrates' Court.[2]

✓ ✗ I have explained why this is correct – Damien has committed an offence that can be tried summarily.[3]

✓ ✗ I have stated that there are benefits to having the case heard in the Magistrates' Court.[4]

✓ ✗ I have described one benefit of a hearing in the Magistrates' Court.[5]

REVIEW

- ✓ ✗ I have described a second benefit of a hearing in the Magistrates' Court.[6]
- ✓ ✗ I have stated that there are also benefits to a jury trial in a higher court.[7]
- ✓ ✗ I have described one benefit of a jury trial.[8]
- ✓ ✗ I have described a second benefit of a jury trial.[9]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'indictable offence', 'sentence ', 'jury trial', etc.

Exemplar response

[I agree with Hilary's advice.[1]][Hilary is correct in saying that Damien could choose to have his case heard in the Magistrates' Court.[2]] [Damien has been charged with robbery, of an amount that is less than $100,000, and has therefore committed an indictable offence that is able to be tried summarily pursuant to ss. 28 and 29 of the *Criminal Procedure Act 2009* (Vic).[3]]

[As Hilary suggested, there are some benefits to Damien being tried in a hearing in the Magistrates' Court.[4]][One benefit of having the offence heard summarily is that it will be less expensive for Damien. The legal representation required for a hearing in the Magistrates' Court will be cheaper and the case will be resolved more quickly than if it were heard by a jury in the County Court.[5]][Furthermore, there are lower maximum sentences that the magistrate can impose, potentially resulting in a less severe sentence for Damien.[6]]

[However, there are also benefits to a jury trial.[7]][One benefit of a jury trial in the County Court is that Damien will be tried by his peers. The decision will be made by a group who represent a cross-section of the community, rather than a magistrate alone.[8]][Additionally, the presence of a jury in the trial will ensure that plain English is used throughout, making the process more accessible for Damien.[9]]

3.

- ✓ ✗ I have stated the extent to which diversion programs or DTOs achieve the purposes of sanctions.[1]
- ✓ ✗ I have explained how a diversion program or DTO achieves one purpose of sanctions.[2]
- ✓ ✗ I have explained how a diversion program or DTO achieves a second purpose of sanctions.[3]
- ✓ ✗ I have used a linking word to distinguish, such as 'however', 'on the other hand', 'whereas', (or similar).[4]
- ✓ ✗ I have explained how a diversion program or DTO does not achieve one purpose of sanctions.[5]
- ✓ ✗ I have explained how a diversion program or DTO does not achieve a second purpose of sanctions.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'rehabilitation', 'sentence ', 'court', etc.

Exemplar response

[Drug treatment orders (DTOs) achieve the purposes of sanctions to some extent.[1]]

[DTOs achieve rehabilitation by allowing the offender to remain in the community while undergoing treatment for the underlying reasons for their offending. This permits the offender to remain in close contact with their family and support networks, often increasing their chances of rehabilitation.[2]][DTOs also achieve punishment by imposing conditions on the offender, such as regular drug testing, weekly attendances at the Drug Court or a curfew. These conditions are restrictive and inconvenient for the offender, thus punishing them for their actions.[3]]

[On the other hand,[4]][DTOs are limited in their ability to achieve protection as they allow offenders to remain in the community, risking the possibility that the offender may violate their conditions and commit further crime.[5]][Furthermore, DTOs may not achieve deterrence to the same extent as a term of imprisonment as they are a less severe sentence. DTOs do not heavily restrict the freedom of an offender and may therefore fail to discourage both the offender and the public from committing crimes of a similar nature, although the suspended prison sentence that is part of a DTO will provide some deterrence from offending.[6]]

Possible points to include

Diversion programs

Achieve the purposes of sanctions:

- Rehabilitation is achieved because the offender must engage in conditions that are aimed at reducing their likelihood of reoffending.
- Punishment is achieved because the offender must follow the conditions imposed, such as volunteer work, writing an apology to the victim, rehabilitative treatment. This should be restrictive and inconvenient for the offender.

- Protection can be achieved if the offender is successfully rehabilitated and discouraged from committing further crime by the conditions imposed on them.

Do not achieve the purposes of sanctions:

- Denunciation is not achieved because the sentence is much less severe than a term of imprisonment and does not condemn the actions of the offender.
- Deterrence may not be achieved because the sentence is not harsh enough to discourage the offender or society from committing similar crimes. The offender will not even have a criminal record.
- Protection may not be achieved if the offender breaches the diversion program and becomes a danger to the community.

7A Murder: R v Davies [2017]

LEVEL 1

1. B **2.** D **3.** C **4.** A **5.** B

LEVEL 2

6.

- ✓ ✗ I have provided one reason why Davies' guilty plea resulted in a lesser sentence: victim's family were able to avoid a trial.[1]
- ✓ ✗ I have described one other benefit of guilty pleas.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'guilty plea', 'victim', 'trial', etc.

Exemplar response

[One reason why Davies' guilty plea resulted in a less severe sentence is that the victim's family were prevented from having to attend and give evidence at trial, which would have caused stress and trauma.[1]][One other benefit of guilty pleas is that they reduce court workloads and minimise delays for other cases that go to trial.[2]]

Possible points to include

Other benefits of guilty pleas:

- The prosecution does not have to prove the guilt of the accused.
- Society does not have to bear the time and cost of a trial.
- Accused does not have to face the stress, time and costs involved in going to trial.

7.

- ✓ ✗ I have identified the first court that heard Davies' case: Magistrates' Court.[1]
- ✓ ✗ I have outlined its original criminal jurisdiction.[2]
- ✓ ✗ I have outlined its appellate criminal jurisdiction.[3]
- ✓ ✗ I have described which part of Davies' case was heard in this court.[4]
- ✓ ✗ I have identified the second court that heard Davies' case: Supreme Court - Trial Division.[5]
- ✓ ✗ I have outlined its original criminal jurisdiction.[6]
- ✓ ✗ I have outlined its appellate criminal jurisdiction.[7]
- ✓ ✗ I have described which part of Davies' case was heard in this court.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'original jurisdiction', 'appellate jurisdiction', 'summary offence', 'indictable offence', etc.

Exemplar response

[The first court that heard Davies' case was the Magistrates' Court.[1]][The Magistrates' Court has original jurisdiction to hear all summary offences, indictable offences heard summarily and some pre-trial hearings for indictable offences.[2]][It has no appellate jurisdiction.[3]][In Davies' case, the committal hearing was heard in the Magistrates' Court.[4]]

[The second court that heard Davies' case was the Supreme Court - Trial Division.[5]][The Supreme Court - Trial Division has original jurisdiction to hear all criminal offences, though in practice it only hears the most serious indictable offences, such as murder.[6]][In its appellate jurisdiction it hears criminal appeals from the Magistrates' Court on points of law.[7]][In Davies' case, the pre-sentencing and sentencing hearings were heard in the Supreme Court Trial Division.[8]]

8.

- ✓ ✗ I have stated that this is incorrect.[1]
- ✓ ✗ I have explained that this is incorrect because the burden of proof rests with the prosecution in criminal cases.[2]
- ✓ ✗ I have explained that the burden of proof upholds the presumption of innocence as accused persons are not required to give evidence, do not need to prove their innocence and cannot be forced to incriminate themselves.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'burden of proof', 'prosecution', 'presumption of innocence', etc.

Exemplar response

[This statement is incorrect.[1]][Davies would not have to prove his innocence if he pleaded 'not guilty' because the burden of proof in criminal cases rests with the prosecution.[2]][This upholds the presumption of innocence as accused persons are not required to give any evidence at trial unless they wish to do so, reflecting the fact that the accused is presumed innocent until proven guilty. They do not need to prove their innocence and cannot be compelled to incriminate themselves.[3]]

9.

- ✓ ✗ I have described one purpose of sanctions.[1]
- ✓ ✗ I have explained why this purpose was/was not a priority in Davies' sentencing.[2]
- ✓ ✗ I have described a second purpose of sanctions.[3]
- ✓ ✗ I have explained why this purpose was/was not a priority in Davies' sentencing.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'sanction', etc.

Exemplar response

[The purpose of punishment is to make sure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.[1]][Punishment was a priority in Davies' sentencing as he committed extremely heinous crimes that deserved a severe punishment, such as life imprisonment.[2]]

[The purpose of protection is to ensure that offenders who pose a significant risk to the welfare of society are restricted from engaging in further criminal behaviour through the sanction that is imposed.[3]][Protection was not a major priority in Davies' sentencing. Although Davies committed very serious crimes which suggest that he poses a threat to society, he was very advanced in age at the time of sentencing and the need for protection was therefore significantly reduced.[4]]

Possible points to include

Other purposes of sanctions:

- Rehabilitation - to sentence offenders in a manner that breaks the cycle of criminal behaviour (or 'recidivism') so that criminal offending may be prevented or stopped.
  - This was not a priority in Davies' sentencing as he was advanced in age, had many prior convictions and is unlikely to ever be released from prison.
- Denunciation - to illustrate the court's disapproval for the criminal behaviour of the offender.
  - This was a priority in Davies' sentencing as the courts need to condemn very serious and violent crimes such as rape and murder.
- Deterrence - to impose a sanction which will 'make an example' of the offender, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.
  - Specific deterrence was not a priority due to the age of the offender and the limited chance of his ever being released from prison. General deterrence was a priority as there is a need to discourage members of society from committing crimes of such a heinous nature.

10.

- ✓ ✗ I have stated one way in which fairness was upheld in Davies' case.[1]
- ✓ ✗ I have described this in further detail.[2]
- ✓ ✗ I have identified a second way in which fairness was upheld in Davies' case.[3]

- ✓ ✗ I have described this in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sentence', 'guilty plea', etc.

Exemplar response

[One way in which fairness was upheld in Davies' case is through fair processes.[1]][Davies was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations, promoting a fair outcome.[2]][A second way in which fairness was upheld is through the sentence imposed on Davies.[3]][After Davies pleaded 'guilty', the sentencing judge carefully explained all of his reasons for imposing the sentence that he did, including a reduction in the sentence due to the guilty plea. This is fair because the outcome reflected Davies' guilty plea.[4]]

11.

- ✓ ✗ I have described appeals as a reason for the court hierarchy.[1]
- ✓ ✗ I have provided an example of this reason in Davies' case.[2]
- ✓ ✗ I have described another reason for the court hierarchy.[3]
- ✓ ✗ I have provided an example of this reason in Davies' case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'appeal', 'jurisdiction', etc.

Exemplar response

[An appeal is a request made to a superior court, to review and (if successful) alter a previous decision made by a lower court. 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.[1]][For example, in Davies' case, the court hierarchy would allow him to appeal his sentence to the Court of Appeal if he was granted leave to do so.[2]]

[Another reason for the court hierarchy is specialisation. Specialisation refers to the expertise developed by each of the courts in hearing certain types of criminal cases. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction – a set of criminal offences that each court hears regularly.[3]][For example, Davies' sentence hearing was heard by Justice Lex Lasry, an experienced judge of the Supreme Court who specialises in hearing and sentencing cases that involve the most serious indictable offences, such as murder.[4]]

Possible points to include

Other reasons for the court hierarchy:

- Administrative convenience - comes from separating minor offences and disputes that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts. This avoids the superior courts being 'clogged up' by minor disputes.
  - For example, following the committal hearing, Davies' case went straight to the Supreme Court for sentencing. He and the victim's family were able to avoid delays, as the Supreme Court is not 'clogged up' also hearing minor disputes.
- Doctrine of precedent - is the legal mechanism by which decisions made in higher courts are followed in future, similar cases that arise in lower courts.
  - For example, decisions made in relation to Davies' sentence would have been similar to those made in other cases of a similar nature, based on earlier decisions of superior courts about sentencing laws in Victoria.

LEVEL 3

12.

- ✓ ✗ I have provided one reason why Davies' sentence was longer than the average murder sentence.[1]
- ✓ ✗ I have described this reason in further detail.[2]
- ✓ ✗ I have provided a second reason why Davies' sentence was longer than the average murder sentence.[3]
- ✓ ✗ I have described this reason in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'conviction', 'jurisdiction', 'imprisonment', etc.

Exemplar response

[One reason why Davies received a longer sentence than the average murder sentence is that he had prior convictions.[1]][The fact that Davies had prior convictions of a similar nature and involving sexual assault is an aggravating factor that suggests that he poses a threat to society and that previous terms of imprisonment were not significant enough to deter Davies from committing further crimes.[2]] [A second reason why Davies received a longer sentence is that he waited 33 years to admit to the offence.[3]][In waiting so long to come forward and plead 'guilty' to the rape and murder of Kylie Maybury, Davies denied the victim's family the chance to know what occurred in 1984 and see justice achieved. This suggests that Davies lacked any degree of remorse for his actions.[4]]

LEVEL 4

13.

✓ ✗	I have stated it is possible that Davies could have received either a more or less severe sentence.[1]
✓ ✗	I have stated that the purpose of protection would have been prioritised more, possibly resulting in a harsher sentence.[2]
✓ ✗	I have explained why protection would have been prioritised more.[3]
✓ ✗	I have explained that the purpose of specific deterrence would have been prioritised more, possibly resulting in a harsher sentence.[4]
✓ ✗	I have explained why specific deterrence would have been prioritised more.[5]
✓ ✗	I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[6]
✓ ✗	I have explained that the purpose of rehabilitation would have been prioritised more, possibly resulting in a lesser sentence.[7]
✓ ✗	I have explained why rehabilitation would have been prioritised more.[8]
✓ ✗	I have identified the impact of an earlier guilty plea on the sentencing discount awarded.[9]
✓ ✗	I have explained why an early guilty plea may have resulted in a less severe sentence.[10]
✓ ✗	I have used key legal studies terminology effectively such as: 'conviction', 'guilty plea', etc.

Exemplar response

[There are a number of reasons why Davies may have received either a more or less severe sentence if he had pleaded guilty in 1984.[1]] [If Davies had pleaded guilty in 1984, the purpose of protection would have been more of a priority in sentencing.[2]][Davies was 42 years old at this time and very capable of committing further crimes, which he went on to do as shown by the prior convictions mentioned in the case. Therefore, he posed much more of a danger to the community than he does now as an elderly man, and a more severe sentence (without parole) may have been deemed necessary for protection.[3]][Furthermore, the need for specific deterrence would also have held more significance if Davies was not so advanced in age,[4]][as the likelihood of him committing further crimes would have been higher. Thus, a harsher sentence may have been imposed to achieve this.[5]]

[On the other hand,[6]][if Davies had pleaded guilty in 1984, rehabilitation would have been prioritised more in his sentencing.[7]][At this point in time Davies was much younger and did not have the same criminal history as he did in 2016. It is therefore more likely that he could have been rehabilitated, at least to an extent, and possibly even released from prison at some point in his life, whereas now it is very unlikely that he will return to society.[8]][Additionally, the sentence may have been shorter if Davies pleaded guilty earlier because earlier guilty pleas usually attract a larger sentencing discount.[9]][One of the reasons why Davies received such a harsh sentence was because he waited so long to confess his guilt and therefore deprived the victim's family of seeing justice achieved. An early guilty plea would have benefited both the victim's family and the courts, and Davies may have been rewarded with a slightly less severe sentence and a greater reduction in his prison term.[10]]

14.

✓ ✗	I have stated the extent to which imprisonment achieves the purposes of sanctions.[1]
✓ ✗	I have identified one purpose of sanctions that imprisonment achieves in this case.[2]
✓ ✗	I have explained this in further detail, with reference to the case.[3]

- ✓ ✗ I have identified a second purpose of sanctions that imprisonment achieves in this case.[4]
- ✓ ✗ I have explained this in further detail, with reference to the case.[5]
- ✓ ✗ I have identified a third purpose of sanctions that imprisonment achieves in this case.[6]
- ✓ ✗ I have explained this in further detail, with reference to the case.[7]
- ✓ ✗ I have used a linking word/phrase such as 'however','on the other hand' to show both sides.[8]
- ✓ ✗ I have identified one purpose of sanctions that imprisonment does not achieve in this case.[9]
- ✓ ✗ I have explained this in further detail, with reference to the case.[10]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'conviction', 'jurisdiction', 'imprisonment', etc.

Exemplar response

[Imprisonment does achieve the most relevant purposes of sanctions in this case, though it cannot achieve all purposes.[1]]

[Imprisonment achieves punishment as it is the most severe sanction available to the courts.[2]][The term of life imprisonment imposed on Davies completely deprives Davies of his freedom and removes him from the community, including his friends and family. This is a particularly harsh punishment for Davies as he is advanced in age and has almost no hope of being released from prison in his life.[3]][Imprisonment also achieves denunciation.[4]][Depriving a person of their freedom and keeping them restricted to a prison is an extremely severe punishment which fully conveys the court's condemnation of the offender's actions. By sentencing Davies to life imprisonment, Justice Lasry has made it clear that the courts seriously disapprove of his criminal behaviour.[5]]

[Furthermore, imprisonment achieves both general and specific deterrence in this case.[6]][Imprisonment will always achieve general deterrence as it is such a harsh sentence and the thought of being imprisoned will usually discourage members of the community from committing crimes of a similar nature. It can also achieve specific deterrence by preventing the offender from committing further crimes due to a fear of being imprisoned again, though specific deterrence was not a high priority in this case given the age of the offender.[7]]

[On the other hand,[8]][imprisonment is unlikely to achieve rehabilitation in this case.[9]][The negative environment in prison, exposure to other criminals and lack of contact with supportive family and friends mean that imprisonment rarely achieves rehabilitation. Access to rehabilitative services is limited and approximately 40% of those released from Victorian prisons reoffend to such a serious extent that they are in prison again within 2 years. Given his age and criminal history it is very unlikely that Davies will be rehabilitated in prison, however, rehabilitation was not a high priority for the courts in this case.[10]]

7B DPP v Chatfield [2019]

LEVEL 1

1. D **2.** B **3.** D **4.** A **5.** C

LEVEL 2

6.
- ✓ ✗ I have stated that Chatfield committed indictable offences.[1]
- ✓ ✗ I have provided one reason to justify this answer: Chatfield committed serious criminal offences.[2]
- ✓ ✗ I have provided a second reason to justify this answer: the sentencing hearing took place in the County Court.[3]
- ✓ ✗ I have stated that Chatfield also committed a summary offence.[4]
- ✓ ✗ I have provided one reason to justify this answer: in his sentencing remarks, Judge Grant identified 'committing an offence on bail' as a summary offence.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'indictable offence', 'jurisdiction', 'summary offence', etc.

Exemplar response

[Chatfield committed two indictable offences; home invasion and intentionally causing injury.[1]][This is evident because these are both serious criminal offences,[2]][and Chatfield was sentenced in the County Court, which has jurisdiction to hear all indictable offences except the most serious such as murder.[3]][Chatfield also committed a summary offence; committing an offence while on bail.[4]] [Judge Grant identified this as a summary offence in his sentencing remarks.[5]]

7.

✓ ✗ I have identified one benefit of guilty pleas in the criminal justice system.[1]

✓ ✗ I have described this benefit in further detail.[2]

✓ ✗ I have identified a second benefit of guilty pleas in the criminal justice system.[3]

✓ ✗ I have described this benefit in further detail.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'guilty plea', 'victim', 'trial', 'prosecution', etc.

Exemplar response

[One benefit of guilty pleas is that they allow victims of crime and their families to avoid watching and participating in a trial.[1]] [Criminal trials can be both stressful and traumatic for victims of crime. Giving evidence forces them to relive the negative experience and can result in secondary victimisation for some people. Guilty pleas are therefore favourable for victims because they allow for justice to be achieved without going to trial.[2]][Guilty pleas also benefit the prosecution in a criminal case as they do not have to prove the accused is guilty.[3]][In cases where evidence is limited or the prosecution case relies largely on circumstantial evidence or witnesses that may seem unsure or unreliable in court, it may be difficult for the prosecution to prove the guilt of the accused beyond reasonable doubt. A guilty plea saves time and resources for the prosecution as they do not need to prove the case with oral and forensic evidence beyond reasonable doubt.[4]]

Possible points to include

Other benefits of guilty pleas:

- Saves court time and resources – minimises delays in cases that do go to trial.
- Accused does not have to face the stress, time and costs involved in going to trial.

8.

✓ ✗ I have identified the first court that heard Chatfield's case: Magistrates' Court.[1]

✓ ✗ I have outlined its original criminal jurisdiction.[2]

✓ ✗ I have outlined its appellate criminal jurisdiction.[3]

✓ ✗ I have described which part of Chatfield's case was heard in this court.[4]

✓ ✗ I have identified the second court that heard Chatfield's case: Koori Court (division of the County Court).[5]

✓ ✗ I have outlined its original criminal jurisdiction.[6]

✓ ✗ I have outlined its appellate criminal jurisdiction.[7]

✓ ✗ I have described which part of Chatfield's case was heard in this court.[8]

✓ ✗ I have used key legal studies terminology effectively such as: 'original jurisdiction', 'appellate jurisdiction', 'summary offence', 'indictable offence', etc.

Exemplar response

[The first court that heard Chatfield's case was the Magistrates' Court.[1]][The Magistrates' Court has original jurisdiction to hear all summary offences, indictable offences heard summarily and some pre-trial hearings for indictable offences.[2]][It has no appellate jurisdiction.[3]][In Chatfield's case, the committal hearing was heard in the Magistrates' Court.[4]]

[The second court that heard Chatfield's case was the Koori Court division of the County Court.[5]] [The Koori Court has original jurisdiction to conduct sentencing hearings for indictable offences where the offender is Indigenous and has pleaded guilty.[6]] [The Koori Court has no appellate jurisdiction, however the wider County Court can hear appeals against sentences and guilty verdicts delivered in the Magistrates' Court.[7]] [In Chatfield's case, the sentencing hearing was heard in the Koori Court.[8]]

9.

- ✓ ✗ I have described a purpose of sanctions.[1]
- ✓ ✗ I have explained why it was/was not a priority in Chatfield's case.[2]
- ✓ ✗ I have described a second purpose of sanctions.[3]
- ✓ ✗ I have explained why it was/was not a priority in Chatfield's case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'victim', 'witness', 'offence', 'assault', etc.

Exemplar response

[The purpose of protection is to ensure that offenders who pose a significant risk to the welfare of society (and/or their victims and/or witnesses to an offence) are restricted from engaging in further criminal behaviour through the sanction that is imposed.[1]] [Protection was a priority in Chatfield's case as he has a long history of similar offences, many involving assault. He has therefore shown himself to be a threat to the community, requiring Judge Grant to impose a sanction which would remove Chatfield from society for a period of time.[2]] [The purpose of rehabilitation is to sentence offenders in a manner that breaks the cycle of criminal behaviour (or 'recidivism') so that criminal offending may be prevented or stopped.[3]] [Rehabilitation was not a high priority in Chatfield's case. Chatfield has a history of drug and alcohol abuse, closely linked to his offending. Despite some treatment and attempts to address problem areas in the past, Chatfield repeatedly relapsed back into substance abuse, leading to further offending. This made rehabilitation less of a priority in Chatfield's sentence.[4]]

Possible points to include

- Punishment – to make sure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.
  - Due to the array of aggravating factors in this case, the offence did fall towards the more severe end of this type of crime. It was therefore necessary to impose a harsh sentence in order to achieve just punishment.
- Denunciation – to illustrate the court's disapproval for the criminal behaviour of the offender.
  - This was a priority in Chatfield's sentencing as the courts need to condemn serious cases of assault.
- Deterrence – to impose a sanction which will 'make an example' of the offender, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.
  - Both specific and general deterrence were prioritised in Chatfield's sentencing. Specific deterrence was significant because of Chatfield's array of prior convictions of a similar nature. This repeated offending suggests that other less severe sanctions imposed in the past did not achieve specific deterrence. General deterrence was also a key consideration in sentencing due to the need to discourage others in the community from committing crimes of a similar nature.

10.

- ✓ ✗ I have identified one way in which access was upheld in Chatfield's case.[1]
- ✓ ✗ I have described this in further detail.[2]
- ✓ ✗ I have identified a second way in which access was upheld.[3]
- ✓ ✗ I have described this in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offence', 'jurisdiction', 'offender', etc.

Exemplar response

[One way in which access was upheld in Chatfield's case is through legal representation.[1]] [Chatfield had legal representation that would have guided him through all aspects of the court processes ensuring that he knew his rights and understood these processes. This promotes access as it ensured that Chatfield was not disadvantaged by a lack of legal knowledge.[2]] [A second way in which access was upheld is through the use of the Koori Court.[3]] [The Koori Court operates as a sentencing court for Aboriginal and Torres Strait Islander people who have pleaded guilty to an offence that falls under the County Court's jurisdiction. The Koori Court provides a more informal atmosphere when compared to other courts. This allows for greater participation by the offender and Indigenous leaders from the offender's community in the court process and therefore promotes access to the justice system.[4]]

LEVEL 3

11.

- ✓ ✗ I have suggested one reason why Chatfield received a term of imprisonment: prospects of rehabilitation were limited.[1]
- ✓ ✗ I have described this in further detail.[2]
- ✓ ✗ I have suggested a second reason why Chatfield received a term of imprisonment: gravity of the offence.[3]
- ✓ ✗ I have described this in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'sentence', 'aggravating factor', 'denunciate', etc.

Exemplar response

[Chatfield's limited prospects of rehabilitation may have been one reason why he received a term of imprisonment rather than a CCO.[1]] [Chatfield has a history of drug and alcohol abuse, closely linked to his offending. Despite some treatment and attempts to address problem areas in the past, Chatfield repeatedly relapsed back into substance abuse, leading to further offending. This resulted in Judge Grant imposing a sentence that would heavily restrict Chatfield's freedom rather than a CCO aimed at rehabilitation, because Chatfield does not seem likely to be rehabilitated.[2]]

[The gravity of Chatfield's offending is another reason why he was sentenced to a term of imprisonment.[3]] [Due to an array of aggravating factors, such as the fact that Chatfield carried a weapon and committed the offence in front of a child, the offence fell towards the more serious end of this type of crime. Thus, a harsher sentence was necessary to punish Chatfield appropriately and denunciate his conduct.[4]]

Possible points to include

- The need to prioritise community protection in this case is another possible reason why imprisonment was preferred to a CCO. Chatfield's prior convictions for similar offences suggest he is a threat to public safety and therefore it was important to protect society by imprisoning him, rather than having Chatfield serve his sentence in the community.

LEVEL 4

12.

- ✓ ✗ I have stated the extent to which I agree with the statement.[1]
- ✓ ✗ I have provided a reason why I agree with the statement, linking imprisonment and the purposes of sanctions.[2]
- ✓ ✗ I have provided a second reason why I agree with the statement, linking imprisonment and the purposes of sanctions.[3]
- ✓ ✗ I have used a linking word/phrase such as 'however', 'on the other hand', or similar, to show both sides.[4]
- ✓ ✗ I have provided a reason why I disagree with the statement, linking imprisonment and the purposes of sanctions.[5]
- ✓ ✗ I have provided a second reason why I disagree with the statement, linking imprisonment and the purposes of sanctions.[6]
- ✓ ✗ I have referenced the case throughout my response.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'original jurisdiction', 'appellate jurisdiction', 'summary offence', 'indictable offence', etc.

Exemplar response

[I agree with the statement to some extent.[1]] [One reason why I agree with the statement is because imprisonment does prioritise punishment. Imprisonment achieves punishment because Chatfield is placed in a very harsh environment, with his movement restricted. He will also lose most contact with family and friends.[2]] [I also agree that imprisonment neglects some purposes of sanctions, particularly rehabilitation. The harsh environment within prison, removed from family and friends, is often detrimental to the rehabilitation of offenders. Additionally, long waiting lists for prisons' rehabilitative services will make it difficult for Chatfield to overcome his abuse of alcohol and drugs while in prison, making rehabilitation unlikley.[3]]

[On the other hand, imprisonment does achieve purposes of sanctions other than punishment in this case.[4]] [Imprisonment achieves protection by removing Chatfield from the community and preventing him from committing further offences, particularly assault, on either the victims or other members of society for the time being.[5]]

[Imprisonment also achieves deterrence. Chatfield was sentenced to a reasonably long term of imprisonment and will therefore hopefully be discouraged from committing further offences once released in order to avoid further prison time. Furthermore, general deterrence is achieved by this sanction as the severity of a prison term will generally discourage most people from committing crimes of a similar nature, due to the fear of being imprisoned.[6]]

Possible points to include

Students may also agree or disagree fully with the statement so long as they include points that support their argument.

Other reasons to disagree with the statement:

- Imprisonment achieves denunciation in this case. This purpose of sanctions is not neglected.

Other reasons to agree with the statement:

- Imprisonment may not achieve protection if Chatfield reoffends once he is released (based on his prior criminal history of recidivism and the lack of rehabilitative services available in prison, this may happen).
- Imprisonment may not achieve specific deterrence in this case as Chatfield has not been deterred by other sentences imposed in the past and recidivism rates in Victoria suggest that some offenders aren't successfully deterred through imprisonment.

7C DPP v Arpaci [2018]

LEVEL 1

1. C **2.** B **3.** B **4.** D **5.** C

LEVEL 2

6.

✓ ✗	I have identified which party had the burden of proof in this case – the prosecution.[1]
✓ ✗	I have explained how this upholds the presumption of innocence.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'prosecution', 'accused', etc.

Exemplar response

[The prosecution had the burden of proving this case as they were the party that made an accusation against Arpaci.[1]][This upholds the presumption of innocence as it ensures that accused persons, such as Arpaci, do not have to find and give evidence which proves their innocence; they are presumed innocent unless the prosecution can prove their guilt beyond reasonable doubt.[2]]

7.

✓ ✗	I have described the actus reus element of culpable driving.[1]
✓ ✗	I have explained the actus reus element in Arpaci's case.[2]
✓ ✗	I have described the mens rea element of culpable driving.[3]
✓ ✗	I have explained the mens rea element in Arpaci's case.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'accused', 'actus reus', etc.

Exemplar response

[In order to prove the actus reus for culpable driving, it must be established that the accused was driving a motor vehicle and that their culpable driving was responsible for causing the death of another person.[1]][In this case, Arpaci's actions constituted the actus reus elements of culpable driving as he was driving a motor vehicle and the nature of his driving was a significant cause of the deaths of Churchill and Clonaridis.[2]][The mens rea element of culpable driving requires that the accused was driving recklessly, grossly negligently or under the influence of alcohol or drugs to a very significant extent.[3]][Arpaci satisfied the mens rea element because engaging in a drag race and exceeding the speed limit by 80km/h is classified as grossly negligent driving.[4]]

8.

- ✓ ✗ I have identified one benefit of a jury trial in this case.[1]
- ✓ ✗ I have described this benefit in further detail, linked to the principles of justice.[2]
- ✓ ✗ I have identified a second benefit of a jury trial in this case.[3]
- ✓ ✗ I have described this benefit in further detail, linked to the principles of justice.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'prosecution', 'accused', etc.

Exemplar response

[One benefit of a jury trial in this case is trial-by-peers.[1]][A group of people representing a cross-section of the community was used as the decision-maker, allowing Arpaci to feel that his case was fairly decided by his equals rather than being oppressed by the state.[2]] [A second benefit of a jury trial in this case is that plain English would have been used.[3]][The presence of a jury 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 would have allowed Arpaci to better understand the processes being used against him, promoting access.[4]]

Possible points to include

Other benefits of a jury trial:

- Democratic – trial by peers also protects democracy, ensuring decisions are based on the facts and the law, not politically-motivated, which is fair.
- Independence – juries are independent of all parties to a dispute. They are randomly selected from the community, have no connection to the victim, accused or witnesses. Further they cannot seek additional information about the case beyond the courtroom. They can therefore be completely impartial which promotes fairness.
- Used in all indictable offences – all accused persons (including Arpaci) charged with an indictable offence who have pleaded not guilty will have the same opportunity for their case to be heard and determined by a jury.

9.

- ✓ ✗ I have identified one way in which one of the principles of justice was upheld.[1]
- ✓ ✗ I have described this in further detail, explicitly linked to Arpaci's case.[2]
- ✓ ✗ I have identified a second way in which one of the principles of justice was upheld.[3]
- ✓ ✗ I have explained this in further detail, explicitly linked to Arpaci's case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'accused', etc.

Exemplar response

[One way in which fairness was upheld in this case was through the use of fair processes during pre-trial and trial stages.[1]][Arpaci was made aware of the charges being brought against him and the evidence that police had gathered and he had the opportunity to defend those accusations, which promotes fairness.[2]][One way in which equality was upheld was through the provision of rights to Arpaci as an accused.[3]][Arpaci was afforded all of the rights that an accused person has in Victoria. The police investigation and the court procedures were consistent with the rules of procedures that are followed in all cases. He would not have been treated any differently than any other person despite the horrendous nature of his crimes.[4]]

LEVEL 3

10.

- ✓ ✗ I have stated that a guilty plea would likely have resulted in a less severe sentence for Arpaci.[1]
- ✓ ✗ I have justified this answer by explaining that guilty pleas have a number of benefits in the criminal justice system.[2]
- ✓ ✗ I have described one benefit of guilty pleas.[3]
- ✓ ✗ I have described a second benefit of guilty pleas.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'victim', 'plea', etc.

Exemplar response

[It is likely that Arpaci would have received a less severe sentence if he had pleaded guilty to the two counts of culpable driving.[1]] [A guilty plea will generally result in a sentence reduction because they have a lot of benefits within the criminal justice system.[2]] [For example, a guilty plea prevents victims and victims' families from experiencing the stress and trauma of attending and giving evidence at trial, which can result in secondary victimisation.[3]] [Furthermore, guilty pleas reduce the courts' workloads and minimise delays in cases that do go to trial.[4]]

Possible points to include

Other benefits of guilty pleas:

- The prosecution does not have to prove the guilt of the accused.
- The accused does not have to face the stress, time and cost involved in going to trial.
- Society is saved the time and cost of a trial.

11.

✓ ✗	I have suggested one reason for the harsh sentence.[1]
✓ ✗	I have described this reason in further detail, linking explicitly to the facts in Arpaci's case.[2]
✓ ✗	I have suggested a second reason for the harsh sanction.[3]
✓ ✗	I have described this reason in further detail, linking explicitly to the facts in Arpaci's case.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'deterrence', etc.

Exemplar response

[One reason why Arpaci received a more severe sentence than the average culpable driving offender is the gravity of his offending.[1]] [Judge Hogan said that this was on the upper end of this type of crime and that while they didn't plan to kill anyone, given the high speeds (180km/hour) and negligent nature of the driving, it should have been known that it was highly likely that something would go wrong and that the extent of the harm that would occur was likely to be very high.[2]]

[A second reason why Arpaci received a longer sentence is the need to prioritise general deterrence in this case.[3]] [Judge Hogan highlighted the need to send a message to other drivers that, if they engage in drag racing or other competitive behaviour, particularly at high speeds and interfering with other traffic on a public roadway like Arpaci did, then they need to be aware that they will be appropriately punished for it. The sentence therefore needed to be harsh in order to discourage others from this specific type of culpable driving.[4]]

Possible points to include

Other aggravating factors that resulted in a harsher sentence:

- Victim impact statements – several members of the victims' families submitted victim impact statements which were taken into account.

Other purposes of sanctions that resulted in a harsher sentence:

- Punishment – due to the gravity of the offence and the level of carelessness displayed by Arpaci in regards to the lives of other drivers, just punishment was a key consideration in the sentence. Judge Hogan highlighted the need to 'appropriately' punish Arpaci according to the severity of his actions.
- Denunciation – a lengthy term of imprisonment was imposed to convey the court's condemnation of Arpaci's offence.
- Protection – Arpaci's blatant disregard for the safety of other drivers suggests that he does pose a significant threat to the community. Judge Hogan also pointed out the need to impose a sentence which would ensure community protection indirectly, by trying to deter others from repeating the negligent behaviour.

LEVEL 4

12.

- ✓ ✗ I have described one purpose of sanctions.[1]
- ✓ ✗ I have explained how this purpose is upheld by imprisonment.[2]
- ✓ ✗ I have used a linking word/phrase such as 'however', 'on the other hand', or similar, to show both sides.[3]
- ✓ ✗ I have explained how this purpose is not upheld by imprisonment.[4]
- ✓ ✗ I have described a second purpose of sanctions.[5]
- ✓ ✗ I have explained how this purpose is upheld by imprisonment.[6]
- ✓ ✗ I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[7]
- ✓ ✗ I have explained how this purpose is not upheld by imprisonment.[8]
- ✓ ✗ I have referenced the case throughout my response.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'offender', 'victim', 'imprisonment', 'recidivism', etc.

Exemplar response

[The purpose of protection is to ensure that offenders who pose a significant risk to the welfare of society (and/or their victims and/or witnesses to an offence) are restricted from engaging in further criminal behaviour through the sanction that is imposed.[1]] [Imprisonment and the cancellation of his licence achieve protection as the sanction removes Arpaci from the community and prevents him from driving and endangering the lives of other drivers. A prison sentence also achieves protection indirectly by discouraging others in the community from committing similar crimes.[2]] [However,[3]] [imprisonment may not achieve protection in this case if Arpaci is released from prison, which he likely will be in his mid-/late-thirties. Due to the lack of focus that prisons place on rehabilitation, many offenders go on to reoffend once released from prison. Community protection therefore may not be guaranteed in the long run.[4]]

[The purpose of rehabilitation is to sentence offenders in a manner that breaks the cycle of criminal behaviour (or 'recidivism') so that criminal offending may be prevented or stopped.[5]] [Imprisonment may achieve rehabilitation as prisons do provide some programs to address alcohol and drug dependencies, which cause many offenders to engage in criminal behaviour, though these probably won't be appropriate for Arpaci.[6]] [On the other hand,[7]] [the harsh environment within prison is often detrimental to the rehabilitation of offenders. If an offender has mental health issues that contributed to their offending or which have been developed as a result of the offending (as in Arpaci's case), removing offenders from family and friends in a restricted environment will often make such mental health issues worse.[8]]

Possible points to include

Other purposes of sanctions:

- Punishment – the purpose of punishment is to make sure offenders 'pay' for the impact their crimes have had on victims of crime and/or society as a whole.
  - Imprisonment achieves punishment by removing Arpaci from the community and depriving him of any freedom.
- Denunciation – the purpose of denunciation is to illustrate the court's disapproval for the criminal behaviour of the offender.
  - Imprisonment achieves denunciation as a lengthy term was imposed to convey the court's condemnation of Arpaci's offence.
- Deterrence – the purpose of deterrence is to impose a sanction which will 'make an example' of the offender, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.
  - Specific deterrence is achieved because the length of the imprisonment should discourage Arpaci from committing further crimes as he will not want to return to prison. On the other hand, the very high rate of recidivism in Victoria (around 40% of prisoners return to prison within 2 years of their release) suggests that prison may not be an effective specific deterrent in many cases. This may be because the offender is exposed to other criminals and criminal behaviour whilst in prison.
  - General deterrence is achieved because imprisonment emphasises the gravity of such offences and reminds other drivers that they will be punished if they engage in similar behaviour.

8A Remedies – Principles of justice

LEVEL 1

1. C **2.** D **3.** B

LEVEL 2

4.

✓ ✗	I have described fairness as 'ensuring equitable legal processes are in place and all parties receive an unbiased hearing' (or similar).[1]
✓ ✗	I have provided one example of how fairness is upheld through civil dispute resolution in Victoria.[2]
✓ ✗	I have been careful not to re-use the word 'fair' in my definition.
✓ ✗	I have used key legal studies terminology effectively such as: 'parties', etc.

Exemplar response

[Fairness means ensuring there are equitable legal processes in place and all parties receive an unbiased hearing.[1]][One example of how fairness is upheld through the civil justice system is that resolution can be provided quickly to avoid delays and minimise the pain, suffering and anxiety felt by the plaintiff or defendant.[2]]

Possible points to include

Other possible examples of how fairness is upheld through civil dispute resolution in Victoria include:

- All plaintiffs in civil disputes have an opportunity to present evidence and legal arguments, presenting their case in its best light.
- All defendants in civil disputes have an opportunity to present evidence and legal arguments, presenting their defence in its best light.
- Decisions are not based on bias (based on race, gender, age or political beliefs) but rather are based solely on the facts and the law.

5.

✓ ✗	I have described equality as 'ensuring all people are treated the same before the law regardless of their age, race, and so on, with an equivalent opportunity to present their case' (or similar).[1]
✓ ✗	I have provided one example of how equality is upheld through civil dispute resolution in Victoria.[2]
✓ ✗	I have been careful not to re-use the word 'equality' in my definition.
✓ ✗	I have used key legal studies terminology effectively such as: 'remedies', etc.

Exemplar response

[Equality is defined as ensuring all people are treated in the same way before the law regardless of their age, race, and so on, with an equivalent opportunity to present their case.[1]][One example of how equality is upheld by the civil justice system is that similar cases should have similar outcomes in terms of any remedy provided.[2]]

Possible points to include

Other possible examples of how equality is upheld through civil dispute resolution in Victoria include:

- Plaintiffs and defendants are treated in the same manner regardless of age, gender, religion or disability.
- Procedures (such as the way evidence is presented) are applied in the same way for all who seek a remedy or are defending a claim.

6.

✓ ✗	I have described access as 'ensuring individuals in society have an understanding of legal rights and the ability to pursue their case' (or similar).[1]
✓ ✗	I have provided one example of how access is upheld through civil dispute resolution in Victoria.[2]

✓ ✗ I have been careful not to re-use the word 'access' in my definition.

✓ ✗ I have used key legal studies terminology effectively such as: 'remedies', etc.

Exemplar response

[Access to justice in civil cases means ensuring individuals and businesses in society have an understanding of their legal rights and the ability to pursue their case.[1]][One example of how access is upheld through the civil justice system is people knowing they have a legal right to seek a remedy if their rights have been infringed and they have suffered injury.[2]]

Possible points to include

Other possible examples of how access is upheld through civil dispute resolution in Victoria include:

- Knowing which dispute resolution body or process is the most appropriate way to seek compensation for a civil wrong that has caused injury.
- Knowing how to commence and conduct a civil proceeding to remedy an injury.
- Injured persons being able to afford the fees associated with pursuing a remedy.
- 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 to reduce your liability.
- Unsuccessful parties knowing whether they have a right to appeal an unfavourable outcome.

8B Methods of civil dispute resolution

LEVEL 1

1. B **2.** B **3.** C **4.** C

5. D **6.** A

LEVEL 2

7. ✓ ✗ I have identified one feature of conciliation.[1]

✓ ✗ I have identified a second feature of conciliation.[2]

✓ ✗ I have identified a third feature of conciliation.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'conciliator', etc.

Exemplar response

[One feature of conciliation as a method of dispute resolution is the use of an independent third-party known as a conciliator.[1]][A second feature of conciliation is that the conciliator helps to facilitate communication between the parties and can offer suggestions.[2]][A third feature of conciliation is that the emphasis is on reaching a solution, not determining who is right or wrong.[3]]

Possible points to include

- The decision is not binding (unless parties sign a deed to make the agreement legally enforceable).
- Conciliation occurs in a less formal and more supportive environment.
- Legal representation is generally not used in conciliation.

8. ✓ ✗ I have described mediation as a process in which parties reach their own resolution.[1]

✓ ✗ I have described one feature of mediation.[2]

✓ ✗	I have described a second feature of mediation.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'mediator', '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]] [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 on at mediation.[3]]

Possible points to include

- Mediation is private.
- Mediation puts emphasis on the solution, not who is right or wrong.
- Legal representation is usually not used in mediation.

LEVEL 3

9.

✓ ✗	I have identified arbitration as the method of dispute resolution.[1]
✓ ✗	I have explained arbitration as being 'a non-judicial resolution process involving an independent third party (arbitrator) who listens to the parties present evidence and makes a binding decision' (or similar).[2]
✓ ✗	I have justified this conclusion by providing one reason that indicates Blake and Fred used arbitration.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'binding', 'parties', 'dispute', etc.

Exemplar response

[The method of dispute resolution that Blake and Fred used is abritration.[1]] [Arbitration is a non-judicial resolution process involving an independent third party (arbitrator) who listens to the parties present evidence and makes a binding decision. The rules of evidence and procedure are more relaxed than in court and it is commonly used by parties in commercial contracts.[2]] [It is evident that Blake and Fred used arbitration because they did not come to the decision on their own, rather a third party made a decision in one party's favour.[3]]

Possible points to include

Other aspects of the case indicating they used arbitration:

- The outcome was binding (it is not automatically binding in mediation or conciliation).
- The parties used legal representation (more common in arbitration than mediation or conciliation).

10.

✓ ✗	I have described one similarity between mediation and conciliation.[1]
✓ ✗	I have described one feature of conciliation that differs from mediation.[2]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
✓ ✗	I have described the matching feature of mediation.[4]
✓ ✗	I have described a second similarity between mediation and conciliation.[5]
✓ ✗	I have described a second feature of conciliation that differs from mediation.[6]
✓ ✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[7]
✓ ✗	I have described the matching feature of mediation.[8]
✓ ✗	I have referred to the prompt in my comparison.

✓ ✗ I have used key legal studies terminology effectively such as: 'mediator', 'conciliator', 'dispute', etc.

Exemplar response

[One similarity between mediation and conciliation is that the third party facilitates discussion between the parties so they can reach their own decision.[1]][But they aren't 'indistinguishable' as the quote suggests, because one difference is that in conciliation the third-party may offer suggestions to assist in reaching a solution,[2]][whereas[3]][in mediation the third-party does not offer suggestions.[4]]

[Another similarity between mediation and conciliation is the non-binding outcome. Any solution reached using mediation or conciliation is not binding unless the parties sign a deed of settlement.[5]][A further way they can be distinguished is that in conciliation the independent third party is referred to as a 'conciliator',[6]][however[7]][in mediation the third party is referred to as a 'mediator'.[8]]

Possible points to include

Other similarities between mediation and conciliation include:

- The disputing parties may appoint the third party (however, not always, as the court may in the case of judicial mediation).
- The parties are the decision makers, not the third party.
- Generally there is no evidence presented.
- Rules of procedure are relaxed and supportive.
- Generally there is no legal representation.

11.

✓ ✗ I have identified one error in the scenario.[1]

✓ ✗ I have provided the correct process for this error.[2]

✓ ✗ I have identified a second error in the scenario.[3]

✓ ✗ I have provided the correct process for this error.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'conciliation', 'mediation', etc

Exemplar response

[One error in this scenario is that the independent third party made the decision.[1]][Since the parties were using conciliation, the third party may suggest ways to resolve the dispute, but the parties would reach their own resolution.[2]]

[A second error in this scenario is that the outcome was binding.[3]][In conciliation, the outcome would not be automatically binding on the parties, and therefore the outcome would not be enforceable.[4]]

Possible points to include

Another error and correction includes:

- The third party being referred to as a 'mediator' – they would in fact be a 'conciliator'.

12.

✓ ✗ I have identified one method of dispute resolution that would be appropriate.[1]

✓ ✗ I have justified this conclusion by providing one reason why this method would be appropriate in this scenario.[2]

✓ ✗ I have linked this justification to the facts in the scenario – their desire for a low cost option.[3]

✓ ✗ I have justified this conclusion by providing a second reason why this method would be appropriate in this scenario.[4]

✓ ✗ I have linked this justification to the facts in the scenario – their desire to choose their own outcome.[5]

✓ ✗ I have justified this conclusion by providing a third reason why this method would be appropriate in this scenario.[6]

✓ ✗ I have linked this justification to the facts in the scenario – their desire for informality.[7]

✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'parties', etc.

Exemplar response

[One method of dispute resolution that would be appropriate for Eric and Lester is mediation.[1]][This would be an appropriate method of dispute resolution in Eric and Lester's case as it is the cheapest method of civil dispute resolution, with low fees paid to a mediator and lawyers often not used.[2]][The parties have indicated they want a low-cost option.[3]][It also would allow Eric and Lester to determine their own solution without suggestions from the third party,[4]][which they both want.[5]][Mediation has relaxed rules of evidence and procedure and is conducted in a private and supportive way,[6]][making it the informal process Eric and Lester want.[7]]

Possible points to include

- Conciliation would also be an appropriate method of dispute resolution.
- Conciliation is a non-judicial resolution process involving an independent third party (conciliator) with specialist knowledge about the type of dispute in question.
- This would be appropriate for Eric and Lester as:
  - it is a cheaper method of civil dispute resolution
  - it has very relaxed rules of evidence and procedure, which they desire
  - the parties would also be able to determine their own solution with the assistance of the conciliator's suggestions, which they prefer.

13.

✓	✗	I have described one similarity between arbitration and another method of civil dispute resolution.[1]
✓	✗	I have described one feature of arbitration that differs from the other method of dispute resolution.[2]
✓	✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[3]
✓	✗	I have described the matching feature of the other method of dispute resolution.[4]
✓	✗	I have described a second similarity between arbitration and the other method of civil dispute resolution.[5]
✓	✗	I have described a second feature of arbitration that differs from the other method of dispute resolution.[6]
✓	✗	I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight difference.[7]
✓	✗	I have described the matching feature of the other method of dispute resolution.[8]
✓	✗	I have used key legal studies terminology effectively such as: 'parties', 'dispute', 'arbitration', etc.

Exemplar response

[One similarity between arbitration and another method of civil dispute resolution, mediation, is that the parties generally have the freedom to appoint an independent third party to facilitate/hear their dispute.[1]][One difference between arbitration and mediation is that in arbitration the independent third party makes a binding decision for the parties,[2]][whereas[3]][in mediation the parties themselves are the decision-makers.[4]]

[A second similarity between arbitration and mediation is that these dispute resolution processes are both conducted in private.[5]]

[A second difference is that in arbitration the decision is automatically binding and legally enforceable,[6]][unlike[7]][mediation where the outcome is generally not binding unless the parties take steps to make it legally enforceable such as signing a deed of settlement.[8]]

Possible points to include

Students may choose to describe multiple similarities then multiple differences, or a similarity/difference/similarity/difference. Either approach is acceptable.

For mediation

Other similarities include:

- Mediation and arbitration have relaxed rules of procedure where parties can speak freely about the issues.

Other differences include:

- Legal representation is generally not used in mediation and parties without representation are not disadvantaged, whereas in arbitration parties often require legal representation and those without it may be disadvantaged.
- Third party's role in mediation is to facilitate discussion, whereas in arbitration it is to listen to evidence and deliver the verdict.
- In mediation, the third party is a mediator, whereas in arbitration they are an arbitrator.

- Arbitration involves presentation of evidence and legal arguments whereas mediation does not involve the presentation of evidence as the focus is on a resolution, not who is right or wrong.

For conciliation

Similarities include:

- Parties may in some cases appoint the third party.
- Relaxed rules of procedure enable parties to speak freely.
- The dispute resolution process is confidential.

Differences include:

- In conciliation the parties are the decision-maker whereas in arbitration the third party makes the decision.
- Arbitration involves presentation of evidence whereas conciliation does not.
- Legal representation is generally not used in conciliation and parties without representation are not disadvantaged whereas in arbitration parties often require legal representation and those without may be disadvantaged.
- Third party's role in conciliation is to facilitate discussion and provide solutions whereas in arbitration it is to listen to evidence and deliver the verdict.
- In conciliation, the third party is called a conciliator, whereas in arbitration they are an arbitrator.

LEVEL 4

14.

- ✓ ✗ I have stated a contention about how effective mediation is, linked to the principles of justice.[1]
- ✓ ✗ I have explained a strength of mediation.[2]
- ✓ ✗ I have linked this strength to the principles of justice.[3]
- ✓ ✗ I have explained a weakness of mediation.[4]
- ✓ ✗ I have linked this weakness to the principles of justice.[5]
- ✓ ✗ I have stated a contention about how effective conciliation is, linked to the principles of justice.[6]
- ✓ ✗ I have explained a strength of conciliation.[7]
- ✓ ✗ I have linked this strength to the principles of justice.[8]
- ✓ ✗ I have explained a weakness of conciliation.[9]
- ✓ ✗ I have linked this weakness to the principles of justice.[10]
- ✓ ✗ I have referred to the data in my response.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'mediation', 'conciliation', 'VCAT', etc.

Exemplar response

[Mediation is often, but not always, an effective method of civil dispute resolution.[1]]

[Mediation is effective as it is a cheaper method of dispute resolution. Mediation is often conducted before court proceedings or a tribunal hearing and without legal representation, meaning parties have spent less than they would by resolving a dispute at trial in front of a judge.[2]] [This enables those who have less financial means to access dispute resolution, promoting the achievement of justice.[3]]

[However, as shown by the data, many parties do not reach a voluntary agreement. In 2017-18, VCAT found that 45% of matters did not reach an agreement. In these situations, parties have to conduct a hearing after mediation has occurred which means time and money has been wasted.[4]] [This delay in resolving a matter can add to an injured party's suffering, which can be seen as limiting the achievement of fairness.[5]]

[Conciliation is also not always an effective method of civil dispute resolution.[6]] [Conciliation is an effective method of dispute resolution because parties are able to control the outcome. The third party may offer solutions and help to facilitate communication, but the parties are the ultimate decision-makers which should lead to a mutually acceptable outcome.[7]]

[This control and the outcome being voluntarily entered into should cause parties to be more satisfied with the resolution and feel that the outcome is fair.[8]]

[However, the parties cannot be compelled to participate in conciliation, and as such not all matters can be resolved in this informal and private manner. This is a small concern though, as the cost and time savings create an incentive for most parties to attempt conciliation.[9]] [Therefore this inability to compel parties to attempt conciliation only limits access to this form of dispute resolution to a small extent.[10]]

Possible points to include

- An evaluation of mediation and/or conciliation being effective or ineffective methods of civil dispute resolution is acceptable as long as the data has been referred to in the response and the stance has been justified.
- This question could be answered by evaluating mediation and conciliation separately (as above) or together.

For mediation

Other advantages include:

- The supportive third party helps to facilitate communication which is less intimidating than a judge or magistrate. This promotes access to justice.
- Informal rules of evidence and procedure give the parties freedom and support. This promotes access to justice.
- Matters are kept private and not made public (unlike a trial). This promotes access to justice, as the public nature of a trial may discourage some parties from pursuing or defending a claim.

Other disadvantages include:

- Not suitable for all matters. Disputes that require complicated rules of evidence or the resolution of complex legal issues would not be appropriate in mediation.
- Due to lack of representation and relaxed rules of procedure, one party may dominate the other. This is especially likely if one party is vulnerable, perhaps leading to an unfair outcome.

For conciliation

Other advantages include:

- Conciliation is a cheaper method of civil dispute resolution, promoting access to justice.
- Matters are kept private and not made public, promoting access to justice.
- Informal rules of evidence and procedure give the parties freedom and support.
- Third party is experienced in the area and can provide useful suggestions. This should lead to outcomes that take into account the specifics of the parties and the dispute, which is fair.

Other disadvantages include:

- Not suitable for all matters. Disputes that require complicated rules of evidence would not be appropriate in conciliation. As such it is not accessible in all cases.
- Parties may not reach a resolution and then be required to go to trial, meaning time and money has been wasted.
- Due to lack of representation and relaxed rules of procedure, one party may dominate the other. This is especially likely if one party is vulnerable, which may lead to an outcome that is unfair.

15.

✓	✗	I have commented on the prompt, regarding the ability of arbitration to uphold the principles of justice.[1]
✓	✗	I have described one strength of arbitration.[2]
✓	✗	I have linked this strength to the principles of justice.[3]
✓	✗	I have used a linking term such as 'however', 'but', (or similar) to show I am discussing 'both sides'.[4]
✓	✗	I have described one weakness of arbitration.[5]
✓	✗	I have linked this weakness to the principles of justice.[6]
✓	✗	I have described a second strength of arbitration.[7]
✓	✗	I have linked this strength to the principles of justice.[8]

- ✓ ✗ I have used a linking term such as 'however', 'but', (or similar) to show I am discussing 'both sides'.[9]
- ✓ ✗ I have described a second weakness of arbitration.[10]
- ✓ ✗ I have linked this weakness to the principles of justice.[11]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'arbitration', 'dispute', 'parties', etc.

Exemplar response

[Although arbitration can be a very successful method of dispute resolution in many cases, it does not always uphold the principles of justice.[1]][Because a trial in court is public, arbitration is an appropriate method to resolve civil disputes when the parties want a matter resolved privately.[2]][Arbitration therefore promotes access to justice, because it overcomes the issue that a formal and public trial might discourage parties from pursuing or defending a civil matter.[3]]

[However,[4]][if one party has legal representation but the other doesn't, there may be a power imbalance. Unrepresented parties are disadvantaged as they may not understand the rules of procedure followed in arbitration.[5]][In these situations, arbitration may not promote equality.[6]]

[Another reason arbitration is highly regarded as a way to resolve disputes is that it is a comparatively low cost method. Parties may not need legal representation and if a lawyer is used, it will be for a shorter period than during the preparation and presentation of a case at trial, minimising costs.[7]][By minimising costs, arbitration promotes access to justice for those who may not be able to pursue or defend a case through the courts, especially if the amount claimed is small.[8]]

[Yet[9]][arbitration is not the most appropriate method where parties wish to reach their own decision. In situations where the parties wish to control the outcome of the case, arbitration would not be the most appropriate as the arbitrator delivers a binding verdict.[10]] [The absence of such control over the outcome may leave parties dissatisfied and feeling that the outcome is unfair.[11]]

Possible points to include

Other strengths of arbitration include:

- Provides an outcome that is automatically binding, which promotes dispute resolution in cases where the parties may be unwilling to compromise or negotiate.
- Arbitration provides more relaxed rules of evidence and procedure (compared to a court), promoting access to justice.

Other weaknesses of arbitration include:

- It can be more costly than mediation or conciliation (and therefore comparatively less accessible) as legal representation may be used in some cases.
- Arbitration is not appropriate for every dispute, especially those that require complicated rules of evidence and procedure which may prevent access in these situations.
- There are limited rights to appeal arbitrators' decisions. This may leave the parties feeling an incorrect outcome cannot be reviewed, which is unfair.

16.

- ✓ ✗ I have stated the extent to which mediation upholds the principles of justice.[1]
- ✓ ✗ I have described one strength of mediation.[2]
- ✓ ✗ I have linked this strength to the principles of justice.[3]
- ✓ ✗ I have used a linking term such as 'however', 'but', (or similar) to show I am discussing 'both sides'.[4]
- ✓ ✗ I have described one weakness of mediation.[5]
- ✓ ✗ I have linked this weakness to the principles of justice.[6]
- ✓ ✗ I have described a second strength of mediation.[7]
- ✓ ✗ I have linked this strength to the principles of justice.[8]
- ✓ ✗ I have used a linking term such as 'however', 'but', (or similar) to show I am discussing 'both sides'.[9]

✓	✗	I have described a second weakness of mediation.[10]
✓	✗	I have linked this weakness to the principles of justice.[11]
✓	✗	I have used key legal studies terminology effectively such as: 'mediation', 'dispute', 'parties', etc.

Exemplar response

[Mediation is a very effective method of dispute resolution, as shown through its overall ability to uphold the principles of justice.[1]]

[Mediation is able to uphold the principles of justice as it is a cheaper method of civil dispute resolution. Mediation has much lower costs than a trial and the absence of legal representation further reduces the costs involved.[2]] [This upholds the principles of justice as it is a lot more accessible to those who do not have the financial means to pursue or defend a case in a trial.[3]]

[However,[4]] [mediation does not uphold the principles of justice in a case where there is animosity between the parties, and one party may intimidate the other. While the mediator ensures that both parties are heard, one may still feel pressured into agreeing to an outcome they are not satisfied with.[5]] [In these cases, it may result in an unfair and one-sided outcome, meaning fairness is not achieved.[6]]

[Another way mediation promotes justice is by allowing the parties to voluntarily determine the outcome.[7]] [This promotes fairness as parties are able to agree upon a solution that is accepted by all involved and should leave parties feeling more satisfied than when an outcome is imposed upon them.[8]]

[And yet,[9]] [mediation does not always uphold the principles of justice as the outcome is not automatically legally binding, meaning parties may not adhere to their agreed resolution. However this is a small weakness because the agreement can be made binding if the parties sign a deed of settlement.[10]] [This means mediation fails to promote access to justice in only some disputes.[11]]

Possible points to include

Other ways mediation upholds the principles of justice:

- Unrepresented parties are not disadvantaged (as legal representation is often not used), upholding equality as both parties are on a level footing without legal representation, and fairness as the outcome is not the result of which case is better presented.
- Disputes that go to mediation are kept private. This upholds access as those intimidated by details of their dispute being shared during a trial are able to resolve their dispute through mediation instead.
- Mediation is informal. This is less intimidating for many parties who are confused by the complicated rules of evidence and procedure, promoting access to justice (as the formality of the courts may discourage parties from pursuing or defending civil cases). This also upholds equality as all parties can speak freely about the dispute.
- The supportive third party upholds access as the less adversarial environment encourages individuals to participate.

Other ways mediation may not uphold the principles of justice:

- Mediation is not suitable for all cases if there is a history of broken promises or the parties won't negotiate. However this is a small weakness, as the cost and time savings compared to a trial encourage the parties in most disputes to attempt to mediate.

8C Institutions that resolve civil disputes

LEVEL 1

1. D **2.** C **3.** A **4.** D

5. B **6.** D

LEVEL 2

7.

✓	✗	I have defined the Fair Work Ombudsman as 'an institution that provides information to employers and employees to help them understand their rights and responsibilities under Australian workplace law' (or similar).[1]
✓	✗	I have explained another feature of the Fair Work Ombudsman.[2]

✓ ✗ I have provided one example of a dispute the Fair Work Ombudsman may hear.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'claims', etc.

Exemplar response

[The Fair Work Ombudsman is an institution that provides information to employers and employees to help them understand their rights and responsibilities under Australian workplace laws.[1]][The Fair Work Ombudsman's services are free to all Australians.[2]] [One example of a dispute the Fair Work Ombudsman may hear is an employee who claims they have been underpaid.[3]]

Possible points to include

Other features of the Fair Work Ombudsman include:

- The Fair Work Ombudsman may investigate whether a workplace is complying with Australian workplace laws.
- The Fair Work Ombudsman may commence legal action against an employer who has breached Australian workplace laws.
- The Fair Work Ombudsman may give advice to employees or employers about how to resolve a dispute.
- The Fair Work Ombudsman may provide mediation services to help resolve a workplace issue.

Other disputes that could be heard by the Fair Work Ombudsman include:

- An employee who claims their award has not been upheld.
- An employee who claims their employment was unlawfully terminated.
- An employee who claims their leave entitlements have not been upheld.

8. ✓ ✗ I have defined CAV as a complaints body that gives advice about civil disputes regarding the provision of goods and services (or similar).[1]

✓ ✗ I have explained another feature of CAV.[2]

✓ ✗ I have provided one example of a dispute CAV may hear.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'parties', etc.

Exemplar response

[Consumer Affairs Victoria (CAV) is a complaints body that gives advice about civil disputes regarding the provision of goods and services.[1]][CAV will encourage the parties to settle the dispute themselves but may provide conciliation if they are unable to.[2]] [An example of a dispute CAV may hear is a complaint from a tenant against their landlord.[3]]

Possible points to include

Other features of CAV include:

- CAV may commence legal action against a business that breaches consumer laws in Victoria.
- CAV may investigate complaints about unsafe products being sold in Victoria.
- CAV can advise the government about consumer affairs legislation.
- CAV provides information about consumer laws to the public.

Other disputes that could be heard by CAV include:

- A complaint from a consumer against a business.

9. ✓ ✗ I have explained one way VCAT upholds the principle of access.[1]

✓ ✗ I have explained a second way VCAT upholds the principle of access.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'dispute', 'parties', etc.

Exemplar response

[One way VCAT upholds the principle of access is by being cost effective. Resolving a dispute at VCAT is relatively cheap which promotes access to dispute resolution for those who have limited financial means.[1]][A second way VCAT upholds the principle of access is through its informality. The processes conducted at VCAT are less formal and more support is provided to parties, making it less intimidating and more accessible to parties.[2]]

LEVEL 3

10.

- ✓ ✗ I have described one similarity between VCAT and CAV.[1]
- ✓ ✗ I have described one feature of VCAT that differs from CAV.[2]
- ✓ ✗ I have used a distinguishing word such as: 'whereas', 'however', 'on the other hand', to highlight differences.[3]
- ✓ ✗ I have described the corresponding feature of CAV.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jurisdiction', 'dispute', 'conciliation', etc.

Exemplar response

[One similarity between VCAT and CAV is that they both have jurisdiction to hear disputes from tenants against landlords.[1]]
[One difference between VCAT and CAV is that VCAT decisions are automatically binding,[2]][whereas,[3]][CAV uses conciliation which does not provide an automatically binding outcome.[4]]

Possible points to include

Other similarities between VCAT and CAV include (but are not limited to):

- VCAT and CAV both help resolve civil disputes.

Other differences between VCAT and CAV include (but are not limited to):

- VCAT is a tribunal whereas CAV is a complaints body.
- VCAT can hear a wide range of civil matters whereas CAV can only hear a limited type of consumer matters.

11.

- ✓ ✗ I have identified an appropriate institution to hear this claim.[1]
- ✓ ✗ I have described one reason that justifies why it would be appropriate.[2]
- ✓ ✗ I have linked this reason to the facts in the scenario – within CAV's jurisdiction.[3]
- ✓ ✗ I have described a second reason that justifies why a complaints body would be appropriate for Andy.[4]
- ✓ ✗ I have linked this reason to the facts in the scenario – parties previously attempting to negotiate a settlement.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'parties', 'dispute', 'institution', etc.

Exemplar response

[Consumer Affairs Victoria (CAV) is a complaints body that hears disputes about the provision of goods and services, and would be an appropriate institution to hear Andy's dispute.[1]][CAV has the jurisdiction to hear claims from a tenant against their landlord.[2]]
[CAV would therefore be appropriate in Andy's case as his claim is against his landlord, which falls within CAV's jurisdiction.[3]][CAV is appropriate when the parties have previously attempted to negotiate a resolution.[4]][This would be appropriate for Andy as he and his landlord have previously attempted to negotiate a settlement.[5]]

Possible points to include

VCAT may also be an appropriate institution to hear Andy's claim. The residential tenancies division within VCAT would have jurisdiction to hear Andy's case, as it can make binding decisions to resolve disputes between landlords and their tenants.

12.

- ✓ ✗ I have identified the Fair Work Ombudsman as being an appropriate institution to hear this claim.[1]
- ✓ ✗ I have described one reason that justifies why the Fair Work Ombudsman would be appropriate for Sally.[2]
- ✓ ✗ I have linked this reason to the facts in the scenario – desire for low cost.[3]
- ✓ ✗ I have described a second reason that justifies why the Fair Work Ombudsman would be appropriate for Sally.[4]
- ✓ ✗ I have linked this reason to the facts in the scenario – employer intimidation.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'claim', 'dispute', 'jurisdiction', etc.

Exemplar response

[The Fair Work Ombudsman would be most appropriate to hear Sally's claim as disputes about workplace issues fall within their jurisidction.[1]][The Fair Work Ombudsman would be appropriate for Sally as their services are free to all Australians.[2]][This would satisfy Sally's desire to have her claim resolved at no cost.[3]][Fair Work Ombudsman offers mediation which could assist Sally in resolving her issue.[4]][This would be appropriate as Sally stated that she feels intimidated by her employer and having a third-party present is likely to reduce this issue.[5]]

13.

✓ ✗ I have identified VCAT as being an appropriate institution to hear this claim.[1]

✓ ✗ I have described one reason that justifies why VCAT would be appropriate.[2]

✓ ✗ I have linked this reason to the facts in the scenario – desire for a binding outcome.[3]

✓ ✗ I have described a second reason that justifies why VCAT would be appropriate.[4]

✓ ✗ I have linked this reason to the facts in the scenario – desire to avoid complication.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'jurisdiction', 'institution', etc.

Exemplar response

[The Victorian Civil and Administrative Tribunal (VCAT) would be an appropriate institution to hear this case as it falls within their jurisdiction.[1]][VCAT would be appropriate as the outcome would be binding.[2]][This would be appropriate for Jack and Rob as it would satisfy their requirement of a binding outcome.[3]][Taking a dispute to VCAT is less intimidating as it avoids using complicated processes and legal jargon.[4]][This would be appropriate for Jack and Rob as it would satisfy their desire to avoid complication.[5]]

14.

✓ ✗ I have stated whether I think CAV is an appropriate institution to hear this dispute.[1]

✓ ✗ I have provided one reason why CAV is appropriate to hear this dispute.[2]

✓ ✗ I have linked this reason to the facts in the scenario – Eric's faulty tennis racket.[3]

✓ ✗ I have provided one reason why CAV is not appropriate to hear this dispute.[4]

✓ ✗ I have linked this reason to the facts in the scenario – vendor being unwilling to communicate.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'parties', 'dispute', 'institution', etc.

Exemplar response

[I think CAV would be an appropriate institution to hear Eric and the vendor's dispute.[1]][CAV would be an appropriate institution to hear this dispute as it falls within their jurisdiction.[2]][Eric believes that he was sold a faulty tennis racket and wants a refund. This falls within CAV's jurisdiction to hear claims involving breaches of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).[3]]

[However, CAV may not be appropriate if the vendor refuses to attend conciliation.[4]][CAV cannot compel parties to attend conciliation, and if the vendor refuses court action will be required.[5]]

LEVEL 4

15.

✓ ✗ I have explained one way that VCAT upholds access.[1]

✓ ✗ I have have explained a second way that VCAT upholds access.[2]

✓ ✗ I have explained one way that VCAT does not uphold access.[3]

✓ ✗	I have explained a second way that VCAT does not uphold access.[4]
✓ ✗	I have provided one reason why VCAT would be an appropriate institution to resolve Amber's dispute.[5]
✓ ✗	I have linked this reason to the facts in the scenario – dispute between Amber and her landlord.[6]
✓ ✗	I have used key legal studies terminology effectively such as: 'parties', 'dispute', 'institution', etc.

Exemplar response

[One way VCAT upholds the principle of access is by being cost effective. Resolving a dispute at VCAT is relatively cheap which promotes access to dispute resolution for those who have limited financial means.[1]] [A second way VCAT upholds the principle of access is through its informality. The processes conducted at VCAT are less formal and more support is provided to parties, making it less intimidating and more accessible to parties.[2]]

[One way VCAT does not uphold access is that it can only resolve disputes within its jurisdiction. Matters that do not fall within VCAT's jurisdiction (e.g. representative proceedings) must be taken to court, limiting access.[3]] [A second way that VCAT does not uphold access is through increasing costs. The cost of some VCAT lists are increasing and more complicated matters still require representation which may reduce access for those with limited financial means.[4]]

[One reason why VCAT would be an appropriate institution to resolve Amber's case is that the issue falls within its jurisdiction.[5]] [VCAT has a residential tenancies division which hears disputes between tenants and landlords which is appropriate for Amber's dispute with her landlord.[6]]

Possible points to include

Other ways VCAT does not uphold access:

- VCAT often requires parties to self-represent, which can create difficulties for those from a non-English speaking background/the poorly educated which may limit access for these parties if they cannot bring a civil claim to VCAT.

Other reasons VCAT may be appropriate include:

- If Amber is willing and able to present her own case, VCAT would be appropriate.
- If Amber would prefer an informal dispute resolution process compared to court, VCAT would be appropriate.
- The dispute does not involve complex legal issues.

8D Civil jurisdictions of Victorian courts

LEVEL 1

1. C **2.** C **3.** A **4.** D **5.** D

LEVEL 2

6.

✓ ✗	I have described specialisation as a reason for the court hierarchy.[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 included an example to illustrate specialisation in civil cases.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'fairness', 'claims', etc.

Exemplar response

[Specialisation promotes fairness and accuracy in decision making by ensuring that cases are heard by experienced legal professionals who have expert knowledge of the law pertaining to those particular cases.[1]] [By organising the courts into a hierarchy, with each having its own jurisdiction, courts develop this experience by regularly resolving similar cases.[2]]

[For example, a judge in the Supreme Court (Trial Division) would be familiar with specific laws relating to large and complex representative proceedings.[3]]

7.

- I have described administrative convenience as 'the efficiency gained by separating cases into different courts in the court hierarchy, which ensures superior courts are free to devote time to long and complex matters without these courts being 'clogged up' with lots of minor disputes' (or similar).[1]
- I have used a distinguishing word to demonstrate contrast such as: 'however', 'on the other hand', 'whereas', etc.[2]
- I have described specialisation as 'a court developing skills and experience in resolving similar cases frequently' (or similar).[3]
- I have used key legal studies terminology effectively such as: 'appeals', 'expertise', etc.

Exemplar response

[Administrative convenience refers to the benefit derived from separating minor civil disputes that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts. The court hierarchy allows the superior court to devote time to these more complex disputes, without being 'clogged up' by a lot of minor matters.[1]] [On the other hand,[2]] [specialisation refers to the expertise of each of the courts in hearing certain types of cases. A court hierarchy delivers specialisation by assigning each court a defined jurisdiction, developing skills and experience in resolving similar cases frequently.[3]]

LEVEL 3

8.

- I have identified one other reason for having a court hierarchy.[1]
- I have described this reason in further detail.[2]
- I have linked this reason for the hierarchy to the facts in this case.[3]
- I have used key legal studies terminology effectively such as: 'appeal', 'overturned', etc.

Exemplar response

[One other reason for the existence of a court hierarchy is to allow for the process of appeals.[1]] [Indeed, appeals are only possible if the courts are arranged into a hierarchy, where decisions made in lower courts can be reviewed by higher courts in the same hierarchy.[2]] [In this case, the retailer was able to appeal a decision from the Supreme Court (Trial Division) to the Court of Appeal, where the appeal was upheld and the incorrect decision overturned. If there was no court hierarchy, the retailer would be unable to have the decision made by the original judge reviewed.[3]]

Possible points to include

Administrative convenience:

- Administrative convenience refers to the benefit derived from separating minor civil disputes that are heard by lower courts from the more serious, complex and time-consuming cases that are heard in higher courts. The court hierarchy allows the superior court to devote time to these more complex disputes, without being 'clogged up' by a lot of minor matters.
- In this case the retailer was able to have its case heard in a superior court of record, which was necessary given the complexity of the case and the damages sought. The parties to this longer case benefited from the Supreme Court not being clogged up with many minor claims.

9.

- I have explained why India is correct, by identifying the original jurisdiction of both the County Court and Supreme Court (Trial Division).[1]
- I have referred to the case to demonstrate that her claim falls under the jurisdiction of the County Court and the Supreme Court (Trial Division).[2]
- I have used key legal studies terminology effectively such as: 'jurisdiction', 'dispute', etc.

Exemplar response

[India is correct. Although it is likely to go to the Magistrates' Court in the first instance, her case could also be heard in either the County Court or Supreme Court (Trial Division), which both have unlimited jurisdiction in civil matters.[1]][This means that a claim for $65,000 in India's case would fall under both courts' original civil jurisdictions, though in practice it is highly likely that it will be heard in the Magistrates' Court.[2]]

10.

- ✓ ✗ I have identified one error in the extract.[1]
- ✓ ✗ I have provided the correct definition, process or procedure.[2]
- ✓ ✗ I have identified a second error in the extract.[3]
- ✓ ✗ I have provided the correct definition, process or procedure.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jurisdiction', 'superior court', etc.

Exemplar response

[One error in the extract is that the case will be determined in the Magistrates' Court. The claim is for $175,000, which is outside the civil jurisdiction of the Magistrates' Court as it hears claims up to $100,000.[1]][Instead, this case is likely to be heard at first instance in either the County Court or the Supreme Court (Trial Division), which both have civil jurisdiction to hear claims of unlimited amount.[2]] [A second error in the extract is the club being proven liable 'beyond reasonable doubt'.[3]][This is incorrect as the burden of proof in civil cases is 'on the balance of probabilities'.[4]]

LEVEL 4

11.

- ✓ ✗ I have identified one way the court hierarchy promotes access.[1]
- ✓ ✗ I have described this strength of the court hierarchy in further detail.[2]
- ✓ ✗ I have identified a second way the court hierarchy promotes access.[3]
- ✓ ✗ I have described this strength of the court hierarchy in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'administrative convenience, 'pre-trial procedures', etc.

Exemplar response

[One way in which the court hierarchy promotes access is through administrative convenience.[1]][The added administrative convenience of having a court hierarchy promotes access by reducing the backlog of cases in particular courts and minimising unnecessary delays and costs associated with taking a matter to court.[2]][A second way in which the court hierarchy promotes access is through the use of pre-trial procedures.[3]][All courts in the hierarchy use pre-trial procedures that require parties to share information about the facts and legal issues in the dispute. This regularly results in the parties settling the dispute prior to a trial (often through mediation), minimising overall costs in resolving the matter.[4]]

8E Role of the jury in a civil trial

LEVEL 1

1. C **2.** B **3.** D **4.** D

5. A **6.** C **7.** B

LEVEL 2

8.

- ✓ ✗ I have stated one reason why a jury may not be used in a civil trial.[1]
- ✓ ✗ I have stated another reason why a jury may not be used in a civil trial.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'court', etc.

Exemplar Response

[One reason why a jury may not be used in a civil matter is if the case is being heard in the Magistrates' Court or VCAT. Juries are only empanelled in the County Court and Supreme Court in civil cases.[1]][Another reason why a jury may not be used is if the parties would both prefer a trial by judge alone. In order for a jury to be empanelled in a civil case, one of the parties must request a jury and cover the costs associated with a jury.[2]]

Possible points to include

Other possible reasons why a jury may not be used:

- The judge orders that the case be tried by judge alone.

9.

- ✓ ✗ I have stated that John would not be liable for jury service.[1]
- ✓ ✗ I have explained why John is not liable for jury service.[2]
- ✓ ✗ I have referenced Schedule 2 of the *Juries Act 2000* (Vic).[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury service', etc.

Exemplar Response

[It is not likely that John would be liable for jury service.[1]][John has a severe physical disability which would make him ineligible for jury service.[2]][Schedule 2 of the *Juries Act 2000* (Vic) outlines those people who are ineligible for jury service, including anyone who has a disability which renders the person incapable of performing the duties of jury service.[3]]

10.

- ✓ ✗ I have described a 'juror summons' as 'a court order sent to some or all of the people on the jury list requiring them to present themselves at court for jury service' (or similar).[1]
- ✓ ✗ I have explained the purpose of a summons.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'summons', 'jury service', etc.

Exemplar Response

[A juror summons is a court order sent to some or all of the people on the jury list requiring them to present themselves at court for jury service.[1]][The purpose of a summons is to inform the people on a jury list that they are required for jury service at least 10 days before they need to attend. The summons must specify the date, time and place where the person is required to attend for jury service.[2]]

11.

- ✓ ✗ I have identified one responsibility of the jury in a civil trial.[1]
- ✓ ✗ I have provided further detail about this responsibility of the jury.[2]
- ✓ ✗ I have identified a second responsibility of the jury in a civil trial.[3]
- ✓ ✗ I have provided further detail about this responsibility of the jury.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'liability', 'damages', 'plaintiff', 'defendant', etc.

Exemplar Response

[One responsibility of the jury in a civil trial is to listen to and remember the evidence, directions and submissions presented at trial.[1]][Jurors must remain alert, take notes and keep track of complex information throughout the trial, as well as understanding any directions from the judge and the summaries presented by legal representatives.[2]][Another responsibility of the jury in a civil trial is to decide liability and damages.[3]][The jury must decide whether or not the defendant is responsible for the harm caused to the plaintiff, based on the ability of the plaintiff to prove their case on the balance of probabilities. In some matters, the jury will also be required to calculate damages after the defendant has been found liable.[4]]

Possible points to include

Other possible responsibilities of the jury in a civil trial:

- Be objective
  - Jurors must be independent and unbiased.
  - Jurors that cannot make an impartial decision should asked to be excused.
  - Jurors should not conduct their own research into a case outside of the court.

12.

- ✓ ✗ I have identified a strength of juries in civil trials.[1]
- ✓ ✗ I have described how this strength is linked to the principles of justice.[2]
- ✓ ✗ I have identified a weakness of juries in civil trials.[3]
- ✓ ✗ I have described how this weakness is linked to the principles of justice.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'jurors', etc.

Exemplar Response

[One strength of using a jury in a civil trial is that in very serious cases juries provide for trial-by-peers.[1]][A cross-section of the community is used as 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.[2]][One weakness of using a jury in a civil trial is that jurors may be influenced by what they hear about a party to a case in the media,[3]][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.[4]]

Possible points to include

Other possible strengths of juries in civil trials:

- Juries are independent of all parties to a dispute. This promotes fairness.
- 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 promotes access to justice.
- Both parties have the capacity to request a jury trial, which promotes equality before the law.

Other possible weaknesses of juries in civil trials:

- Making decisions in complex civil cases may be too difficult for people with no legal training. May undermine fairness.
- The use of juries creates delays. Adds to the suffering of a party seeking a remedy, which is unfair.
- Juries are used in a very small proportion of civil cases (meaning fairness is promoted by juries in relatively few matters).
- Additional fees are required for jury trials. This may render juries inaccessible.
- Many civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is further limited.

LEVEL 3

13.

- ✓ ✗ I have explained why the first statement is incorrect: this case would not be heard in the Magistrates' Court because the claim is more than $100,000.[1]
- ✓ ✗ I have explained why the second statement is incorrect: the trial will only be heard by a jury if one of the parties request a trial by jury, otherwise it will be heard by judge alone. If the trial is heard by a jury, the jury will consist of 6 jurors, not 12.[2]

✓ ✗ I have explained why the third statement is incorrect: a trial by jury will not be unfair because jurors are not allowed to do their own research on a case outside of the courtroom.[3]

✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'juror', etc.

Exemplar Response

[The first statement is incorrect because this case involves a claim of more than $100,000 and would therefore not be heard in the Magistrates' Court. The trial would take place in the County Court or Supreme Court.[1]][The second statement is incorrect because this trial will not necessarily be heard by a jury, unless one of the parties requests a trial-by-jury. Otherwise, it will be heard by judge alone. Furthermore, if a jury is empanelled it will consist of 6 jurors, not 12.[2]][The third statement is incorrect because a trial by jury should not be biased or unfair. Jurors are not allowed to do their own research on a case outside of the courtroom. A juror who feels they cannot make an impartial decision must ask to be excused.[3]]

14. a) ✓ ✗ I have stated that the jury would not award damages in this case.[1]

✓ ✗ I have justified my answer.[2]

✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'damages', 'defamation', etc.

Exemplar Response

[The jury in this case would not have decided the amount of damages awarded to Wilson.[1]][This is because the case is a defamation claim and juries are not permitted to decide damages in defamation cases. This would be the judge's responsibility.[2]]

b) ✓ ✗ I have identified one responsibility of the jury in this case.[1]

✓ ✗ I have explained this responsibility in greater detail.[2]

✓ ✗ I have identified a second responsibility of the jury in this case.[3]

✓ ✗ I have explained this responsibility in greater detail.[4]

✓ ✗ I have signposted my answer appropriately by using terms such as: 'one responsibility', 'another responsibility', etc.

✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'liability', 'defendant', 'plaintiff', etc.

Exemplar Response

[One responsibility of the jury in this case was to be objective.[1]][This requires the jury to make independent and impartial decisions which are based on the facts and evidence presented in court. The jurors are prohibited from conducting their own research into the case outside of court because this may prevent them from making an objective and unbiased decision. This is particularly important in high profile cases such as this, where there is a lot of information available online and in the media.[2]]

[Another responsibility of the jury in this case was to deliver a verdict on the liability of the defendant.[3]][The jury was required to determine whether the defendant had published defamatory matter about the plaintiff and if so, whether the defence of qualified privilege raised by the defendant was established.[4]]

Possible points to include

Other possible responsibilities of the jury:

- To stay alert and keep track of any facts or evidence presented during the trial.
- To listen to any directions given to them by the judge and to the presentations of legal representatives.

15. ✓ ✗ I have explained one similarity between the role of civil and criminal juries.[1]

✓ ✗ I have explained a second similarity between the role of civil and criminal juries.[2]

✓ ✗ I have described one feature of a civil jury's role that differs from the role of a criminal jury.[3]

- ✓ ✗ I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[4]
- ✓ ✗ I have described the corresponding feature of a criminal jury.[5]
- ✓ ✗ I have described a second feature of a civil jury's role that differs from the role of a criminal jury.[6]
- ✓ ✗ I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[7]
- ✓ ✗ I have described the corresponding feature of a criminal jury.[8]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'jury', 'accused', 'liability', 'defendant', 'plaintiff', etc.

Exemplar Response

[Civil and criminal juries ultimately share a similar role. They act as an impartial decider of facts, and must deliver a verdict based on the facts and evidence presented at trial.[1]][Both civil and criminal juries are required to reach a unanimous verdict, however, a majority verdict may be allowed in certain circumstances in both civil and criminal matters.[2]]

[One of the differences in the role of civil and criminal juries is that in a civil matter the jury determines the liability of the defendant on the balance of probabilities,[3]][whereas[4]][a jury in a criminal trial is required to decide whether the accused is guilty beyond reasonable doubt.[5]][Additionally, civil juries may sometimes be required to decide what damages are awarded to a successful plaintiff,[6]][but[7]][criminal juries will never decide which sanction should be imposed on a guilty offender.[8]]

Possible points to include

Students may choose to describe multiple similarities then multiple differences, or a similarity/difference/similarity/difference. Either approach is acceptable.

Other possible similarities in the role of civil and criminal juries:

- Jurors must make their decision based only on the evidence presented, and nothing else, meaning that they are unable to conduct their own research. This is the same in both a criminal and a civil trial.
- Jurors must be unbiased, listen to the evidence and listen to the directions given by the judge.

LEVEL 4

16.

- ✓ ✗ I have provided a brief introduction that provides contextual information about the role of civil juries, addressing the task word.[1]
- ✓ ✗ I have identified one justification for the use of a jury in a civil trial.[2]
- ✓ ✗ I have described this strength of the jury system in more detail, linked to the principles of justice.[3]
- ✓ ✗ I have identified a second justification for the use of a jury in a civil trial.[4]
- ✓ ✗ I have described this strength of the jury system in more detail, linked to the principles of justice.[5]
- ✓ ✗ I have identified a third justification for the use of a jury in a civil trial.[6]
- ✓ ✗ I have described this strength of the jury system in more detail, linked to the principles of justice.[7]
- ✓ ✗ I have signposted my answer appropriately by using terms such as: 'using juries is justified because', 'another reason is', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'judge', 'objectively', 'evidence', 'liability', 'representative', 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.[2]]

[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', which promotes fairness in the justice system.[3]]

[Further, using juries is justified as they are 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, culture, age, gender and socio-economic status.[4]]

[Consequently, decisions can be more likely to reflect the values of the community which is fair for participants in civil cases.[5]]

[Lastly, jury trials in civil law matters can also be justified because they allow the community to participate directly in the administration of justice,[6]][enhancing understanding of and confidence in the legal system which in turn promotes access to justice.[7]]

17.

✓ ✗	I have stated the extent to which I agree with the statement.[1]
✓ ✗	I have identified one reason jury trials should be retained/abolished.[2]
✓ ✗	I have described this strength/weakness of civil juries in detail, linked to the principles of justice.[3]
✓ ✗	I have identified a second reason jury trials should be retained/abolished.[4]
✓ ✗	I have described this strength/weakness of civil juries in detail, linked to the principles of justice.[5]
✓ ✗	I have provided a statement of the opposing view to show I am discussing 'both sides'.[6]
✓ ✗	I have identified one reason for this opposing view.[7]
✓ ✗	I have described this strength/weakness of civil juries in detail, linked to the principles of justice.[8]
✓ ✗	I have identified a second reason for this opposing view.[9]
✓ ✗	I have described this strength/weakness of civil juries in detail, linked to the principles of justice.[10]
✓ ✗	I have provided a brief concluding statement restating my response to the task word and contention.[11]
✓ ✗	I have used signposting language to structure my response such as: 'whilst', 'furthermore', 'one limitation', 'another limitation', 'in addition', 'in conclusion', etc.
✓ ✗	I have used key legal studies terminology effectively such as: 'jury', 'trial-by-peers', 'plaintiff', 'defendant', etc.

Exemplar Response

[Whilst there are some disadvantages to the use of a jury in civil trials including costs and delay, I disagree to a large extent that they should be abolished because they can also provide a number of benefits.[1]][A reason they should not be abolished is the use of a jury in a civil trial allows for trial-by-peers and protects democracy.[2]][A cross-section of the community is used as 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 and ensures decisions are based on the facts and the law not political motivations, which promotes fairness.[3]]

[Another reason I disagree is that, using a jury in a civil trial ensures that plain English is used in court,[4]][so 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 enables plaintiffs and defendants to better understand the process being used, which promotes access to justice by improving understanding of the legal process.[5]][Whilst the above may be acknowledged benefits of a jury trial, using a jury in a civil trial does have some limitations.[6]]

[One limitation of using a jury in a civil trial, correctly stated in the prompt, is that making decisions in legal cases is a complex task undertaken by people with no legal training,[7]][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.[8]]

[Another weakness is that the use of juries creates delays,[9]][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 a defendant, on plaintiffs seeking compensation and witnesses by compounding the stress involved.[10]]

[In conclusion, whilst the use of juries in civil trials can be beneficial and should not be abolished, juries may not always be the best option to hear a trial.[11]]

Possible points to include

Other possible strengths of a civil jury (to be described as reasons not to abolish juries in civil cases):

- Juries are independent of all parties to a dispute.
- Both parties have the capacity to request a jury trial.

Other possible weaknesses of a civil jury (to be described as reasons to abolish juries in civil cases):

- Jurors may be influenced by what they hear about a party to a case in the media.
- Juries are used in a very small proportion of civil cases. Abolishing civil juries would impact upon very few disputes.
- Additional fees are required for jury trials.
- Many civil disputes are resolved in VCAT or the Magistrates' Court, so access to jury trial is already very limited.

8F The purposes & types of civil remedies

LEVEL 1

1. **a)** Exemplary damages **b)** Compensatory damages **c)** Nominal damages

2. D

3. C

4. B

5. C

6. C

7. B

LEVEL 2

8.

- ✓ ✗ I have defined a civil remedy as 'an order from the court which upholds the plaintiff's civil rights by providing relief for the injury they have suffered' (or similar).[1]
- ✓ ✗ I have included examples of civil remedies.[2]
- ✓ ✗ I have identified the purpose of civil remedies as 'restoring the plaintiff to their former position' (or similar).[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'remedy', 'plaintiff', etc.

Exemplar response

[A civil remedy is an order from the court (or VCAT) which upholds the plaintiff's civil rights by providing relief for the injury they have suffered.[1]][Examples of the most common civil remedies include damages and injunctions.[2]][The overarching purpose of all civil remedies is to restore the plaintiff, as much as possible, to the position they were in before their rights were infringed.[3]]

9.

- ✓ ✗ I have identified the type of damages in the scenario as nominal damages.[1]
- ✓ ✗ I have outlined the purpose of nominal damages as 'to reflect that the plaintiff was legally right' (or similar).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'damages', 'plaintiff', 'defendant', etc.

Exemplar response

[The type of damages awarded to Susan in the above scenario are nominal damages.[1]][The purpose of nominal damages is to reflect that the plaintiff is legally right, but the actions of the defendant did not cause any harm/loss to the plaintiff.[2]]

10. ✓ ✗ I have defined an injunction as a 'court order compelling a party to do something, or preventing a party from doing something' (or similar).[1]

✓ ✗ I have stated that injunctions are mandatory or restrictive.[2]

✓ ✗ I have provided an example of a mandatory injunction.[3]

✓ ✗ I have provided an example of a restrictive injunction.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'mandatory', 'restrictive', 'defendant', etc.

Exemplar response

[An injunction is a court order compelling a party to do something or preventing a party from doing something.[1]][There are two types of injunctions, mandatory and restrictive.[2]][One example of a mandatory injunction would be an order which demands a written apology from the defendant.[3]][An example of a restrictive injunction would be an order which prevents a property from being sold.[4]]

Possible points to include

Other possible examples of a mandatory injunction include:

- An order forcing a party to perform part of a contract that was breached.
- An order forcing a party to deliver goods.
- An order forcing a party to execute documents to give effect to a transaction (such as a transfer of land or release of mortgage).

Other possible examples of a restrictive injunction include:

- An order preventing publication or use of confidential information.
- An order preventing the sale of a product where there is a trademark or patent infringement allegations.
- An order preventing the demolition of a heritage listed site.

LEVEL 3

11. **a)** ✓ ✗ I have defined specific damages as 'having a precise value' (or similar).[1]

✓ ✗ I have provided one example of specific damages in the case.[2]

✓ ✗ I have used a contrasting linking word, such as: 'however', 'whereas', 'on the other hand', 'in contrast', etc.[3]

✓ ✗ I have defined general damages as 'not having a precise value' (or similar).[4]

✓ ✗ I have provided one example of general damages in the case.[5]

✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'damages', etc.

Exemplar response

[Specific damages are a type of compensatory damages which have a precise value and are easily quantifiable.[1]][An example of specific damages in this case is the $940,000 awarded to the plaintiff for pecuniary loss, which includes loss of income and medical expenses.[2]]

[In contrast,[3]][general damages are a type of compensatory damages which do not have a precise value and are not easily quantifiable.[4]][An example of general damages in this case is the $320,000 awarded to the plaintiff for pain and suffering and loss of enjoyment of life.[5]]

b) ✓ ✗ I have explained how specific damages do achieve their purpose in this case.[1]

✓ ✗ I have used a contrasting term such as 'however', 'on the other hand', etc. to show 'both sides'.[2]

✓ ✗ I have explained how specific damages may be limited in their ability to achieve their purpose in this case.[3]

- ✓ ✗ I have explained how general damages do achieve their purpose in this case.[4]
- ✓ ✗ I have used a contrasting term such as 'however', 'on the other hand', etc. to show 'both sides'.[5]
- ✓ ✗ I have explained how general damages may be limited in their ability to achieve their purpose in this case.[6]
- ✓ ✗ I have made explicit references to the case study.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'defendant', etc.

Exemplar response

[Specific damages achieve their purpose in this case by reimbursing the plaintiff, Mr Shirreff, for the financial loss that he has suffered, and thus restoring him to the financial position that he was in prior to the infringement of his rights.[1]] [However,[2]] [the ability for specific damages to achieve their purpose may be limited by the capacity of the defendant to pay the damages. For example, Elazac Pty Ltd may not be able to afford the damages that they owe to Mr Shirreff, meaning the plaintiff would not be restored to his original financial position.[3]]

[General damages achieve their purpose in this case by offering monetary compensation for the harm suffered by Mr Shirreff. The amount awarded for pain and suffering and loss of enjoyment of life in this case aims to reimburse Mr Shirreff for the negative experiences that he has had as a result of his employer's negligence.[4]] [On the other hand,[5]] [it is impossible to place a quantifiable value on subjective experiences such as pain and suffering, thus limiting the ability of general damages to fully compensate Mr Shirreff or reverse the harm that he has suffered.[6]]

12. a)

- ✓ ✗ I have identified the injunction in this case as a short-term restrictive injunction.[1]
- ✓ ✗ I have described a restrictive injunction as 'an order from the court that prevents a party from doing something' (or similar).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'injunction', etc.

Exemplar response

[The injunction awarded in this case is a short-term (or interlocutory) restrictive injunction.[1]] [A restrictive injunction is an order from the court that prevents one or both parties in a civil dispute from undertaking a particular action, such as selling a house.[2]]

b)

- ✓ ✗ I have explained the purpose of the injunction in this case as 'preventing harm to the plaintiff' (or similar).[1]
- ✓ ✗ I have provided an example of the injunction achieving its purpose in this case.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'injunction', 'dispute', etc.

Exemplar response

[The purpose of the restrictive injunction awarded in this case is to prevent harm to the plaintiff by prohibiting the sale of the property in question.[1]] [The injunction ensures that James cannot sell the property before the dispute is settled, thus preventing any loss or damage that may have been suffered by Mary if this had occurred.[2]]

13.

- ✓ ✗ I have identified the type of damages as exemplary damages.[1]
- ✓ ✗ I have justified this response, with reference to the extract.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'damages', 'defendant', 'plaintiff', etc.

Exemplar response

[The type of damages being referred to in this extract is exemplary damages.[1]] [This is evident because exemplary damages are the only type of damages which aim to 'punish' the defendant for an extreme infringement on and disregard for the plaintiff's rights. This may involve excessive 'malice, violence or cruelty'.[2]]

14.

- ✓ ✗ I have outlined one remedy that Emma may be awarded.[1]
- ✓ ✗ I have stated the extent to which this remedy achieves one of its purposes in the case.[2]
- ✓ ✗ I have explained one way this remedy does achieve its purpose in this case.[3]
- ✓ ✗ I have explained a second way this remedy does achieve its purpose in this case.[4]
- ✓ ✗ I have used a contrasting term such as 'however', 'on the other hand', etc. to show 'both sides'.[5]
- ✓ ✗ I have explained how this remedy may not achieve its purpose in the case.[6]
- ✓ ✗ I have signposted my response appropriately using terms such as: 'one remedy is', 'on the other hand', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'damages', 'plaintiff', etc.

Exemplar response

[One remedy that Emma may be awarded is compensatory damages. Compensatory damages are the most common damages sought, and aim to reimburse the plaintiff for the loss they have suffered.[1]][Compensatory damages will, to some extent, be able to restore the plaintiff, Emma, to the position that she was in prior to the infringement of her rights.[2]][Specific damages, which would be awarded for the medical expenses and loss of income that Emma has experienced, reflect the financial loss that the plaintiff has suffered and will restore Emma to the financial position that she was in prior to the incident. The quantifiable nature of things like medical bills and loss of income make it easier for specific damages to fully reimburse Emma for her loss.[3]]

[On the other hand,[4]][general damages, which would be awarded for the pain and suffering that Emma has experienced, are somewhat limited in their ability to fully restore a plaintiff to their former position. While these damages do recognise the suffering that Emma has undergone,[5]][it is impossible to place a monetary value on subjective experiences like pain and suffering, which may prevent Emma from feeling that she has been entirely compensated.[6]]

LEVEL 4

15.

- ✓ ✗ I have stated 'how much' I agree with this statement.[1]
- ✓ ✗ I have explained a limitation of damages.[2]
- ✓ ✗ I have provided an example to illustrate this limitation.[3]
- ✓ ✗ I have explained a strength of damages.[4]
- ✓ ✗ I have provided an example to illustrate this strength.[5]
- ✓ ✗ I have explained a second limitation of damages.[6]
- ✓ ✗ I have provided an example to illustrate this limitation.[7]
- ✓ ✗ I have explained a second strength of damages.[8]
- ✓ ✗ I have provided an example to illustrate this strength.[9]
- ✓ ✗ I have signposted my response appropriately using terms such as: 'for example', 'on the other hand', 'however', etc.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'damages', 'defendant', etc.

Exemplar response

[I disagree to a large extent with this statement. While damages are not able to reverse the harm that a plaintiff has suffered, they are not a useless remedy.[1]][Damages are limited in their ability to achieve the purposes of remedies because they are not ultimately able to take away all the negative experiences that the plaintiff has had.[2]]

[For example, if a plaintiff has suffered from a particularly grievous injury due to the infringement on their rights even an award of general damages may not sufficiently reimburse the plaintiff for their pain and suffering.[3]]

[On the other hand, damages, particularly compensatory damages, do serve a purpose and will often successfully restore the plaintiff to their former financial position. Thus, while there is no way to reverse the harm suffered by the plaintiff, damages can at the very least resolve any financial difficulty or inconvenience which may have resulted from the infringement of rights – this is not useless.[4]] [For example, medical expenses, loss of income, or damage to property can all be effectively resolved by damages.[5]]

[The ability of damages to achieve the purposes of remedies can also be limited by the financial capacity of the defendant. If a defendant is unable to pay damages, this will prevent the plaintiff from being restored to their former position.[6]] [For example, some types of damages, such as exemplary damages, may be extremely costly and beyond the ability of the defendant to pay.[7]]

[However, an award of damages does recognise that the plaintiff's rights have been infringed and thus allows the plaintiff to feel that some justice has been achieved and that their suffering has been recognised.[8]] [For example, even nominal damages, though minimal, acknowledge that the defendant has breached the plaintiff's rights, while exemplary damages serve as a punishment for an extreme infringement of rights.[9]]

16.

✓ ✗	I have stated how effective injunctions are at achieving their purposes.[1]
✓ ✗	I have stated a purpose of injunctions.[2]
✓ ✗	I have explained how injunctions achieve this purpose.[3]
✓ ✗	I have explained how injunctions do not achieve this purpose.[4]
✓ ✗	I have provided an example.[5]
✓ ✗	I have stated another purpose of injunctions.[6]
✓ ✗	I have explained how injunctions achieve this purpose.[7]
✓ ✗	I have explained how injunctions do not achieve this purpose.[8]
✓ ✗	I have provided an example.[9]
✓ ✗	I have signposted my response appropriately using terms such as: 'one purpose of injunctions', 'on the other hand', 'however', etc.
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'defendant', 'injunction', etc

Exemplar response

[Injunctions are, to some extent, able to achieve the purposes of civil remedies. However, there are a number of limitations to also consider.[1]] [One purpose of injunctions is to restore the plaintiff to their former position.[2]] [Injunctions can achieve this purpose by prohibiting or mandating the actions of the defendant in a way that will prevent any further infringement on the plaintiff's rights. Thus, the plaintiff is returned to the position that they were in before the defendant breached their civil rights.[3]]

[On the other hand, if the defendant does not adhere to the injunction, this purpose will not be achieved. An injunction can only successfully resolve an infringement of rights if the injunction is followed.[4]] [For example, if a court awards an injunction which prevents the defendant from publishing defamatory posts online about the plaintiff, this will theoretically restore the plaintiff to their former position by removing any threat posed by the defendant. However, if the defendant does not adhere to the injunction, the rights of the plaintiff will continue to be infringed.[5]]

[Another purpose of injunctions is to prevent any harm to the plaintiff.[6]] [Injunctions achieve this purpose by preventing the defendant from acting in a way which breaches the plaintiff's rights.[7]] [However, injunctions are limited in this ability as they cannot reverse any harm that the plaintiff has already suffered as a result of the defendant's actions. Thus, the injunction might provide little benefit if damage has already occurred.[8]] [For example, an injunction which requires a defamatory publication to be removed from circulation will prevent any further harm to the plaintiff's reputation, but may not be as effective if their reputation has already suffered substantial damage.[9]]

Chapter 8 Review questions

LEVEL 5

1. a)

- ✓ ✗ I have stated that Alisha has the burden of proof in this case.[1]
- ✓ ✗ I have justified this statement by identifying Alisha as the plaintiff.[2]
- ✓ ✗ I have stated that the standard of proof in this case is 'on the balance of probabilities'.[3]
- ✓ ✗ I have justified this statement by identifying the case as a civil matter.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'plaintiff', 'claim', etc.

Exemplar response

[Alisha has the burden of proof in this case[1]][because she is the plaintiff bringing a claim against the magazine (the defendant).[2]][The standard of proof is 'on the balance of probabilities',[3]][as this is a civil case.[4]]

b)

- ✓ ✗ I have identified one responsibility of the jury in Alisha's case.[1]
- ✓ ✗ I have described this responsibility in further detail.[2]
- ✓ ✗ I have described a second responsibility of the jury in Alisha's case.[3]
- ✓ ✗ I have described this responsibility in further detail.[4]
- ✓ ✗ I have been careful not to state that the jury decides damages, as this is a defamation case.
- ✓ ✗ 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 Alisha'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 Alisha'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 remedy that may be awarded to Alisha.[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]

REVIEW

✓ ✗	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 Alisha 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 Alisha to her former position in this dispute. For example, if Alisha is awarded a mandatory injunction requiring the defendant to apologise for the defamatory publication, this would benefit Alisha 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 Alisha has already suffered harm from the defamatory publication, and an injunction cannot reverse this harm and may not completely reverse the damage to her reputation.[5]]

[A second purpose of injunctions is to prevent harm to the plaintiff.[6]][A restrictive injunction could prevent further harm to Alisha in this case by preventing the defendant from republishing this defamatory material in the future, thus protecting Alisha's reputation.[7]]

[On the other hand,[8]][this will provide limited benefit if Alisha 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 Alisha:

- 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 Alisha's case by reimbursing Alisha 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 Alisha 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 Alisha experienced as a result of the defamatory publication.

d)

✓ ✗	I have identified one method of dispute resolution, other than a trial that the parties could have used.[1]
✓ ✗	I have described this method in further detail.[2]
✓ ✗	I have described a strength of this method, linking to the principles of justice.[3]
✓ ✗	I have described a second strength of this method, linking to the principles of justice.[4]
✓ ✗	I have used a linking word/phrase such as 'however', 'on the other hand' to show both sides.[5]
✓ ✗	I have described a weakness of this method, linking to the principles of justice.[6]
✓ ✗	I have described a second weakness of this method, linking to the principles of justice.[7]
✓ ✗	I have referenced the case throughout my response.
✓ ✗	I have used key legal studies terminology effectively such as: 'juror', 'liability', 'damages', 'plaintiff', 'defendant', etc.

Exemplar response

[One method of dispute resolution available to Alisha, other than a trial, is arbitration.[1]][Arbitration is a dispute 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.[2]]

[Arbitration would promote the principle of access in Alisha's case as it offers a more informal approach for dispute resolution. The parties are not bound by formal court procedure, the parties may agree on the procedure to be adopted and thereby achieve a more flexible and efficient process compared to a court. This would likely be less intimidating for Alisha than a trial.[3]][Furthermore, arbitration achieves fairness by ensuring a binding decision for the parties. Both Alisha and the magazine publisher must follow the outcome as it is legally enforceable.[4]]

[On the other hand,[5]][parties whose dispute is resolved through arbitration have a limited right to appeal, potentially preventing a fair outcome. If Alisha or the magazine publisher are dissatisfied with the outcome of the arbitration, they may not be able to appeal the decision, which is unfair if a mistake in applying the law of defamation goes uncorrected.[6]]

[Additionally, arbitration may not be able to achieve an equal hearing for both parties if only one party has legal representation. For example, if the magazine publisher is represented and Alisha is not, this will result in a power imbalance that may impact upon the outcome: if the best-presented case succeeds rather than the party 'in the right' this is unfair.[7]]

Possible points to include

Other strengths of arbitration:

- Privacy – the general public cannot watch an arbitration hearing and neither the parties nor the arbitrator can (generally) disclose confidential information. This privacy may be desired in this case as both parties are known in the media.
- Flexible – parties can agree who the arbitrator is or who should appoint the arbitrator if they cannot agree.
- Independent third party – the arbitrator will be independent of both parties, making a decision based solely on the law and the facts.

Other weaknesses of arbitration:

- Costly – can be more expensive than mediation and conciliation, especially in complicated matters as legal representation may be required.
- Rules of evidence – due to relaxed rules of evidence, an arbitrator may consider evidence that would be inadmissible to present to a judge and/or jury. This may result in an unfair hearing for one party.

Other methods that could have been chosen include mediation and conciliation.

Strengths of mediation:

- Cost effective – both parties would save money on court fees and legal representation if the dispute were resolved through mediation.
- Private – mediation offers a confidential and discreet method of dispute resolution. This would be appropriate in this case as one or both parties may want to avoid media attention.
- Informal – formal rules of evidence and procedure don't apply, parties feel supported by the mediator and parties can be free to speak as they wish. This would be appropriate in this case if one or both parties are intimidated by the formality of a trial.
- Independent third party – will help facilitate discussion between Alisha and the magazine publisher.
- Control – parties have control over the outcome. Alisha and the publisher would be able to negotiate and decide on a mutually agreeable outcome.
- Time – mediation is faster than a trial and reduces the courts' trial workload, minimising delays for Alisha.

Weaknesses of mediation:

- Time and cost – mediation takes time and can be costly if it is not ultimately successful anyway. Though mediation could be a more effective method of dispute resolution for Alisha's case, an unsuccessful mediation would be a waste of time and money.
- Intimidation – the informal nature of mediation can lead to an imbalance of power where one party is intimidated and feels forced to compromise more than the other party. For example, Alisha may be intimidated to negotiate with a large company in an informal setting. However the role of the mediator in managing the discussion ensures this is a small weakness.
- Not automatically binding – unless the parties enter into a binding agreement or terms of settlement at the end of the mediation, the decision is not binding, thus risking one party reneging on their promise.

Strengths of conciliation:

- Cost effective – both parties would save money on court fees and legal representation if the dispute were resolved through conciliation.

- Private – conciliation offers a confidential and discreet method of dispute resolution. This would be appropriate in this case as one or both parties may want to avoid media attention.
- Informal – formal rules of evidence and procedure don't apply, parties feel supported by the conciliator and parties can be free to speak as they wish. This would be appropriate in this case if one or both parties are intimidated by the formality of a trial.
- Independent third party – will help facilitate discussion and suggest resolutions for Alisha and the magazine publisher.
- Control – parties have control over the outcome. Alisha and the publisher would be able to negotiate and decide on a mutually agreeable outcome.
- Time – conciliation is faster than a trial and reduces the courts' trial workload, minimising delays for Alisha.

Weaknesses of conciliation:

- Intimidation – the informal nature of conciliation can lead to an imbalance of power where one party is intimidated and feels forced to compromise more than the other party. For example, Alisha may be intimidated to negotiate with a large company in an informal setting. However the role of the conciliator in managing the discussion ensures this is a small weakness.
- Not automatically binding – unless the parties enter into a binding agreement or terms of settlement at the end of the conciliation, the decision is not binding, thus risking one party reneging on their promise.
- No resolution – parties do not have to reach a resolution. If no resolution is reached between Alisha and the publisher, the conciliation will be a waste of time.

2.

✓ ✗	I have stated the extent to which I agree with the statement.[1]
✓ ✗	I have identified a strength of mediation.[2]
✓ ✗	I have described this strength in further detail (such as linking to the principles of justice).[3]
✓ ✗	I have identified a second strength of mediation.[4]
✓ ✗	I have described this strength in further detail (such as linking to the principles of justice).[5]
✓ ✗	I have used a linking word/phrase such as 'however', 'on the other hand' to show both sides.[6]
✓ ✗	I have stated that trials in the courts can also be effective.[7]
✓ ✗	I have identified a strength of trials.[8]
✓ ✗	I have described this strength in further detail (such as linking to the principles of justice).[9]
✓ ✗	I have identified a second strength of trials.[10]
✓ ✗	I have described this strength in further detail (such as linking to the principles of justice).[11]
✓ ✗	I have used key legal studies terminology effectively such as: 'mediation', 'trial', 'dispute resolution', 'binding decision', etc.

Exemplar response

[I disagree with the statement to a large extent because mediation, though often an appropriate method of dispute resolution, is not always more effective than a trial.[1]]

[One reason why I agree that mediation can be a very effective method of dispute resolution is that it is less costly than a trial and therefore promotes access to justice.[2]][Mediation is conducted before court proceedings so parties will spend less money resolving a dispute at mediation compared to the costs of a trial. Also, legal representation is often not required which reduces costs too.[3]]

[Furthermore, although mediation is not always the most effective method, the informal nature of mediation can make it more accessible than a jury trial, which may be intimidating for some people.[4]][Formal rules of evidence and procedure don't apply, parties feel supported by the mediator and parties can be free to speak as they wish. The intimidating nature of a trial may discourage some parties from initiating or defending a claim, a weakness that mediation overcomes – boosting access to justice.[5]]

[On the other hand,[6]][trials can also be an effective means of dispute resolution for some cases, and may sometimes be more appropriate than mediation.[7]][A trial will be more effective in situations where the parties want a binding and enforceable outcome to be imposed by an independent third party.[8]]

[If parties to a dispute are not able to effectively negotiate and reach a mutually acceptable resolution, a trial with a binding decision is an effective way to resolve the dispute.[9]][Trials are also more appropriate for the resolution of complex civil matters,[10]][such as representative proceedings with complicated legal issues to decide, using the skills of barristers and judges rather than being resolved via more informal methods like mediation and conciliation.[11]]

Possible points to include

Students could have responded differently to the prompt, agreeing or disagreeing to any extent as long as this is supported by the points that follow. Students may therefore describe weaknesses then strengths, or vice versa – either structure is acceptable.

Other strengths of mediation:

- Private – mediation offers a confidential and discreet method of dispute resolution. This would be appropriate if one or both parties want to avoid media attention.
- Independent third party – will help facilitate discussion between the parties.
- Control – parties have control over the outcome.
- Time – mediation is faster than a trial (thereby avoiding such suffering) and reduces the courts' trial workload, minimising delays for matters that do go to trial.

Other strengths of trials:

- Jury trial allows for trial-by-peers.
- Role of the judge as an experienced and informed decision-maker.
- Strict rules of evidence and procedure ensure there is fairness and equality in the way that a dispute is resolved – both parties have the same opportunity to present their case.

3.

- ✓ ✗ I have made an evaluative comment on the statement.[1]
- ✓ ✗ I have identified a weakness of VCAT.[2]
- ✓ ✗ I have described this weakness in further detail (such as linking to the principles of justice).[3]
- ✓ ✗ I have identified a second weakness of VCAT.[4]
- ✓ ✗ I have described this weakness in further detail (such as linking to the principles of justice).[5]
- ✓ ✗ I have used a linking word/phrase such as 'however', 'on the other hand' to show both sides.[6]
- ✓ ✗ I have stated that there are also strengths to VCAT's dispute resolution process.[7]
- ✓ ✗ I have identified a strength of VCAT.[8]
- ✓ ✗ I have described this strength in further detail (such as linking to the principles of justice).[9]
- ✓ ✗ I have identified a second strength of VCAT.[10]
- ✓ ✗ I have described this strength in further detail (such as linking to the principles of justice).[11]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'VCAT', 'appeal', 'parties', etc.

Exemplar response

[This statement is, to some extent, correct as there are weaknesses in the operation of VCAT as a body of dispute resolution, however, there are also a number of strengths.[1]]

[A reason I agree with the statement is that the way VCAT operates to resolve disputes provides limited avenues to appeal a VCAT decision.[2]][There is a limited right to appeal VCAT decisions, which may be seen as unfair to parties dissatisfied with the outcome of their case. Furthermore, if a decision is made in VCAT, the appeal must be brought to the Supreme Court Trial Division or Court of Appeal, making it more costly to prepare and present – this may cause mistakes in the application of the law to go uncorrected, which is unfair.[3]]

[Another weakness of VCAT is its limited jurisdiction to resolve disputes.[4]][Whilst VCAT resolves a very high volume of minor cases within its jurisdiction (for example, over 50,000 residential tenancies disputes are resolved by VCAT per year), some complex civil matters must proceed to the courts, such as representative proceedings and personal injury cases.[5]]

REVIEW

[However,[6]][there are also a number of strengths to the way that VCAT operates to resolve disputes.[7]][VCAT is a cost effective way of resolving disputes.[8]][Dispute resolution through VCAT is relatively cheap (as filing fees are usually low and parties often do not use legal representation) and therefore promotes access for parties with limited financial capacity.[9]]

[Additionally, VCAT encourages resolution by agreement through methods such as mediation.[10]][This promotes fairness by allowing the parties to be directly involved in resolving their dispute and therefore more satisfied with the process and outcome. It also minimises the delay between starting proceedings and reaching a resolution.[11]]

Possible points to include

Students could have responded differently to the prompt, agreeing or disagreeing to any extent as long as this is supported by the points that follow. Students may therefore describe weaknesses then strengths, or vice versa – either structure is acceptable.

Other weaknesses of VCAT:

- Lack of jury trials – no trial-by-peers.
- Self-representation – VCAT often requires parties to self-represent, which can create difficulties for those who are poorly educated or from a non-English speaking background.
- Increasing costs – costs in some VCAT lists are increasing (and more complex matters require legal representation).

Other strengths of VCAT:

- Binding outcome – the outcome of a VCAT hearing is binding and enforceable; decisions reached by the parties' agreement in mediation or a compulsory conference can also be made binding through a VCAT order.
- Timely resolution – in many cases VCAT hearings are resolved more quickly as they have fewer pre-hearing steps, as well as more informal rules of procedure.
- Informal – VCAT is less formal than taking a matter to court and provides significant support to both parties. Each party can present their case without being limited by the strict rules of evidence and procedure that exist in court.

9A Savage v Monash University [2017]

LEVEL 1

1. D **2.** B **3.** C **4.** D **5.** A

LEVEL 2

6.

- ✓ ✗ I have described the first element.[1]
- ✓ ✗ I have provided an example of this element in the case.[2]
- ✓ ✗ I have described the second element.[3]
- ✓ ✗ I have provided an example of this element in the case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'defendant', 'plaintiff', etc.

Exemplar response

[A duty of care is the legal obligation to avoid conduct that can be reasonably foreseen to harm a person's neighbour. In order to establish negligence, it must be shown that the defendant owed a duty of care to the plaintiff not to create the risk of injury that occurred.[1]][For example, in the case *Savage v Monash,* Monash University owed Savage a duty of care as the occupier of the property she was walking on to try to prevent any foreseeable injury.[2]][A breach of duty is when the defendant has fallen below the standard of care that would be expected of a reasonable person in the same position. This is the element that determines whether the defendant has actually been negligent.[3]][For example, in this case Monash breached their duty of care by failing to act as a reasonable occupier and take care to prevent anyone being injured by the state of the crossing in question.[4]]

7.

- ✓ ✗ I have identified one reason why mediation would be a better option.[1]
- ✓ ✗ I have described this reason in further detail.[2]
- ✓ ✗ I have identified a second reason why mediation would be a better option.[3]
- ✓ ✗ I have described this reason in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'parties', 'disbursement', etc.

Exemplar response

[One reason why mediation would have been a better option than a trial is that it is less costly.[1]][If the parties had been able to resolve the dispute through mediation, they would not have been forced to pay for the court's filing fees and fees for legal representation that are necessary for a trial in the County Court.[2]][Another reason why mediation would have been preferable for the parties is that it is a private method of dispute resolution.[3]][Often when an issue is resolved through mediation, both parties agree to keep the details of the agreement private. This would have been favourable for the University in particular as it would prevent any damage to their reputation and avoid Savage publicly discussing her injury and suffering.[4]]

Possible points to include

Other benefits of mediation:

- It is a more timely process than dispute resolution through the courts, allowing the parties to achieve an outcome with less delay.
- The resolution is made by agreement rather than being forced on the parties.

8.

- ✓ ✗ I have identified the defence raised in the case: contributory negligence.[1]
- ✓ ✗ I have described this defence in further detail.[2]

✓ ✗	I have provided one reason why the defence was unsuccessful.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'loss', 'reasonable care', etc.

Exemplar response

[The defence to negligence that was raised in this case is contributory negligence.[1]][Contributory negligence is a defence that may be raised where the plaintiff also played a part in causing their own loss or damage by failing to take reasonable care for themselves.[2]] [One reason why this defence did not succeed in the case is that, based on evidence given by the grounds manager, many other people who made use of the crossing walked over it in the same manner as the plaintiff, suggesting that this was what a reasonable person would do.[3]]

Possible points to include

Other reasons why the defence did not succeed:

- There were puddles in many places on the crossing. It would be unreasonable to expect the plaintiff to jump over large puddles in order to guarantee her safety.
- The plaintiff was wearing robust shoes which made it reasonable for her to choose to walk in a straight line across the pathway rather than zig zagging.

9.

✓ ✗	I have identified one way in which the principles of justice were upheld.[1]
✓ ✗	I have described this in further detail.[2]
✓ ✗	I have identified a second way in which the principles of justice were upheld.[3]
✓ ✗	I have described this in further detail.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'pleadings', 'discovery', 'claim', 'parties', etc.

Exemplar response

[One way in which fairness was upheld in this case is through pre-trial procedures.[1]][The pre-trial processes of pleadings and discovery allowed for all parties to exchange documents and other information regarding their claims and evidence in a clear, open and transparent way. This enables each party to prepare to test the accuracy of the other party's evidence in court – which ensures the decision is based on accurate and reliable evidence.[2]][One way in which equality was upheld is through the equal chance to present each case.[3]][Despite Savage being a private citizen and Monash University being a large institution, both parties were equally entitled to present evidence and challenge the evidence of the other party.[4]]

Possible points to include

Other ways in which fairness was upheld:

- Legal representation. Both parties had legal representation to present their case in the best possible light. Thus, no party was disadvantaged.
- Party control. Both parties were able to control their own case and decide which evidence to submit to prove the facts of the case.
- Independent and unbiased decision maker. An independent judge was able to resolve the complicated legal and factual issues in an objective way. The reasons for the conclusions reached (showing how the law was applied to the facts) are published.
- Appeals. Monash University took the opportunity to lodge an application to appeal to the Supreme Court, which ensured that the application of the law in this case was affirmed by a higher court (however this caused delay in the final resolution of the matter from Savage's perspective).

Ways in which access was upheld:

- Mediation. The parties were given an opportunity to resolve the dispute through mediation, which is a less expensive and less time-consuming method than a trial.

LEVEL 3

10.

- ✓ ✗ I have outlined why the first statement is incorrect.[1]
- ✓ ✗ I have explained the correct process.[2]
- ✓ ✗ I have outlined why the second statement is incorrect.[3]
- ✓ ✗ I have explained the correct process.[4]
- ✓ ✗ I have outlined why the third statement is incorrect.[5]
- ✓ ✗ I have explained the correct process.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'standard of proof', 'claim', 'cause of action', 'defendant', etc.

Exemplar response

[The first statement is incorrect because Savage does not have to prove the case beyond reasonable doubt.[1]][This is a civil proceeding and the standard of proof is 'on the balance of probabilities'. Thus, Savage would only need to prove that the University was 'probably' liable in order to be successful in her claim.[2]][The second statement is incorrect because the limitation of actions period does not begin from the time that the incident occurs.[3]][The limitation period only begins when the cause of action arises. This is when the plaintiff realises that they have suffered personal injury as a result of the defendant's actions or omissions. Thus, Savage did not bring the case after the limitation period and Monash could not raise this as a defence.[4]][The third statement is incorrect because contributory negligence is not a complete defence.[5]][When contributory negligence is successfully raised, the defendant will still be liable for negligence (just to a lesser degree). Therefore, the University would likely still be required to pay some damages.[6]]

11.

- ✓ ✗ I have stated that Savage would not have succeeded.[1]
- ✓ ✗ I have stated that a claim of negligence requires the defendant to have breached the duty of care.[2]
- ✓ ✗ I have explained the test in such cases – whether the defendant has fallen below the standard of care that would be expected of a reasonable person in the same position.[3]
- ✓ ✗ I have made reference to the case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'claim', 'defendant', 'plaintiff', etc.

Exemplar response

[Savage would not have succeeded in her action if this were the case.[1]][In order for a claim of negligence to succeed, it must be shown that the defendant breached the duty of care that they owed the plaintiff.[2]][The plaintiff must prove that the defendant has fallen below the standard of care that would be expected of a reasonable person in the same position.[3]][If the crossing in this case was in a secluded area and the university had taken measures to warn pedestrians of the potential hazard, they would have exercised a reasonable standard of care to prevent injury.[4]]

12.

- ✓ ✗ I have described one impact of the negligence on Savage.[1]
- ✓ ✗ I have described a second impact of the negligence on Savage.[2]
- ✓ ✗ I have described one impact of the negligence on Monash University.[3]
- ✓ ✗ I have described a second impact of the negligence on Monash University.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'negligence', 'compensatory damages', 'plaintiff', etc.

Exemplar response

[One impact of the negligence on Savage was the physical injury that she suffered as a result. Savage developed a condition of chronic pain disorder, is limited in her ability to walk, and has gained a substantial amount of weight as a direct result of the injury to her ankle.

These physical consequences have made life significantly harder for Savage.[1] [A second impact of the negligence for Savage was the psychological impact. Savage reported developing a negative, anxious and depressed mindset since the injury, which would likely decrease her enjoyment of life and the relationships she has with those close to her.[2]]

[One impact of the negligence on Monash University was financial loss. The University was forced to pay Savage $275,000 in compensatory damages. It was also required to cover the plaintiff's legal costs.[3]] [Another impact on the University would be reputational damage. Having the public associate Monash with a negligence case where the plaintiff was seriously injured due to a breach of duty of care would not be good for its reputation as a top-tier university in Victoria.[4]]

Possible points to include

Other impacts on the plaintiff:

- Financial loss – Savage may have suffered financial loss due to the cost of her legal fees (the costs order requiring Monash to pay her costs may cover only part of her legal expenses).

Other impacts on the defendant:

- Cultural changes – the negligence case may prompt Monash to be more stringent in matters of safety and campus maintenance.
- Third-party claims and class actions – there is a possibility that hearing about this case and the plaintiff's success may encourage other people who were injured in the same or similar way to initiate their own case against Monash.

9B Rush v Nationwide News [2019]

LEVEL 1

1. C **2.** B **3.** D **4.** B **5.** D

LEVEL 2

6.

✓ ✗	I have stated that the burden of proof in this case lies with the plaintiff, Geoffrey Rush, as he was the party bringing the claim.[1]
✓ ✗	I have stated that the standard of proof in a civil case is 'on the balance of probabilities'.[2]
✓ ✗	I have referred explicitly to the parties in this dispute in my answer.
✓ ✗	I have used key legal studies terminology effectively such as: 'plaintiff', 'defendant', etc.

Exemplar response

[The burden of proof in this case lies with the plaintiff, Geoffrey Rush, as he is the party bringing the claim against the defendants, Nationwide News and Jonathon Moran.[1]] [The burden of proof in this case is 'on the balance of probabilities', as it is a civil case.[2]]

7.

✓ ✗	I have identified the limitation of actions period for a defamation claim: one year.[1]
✓ ✗	I have explained that if Rush had initiated a claim after this period, the defendants could have used the limitation of actions as a defence.[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'defendant', 'defence', 'liable', etc.

Exemplar response

[The limitation of actions period for a defamation claim is one year.[1]] [If Rush had attempted to initiate a civil claim against the defendants, Nationwide News and Jonathon Moran, after the limitation period had elapsed, the defendants would have been able to raise the limitation of actions as a defence in court and would not have been liable for the civil wrong.[2]]

8.

- ✓ ✗ I have identified a defence to defamation that was used in this case: truth.[1]
- ✓ ✗ I have described this defence in further detail.[2]
- ✓ ✗ I have explained what is necessary to prove this defence.[3]
- ✓ ✗ I have described whether or not this defence was successful in this case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'substantial truth', 'defendant', 'defamatory', etc.

Exemplar response

[The defence used in this case was truth.[1]][The defence of truth (or justification) can be raised where the defendant claims the matter was true and therefore not defamatory.[2]][The defendant must prove that the statements were substantially true, which means true in substance or not materially different from the truth.[3]][The defence was not successful in this case as the defendants were not able to prove the substantial truth of the defamatory imputations about Rush's conduct towards Norvill.[4]]

LEVEL 3

9.

- ✓ ✗ I have identified a method of dispute resolution that would have been appropriate in this case.[1]
- ✓ ✗ I have provided one reason why this method is appropriate in this case.[2]
- ✓ ✗ I have provided a second reason why this method is appropriate in this case.[3]
- ✓ ✗ I have been careful not to describe the benefits of this method in general, instead linking to the facts in the case.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'mediation', 'defendant', etc.

Exemplar response

[One method of dispute resolution that would have been appropriate in this case, other than a trial, is mediation.[1]][Mediation would have been appropriate as it is a private and confidential means of resolving a dispute. This would likely be preferable for both parties, as it can prevent the reputational damage that comes with being involved in a public trial regarding allegations of inappropriate conduct.[2]][Mediation is also a cheaper and less time-consuming means of dispute resolution than the courts, creating a more accessible process for both Rush and the defendants.[3]]

Possible points to include

Another benefit of mediation in this case is the dispute resolution process is far quicker than resolution by trial.

Another method of dispute resolution that would have been appropriate is conciliation. Benefits of conciliation in this case would include:

- Private negotiation of a resolution to the dispute and a confidential outcome.
- Lower-cost method of dispute resolution.
- Quicker dispute resolution, compared to a trial.

10.

- ✓ ✗ I have identified one impact of the defamation claim on one party.[1]
- ✓ ✗ I have explained this impact in further detail.[2]
- ✓ ✗ I have identified one impact of the defamation claim on a second party.[3]
- ✓ ✗ I have explained this impact in further detail.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'trial', 'defendant', etc.

Exemplar response

[The defamation claim in this case had a financial impact on the defendants.[1]]

[The Federal Court awarded Rush a total amounting to almost $2.9 million in damages. These damages, as well as the legal fees associated with the trial, would have had a substantial impact on the financial position of Nationwide News.[2]][The defamatory articles also cause reputational damage to the plaintiff.[3]][The series of articles published by Nationwide News included a series of allegations, accusing Rush of engaging in innappropriate behaviour and sexual harassment. This was shown to impact his reputation as a celebrated Australian actor and interfere with his job prospects. Despite succeeding in the defamation claim, some damage to Rush's reputation may not be undone by the verdict and award of damages.[4]]

Possible points to include

Impacts on the defendants:

- Reputational damages – the defendant was found to have published false allegations, potentially lowering public opinion of the publishing corporation's integrity.
- Threat to free speech – some people may see the outcome of the case as a detriment to free speech. In particular, it has been argued that strict defamation laws could decrease the likelihood of people coming forward with controversial allegations, especially against people in power or authority, as Nationwide News did in this case.

Impacts on the plaintiff:

- Financial impact – cost of court fees and legal representation necessary for the trial.
- Psychological damage – the defamatory allegations likely caused significant pain and humiliation for Rush and his family.

Impacts on the witness:

- Psychological damage – Norvill likely suffered humiliation and embarrassment after she was found not to be a credible witness by the court. This is particularly so given she did not commence any legal proceedings against Rush, nor did she speak with the Daily Telegraph prior to its publication of stories about Rush; she was subject to public scrutiny she did not invite.

LEVEL 4

11.

✓ ✗	I have identified one way in which fairness was upheld in this case.[1]
✓ ✗	I have explained this in further detail.[2]
✓ ✗	I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[3]
✓ ✗	I have identified one way in which fairness was not upheld.[4]
✓ ✗	I have explained this in further detail.[5]
✓ ✗	I have identified one way in which access was upheld.[6]
✓ ✗	I have explained this in further detail.[7]
✓ ✗	I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[8]
✓ ✗	I have identified one way in which access was not upheld.[9]
✓ ✗	I have explained this in further detail.[10]
✓ ✗	I have referred explicitly to the facts in this case in my response.
✓ ✗	I have used key legal studies terminology effectively such as: 'mediation', 'defendant', etc.

Exemplar response

[One way in which fairness was upheld in this case was through legal representation.[1]][Both parties had legal representation to present their case in the best possible light. Thus, no party was disadvantaged.[2]][However,[3]][fairness was somewhat limited due to the trial being held in the Federal Court.[4]][By electing to have a trial in the Federal Court, rather than a superior state court, Rush made it more difficult for Nationwide News to request a jury trial. This may be seen as unfair, as state laws promote the use of juries in defamation cases. The defendant was therefore unable to have their case determined by 'ordinary reasonable readers'.[5]]

[One way in which access was upheld in this case was through the trial process in the Federal Court.[6]]

[Rush was able to choose to have his case heard in the Federal Court. This will minimise delays, and therefore legal costs, as there will be no jury in the Federal Court and most evidence is given via affidavit.[7]][On the other hand,[8]][access is limited by the array of legal fees associated with a trial.[9]][Legal costs, including court filing fees and legal representation, are very expensive in higher courts, impacting on access for both parties. As the matter is being appealed, costs will be higher by the time this dispute is concluded.[10]]

Possible points to include

Other ways in which fairness was upheld:

- Fair processes. This case would have followed rules and procedures that were consistent with how all civil cases are handled.
- Pre-trial procedures. The pre-trial processes of pleadings and discovery allowed for all parties to exchange documents and be clear, open and transparent about their claims and the remedies being sought.

12.

✓ ✗	I have stated whether or not I agree with the statement.[1]
✓ ✗	I have identified an advantage of the Federal Court for the plaintiff.[2]
✓ ✗	I have explained this advantage in further detail.[3]
✓ ✗	I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[4]
✓ ✗	I have identified a disadvantage of the Federal Court for the plaintiff.[5]
✓ ✗	I have explained this disadvantage in further detail.[6]
✓ ✗	I have identified an advantage of the Federal Court for the defendant.[7]
✓ ✗	I have explained this advantage in further detail.[8]
✓ ✗	I have used a linking word/phrase such as 'however','on the other hand', or similar, to show both sides.[9]
✓ ✗	I have identified a disadvantage of the Federal Court for the defendant.[10]
✓ ✗	I have explained this disadvantage in further detail.[11]
✓ ✗	I have referred to the *Rush* case throughout my response.
✓ ✗	I have used key legal studies terminology effectively such as: 'mediation', 'defendant', etc.

Exemplar response

[I agree that there are advantages and disadvantages for both parties in the Federal Court.[1]]

[A trial in the Federal Court is beneficial for the plaintiff because the lack of jury trial and use of affidavit evidence minimise delays and costs.[2]][The lack of jury trials in the Federal Court not only allows a plaintiff such as Rush to avoid a determination by the 'ordinary reasonable reader', it also ensures a much quicker, and therefore less expensive, trial. Furthermore, the use of affidavit evidence rather than oral evidence also saves a significant amount of time in this court.[3]][However,[4]][the Federal Court's reliance on affidavit evidence can also come as a disadvantage to the plaintiff,[5]][as this means that evidence is prepared and provided to the parties well in advance of the trial date. This allows the defendant much more time to find flaws in the plaintiff's case.[6]]

[A trial in the Federal Court is also beneficial for the defendant due to the lack of delays.[7]][A shorter trial is favourable for all parties as it means that court fees and legal representation will be minimised.[8]][On the other hand,[9]][a trial in the Federal Court often deprives a defendant such as Nationwide News of being able to elect a trial by jury.[10]][This may be seen as unfair, as state laws promote the use of juries in defamation cases. The defendant is therefore unable to have their case determined by 'ordinary reasonable readers'.[11]]

Possible points to include

Students could have chosen to disagree with the prompt as long as they include points to support their opinion.

9C Begovic v Northpark Berwick Investments [2019]

LEVEL 1

1. C **2.** B **3.** B **4.** C **5.** D

6. A **7.** C

LEVEL 2

8.

- ✓ ✗ I have identified one piece of evidence that supported the decision that the Triton was not as fuel-efficient as advertised.[1]
- ✓ ✗ I have described this evidence in further detail.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'evidence', 'misleading', etc.

Exemplar response

[One aspect of Begovic's evidence that suggested he was misled about the fuel efficiency of his vehicle was the result of the test drives.[1]][Begovic and a Mitsubishi technician conducted three test drives that all showed the vehicle using significantly more fuel per 100km than advertised on the label when he purchased it.[2]]

Possible points to include

Other evidence indicating higher-than-advertised fuel usage included:

- Begovic's fuel receipts and data showing distances travelled by the vehicle after each refill.
- Expert evidence from Winkelmann following her tests on the vehicle showing fuel consumption 26% higher (on average) than that which was stated on the label.

9.

- ✓ ✗ I have stated this is incorrect.[1]
- ✓ ✗ I have justified this conclusion by stating this is a civil matter, not a criminal matter.[2]
- ✓ ✗ I have stated the correct standard of proof is 'on the balance of probabilities'.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'civil', 'balance of probabilities', etc.

Exemplar response

[This statement is incorrect,[1]][because it is a civil matter rather than a criminal matter.[2]][Therefore, Begovic needed to prove that he was misled on the balance of probabilities.[3]]

10.

- ✓ ✗ I have identified one way in which one of the principles of justice was upheld.[1]
- ✓ ✗ I have described this in further detail, explicitly linked to Begovic's case.[2]
- ✓ ✗ I have identified a second way in which one of the principles of justice was upheld.[3]
- ✓ ✗ I have explained this in further detail, explicitly linked to Begovic's case.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'VCAT', 'fairness', etc.

Exemplar response

[One way in which fairness was upheld is through the use of legal representation.[1]][Begovic's use of a lawyer would ensure his case was presented by an expert in its best light, which promotes a fair hearing.[2]][A second way the principles of justice were promoted is the attempt at conciliation prior to the hearing.[3]][Though ultimately not successful, such a process through the compulsory conference was an attempt to resolve the case more quickly and at lower cost, promoting access to justice for such matters.[4]]

Possible points to include

Principles of justice were also encouraged in the following ways:

- Fairness was promoted by the right to appeal. Mitsubishi is taking the opportunity to appeal to the Supreme Court, which will ensure any mistakes in the application of the law are corrected.
- The process allowed the full facts to emerge, which is fair. To ensure the correct decision was reached, VCAT made orders before the hearing about the sharing of expert evidence. In addition, Mitsubishi's representative was allowed to contact colleagues during the hearing to clarify evidentiary issues regarding fuel consumption and how new cars are tested. These processes help ensure the 'right' outcome and are part of VCAT's 'Fair Hearing Obligation' procedures, ensuring both parties had a reasonable chance to present their case.
- Party control upholds fairness. Begovic was able to control his own case, in that he decided to present expert evidence and his own evidence proving his fuel usage. Both of these decisions in preparing and presenting his case enabled him to present his case in its best light.
- The independent and unbiased decision maker upheld fairness. An independent VCAT member was able to resolve the complicated legal and factual issues in an objective way and the reasons for the conclusions reached (showing how the law was applied to the facts) are published.
- All parties had an equal chance to present their cases. Despite Begovic being a private citizen and Mitsubishi being a huge global manufacturer, both parties were equally entitled to present evidence and challenge the evidence of the other party (although Mitsubishi didn't take full advantage of this opportunity).

LEVEL 3

11.

✓ ✗	I have stated that Begovic would not have succeeded.[1]
✓ ✗	I have justified this conclusion by stating that an action for misleading or deceptive conduct requires more than confusion.[2]
✓ ✗	I have stated the correct test in such cases – that a reasonable consumer is likely to be led into error.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'civil', 'misleading', etc.

Exemplar response

[In such a scenario, it is unlikely that Begovic would be successful in a misleading or deceptive conduct claim.[1]][An action under s. 18 of the *ACL* requires a plaintiff to do more than show that they were confused about a product,[2]][he or she must instead prove that a reasonable consumer was likely to be led into error by the defendant's statements to succeed in claiming a remedy for misleading or deceptive conduct.[3]]

12.

✓ ✗	I have identified one appropriate method of dispute resolution.[1]
✓ ✗	I have briefly described this method of dispute resolution.[2]
✓ ✗	I have stated that this process itself is private.[3]
✓ ✗	I have stated that the terms of any outcome reached using this method are usually confidential.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'confidential', 'outcome', 'damages', etc.

Exemplar response

[An appropriate alternative way to resolve this dispute would have been through conciliation.[1]][Conciliation is a resolution process involving an independent third party (conciliator) with specialist knowledge about the type of dispute in question who encourages the parties to communicate, assisting them to voluntarily agree to a resolution.[2]][The conciliation process is conducted in private[3]][and the terms of the agreements reached using conciliation, such as the damages awarded or whether fault is admitted by the defendant, are also usually confidential.[4]]

Possible points to include

Mediation would also be an appropriate method of dispute resolution. The mediation process is conducted in private and the terms of the agreements reached using mediation, such as the damages awarded or whether fault is admitted by the defendant, are also usually confidential.

13.

✓ ✗	I have stated that VCAT is not the appropriate institution for such a proceeding.[1]
✓ ✗	I have justified this conclusion by stating VCAT cannot conduct representative proceedings.[2]
✓ ✗	I have stated that the Supreme Court – Trial Division is instead the appropriate place for consumers to initiate a representative proceeding.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'court', 'representative proceedings', 'damages', etc.

Exemplar response

[VCAT is not the right institution to resolve a class action involving these 65 consumers.[1]][This is because VCAT does not have the power to conduct representative proceedings,[2]][instead such a claim should be initiated within the civil jurisdiction of the Supreme Court – Trial Division.[3]]

10A Rights protection in Australia

LEVEL 1

1. D

2. **a)** Implied right

b) Structural protection in the Constitution

c) Right protected by the VCHRR

d) Right protected in legislation

e) Express right

3. C

4. B

5. C

6. C

7. B

LEVEL 2

8.

✓ ✗	I have described express rights as 'human rights explicitly stated in the Constitution' (or similar).[1]
✓ ✗	I have described express rights as being entrenched, meaning they can only be removed by referendum.[2]
✓ ✗	I have included an example of an express right.[3]
✓ ✗	I have avoided re-using the term 'express' in my definition.
✓ ✗	I have used key legal studies terminology effectively such as: 'rights', 'Constitution', etc.

Exemplar Response

[Express rights are human rights explicitly stated in the Constitution.[1]] [These rights are entrenched and can therefore only be amended or removed by the referendum process, not by law-makers alone.[2]] [One example of an express right is the right to freedom of religion in s. 116 of the Constitution.[3]]

Possible points to include

Other examples of express rights are:

- Trial by jury for Commonwealth indictable offences (s. 80)
- Just terms when the Commonwealth compulsorily acquires property (s. 51(xxxi))
- Non-discrimination based on state of residence (s. 117)
- Freedom of interstate trade and movement (s. 92)

9.

✓ ✗	I have described an implied right as 'an entitlement that is not explicitly stated in the Constitution, however the High Court has ruled that this right is intended to exist' (or similar).[1]
✓ ✗	I have stated the Court recognised the implied right through its interpretation of the words in the Constitution.[2]
✓ ✗	I have identified the example of an implied right as the right to freedom of communication on political matters.[3]
✓ ✗	I have avoided re-using the term 'implied' in my definition.
✓ ✗	I have used key legal studies terminology effectively such as: 'Constitution', 'freedom', etc.

Exemplar Response

[An implied right is an entitlement that is not explicitly stated in the Constitution, however the High Court has ruled that this right is intended to exist,[1]][based on the Court's interpretation of the words in the Constitution.[2]][An example of an implied right is the right to freedom of political communication.[3]]

10.

- ✓ ✗ I have described structural protections as 'systems and mechanisms set up by the Constitution that indirectly protect human rights' (or similar).[1]
- ✓ ✗ I have identified one example of a structural protection.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'mechanisms', 'Constitution', etc.

Exemplar Response

[Structural protections are the systems and mechanisms set up by the Constitution that indirectly protect human rights.[1]][One example of a structural protection is the separation of powers principle, which ensures there is no abuse of power by branches of government such as the parliament or the executive.[2]]

Possible points to include

Another example of a structural protection is the principle of representative government.

11.

- ✓ ✗ I have identified a weakness of rights protection by express rights.[1]
- ✓ ✗ I have explained in further detail this weakness.[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Constitution', 'parliament', etc.

Exemplar Response

[Another weakness of the way express rights protect human rights in Australia is that there are very few express rights in the Constitution limiting the law-making powers of parliament, so the human rights protection provided is really limited.[1]][This is especially so in comparison to similar democratic countries such as the USA and Canada, whose constitutions have many more express rights acting as a limitation on the power of law-makers.[2]]

Possible points to include

Other weaknesses of protection provided by express rights include:

- The express rights are very narrow in their operation; for example, s. 80 provides an independent jury trial only for Commonwealth indictable offences, yet most criminal laws are made by the states.
- The High Court can declare legislation invalid if it breaches the express rights, however this can only occur after the legislation is challenged by a party affected by the law meaning express rights infringements can continue for an extended period.
- The High Court can declare legislation invalid if it breaches the express rights, however this is time-consuming and expensive for an affected party, and the Court cannot award damages to those who suffer injury due to express rights being violated in some way.

12.

- ✓ ✗ I have described the right being 'fully enforceable' as 'legislation violating that right being declared invalid' (or similar).[1]
- ✓ ✗ I have stated the High Court as the body that will make such a declaration.[2]
- ✓ ✗ I have stated the law is declared invalid after it is challenged by a party with standing.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'High Court', 'standing', etc.

Exemplar Response

[The implied right being 'fully enforceable' means that legislation that restricts free communication on political issues will be declared invalid[1]][by the High Court,[2]][when that law has been challenged by a party that is affected by the legislation.[3]]

13.

- ✓ ✗ I have identified a strength of rights protection relying on representative government.[1]
- ✓ ✗ I have explained this strength in further detail (using an example if relevant).[2]
- ✓ ✗ I have identified a weakness of rights protection relying on representative government.[3]
- ✓ ✗ I have explained this weakness in further detail (using an example if relevant).[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'rights', 'voters', etc.

Exemplar Response

[A strength of relying on representative government as a mechanism to protect human rights is that it allows rights protection to change as society changes.[1]][For example, laws promoting equality for all people regardless of gender and race were created when society's values changed, because the system of representative government ensures new laws are created to reflect changes in the community's values about human rights protections.[2]][A weakness of relying on representative government as a way to protect rights is it may not be an effective way to protect the rights of unpopular minorities in society.[3]][For example, laws requiring mandatory detention of some asylum seekers violate those individuals' rights but are in fact popular with many voters who are therefore not motivated to remove law-makers passing such legislation.[4]]

Possible points to include

Another strength of relying on representative government is:

- Fear of losing power at an election should prevent law-makers passing laws to violate human rights, which is preferable to having mechanisms for compensating/removing rights abuses after the fact.

Another weakness of relying on representative government is:

- If the parliament passes laws that breach individuals' rights in a way that outrages the community, voters will need to wait for an election before removing such law-makers (which may be years away at the time of the law being passed). In such cases, rights abuses may continue for some time.

14.

- ✓ ✗ I have described the VCHRR as protecting human rights by 'ensuring that the parliament considers and debates the impact of all new legislation in Victoria on the human rights listed in the *Charter*' (or similar).[1]
- ✓ ✗ I have identified one example of a right in the VCHRR.[2]
- ✓ ✗ I have identified a second example of a right in the VCHRR.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: '*Charter*', 'human rights', 'legislation', etc.

Exemplar Response

[The VCHRR protects human rights by ensuring that the parliament considers and debates the impact of all new legislation in Victoria on the human rights listed in the *Charter*.[1]][An example of a right in the *Charter* is the right to equality before the law in s. 8.[2]][A second right in the *Charter* is protection from torture in s. 10.[3]]

Possible points to include

Other examples of *Charter* rights include:

- Protection from slavery (s. 11)
- Right to freedom of thought and religion (s. 14)
- For those accused of a criminal offence the right to silence and the right to an interpreter (s. 25)

15.

- ✓ ✗ I have identified a weakness of rights protection under the *Charter*.[1]
- ✓ ✗ I have explained this weakness in further detail (using an example if relevant).[2]
- ✓ ✗ I have used key legal studies terminology effectively such as: '*Charter*', 'proceedings', etc.

Exemplar Response

[A weakness of the *Charter* in protecting human rights is that it does not create the right to begin legal action for rights breaches.[1]] [This means a party who feels some new law (or an action by a government body such as the police) violates their rights under the VCHRR cannot initiate proceedings in a court or tribunal under this law seeking a remedy.[2]]

Possible points to include

Other weaknesses of the VCHRR include:

- The VCHRR applies only to new laws being considered in Victoria. It has no impact on new laws being developed in the Commonwealth Parliament, which may infringe upon the rights of Victorians.
- Although the VCHRR requires Victorian law-makers to explicitly consider whether new laws violate human rights in the *Charter*, it does not stop such laws being created.

16.

✓ ✗	I have described statutory protection as legislation making it unlawful to discriminate against a person (or similar).[1]
✓ ✗	I have identified some of the grounds on which such mistreatment is unlawful.[2]
✓ ✗	I have identified some of the places in which it is unlawful to mistreat someone on such grounds.[3]
✓ ✗	I have included a relevant example of law protecting human rights.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'rights', 'legislation', etc.

Exemplar Response

[Laws created by the Commonwealth and Victorian parliaments protect human rights by making certain discrimination unlawful.[1]] [This legislation makes it unlawful to discriminate against people on the basis of gender, religion, age and sexuality,[2]] [in places such as the provision of goods and services, offering employment and providing education.[3]] [An example of such statutory protection includes the *Racial Discrimination Act,* preventing mistreatment based on a person's race.[4]]

Possible points to include

Other examples of statutory protections of rights include:

- *Sex Discrimination Act,* preventing mistreatment based on a person's gender, sexuality, marital status, etc.
- Criminal procedure legislation, protecting the rights of accused persons when criminal offences are being investigated by police or tried in the courts.

17.

✓ ✗	I have identified this as rights protection by common law.[1]
✓ ✗	I have justified this conclusion by stating the Court was protecting human rights by removing an old principle of court-made law and replacing it with new court-made law (or similar).[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'common law', 'court', etc.

Exemplar Response

[The Court's decision in *Mabo* is an example of rights protection by the common law.[1]] [This is because in this case the High Court was recognising and protecting indigenous peoples' human rights by changing an old principle of law made by a court, and replacing it with new court-made law (called a precedent).[2]]

18.

✓ ✗	I have identified a weakness of rights protection by common law.[1]
✓ ✗	I have explained this weakness in further detail (using an example if relevant).[2]
✓ ✗	I have used key legal studies terminology effectively such as: 'court', 'common law', etc.

Exemplar Response

[A different weakness of common law protection of human rights is that courts cannot initiate a change in the law to recognise human rights, but instead must wait for a relevant case to be brought before the courts.[1]][For instance, the High Court's recognition of indigenous rights to own land was in response to Mabo initiating this claim in the courts, the Court could not proactively create such a right.[2]]

Possible points to include

Other weaknesses of common law protection of human rights include:

- It is the higher courts in the hierarchy that create common law through statutory interpretation, constitutional interpretation and changing outdated common law principles (such as in *Mabo*). Pursuing such a case to the higher courts to determine whether human rights have been breached is very expensive and time-consuming.

LEVEL 3

19.

- ✓ ✗ I have identified one other possible reason for the law being declared invalid.[1]
- ✓ ✗ I have described in further detail this Constitutional protection that may have resulted in the law being declared invalid.[2]
- ✓ ✗ I have linked this possible reason for the law being declared invalid to Campbell's case.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'High Court', 'rights', etc.

Exemplar Response

[A possible reason why this law has been struck down is that it may have breached the implied right.[1]][The High Court will declare invalid any law that breaches the implied right to free political communication, as it did in the *Australian Capital Television* case.[2]][It is possible Campbell challenged a law on the basis it breached this implied right.[3]]

Possible points to include

The law may be declared invalid if it breaches the separation of powers. Under this principle, judicial power is exercised by the courts alone and laws giving judicial power to ministers or parliament will be declared invalid.

20.

- ✓ ✗ I have described one similarity between express and implied rights – they are fully enforceable.[1]
- ✓ ✗ I have described a second similarity between express and implied rights – remedies are not awarded when these rights are infringed.[2]
- ✓ ✗ I have described how express rights are changed.[3]
- ✓ ✗ I have used linking words to distinguish, such as 'whereas', 'however', 'on the other hand', etc to show difference.[4]
- ✓ ✗ I have described how implied rights are changed.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Constitution', 'High Court', etc.

Exemplar Response

[A similarity of express and implied rights is both are fully enforceable. That is, legislation breaching an express or implied right in the Constitution will be declared invalid by the High Court, when that law's validity is challenged.[1]][Another similarity of express and implied rights is those who take court action when such rights are infringed cannot obtain a remedy from the courts for any injury caused by laws breaching these rights.[2]][A difference between express and implied rights is the express rights can be changed only by referendum,[3]][whereas[4]][the implied right can be amended by changing interpretations of the Constitution by the High Court.[5]]

21.

- ✓ ✗ I have correctly predicted the outcome would be that this law is declared invalid.[1]
- ✓ ✗ I have identified the decision in *Australian Capital Television* as creating an implied right to free political communication.[2]

- ✓ ✗ I have stated the law in this question breaches this implied right by limiting free political communication.[3]
- ✓ ✗ I have stated that the outcome for laws breaching the implied right is that such laws are declared invalid by the courts.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'implied right', 'legislation', etc.

Exemplar Response

[I predict my client's legal challenge to this law in the High Court would be successful, and the new legislation would be declared invalid.[1]][The reason for this is because the decision in *Australian Capital Television* created an implied right to freedom of political communication,[2]][which is being breached by this law that limits free communication about Australian law-makers.[3]][In *Australian Capital Television* the law breaching this implied right was declared invalid, and because this law constrains information voters need in a similar way I conclude that the law in this case would also be declared invalid.[4]]

22.

- ✓ ✗ I have stated that Sarah's human rights have been infringed.[1]
- ✓ ✗ I have linked the facts in the question to Sarah meeting the Act's definition of 'potential pregnancy'.[2]
- ✓ ✗ I have linked the facts in the question to Sarah being unlawfully denied the job due to her potential pregnancy.[3]
- ✓ ✗ I have referred to the relevant sections of the Act in my response.
- ✓ ✗ I have used key legal studies terminology effectively such as: 'Act', 'unlawful', etc.

Exemplar Response

[Sarah's human rights as protected by the *Sex Discrimination Act* have been infringed.[1]][As Sarah made a comment about wanting a family, her scenario fits within the definition of 'potential pregnancy' in s. 4B(b) of the Act.[2]][Then, the interviewer has mistreated Sarah based on this potential pregnancy when using this as the reason for denying her the job, which is unlawful under s. 14(1)(b).[3]]

23.

- ✓ ✗ I have identified the law as breaching an express right.[1]
- ✓ ✗ I have stated the law should be challenged in the High Court, because it has power to enforce express rights.[2]
- ✓ ✗ I have predicted the likely outcome as the law being declared invalid.[3]
- ✓ ✗ I have justified this conclusion by linking the content of the law banning prayer to s. 116 protecting free practice of religion.[4]
- ✓ ✗ I have predicted the Court will not provide a remedy such as damages to Josiah's group.[5]
- ✓ ✗ I have justified this conclusion by stating the High Court cannot provide remedies when a law breaches an express right.[6]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'invalid', 'High Court', etc.

Exemplar Response

[The Commonwealth's law breaches a constitutionally-protected express right[1]][therefore its validity should be challenged by Josiah's interfaith group in the High Court.[2]][The likely outcome would be the High Court declaring the Commonwealth law invalid,[3]][because s. 116 of the Constitution protects the right to freely practise one's religion and this law clearly restricts religious observance by preventing praying in public.[4]][The Court would not, however, make an award of damages or any other remedy to address any injury felt by Josiah's group,[5]][because the High Court does not have the power to do so when upholding express rights.[6]]

LEVEL 4

24.

- ✓ ✗ I have made a statement about the overall effectiveness of the express rights in protecting human rights in Australia.[1]
- ✓ ✗ I have identified a weakness of the express rights.[2]
- ✓ ✗ I have described this weakness in further detail (using examples if relevant).[3]
- ✓ ✗ I have used 'however' or similar, to show I am discussing 'both sides'.[4]
- ✓ ✗ I have identified a matching strength of the express rights.[5]
- ✓ ✗ I have described this strength in further detail (using examples if relevant).[6]
- ✓ ✗ I have identified a second weakness of the express rights.[7]
- ✓ ✗ I have described this weakness in further detail (using examples if relevant).[8]
- ✓ ✗ I have used 'however' or similar, to show I am discussing 'both sides'.[9]
- ✓ ✗ I have identified a matching second strength of the express rights.[10]
- ✓ ✗ I have described this strength in further detail (using examples if relevant).[11]
- ✓ ✗ I have identified one example of an express right.[12]
- ✓ ✗ I have identified a second example of an express right.[13]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'rights', 'High Court', etc.

Exemplar Response

[The express rights in the Constitution provide very little effective protection of human rights in Australia.[1]]

[The first reason for this is that there are only five express rights and they are limited in their nature, providing little protection of human rights from government interference.[2]][Many similar nations have many more express rights and those in the Australian Constitution operate narrowly. For example, the right to trial by jury applies only to Commonwealth indictable offences, yet the states make most criminal laws.[3]][However,[4]][these rights are entrenched,[5]][meaning law-makers cannot remove or change these rights without the consent of the voters at a referendum.[6]]

[A second reason the express rights provide limited human rights protection is that the High Court is restricted in its ability to address rights abuses,[7]][as it cannot award damages to those who suffer injury when express rights are infringed and can only declare legislation invalid when its challenged, which is costly for affected parties.[8]][But,[9]][the Constitution does ensure express rights are enforceable[10]][by establishing the High Court as an independent court able to strike down laws that violate the express rights.[11]][Two examples of express rights are freedom of religion[12]][and just terms when the Commonwealth compulsorily acquires a person's property.[13]]

Possible points to include

Describing strengths followed by weaknesses would also be an acceptable structure to this response, however students must link these back to the overall conclusion about the express rights' effectiveness.

Other express rights include:

- Trial by jury for Commonwealth indictable offences.
- Non-discrimination based on state of residence.
- Freedom of interstate trade and movement.

25.

- ✓ ✗ I have made a statement about the overall effectiveness of the *Charter* in protecting human rights, linking to the prompt.[1]
- ✓ ✗ I have identified a strength of the *Charter*.[2]
- ✓ ✗ I have described this strength in further detail (using examples if relevant).[3]

✓ ✗	I have used 'however' or similar, to show I am discussing 'both sides'.[4]
✓ ✗	I have identified a matching weakness of the *Charter*.[5]
✓ ✗	I have described this weakness in further detail (using examples if relevant).[6]
✓ ✗	I have identified a second strength of the *Charter*.[7]
✓ ✗	I have described this strength in further detail (using examples if relevant).[8]
✓ ✗	I have used 'however' or similar, to show I am discussing 'both sides'.[9]
✓ ✗	I have identified a second matching weakness of the *Charter*.[10]
✓ ✗	I have described this weakness in further detail (using examples if relevant).[11]
✓ ✗	I have included a concluding statement restating my overall position.[12]
✓ ✗	I have used key legal studies terminology effectively such as: 'rights', 'legislation', etc.

Exemplar Response

[Despite some limitations, overall I do not think the *Charter* is an ineffective mechanism for protecting rights.[1]]

[Firstly, the *Charter* ensures human rights issues are considered and debated publicly when all new legislation is considered in Victoria.[2]][This creates a political risk for law-makers introducing laws breaching human rights, discouraging law-makers from doing so.[3]][However,[4]][the *Charter* applies only to new laws being considered in Victoria.[5]][It has no impact on new laws being developed in the Commonwealth Parliament, which may infringe upon the human rights of Victorians.[6]]

[A second reason the *Charter* is not ineffective is that the process of debating a statement of compatibility ensures complex issues regarding human rights are debated and resolved in a public way.[7]][For example, the *Charter* made sure the sensitive issue of restricting young people's right to medically assisted dying was considered in public by democratically-elected law-makers.[8]][But,[9]][it must be conceded that although the *Charter* requires Victorian law-makers to explicitly consider whether new laws violate human rights in the *Charter*, it does not stop such laws being created.[10]][So, the voluntary assisted dying legislation was ultimately passed in a form that breaches the right to equality before the law regardless of age.[11]][Despite these weaknesses, statutory protection such as the VCHRR can be very effective.[12]]

Possible points to include

Describing weaknesses followed by strengths would also be an acceptable structure to this response, however students must link these back to the overall conclusion about the *Charter's* effectiveness and the words in the prompt.

Another weakness of the *Charter* includes:

- VCHRR does not create the right to begin legal action for rights breaches. A party who has had their rights breached under VCHRR cannot initiate proceedings under this law seeking a remedy.

10B Rights protection & international treaties

LEVEL 1

1. A **2.** B **3.** A **4.** B

LEVEL 2

5.

- ✓ ✗ I have described a treaty as 'an agreement between two or more nations to do or not do certain things' (or similar).[1]
- ✓ ✗ I have described one way an international treaty can lead to human rights protection in Australian law.[2]
- ✓ ✗ I have described one example of Australian law being influenced by an international treaty in this way.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'treaty', 'parliament', 'unlawful', etc.

Exemplar response

[An international treaty is an agreement between two or more nations to do or not do certain things.[1]][One way an international treaty can lead to the protection of human rights in Australia is by the Commonwealth Parliament passing laws that give effect to human rights protections in treaties Australia has signed.[2]][For example, the *Racial Discrimination Act 1975* protects human rights by making racial discrimination unlawful, following Australia's signing of the Convention on the Elimination of All Forms of Racial Discrimination.[3]]

Possible points to include

One other way an international treaty can lead to the protection of human rights is through the operation of the Joint Parliamentary Committee on Human Rights, which will report to the parliament whether new legislation breaches or upholds human rights obligations in various international treaties. The parliament will then decide whether to pass, reject or amend such proposed legislation.

An example of the Committee's impact on human rights is its endorsement of the *Modern Slavery Act 2018*, which promoted human rights contained in treaties such as the Convention on the Rights of the Child.

LEVEL 3

6.

- ✓ ✗ I have described s. 7 of the Act as making the role of the Parliamentary Joint Committee on Human Rights to 'review legislation in light of its impact upon the international human rights treaties Australia has signed' (or similar).[1]
- ✓ ✗ I have identified the *Convention on the Elimination of All Forms of Discrimination against Women* as one example of the human rights treaties the PJCHR will look at when reviewing new legislation.[2]
- ✓ ✗ I have stated that the PJCHR will therefore report to parliament whether new laws uphold or infringe rights in the *Convention on the Elimination of All Forms of Discrimination against Women*.[3]
- ✓ ✗ I have stated that the Senate and the House of Representatives will ultimately decide whether new laws uphold or breach rights in the *Convention*, the PJCHR's role is only to report on new bills' impact on human rights.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'treaty', 'parliament', 'committee', etc.

Exemplar response

[Under s. 7 of the Act, the PJCHR reviews all bills introduced into the Commonwealth Parliament, to determine whether each bill either promotes or infringes upon the human rights contained within international rights treaties Australia has signed,[1]][including the *Convention on the Elimination of All Forms of Discrimination against Women.*[2]][Therefore, the effect of s. 7 of the Act and the Convention upon proposed laws is that the PJCHR will report to the Parliament whether bills are or are not consistent with the rights within the Convention.[3]][After considering this report, it is up to the Senate and the House to decide whether to pass, reject or amend each bill.[4]]

7.

- ✓ ✗ I have identified the first error in the passage – that the contents of a treaty automatically becomes part of Australian law.[1]
- ✓ ✗ I have described the correct process – legislation must be passed to give effect to the contents of a treaty.[2]
- ✓ ✗ I have identified the second error in the passage – that the PJCHR can prevent legislation breaching human rights.[3]
- ✓ ✗ I have described the correct process – the PJCHR reports on whether bills promote or breach human rights, but the parliament decides whether to pass, amend or reject such bills.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'treaty', 'bill', 'committee', etc.

Exemplar response

[The first error in the Prime Minister's speech is stating that the human rights within the Convention against Torture automatically become part of Australian law.[1]][As stated by the High Court in *Kioa v West,* the parliament must pass a law implementing the human rights protections contained within this treaty for torture to become unlawful within the Australian legal system.[2]]

[The second error is the statement that the parliamentary committee could prevent the passage of new legislation that violates human rights.[3]][Instead, the PJCHR will report upon whether proposed laws violate or uphold the human rights outlined within this convention Australia has signed, but ultimately it is up to the Senate and the House of Representatives to decide whether to pass, reject or amend such bills.[4]]

10C Rights protection in the USA & Canada

LEVEL 1

1. B **2.** D **3.** B **4.** D

LEVEL 2

5.

✓ ✗	I have described 'Bill of Rights' as 'a section of a Constitution devoted to human rights protections, with an extensive list of express rights' (or similar).[1]
✓ ✗	I have described 'entrenched' rights as those that can only be removed by a special process, not by law-makers in the US Congress acting alone (or similar).[2]
✓ ✗	I have described these rights being 'fully enforceable' as meaning laws that breach the express rights will be declared invalid by an independent court, when challenged (or similar).[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'rights', 'courts ', etc.

Exemplar response

[The 'Bill of Rights' is a section of the US Constitution devoted to human rights protections, with an extensive list of express rights.[1]][These express rights are 'entrenched' because they can only be removed by a special process, not by law-makers in the US Congress acting alone.[2]][The express rights in the US Constitution being 'fully enforceable' means laws that breach the express rights will be declared invalid by an independent court, when challenged.[3]]

6.

✓ ✗	I have identified Canada's approach to rights protection as relying on the Charter of Rights and Freedoms.[1]
✓ ✗	I have identified a second feature of rights protection in Canada.[2]
✓ ✗	I have identified a third feature of rights protection in Canada.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'Charter', 'fully enforceable', etc.

Exemplar response

[The central feature of Canada's approach to rights protection is the Constitution's *Charter of Rights and Freedoms*, an extensive list of express rights.[1]][Further, these express rights are fully enforceable, meaning laws that breach the *Charter* rights will be declared invalid when challenged in court and affected parties may be awarded damages.[2]][Lastly, the Supreme Court may advise parliament whether proposed laws may breach rights within the *Charter*.[3]]

Possible points to include

Other features of Canada's approach to rights protection include:

- Parliament is permitted to pass laws that override some of the rights in the *Charter*, if the parliament explicitly makes this declaration. Such laws only operate for 5 years.
- Rights in the *Charter* are entrenched, meaning they can only be removed by a complex process and not by the national parliament acting alone.

LEVEL 3

7.

- I have stated that Australia's approach is only similar to that of the approach in the other nation to a very small extent (or similar).[1]
- I have described one feature of the approach in another nation that differs from the approach taken in Australia.[2]
- I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
- I have described the corresponding feature of the approach in Australia.[4]
- I have described a second feature of the approach in another nation that differs from the approach taken in Australia.[5]
- I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[6]
- I have described the corresponding feature of the approach in Australia.[7]
- I have described one similarity between the approach in Australia and the other nation.[8]
- I have used appropriate signposting in my response such as 'a difference is...', 'whereas', 'unlike' or 'this is similar in...'
- I have used key legal studies terminology effectively such as: 'constitution', 'rights', etc.

Exemplar response

[Although there are a few similarities, Australia's approach to the protection of rights is largely different to the approach taken in Canada.[1]][One key difference is the Canadian Constitution includes an extensive list of express rights in their *Charter*,[2]][whereas[3]] [the Australian Constitution includes very few rights and they are scattered throughout the Constitution. There is no such *Charter* or Bill of Rights; instead, representative government is relied on to protect rights.[4]][Another major difference is the Supreme Court may award damages to those affected by abuses of express rights,[5]][but[6]][the courts cannot do so in Australia.[7]][One similarity is that in both nations these express rights are fully enforceable, meaning a person affected by a law that breaches an express right can have it declared invalid by the courts.[8]]

Possible points to include

Other differences regarding Canada & Australia include:

- In some cases, the Canadian parliament may pass laws explicitly breaching express rights – this cannot be done in Australia.

Comparing USA and Australia

Differences:

- The US Constitution includes an extensive list of express rights in the Bill of Rights, whereas the Australian Constitution includes very few rights and they are scattered throughout the constitution, there is no such bill of rights. Representative government is instead relied on to protect rights.
- US courts may award damages to those affected by abuses of express rights, but the courts cannot do so in Australia.

Similarities:

- In both nations express rights are fully enforceable, meaning a person affected by a law that breaches an express right can have it declared invalid by the courts.
- Constitutional rights are entrenched, meaning they cannot be removed by the nation's law-makers acting alone, only by using a complex process that limits such change from happening without significant support from the majority of citizens.

8.

- I have identified one similarity/difference.[1]
- I have described in more detail this first similarity/difference.[2]
- I have identified a second similarity/difference.[3]
- I have described in more detail this second similarity/difference.[4]
- I have used appropriate signposting in my response such as 'a difference is...', 'whereas', 'unlike' or 'this is similar in...'
- I have used key legal studies terminology effectively such as: 'rights', 'entrenched', etc.

Exemplar response

[One key difference is the Canadian Constitution includes the *Charter of Rights and Freedoms*, whereas the Australian Constitution includes no such charter or bill of rights.[1]][This *Charter* in Canada includes many express rights that are broad in their operation, unlike the very few express rights in Australia which are also narrow in their operation, such as the right to jury trial being only for Commonwealth indictable offences.[2]][One similarity is that in both nations these express rights are fully enforceable,[3]][which means a person affected by a law that breaches an express right can have it declared invalid by an independent court (the High Court of Australia or the Supreme Court in Canada).[4]]

Possible points to include

Other differences regarding Canada & Australia include:

- In some cases, the Canadian parliament may pass laws explicitly breaching express rights – this cannot be done in Australia.
- The courts in Canada may award damages if express rights are breached; the High Court of Australia cannot do so.
- The overall approach in both nations is different – Canada relies on its *Charter* to protect human rights, Australia relies on the principle of representative government and legislation to protect human rights.

Comparing USA and Australia

Differences:

- The overall approach in both nations is different – the US relies on its Bill of Rights to protect human rights, Australia relies on the principle of representative government and legislation to protect human rights.
- The US Constitution includes an extensive list of express rights in the Bill of Rights that are broad in their operation, whereas the Australian Constitution includes very few rights, narrow in the way they operate and they are scattered throughout the constitution, there is no such bill of rights.
- The courts may award damages to those affected by abuses of express rights, but the courts cannot do so in Australia.

Similarities:

- In both nations express rights are fully enforceable, meaning a person affected by a law that breaches an express right can have it declared invalid by the courts.
- Constitutional rights are entrenched, meaning they cannot be removed by the nation's law-makers acting alone, only by using a complex process that limits such change.

9.

- ✓ ✗ I have identified the first error in this passage – the reference to the Canadian Bill of Rights.[1]
- ✓ ✗ I have corrected this error by naming the *Charter of Rights and Freedoms* as the relevant section of the Canadian Constitution.[2]
- ✓ ✗ I have identified the second error in this passage – the statement that those affected by rights abuses cannot be awarded compensation/damages.[3]
- ✓ ✗ I have corrected this error by stating the Supreme Court can award damages to those who suffer injury as a result of laws breaching express rights in Canada.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'damages', '*Charter*', etc.

Exemplar response

[The first error in the passage is the reference to the Canadian Bill of Rights.[1]][The correct name for this part of the Canadian Constitution containing express rights is the *Charter of Rights and Freedoms*.[2]][The second error is stating that those affected by rights abuses are not entitled to a remedy when they challenge the validity of a law in Canada.[3]][The Supreme Court in Canada can award damages to those who suffer injury as a result of laws breaching express rights in the Canadian *Charter*.[4]]

10.

- ✓ ✗ I have identified the first error in this passage – the reference to the Charter of Rights and Freedoms.[1]
- ✓ ✗ I have corrected this error by naming the Bill of Rights as the relevant section of the US Constitution.[2]
- ✓ ✗ I have identified the second error in this passage – the statement that those affected by rights abuses cannot be awarded compensation/damages.[3]

✓ ✗	I have corrected this error by stating the Supreme Court can award damages to those who suffer injury as a result of laws breaching express rights in the USA.[4]
✓ ✗	I have used key legal studies terminology effectively such as: 'damages', 'Bill of Rights', etc.

Exemplar response

[The first error in the passage is the reference to the US Charter of Rights and Freedoms.[1]][The correct name for this part of the US Constitution containing express rights is the Bill of Rights.[2]][The second error is stating that those affected by rights abuses are not entitled to a remedy when they challenge the constitutional validity of a law in the USA.[3]][US courts can award damages to those who suffer injury as a result of laws breaching express rights in the US Bill of Rights.[4]]

10D Possible reforms to rights protection

LEVEL 1

1. D **2.** B **3.** C **4.** C

LEVEL 2

5.

✓ ✗	I have identified passing a statutory charter of rights as another reform to human rights protection in Australia (or similar).[1]
✓ ✗	I have described a Commonwealth statutory charter as being similar to the *Victorian Charter*.[2]
✓ ✗	I have included an example of a right that could be included within such a *Charter*.[3]
✓ ✗	I have described a charter as including human rights in legislation.[4]
✓ ✗	I have stated a *Commonwealth Charter* would ensure new laws are reviewed in terms of their impact on human rights.[5]
✓ ✗	I have stated the Commonwealth would be able to pass laws infringing rights in such a *Charter*.[6]
✓ ✗	I have used key legal studies terminology effectively such as: 'rights', 'charter', 'legislation', etc.

Exemplar response

[One other reform to human rights protection in Australia is to create a statutory charter of human rights,[1]][like that which operates in Victoria[2]][to protect rights such as freedom of speech.[3]][Such a *Charter* would be legislation passed by the Commonwealth Parliament, including a list of protected human rights and likely replacing the mix of laws protecting rights.[4]][The rights within such a *Charter* would be considered by the parliament when new legislation is being debated,[5]][however the parliament would ultimately retain the ability to pass legislation that infringes such rights.[6]]

LEVEL 3

6.

✓ ✗	I have described one feature of a statutory right that differs from additional constitutional protections.[1]
✓ ✗	I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[2]
✓ ✗	I have described the corresponding feature of constitutional protection of the right to free speech.[3]
✓ ✗	I have described a second feature of a statutory right that differs from additional constitutional protections.[4]

✓ ✗	I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[5]
✓ ✗	I have described the corresponding feature of constitutional protection of the right to free speech.[6]
✓ ✗	I have used key legal studies terminology effectively such as: 'constitution', 'charter', 'rights', etc.

Exemplar response

[One difference between a statutory right to free speech (within a charter of rights like the VCHRR) and adding an express right to free speech is that a statutory right would be much easier to create, as it would be created by passing legislation through the parliament,[1]] [whereas[2]] [adding further constitutionally-protected rights is hard because it requires a successful referendum, which has proved to be very difficult to achieve – including failed attempts to add more express rights in the 1980s.[3]] [Another difference is the Commonwealth Parliament remains able to pass legislation that infringes a right to free speech outlined in a statutory charter,[4]] [however[5]] [if an express right to free speech were added, any legislation that breached that right could be declared invalid by the High Court.[6]]

LEVEL 4

7.

✓ ✗	I have identified one advantage of adding express rights to the Constitution.[1]
✓ ✗	I have described in further detail this advantage of additional express rights (as a way to promote human rights protection in Australia).[2]
✓ ✗	I have identified one limitation of adding express rights to the Constitution, other than the expense of conducting a referendum.[3]
✓ ✗	I have described in further detail this limitation of additional express rights (as a way to promote human rights protection in Australia).[4]
✓ ✗	I have referred to the stimulus in my discussion.
✓ ✗	I have used key legal studies terminology effectively such as: 'constitution', 'legislation', 'rights', etc.

Exemplar response

[One advantage of adding more express rights to the Constitution is the public awareness in human rights this would lead to.[1]] [The lead up to a referendum and the compulsory vote itself would provide greater public awareness of human rights protection in the Australian legal system. Greater understanding of human rights issues (such as citizens being detained) leads to more informed voting and richer public debate about the impact of new laws on human rights.[2]]

[A limitation of expanded express rights (or even a bill of rights within the Constitution) is that it's inflexible.[3]] [As society's expectations about human rights change in future, amending or removing the express rights in the Constitution would prove very difficult because a successful referendum is so hard to achieve.[4]]

Possible points to include

Advantages

- The inclusion of further express rights would provide strict human rights protection by ensuring laws that breach the fundamental rights valued in a democratic society would be invalid.
- Express rights protect minorities in society, by ensuring such persons are not discriminated against by legislation passed by the parliament (which may be popular with many voters).

Limitations

- To add further express rights requires a successful referendum, but it is very difficult to amend the Constitution. Only 8 out of 44 attempts to change the Constitution have succeeded; previous attempts to add more express rights have failed.
- With more express rights in the Constitution it would be up to the High Court to determine whether legislation breaches an express right. It can be argued that it is better for a democratically-elected parliament to decide whether a law should or should not be passed at a given time based on its impact on human rights.

8.

- ✓ ✗ I have identified a strength of a statutory charter of rights.[1]
- ✓ ✗ I have described this strength in further detail (using examples if relevant).[2]
- ✓ ✗ I have used 'however' or similar, to show I am discussing 'both sides'.[3]
- ✓ ✗ I have identified a weakness of a statutory charter of rights.[4]
- ✓ ✗ I have described this weakness in further detail (using examples if relevant).[5]
- ✓ ✗ I have identified a second strength of a statutory charter of rights.[6]
- ✓ ✗ I have described this strength in further detail (using examples if relevant).[7]
- ✓ ✗ I have used 'however' or similar, to show I am discussing 'both sides'.[8]
- ✓ ✗ I have identified a second weakness of a statutory charter of rights.[9]
- ✓ ✗ I have described this weakness in further detail (using examples if relevant).[10]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'constitution', 'legislation', 'rights', etc.

Exemplar response

[One advantage of protecting human rights through a statutory charter is the flexibility this reform provides.[1]] [Such a charter provides a more flexible way to solve complex issues regarding laws that are designed to protect society but have an impact on human rights, by ensuring human rights consequences of new laws are more carefully debated and resolved in a public forum by elected law-makers.[2]] [However,[3]] [a shortcoming of such a reform is that it does not protect human rights as strictly as adding greater constitutional protection of rights.[4]] [This is because a statutory charter does not prevent new laws limiting human rights to the same extent that additional express rights might, because parliament retains the ability to pass new laws in future that abolish such rights.[5]]

[Another advantage of a Commonwealth statutory charter of rights is that it would help to educate Australians about human rights issues.[6]] [The existence of a charter and the process it would create for public debate of how new laws impact on human rights would lead to better public discussion and consideration by voters of human rights issues when voting.[7]] [Despite this benefit,[8]] [it can be argued that creating a Commonwealth charter of human rights is not necessary.[9]] [Such a reform could be seen as redundant given there is already significant state and Commonwealth legislation protecting human rights, the PJCHR reviews proposed Commonwealth legislation with respect to the impact of new laws on human rights plus the Constitution guarantees regular elections, providing a way for Australians to remove law-makers that pass laws breaching important human rights.[10]]

Chapter 10 Review questions

LEVEL 5

1. a)

✓ ✗	I have described the VCHRR as protecting human rights by 'ensuring that the parliament considers and debates the impact of all new legislation in Victoria on the human rights listed in the *Charter*' (or similar).[1]
✓ ✗	I have added further detail about how rights are protected through the *Charter's* influence on the law-making process.[2]
✓ ✗	I have identified one example of a right in the VCHRR.[3]
✓ ✗	I have used key legal studies terminology effectively such as: '*Charter*', 'human rights', 'legislation', etc.

Exemplar response

[The VCHRR protects human rights by ensuring that the parliament considers and debates the impact of all new legislation in Victoria on the human rights listed in the *Charter*.[1]][When passing new legislation, the parliament must explain whether a new law is compatible with the rights in the *Charter* and justify any limits placed on human rights by a new law.[2]][An example of a right in the Charter is the right to equality before the law in s. 8.[3]]

Possible points to include

It is not necessary to include section numbers when identifying rights in the VCHRR, but doing so is one way to demonstrate a detailed knowledge of the *Charter*.

Other examples of *Charter* rights include:

- Protection from torture (s. 10)
- Protection from slavery (s. 11)
- Right to freedom of thought and religion (s. 14)

b)

✓ ✗	I have described one feature of express rights that differs from rights in a statutory charter.[1]
✓ ✗	I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[2]
✓ ✗	I have described the matching feature of rights in a statutory charter.[3]
✓ ✗	I have used key legal studies terminology effectively such as: 'Constitution', 'legislation', etc.

Exemplar response

[One difference is that human rights protected by express rights in the Constitution cannot be breached by legislation because any such legislation is declared invalid,[1]][whereas[2]][human rights contained in a statutory charter can be limited/breached by legislation passed by parliament.[3]]

Possible points to include

Express rights are entrenched and can therefore only be changed or removed with the voters' support at a referendum, whereas a statutory charter of human rights can be amended by legislation, with no need for voter consent or participation.

c)

✓ ✗	I have described the relationship between the unsentenced prisoner population and the changes to bail law, and the presumption of innocence as inconsistent (or similar).[1]
✓ ✗	I have justified this comment by describing the prisoner population and new bail laws as imprisoning more individuals not yet convicted of crimes.[2]
✓ ✗	I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
✓ ✗	I have described the presumption of innocence as assuming individuals will not be punished unless found guilty of an offence.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'prisoner', 'innocence', '*Charter*', etc.

Exemplar response

[The graph and new laws allowing more people to be remanded in custody are inconsistent and incompatible with the *Charter's* presumption of innocence.[1]][The graph shows a large and growing number of Victorians being imprisoned despite not yet being found guilty of a crime (or not yet being sentenced) and the updated bail laws allow for more arrested persons to be remanded in custody,[2]][despite[3]][the *Charter* stating that all Victorians are entitled to be treated as innocent until proven guilty.[4]]

d)

✓ ✗ I have identified a weakness of rights protection under the *Charter*.[1]

✓ ✗ I have explained this weakness in further detail (using an example if relevant).[2]

✓ ✗ I have used key legal studies terminology effectively such as: '*Charter*', 'proceedings', etc.

Exemplar response

[Another weakness of the *Charter* in protecting human rights is that it does not create a right to begin legal action for rights breaches.[1]][This means a person who feels that a new law violates their rights under the VCHRR cannot initiate proceedings in a court or tribunal seeking a remedy.[2]]

Possible points to include

Other weaknesses of the VCHRR include:

- The VCHRR applies only to new laws being considered in Victoria. It has no impact on new laws being developed in the Commonwealth Parliament, which may infringe upon the rights of Victorians.

e)

✓ ✗ I have commented that this statement is incorrect, because signed international treaties can influence new laws but do not prevent new laws that violate the rights within such treaties (or similar).[1]

✓ ✗ I have justified this conclusion by stating that international treaties signed by the Australian government do not automatically become part of Australian law and are not binding on law-makers.[2]

✓ ✗ I have stated that the PJCHR will review whether new laws introduced into the Commonwealth Parliament violate human rights contained in international treaties.[3]

✓ ✗ I have stated that the Commonwealth Parliament retains the ability to pass new laws violating rights in international treaties, even following such a review by the PJCHR.[4]

✓ ✗ I have used key legal studies terminology effectively such as: 'PJCHR', 'treaty', 'legislation', etc.

Exemplar response

[This statement is inaccurate, because treaties signed by the Australian government can influence new laws passed by the Commonwealth but cannot prevent new laws that violate the human rights outlined within international treaties.[1]]
[International treaties do not automatically become binding law within Australia when signed by the government and do not limit the law-making powers of the Commonwealth Parliament.[2]][The Parliamentary Joint Committee on Human Rights will review new laws to determine whether they have an impact upon the human rights contained within treaties Australia has signed,[3]][but it is ultimately up to the Commonwealth Parliament to decide whether to pass a new law detaining individuals merely accused of a crime.[4]]

2. a)

✓ ✗ I have stated the extent to which I agree that the Constitution provides limited rights protection.[1]

✓ ✗ I have stated the extent to which I agree that the Constitution would be improved by a Bill of Rights.[2]

✓ ✗ I have identified a weakness of rights protection in the Constitution.[3]

✓ ✗ I have described this weakness in further detail (using examples if relevant).[4]

REVIEW

✓ ✗	I have used 'however' or similar, to show I am discussing 'both sides'.[5]
✓ ✗	I have identified a strength of rights protection in the Constitution.[6]
✓ ✗	I have described this strength in further detail (using examples if relevant).[7]
✓ ✗	I have identified a second weakness of rights protection in the Constitution.[8]
✓ ✗	I have described this weakness in further detail (using examples if relevant).[9]
✓ ✗	I have used 'however' or similar, to show I am discussing 'both sides'.[10]
✓ ✗	I have identified a second strength of rights protection in the Constitution.[11]
✓ ✗	I have described this strength in further detail (using examples if relevant).[12]
✓ ✗	I have identified a strength of adding further express rights (in a Bill of Rights).[13]
✓ ✗	I have described this strength in further detail (using examples if relevant).[14]
✓ ✗	I have used 'however' or similar, to show I am discussing 'both sides'.[15]
✓ ✗	I have identified a weakness of adding further express rights (in a Bill of Rights).[16]
✓ ✗	I have described this weakness in further detail (using examples if relevant).[17]
✓ ✗	I have used appropriate signposting in my response such as 'A reason I agree is...', etc.
✓ ✗	I have used key legal studies terminology effectively such as: 'Constitution', 'rights', etc.

Exemplar response

[I agree to a large extent that the Constitution provides very little effective protection of human rights in Australia,[1]][but I only agree to some extent that rights protection would be improved by adding more express rights.[2]]

[The first reason for this is that there are only five express rights and one implied right, and they are limited in their nature, providing little protection of human rights from government interference.[3]][Many similar nations have many more express rights and those in the Australian Constitution operate narrowly. For example, the right to trial by jury applies only to Commonwealth indictable offences, yet the states make most criminal laws.[4]][However,[5]][the express rights are entrenched,[6]][meaning law-makers cannot remove or change these rights without the consent of the voters at a referendum.[7]]

[A second reason I agree that the Constitution provides limited human rights protection is that the High Court is restricted in its ability to address rights abuses,[8]][as it cannot award damages to those who suffer injury when express or implied rights are infringed and can only declare legislation invalid when it is challenged, which is costly for affected parties.[9]][But,[10]][the Constitution does ensure express and implied rights are enforceable[11]][by establishing the High Court as an independent court able to strike down laws that violate Constitutional rights.[12]]

[A reason I agree that the Constitution would be improved by adding more express rights in a Bill of Rights is that the inclusion of further express rights would provide strict human rights protection[13]][by ensuring laws that breach a wider range of fundamental rights valued in a democratic society would be invalid.[14]][However,[15]][a limitation of a Bill of Rights within the Constitution is that it is inflexible.[16]][As society's expectations about human rights change in future, amending or removing the express rights in the Constitution would prove very difficult because a successful referendum is so hard to achieve.[17]]

Possible points to include

Describing strengths followed by weaknesses would also be an acceptable structure to this response, however students must link these back to the overall conclusion (how much they agree the Constitution provides limited rights protection).

Other limitations of Australia's constitutional protection of rights include:

- 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 from challenging a law that breaches an express right, meaning the law continues to operate.

- The Court cannot award damages to a person affected by a law breaching express or implied rights.

Other strengths of Australia's constitutional protection of rights include:

- The principle of representative government includes having regular elections; the fear of losing power at an election should prevent law-makers passing laws to violate human rights, which is preferable to having mechanisms for compensating/addressing rights abuses after the fact.
- The separation of powers is an effective way to protect human rights. 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 many ways.

Other reasons to support adding a Bill of Rights include:

- Express rights protect minorities in society, by ensuring such persons are not discriminated against by legislation passed by the parliament (which may be popular with many voters).
- Public awareness in human rights would grow. The lead up to a referendum and the compulsory vote itself would provide greater public awareness of human rights protection in the Australian legal system. Greater understanding of such issues leads to more informed voting and better public debate about the impact of new laws on human rights.

Other reasons to oppose adding a Bill of Rights include:

- To add further express rights requires a successful referendum, but it is very difficult to amend the Constitution. Only 8 out of 44 attempts to change the Constitution have succeeded; previous attempts to add more express rights have failed.
- With more express rights in the Constitution it would be up to the High Court to determine whether legislation breaches an express right. It can be argued that it is better for a democratically-elected parliament to decide whether a law should or should not be passed at a given time based on its impact on human rights.

b)

✓ ✗	I have described one feature of the approach in another nation that differs from the approach taken in Australia.[1]
✓ ✗	I have used distinguishing words such as 'whereas', 'however', 'on the other hand', to highlight differences.[2]
✓ ✗	I have described the corresponding feature of the approach in Australia.[3]
✓ ✗	I have used appropriate signposting in my response such as 'A difference is...', 'whereas', etc.
✓ ✗	I have used key legal studies terminology effectively such as: 'Constitution', 'rights', etc.

Exemplar response

[One key difference in the way rights are protected in the USA compared to Australia is that the US Constitution includes an extensive list of express rights in the Bill of Rights,[1]][whereas[2]][the Australian Constitution includes very few rights and they are scattered throughout the document, there is no such bill of rights and representative government is instead relied on to protect rights.[3]]

Possible points to include

Differences between Australia & Canada:

- In some cases, the Canadian parliament may pass laws explicitly breaching express rights – this cannot be done in Australia.
- The courts in Canada may award damages if express rights are breached; the High Court of Australia cannot do so.
- The overall approach in both nations is different – Canada relies on its *Charter* to protect human rights, Australia relies on the principle of representative government and legislation to protect human rights.

Other differences between Australia & USA:

- The courts may award damages to those affected by abuses of express rights, but the courts cannot do so in Australia.

REVIEW

11A Roach v Electoral Commissioner [2007]

LEVEL 1

1. B **2.** B **3.** C **4.** C

5. B **6.** D

LEVEL 2

7.

- ✓ ✗ I have identified one example of a 'substantial reason' described in the Court's decision in *Roach*.[1]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'High Court', 'judgement', etc.

Exemplar response

[One example of a 'substantial reason identified by the High Court for removing the right to vote is being convicted of treason.[1]]

Possible points to include

Other substantial reasons include:

- Unsoundness of mind
- Serving a prison term exceeding three years, which is evidence of seriously breaching society's values.

8.

- ✓ ✗ I have stated the decision was more beneficial for the wider prison population than Roach personally.[1]
- ✓ ✗ I have justified this conclusion by stating approximately 8,000 prisoners serving under three years regained the right to vote.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however', 'on the other hand', to highlight differences.[3]
- ✓ ✗ I have further justified this conclusion by stating Roach did not regain the right to vote, as she was serving a six year prison term.[4]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'imprisonment', 'voting', etc.

Exemplar response

[The Court's decision had a more positive impact on the wider prison population that upon Roach individually.[1]][This is because the right to vote was returned to about 8,000 prisoners around Australia who were serving a prison term under three years,[2]][whereas[3]] [Roach herself was not able to vote following the decision as she was serving a six year prison term.[4]]

9.

- ✓ ✗ I have identified an argument in support of the decision in *Roach*.[1]
- ✓ ✗ I have described this supportive argument in further detail.[2]
- ✓ ✗ I have identified a criticism of the decision in *Roach*.[3]
- ✓ ✗ I have described this critical argument in further detail.[4]
- ✓ ✗ I have signposted my answer appropriately, such as 'a criticism of the decision is...'
- ✓ ✗ I have used key legal studies terminology effectively such as: 'imprisonment', 'voting', 'High Court', etc.

Exemplar response

[An argument in support of the decision in *Roach* is that it was a win for the rights of Indigenous Australians.[1]][The 2006 law disproportionately took the vote from Indigenous Australians, given the overrepresentation of this group in the prison population.[2]]

[A criticism of the decision is that it is not for the High Court to decide who can and cannot vote in elections.[3]]
[The framers of the Constitution deliberately decided not to include an express right to vote and instead left it to the Parliament to decide who can or cannot vote. Some legal experts argue that the High Court should not insert itself into this process of deciding who is disqualified from voting.[4]]

Possible points to include

Support for the decision:

- Prisoners remain members of the community and therefore retain an interest in how it is governed. Most prisoners (except the most serious offenders) should therefore be permitted to participate in voting, given most prisoners serve relatively short sentences and will return to the community at some point.
- To remove the vote from even minor offenders was double-punishment for their crimes. The decision in *Roach* reversed this double-punishment.

Criticisms of the decision:

- What is a 'substantial reason' and would therefore justify removing the vote remains unclear following the Court's decision.
- Those who are in prison have offended society's values and therefore forfeited the right to participate in community activities such as elections.

LEVEL 3

10.

- ✓ ✗ 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 ss. 7 and 24.[2]
- ✓ ✗ I have stated that removing the vote from those under 22 would be invalid.[3]
- ✓ ✗ I have justified this conclusion by stating merely being under 22 would not be a 'substantial reason' for which to remove the vote.[4]
- ✓ ✗ I have stated that removing the vote from Catholic voters would be invalid.[5]
- ✓ ✗ I have justified this conclusion by stating that being of a particular religion would not be a 'substantial reason' for which to remove the vote, and this was explicitly stated in the *Roach* decision.[6]
- ✓ ✗ I have stated it is unclear whether a ban on prisoners serving two years would be valid.[7]
- ✓ ✗ I have justified this conclusion by stating the Court did not set a hard line for which prison terms would or would not be a 'substantial reason' or an excessive removal of voting power.[8]
- ✓ ✗ I have signposted my answer appropriately, such as 'the ban on voters under 22 is invalid because...'
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'High Court', 'voting', etc.

Exemplar response

[Some aspects of this law would likely be declared invalid when challenged in the High Court, but it is unclear if all such changes would be invalid.[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 ss. 7 and 24 of the Commonwealth Constitution require the Parliament to be chosen by a substantial majority of the community.[2]]

[The first change to the Act in this case would be invalid,[3]] [because removing such a large group of voters based solely on their younger age would not be a 'substantial reason' and would therefore not be valid.[4]] [The second change to the Act in this case would also be invalid,[5]] [because removing such a large group of voters based solely on their religious beliefs would not be a 'substantial reason' and would therefore not be valid, which the Commonwealth explicitly acknowledged during its legal argument in *Roach*.[6]]

[Lastly, it is unclear whether removing the vote from prisoners serving a two year sentence would or would not be valid.[7]] [The High Court decided that banning all prisoners was excessive but disqualifying those serving over three years was acceptable, but it did not set a hard line as to when a prison term becomes long enough to be considered a 'substantial reason' for removing the vote, so it is unclear how the High Court would consider this part of the law.[8]]

LEVEL 4

11.

- ✓ ✗ I have stated this is partially correct (or similar).[1]
- ✓ ✗ I have described one reason this is correct: following *Roach* ss. 7 and 24 set up representative government and this requires the adult population to be able to participate in elections, which can only be removed for a substantial reason.[2]
- ✓ ✗ I have used a distinguishing word such as 'whereas', 'however' or 'on the other hand' to show 'both sides'.[3]
- ✓ ✗ I have described one reason this is incorrect: the Commonwealth Constitution does not include an express right to vote.[4]
- ✓ ✗ I have described a second reason this is incorrect: the Commonwealth Parliament has power to decide who can vote and how they must enrol.[5]
- ✓ ✗ I have used key legal studies terminology effectively, such as: 'High Court', 'voting', etc.

Exemplar response

[To say the Commonwealth Constitution requires all adult Australians to be able to vote is only partially correct.[1]][A reason why this statement is accurate is because the *Roach* decision concluded that the Commonwealth Constitution, in requiring the houses of parliament to be 'directly chosen by the people', sets up representative democracy and requires the adult population to be able to participate in elections. The ability to vote can only be validly taken away for a substantial reason.[2]]

[However,[3]][the statement is only partially correct because the Commonwealth Constitution does not explicitly guarantee a right to vote in Australia.[4]][Furthermore, in the *Roach* decision, the High Court stated that the Commonwealth Parliament does have some power to dictate who can and cannot enrol to vote and participate in elections.[5]]

11B Mabo v Queensland (No. 2) [1992]

LEVEL 1

1. C **2.** C **3.** D **4.** C

LEVEL 2

5.

- ✓ ✗ I have described native title as 'an Indigenous community's right to use and possess its traditional lands' (or similar).[1]
- ✓ ✗ I have described how native title is proven.[2]
- ✓ ✗ I have given examples of activities protected by native title rights.[3]
- ✓ ✗ I have described *terra nullius* as 'the common law principle meaning 'land of no-one' in Latin' (or similar).[4]
- ✓ ✗ I have identified the effect of terra nullius on land ownership at the time of British settlement.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'title', 'ownership', 'Crown', etc.

Exemplar response

['Native title' is an Indigenous community's lawful right to use and possess land.[1]][It is proven if the Indigenous community can prove an ongoing connection to its traditional lands since 1788,[2]][and can include the right to fish, hunt, camp and conduct traditional ceremonies on that land.[3]]['*Terra nullius*' is a Latin term meaning 'land of no-one'[4]][and was the original legal principle that allowed the British Crown to automatically claim ownership of the Australian land mass in 1788.[5]]

6.

- ✓ ✗ I have identified the *Native Title Act 1993* (Cth) as an example of codification.[1]
- ✓ ✗ I have defined codification as 'parliament passing legislation to adopt and expand on common law principles created by a court' (or similar).[2]
- ✓ ✗ I described how the *Native Title Act 1993* (Cth) is an example of codification, because the High Court's decision to create native title in *Mabo* was adopted and expanded upon in this statute.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'title', 'legislation', 'High Court', etc.

Exemplar response

[The passage of the *Native Title Act 1993* (Cth) is an example of codification of common law principles.[1]] [This is because the codification of common law principles requires a parliament to pass legislation to uphold and expand on a legal concept made by a court.[2]] [The Commonwealth Parliament did this with the *Native Title Act 1993* (Cth), a piece of legislation that adopted and built on the native title principles established in the High Court's *Mabo* judgement.[3]]

7.

- ✓ ✗ I have stated that the High Court rejected the *terra nullius* principle.[1]
- ✓ ✗ I have described one reason the Court rejected *terra nullius*: the facts show Meriam people as having a system of land ownership.[2]
- ✓ ✗ I have described a second reason the Court rejected *terra nullius*: it was based on a racist and discriminatory view of Aboriginal Australians' social structures.[3]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'native title', 'High Court', '*terra nullius*', etc.

Exemplar response

[To accept the Meriam people's claim to native title rights on Mer, the High Court rejected the *terra nullius* principle.[1]] [One reason it did so was because the facts as presented by Justice Moynihan showed the Meriam people had an elaborate system of land ownership, so it was clearly not the 'land of no-one' at the time of settlement.[2]] [A second reason the Court rejected *terra nullius* was because the principle was based on a discriminatory view of Aboriginal people at the time of settlement, and the Court could not allow this view to continue in the common law.[3]]

LEVEL 3

8.

- ✓ ✗ I have stated that this comment is partially correct.[1]
- ✓ ✗ I have described the first part of the comment as correct.[2]
- ✓ ✗ I have justified this conclusion with reference to the decision in *Mabo* to recognise native title at the time of settlement.[3]
- ✓ ✗ I have described the second part of the comment as incorrect.[4]
- ✓ ✗ I have justified this conclusion with reference to the decision in *Mabo*, stating when native title is extinguished.[5]
- ✓ ✗ I have used key legal studies terminology effectively such as: 'native title', 'extinguished', 'Crown', etc.

Exemplar response

[The comment is only partially correct.[1]] [It is accurate to say that 'in 1788 Indigenous Australians owned the land my local railway station is built on',[2]] [because in *Mabo* the High Court decided that Aboriginal Australians had native title rights to land at the time of British settlement.[3]] [But it is incorrect to state that Indigenous people have native title rights to that land now.[4]] [The High Court described examples of what can extinguish native title, including the loss of a traditional connection to that land since 1788. The traditional connection to the land was lost when Melbourne's suburbs were built up since the mid-1800s.[5]]

Possible points to include

Native title can also be extinguished by the Crown granting land to itself for public works such as railway lines and stations.

BONUS – CARTOON QUESTION ANSWERS

Multiple choice questions

1 E. **2** D.

Short answer questions

3

✓ ✗	I have defined the presumption of innocence as 'the guarantee made to all accused persons that they are to be treated as innocent until it is proven, beyond reasonable doubt, that they are guilty of a criminal offence' (or similar).[1]
✓ ✗	I have explained the presumption of innocence in further detail.[2]
✓ ✗	I have linked the presumption of innocence to the symbolism of Justitia's blindfold, as the presumption applies equally to all accused persons.[3]
✓ ✗	I have used key legal studies terms effectively, such as 'accused', 'innocence', etc.

[The presumption of innocence refers to a guarantee made to all accused persons that they are to be treated as innocent until it is proven, beyond reasonable doubt, that they are guilty of a criminal offence.[1]][This guarantee is afforded to all accused persons, regardless of their personal situation or the circumstances of the case in which they are implicated.[2]][As is shown by Lady Justice being blindfolded, the presumption of innocence is applied in an unbiased and equal way across the legal system, with all accused persons presumed to be innocent regardless of their race, wealth or prior convictions.[3]]

4

✓ ✗	I have explained that human rights are protected under the Australian Constitution by express and implied rights.[1]
✓ ✗	I have stated that the principle of representative government protects human rights in Australia.[2]
✓ ✗	I have explained how representative government has led to the passing of Commonwealth legislation to protect rights.[3]
✓ ✗	I have stated that common law protects human rights.[4]
✓ ✗	I have stated that Victorian law including the *Charter of Human Rights and Responsibilities* protects human rights.[5]
✓ ✗	I have used key legal studies terms effectively, such as 'express', 'implied', 'legislation', etc.

[Human rights are protected under the Australian Constitution, though this only provides protection for a limited number of express and implied rights.[1]][However, the Constitution does create the principle of representative government which indirectly protects human rights,[2]][and this has resulted in the Commonwealth Parliament passing legislation to protect individuals from discrimination based on their race, gender and so on.[3]][Common law[4]][and Victorian legislation such as the Charter of Human Rights and Responsibilities also protect human rights.[5]]

GLOSSARY

A

access ensuring individuals in society have an understanding of legal rights and ability to pursue their case

accessory to a crime an accessory that assists an offender is any person who knows or believes a principal offender is guilty of a serious indictable offence and without reasonable excuse or lawful authority does an act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender

actus reus a Latin term that refers to the element of the crime where the accused person did an act, or failed to do an act, that had criminal consequences.

aggravating factors aspects of the offence and/or offender that increase the culpability of the offender

appeal a request made to a superior court of law to alter an aspect of a previous decision made by a lower court in the same hierarchy

appellate jurisdiction a court's power to hear a case on appeal - that is, once a case has already been determined and a party seeks a review of some aspect of the decision

arbitration a non-judicial resolution process involving an independent third party (arbitrator) who listens to parties present evidence and makes a binding decision

assault the application or threat of force against another person without any lawful excuse

Australian Consumer Law (ACL) a national law that operates to protect Australians engaging in commercial transactions

automatism occurs when an offence is committed by an accused suffering from an involuntary state of mind

B

bicameral legislature a parliament made of two separate houses that is responsible for law-making

bill of rights a section of a nation's constitution that includes an extensive list of express rights

binding precedent precedent which a judge is obliged to follow, as it comes from a decision of the superior court in the same hierarchy where the facts of the case were materially similar

burden of proof the responsibility of proving the facts of a case (or the party who is responsible for meeting the standard of proof)

C

causal connection a link between accused's voluntary act (or omission) and the consequences resulting from this

civil dispute a dispute between two parties where one party feels that their rights have been infringed by the actions of the other party, and is seeking compensation

civil law the laws that are made by judges (common law) or made by parliament (statute law or legislation) that aim to provide individuals and organisations the right to seek a remedy if someone else harms their individual rights

civil 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

common law law made by judges when resolving a dispute. this includes giving meaning to words in legislation and creating principles of law when a new dispute arises for which there is no relevant law to apply; the defintions/ principles created become law to apply in future, similar cases

common law apprehension assault the victim fears imminent unlawful application of force or contact to their body without consent

common law contact assault the unlawful application of force or contact to the victim, without their consent

community corrrection order (CCO) a sanction that is served by the offender while remaining in the community, and will include specific conditions that the offender must follow

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

complaints bodies assist parties to resolve disputes by investigating and attempting to resolve a complaint through conciliation

conciliation a non-judicial resolution process involving an independent third party (conciliator) with specialist knowledge about the type of dispute in question

constitution a law that establishes a nation's system of government. Constitutional law includes rules about how laws are made, which parliament makes laws on particular topics, the role of the people in choosing law-makers and restrictions on the powers of law-makers

Consumer Affairs Victoria (CAV) a civil complaints body that hears disputes about the provision of goods and services. This could be between a consumer and a company, or a tenant and a landlord

court hierarchy a hierarchy that ranks each court according to which types of cases they have the authority to determine

crime a crime is an act or omission that violates an existing law, causes harm to an individual, or society as a whole, and is punishable by law

crimes against property criminal offences that involve using force or deception to obtain, damage or destroy property

crimes against the person criminal offences where a person is harmed

criminal law the laws that are made by judges (common law) and made by parliament (statute law or legislation) that aim to protect society from harm, and to punish those who offend against our basic values, usually by harming or threatening to harm another

D

damages an award of monetary compensation to the plaintiff, against the defendant.

dangerous driving the accused drives in a way that is dangerous to the public and results in the death of another person

defendant the party defending their case in court.

delegated legislation laws that are passed by delegated bodies rather than an Act of Parliament

denunciation one purpose of a sanction; to illustrate the court's disapproval for the criminal behaviour of the offender, and to highlight the offender's transgression of moral and ethical codes.

deterrence one purpose of a sanction; to 'make an example' of the offender, through the imposition of a criminal sanction, with the intent of preventing the offender or would-be offenders from committing crimes of a similar nature.

diversion programs flexible processes that allow low-level offenders to be diverted away from future criminal activity provided that they make amends for their wrongdoing

doctrine of precedent the practice of deciding like cases in a like manner

driving a person wil be driving where they have the ability to accelerate, break and control the movement of the motor vehicle

drug treatment order (DTO) combines a term of imprisonment with drug/alcohol treatment, with the term of imprisonment being suspended while the offender undergoes treatment and supervision

duress the legal recognition that a person may crime where acting under compulsion due to a threat should they fail to comply

E

equality all people are treated equally before the law, with an equal opportunity to present their case

exemplary damages a 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 explicilty stated in the Constitution

F

Fair Work Ombudsman provides information to employers and employees to help them understand their rights and responsibilities under Australian workplace laws

fairness fair legal processes are in place, and all parties receive a fair hearing

fines monetary payment the court will order an offender to make, as a penalty for a criminal offence

G

guilty plea a full admission by an accused person of an offence for which they have been charged

I

implied rights an entitlement that is not explicitly stated in the Constitution, however the High Court has ruled that based on the meaning of words written in the Constitution this entitlement is intended to exist. Laws breaching an implied right are declared invalid by the High Court

imprisonment imprisonment is the most severe sanction available to Australian courts and involves resticting an offender's freedom by confining them in prison for a set period of time

indictable offences more serious criminal offences where the impact on society is significant and are resolved by a judge and jury in higher courts

indictable offences triable summarily less serious indictable offences that may be heard like a summary offence

injunction a court order compelling a party to do something, or preventing a party from doing something

injury a physical injury, or harm to an individual's mental health

insane automatism where the accused is reacting to their own internal illusions

intentional murder the accused causes the death of another with the specific intention to kill or cause grievous bodily harm (serious physical injury), while having no lawful excuse to do so

J

judicial determination a decision by the courts

jury a group of randomly selected individuals chosen from the electoral roll who are required to deliver an impartial and unbiased verdict in court

jury pool all those people who have been sent a summons and have attended court on the day of jury service

K

Koori Court originally established as a specialist division of the Magistrates' Court (though there now exists a Childrens' Koori Court and a County Koori Court), and was developed as a means of reflecting the different cultural values of Aboriginal and Torres Strait Islander's when sentencing Indigenous offenders

M

manslaughter unlawfully causing the death of another person without malice aforethought

mediation a cooperative, non-judicial dispute resolution process involving an independent third party (mediator)

mens rea a Latin term that refers to the mental element of the crime; the state of mind which must be proven to the judge/jury that the accused held, beyond reasonable doubt

mitigating factors aspects of the offence and/or offender that decrease the culpability of the offender

motor vehicle a vehicle intended for highway use and is built to be propelled by a motor

murder voluntarily causing the death of another person with malice aforethought, and without lawful excuse

N

native title an Indigenous group's rights to access and use land for activiites such as hunting, cultural activities; this right existed at the time of British settlement and continued to exist after 1788

nominal damages a small amount of money awarded to show that the plaintiff was legally right

O

obiter dictum translating to mean 'by the way', the obiter dictum of a case refers to statements made by a judge in the process of reaching their decision which do not form part of the formal ratio decidendi (and are therefore not binding on judges deciding future cases), but which may still be seen as being of legal importance and may form part of persuasive precedent

ombudsman an official appointed to investigate individuals' complaints against a company or organisation, especially a public authority

original jurisdiction a court's authority to hear certain cases 'at first instance' - that is, when a case has never been to court before

P

parliamentary committee a smaller group of members of parliament (with anywhere between six - twelve members), and the role of a parliamentary committee is to investigate bills in detail, to ensure the parliament as a whole is well-informed before deciding whether to amend and/or pass new legislation

persuasive precedent precedent which a judge is not formally obliged to follow, but may still be used to assist a judge in determining a case

plaintiff the party bringing the action in a civil dispute

precedent a principle of law created by a court when resolving one case which is then followed in similar cases in future

presumption of innocence 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

principal offender an offender considered to be most immediately linked to the commission of a crime (i.e for carrying out the actus reus)

principles of justice the fundamental or basic ideas and values that try to promote just treatment and outcomes in our legal system

prosecution the party that brings a criminal case to court on behalf of the Crown

protection one purpose of a sanction; to ensure the welfare of society by removing the offender from the community, or placing some restriction on the behaviour of the offender

punishment one purpose of a sanction; to ensure that society and victims of crime see the offender face consequences for the impact of their actions

R

ratio decidendi translating to mean 'the reason for the decision', the ratio decidendi of a case refers to the legal reasoning given by the judge in reaching their decision, which is treated as binding on similar cases in the future

reckless murder the accused causes the death of another while acting with recklessness as to causing death or grievous bodily harm, while having no lawful excuse to do so

rehabilitation one purpose of a sanction; to prevent offenders from re-offending by treating the underlying causes for their criminal behvaiour

remedy an order from the court (or another dispute resolution body) which upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered

representative government a constitutional principle that ensures law-makers will act in a way that reflects the values and expectations of the majority of the community

S

sane automatism where a person's mental capacity is severely influenced by external factors

self-defence the legal recognition that a person may lawfully use force or the threat of force in order to prevent unlawful harm against themselves or another

self-incrimination the act of exposing oneself as being implicated in a crime

separation of powers a constitutional principle that prevents abuses of power - legislative power is granted to the parliament, the ability to administer laws (executive power) is exercised by ministers who are in charge of government departments and the ability to resolve criminal and civil disputes (judicial power) is exercised by the courts

serious injury an injury (including the cumulative effect of more than one injury) that either endangers life, is substantial and protracted or involves the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman

standard of proof the strength of evidence or level of confidence required for the decision maker to reach a verdict in a case

stare decisis translating to mean 'stand by what has been decided', stare decisis is the foundational principle of the doctrine of precedent and refers to following the decisions of past cases in future cases of similar nature

statute law legislation that is passed and enacted by parliament

statutory interpretation the responsibility of the courts to interpret and apply the legislation passed by parliament

strict liability offence an offence where there is no need to prove any mental element (mens rea) of the crime for a person to be found guilty

structural protections the systems and mechanisms set up by the Constitution that indirectly protect human rights

summary offences less serious criminal offences where the impact on society is relatively small and are resolved by a single magistrate in the Magistrates' Court

summons a court order sent to some or all of the people on the jury list requiring them to present themselves at court for jury service

supervening event an additional incident that is so radical that it breaks the chain of causation

T

terra nullius a legal principle that stated Australia was 'land of no one' at the time of British settlement

the rule of law all persons are equal before the law and no one is above the law

treaty an agreement between two or more nations to do/not do certain things

tribunal an institution with the authority to adjudicate civil claims or disputes

V

vicarious liability accountability being imposed upon a defendant (often a company or institution) as a result of the actions of another (often an employee or representative of the company or institution), despite the employer not being at fault itself

victim impact statement (VIS) a written and/or verbal statement to the court about the impact of an offence upon the victim, including any physical, emotional and/or financial suffering

Victorian Civil and Administrative Tribunal (VCAT) have the power to hear limited types of civil and administrative disputes

W

warrant a legal document authorising an action relating to the administration of justice

Acknowledgements

Images

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BONUS CHALLENGE: 'JOINING YOUR LEARNING TOGETHER'

Six of the concepts you have covered in the Legal Studies course are shown below. Writing is a great way to test your knowledge and consolidate your understanding – especially when you're bringing new ideas together!
Here's a challenge for you...

Using two or more of the concepts depicted below, come up with a compelling plot (250 words or less) for a one-off crime drama starring Edward Rollo as the main character.

We'd love you to send them through to us at ***contentteam@edrolo.com***













Psst... the image labelled 2.1.3 represents Unit 2, AOS 1, study design dot point 3 and shows the balancing of institutional powers with individual rights. A potential plot for a crime-drama involving this concept could be based around instances of police brutality, where Edward Rollo is left trying to protect his innocence after being charged with a crime.
Good luck with your own plot proposal - we can't wait to read it!